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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JUNE 15, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 7-6-06 E.A.Graw.H.D.C.

2005-SC-0300-MR

DILLARD HOSKINS — APPELLANT

V.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
04-CR-175

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Dillard Hoskins, was convicted by a Bell Circuit Court jury of two counts of trafficking in a controlled substance in the first-degree, KRS 218A.1412, and two counts of trafficking in a controlled substance in the second-degree, KRS 218A.1413. He was sentenced to a total of twenty-five years imprisonment and appeals to this Court as a matter of right, Ky. Const. § 110(2)(b), asserting one claim of reversible error, viz: the trial court's suppression of evidence that the informant who participated in the controlled drug "buys" from Appellant had been accused of stealing from a post office and that the Bell County Sheriff's Department had "covered it up." Finding no abuse of discretion, we affirm.

Between November 7 and December 10, 2003, Appellant engaged in four controlled drug transactions at his residence in Bell County, Kentucky, with April Jones,

a confidential informant working for the Bell County Sheriff's Department. During each transaction, Appellant sold Jones between three and ten tablets of either Percocet or Lorcet—both pharmaceutical pain medications.[1] Jones surreptitiously audiotaped the first three transactions and the sheriff's department surreptitiously videotaped the fourth transaction.

On the morning of trial, the Commonwealth moved in limine to exclude any mention by defense counsel of a theft from a post office alleged to have been perpetrated by Jones and covered up by the sheriff's department. KRE 103(d). The prosecutor stated that this allegation first came to light during a defense counsel's opening statement in the prosecution of another drug-trafficking case in which Jones was also the confidential informant. Although the trial court had ultimately suppressed the evidence in the previous case, the prosecutor sought to ensure that the allegation was not mentioned again in this case. The trial court sustained the motion, stating that he remembered it from the last trial and that it "had no place . . . ." The record contains no other information about this alleged evidence.

Appellant neither moved to introduce this evidence nor expressed an intention to do so prior to the Commonwealth's motion in limine. Defense counsel did not object when the Commonwealth made its motion or when the judge made his ruling. In fact, defense counsel said nothing during the approximately one-minute "hearing." On appeal, Appellant argues that he would have used this evidence to impeach Jones's credibility as a witness. Unfortunately, he did not so inform the trial court either in response to the motion in limine or during cross-examination of Jones. KRE 103(a)(2).

KRE 608(b) provides:

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[1] Percocet contains oxycodone, a Schedule II controlled substance, KRS 218A.070, and Lorcet contains hydrocodone, a Schedule III controlled substance, KRS 218A.090.

> Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility, . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . . No specific instance of conduct of a witness may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of his inquiry.

(Emphasis added.) We do not know why the trial judge suppressed this evidence at the previous trial, and he stated no reason for suppressing it at this trial other than that he had suppressed it at the previous trial. Appellant has shown no factual basis for the allegations of theft and cover-up either at trial or on appeal. We are unable to conclude that the trial court abused its discretion in suppressing evidence that Appellant never indicated an intent to introduce or explained how or why it was admissible.

In any event, it is hard to imagine how an attack on Jones's credibility would have changed the outcome of the case when Appellant is seen on videotape during one transaction withdrawing the contraband from a bag and handing it to Jones, and he is heard on the audiotapes engaging in three additional transactions with Jones. Although part of Appellant's defense at trial was that a third party, Christy Saylor (now deceased), was the seller, the images and sounds from the recordings introduced at trial show otherwise.

Furthermore, the Commonwealth elicited testimony from Jones on direct examination that she was a convicted felon and that she was currently on felony probation. Jones also testified that she was paid $50.00 by the sheriff's department for her participation in each of the four controlled drug buys, but that she had not been made any other promises regarding other offenses or pending charges. She also admitted on cross-examination that she had told her mother and Appellant's sister that she did not sell any drugs to Appellant. Thus, the jury was presented with substantial

evidence tending to impeach Jones's credibility. It is hard to imagine how additional impeachment would undermine the inherent veracity of the audiotape and videotape recordings that capture Appellant conducting drug transactions with Jones. Thus, if any error had occurred we would deem it harmless. RCr 9.24; Abernathy v. Commonwealth, 439 S.W.2d 949, 952 (Ky. 1969) ("[I]f upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial."), overruled on other grounds by Blake v. Commonwealth, 646 S.W.2d 718 (Ky. 1983).

Accordingly, the judgment of convictions and the sentences imposed by the Bell Circuit Court are AFFIRMED.

All concur.

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