IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: SEPTEMBER 22, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0277-MR

DATE 10-13-05 ELA, D.C.

COREY MCCARY — APPELLANT

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
V. 02-CR-274

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

A jury of the Graves Circuit Court convicted Appellant of Trafficking in a Controlled Substance in the First Degree. KRS 218A.1412(2)(b). For this crime, Appellant was sentenced to a total of twenty years' imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's conviction.

In two independent sting operations conducted by two different law enforcement agencies, Appellant was alleged to have sold cocaine to two undercover informants on two separate occasions. On January 15, 2002, the Commonwealth alleged that he sold cocaine to Amanda McReynolds. McReynolds was deployed by the Mayfield Police Department. She received financial compensation and leniency in sentencing regarding

pending charges for her services. On June 5, 2002, the Commonwealth alleged that he sold cocaine to Steve Sherfield. Sherfield was deployed by the Graves County Sheriff's Department and received only financial compensation for his services.

The unrelated charges were joined for trial, and the jury returned verdicts of guilty on the January 15, 2002, charge, but not guilty on the June 5, 2002, charge. Finding the conviction to be a second or subsequent offense, the jury recommended, and the trial court imposed, a sentence of twenty years' imprisonment for the lone trafficking conviction. Appellant now presents a single issue on appeal: whether the trial court erred to his substantial prejudice when it denied his request for separate trials. We affirm.

On the day before trial, Appellant filed a motion to sever the two charges for trial. The trial court denied the motion on the grounds that the filing was late. Appellant argues that a motion to sever charges is not considered "late" so long as it is made before the jury is sworn. See RCr 9.16. ("A motion for such relief must be made before the jury is sworn . . . .") We agree that pursuant to RCr 9.16, the grounds offered by the trial court were insufficient to justify its ruling. However, we have consistently stated that the correct result must be upheld, regardless of whether the trial court's reasoning supports that result. See e.g., Hodge v. Commonwealth, 116 S.W.3d 463, 470 (Ky. 2003). Accordingly, in order to grant Appellant relief, we must determine whether the actual merits of the claim justify reversal.

"The decision to join or sever is within the sound discretion of the trial court and an exercise of discretion will not be disturbed unless clear abuse and prejudice are shown." Schambon v. Commonwealth, 821 S.W.2d 804, 809 (Ky. 1991). Appellant's sole argument is that he was substantially prejudiced by the joinder because evidence

of both crimes would not have been admissible in separate trials. See Rearick v. Commonwealth, 858 S.W.2d 185,187 (Ky. 1993) ("A significant factor in identifying such prejudice is the extent to which evidence of one offense would be admissible in a trial of the other offense.")

It is true that joinder is generally disfavored in cases where evidence of one offense would not be admissible in a trial of the other offense. Rearick, supra, at 187. See, e.g., Marcum v. Commonwealth, 390 S.W.2d 884, 886 (Ky. 1965). However, joinder can still be permissible in these cases if (1) the crimes are closely related in character, circumstances, and time, and (2) evidence of each crime is simple and distinct. See Sherley v. Commonwealth, 889 S.W.2d 794, 800 (Ky. 1994) (citing Cardine v. Commonwealth, 623 S.W.2d 895 (Ky. 1981)) and Marcum, supra, at 886 ("This rule rests upon the assumption that a properly instructed jury can easily keep such evidence separate in their deliberations and therefore the danger of cumulative effect of evidence is substantially avoided."); see also, Brown v. Commonwealth, 458 S.W.2d 444, 447 (Ky. 1970) ("The evidence of each crime was simple and distinct, the dates of the several offenses were closely connected in time, and even though such evidence of distinct crimes might not have been admissible in separate trials, the promotion of economy and efficiency in judicial administration by the avoidance of needless multiplicity of trials was not outweighed by any demonstrably unreasonable prejudice to the defendant as a result of the consolidations.")

In this case, the evidence cannot be more distinct or simple - two different informants claimed that they bought one rock of cocaine from Appellant. Both parties agree that the "controlled buys" were completely "unrelated," and that the alleged crimes occurred more than four and one-half months apart. There is also no question

whether the crimes are closely related in character since the incidences involve the same crime (trafficking in cocaine) and occurred under similar conditions. Rather, the pivotal question in this case is whether the crimes are too distinct in time and circumstances to be fairly tried in the same proceeding. See Marcum, supra, at 886 ("It appears also that time is of some importance in deciding whether offenses may be tried together.")

We have held that judicial economy justifies the joinder of unrelated offenses which occurred over a one month period. See Cardine v. Commonwealth, 623 S.W.2d 895, 897 (Ky. 1981). However, in Cargill v. Commonwealth, 528 S.W.2d 735, 736-37 (Ky. 1975), we held that joinder of unrelated offenses occurring some four months apart was not justifiable. Id. at 736-37. In this case, while the offenses were simple, distinct, and closely related in character (they were the same offense), they involved completely unrelated circumstances and were distant in time. In circumstances such as these, the likelihood of undue prejudice resulting from the joinder of several similar, but remotely connected crimes which, in bulk, would not be admissible in separate trials is too great to justify joinder. Accordingly, we find that joinder in this case was harmless error.

However, on appeal, Appellant must demonstrate more than mere error to be entitled to a new trial. Sears v. Commonwealth, 561 S.W.2d 672, 674 (Ky. 1978); see also, Cargill, supra, at 737 ("A person who is charged with the commission of crimes may not always have a perfect trial, but he is entitled to a fair trial.") Rather, Appellant is required to make "a positive showing of the prejudice which has resulted [from the error]." Russell v. Commonwealth, 482 S.W.2d 584, 588 (Ky. 1972), *overruled on other grounds by* Pendleton v. Commonwealth, 685 S.W.2d 549 (Ky. 1985). "He must show

something more than the fact that a separate trial might offer a better chance of acquittal or a less severe penalty." Id.

In this case, Appellant was acquitted of one of the two charges submitted to the jury, and thus, any prejudicial effect from the joinder of the two trials was greatly diminished. See Jackson v. Commonwealth, 20 S.W.3d 906, 908 (Ky. 2000); see also, United States v. Rehal, 940 F.2d 1, 4 (1st Cir. 1991) ("[T]he jury's discriminating verdict suggests that it properly compartmentalized the evidence as to the various counts and separately considered defendant's guilt as to each and every one.") Nonetheless, he argues that prejudice can be positively shown by the fact that the jury recommended the maximum sentence for the remaining offense. We find this argument unpersuasive since the sentencing recommendation can just as easily be explained by the fact that Appellant had been convicted of three prior felonies, two of which were for trafficking. When the circumstances of this case are considered in their totality, we find that Appellant has failed to meet his burden to make a positive showing of prejudice resulting from the trial court's failure to sever his two trials.

The judgment of the Graves Circuit Court is affirmed.

All concur.

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