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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 21, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 10-12-06 Ella Grant D.C.

2004-SC-0732-MR

EDWARD BROWN, JR. — APPELLANT

V.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
03-CR-00069

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Edward Brown, Jr., was convicted in the Woodford Circuit Court on two counts of trafficking in a controlled substance and of being a second-degree persistent felony offender. He was sentenced to a total of thirty years' imprisonment and appeals to this Court as a matter of right. For the reasons set forth herein, we affirm.

Appellant's convictions were based upon evidence that he had purchased drugs from a confidential informant, Bob Rogers, on several occasions. On the morning of trial, the Commonwealth moved to preclude the defense from introducing evidence that Rogers was a convicted felon because the convictions were over ten years old. Rogers' 1993 convictions included forgery, criminal possession of a forged instrument and theft by deception over $300. Defense counsel argued that Rogers' continuing contacts with the law, i.e. numerous misdemeanor convictions from 1996 to 2001, kept

the impeachment value of the older felonies current. Specifically, defense counsel contended that because the misdemeanor convictions were also for crimes of deceit, the felonies remained relevant to impeaching his credibility and truthfulness. Granting the Commonwealth's motion, the trial court ruled:

> I understand your argument, and I, and it's a very interesting argument, and in a way I tend to agree. I think it involves felonies under the ten year rule, which says unless the probative value substantially outweighs the prejudicial effect, which would indicate like you said, was much more applicable to the defendant – the prejudicial effect. I think your general theory has failed, Mr. Hicks (defense counsel), so I think I'm going to have to grant [the Commonwealth's] motion. Personally, I believe, you know, since we're talking about honesty, that somebody who continues to steal, it is probably relevant, . . . the evidence co-drafters don't seem to think my way.

Appellant argues on appeal that he should have been permitted to inquire of Rogers about his prior misdemeanor convictions as they related to his character for untruthfulness. Appellant points out that "[a]s amended in 2003, KRE 608 does not permit proof of specific instances of conduct by extrinsic evidence, but they may, '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 . . .'" Terry v. Commonwealth, 153 S.W.3d 794, 801 (Ky. 2005) (quoting KRE 608(b)). Thus, Appellant contends that to create reasonable doubt he was entitled to show that Rogers had a character trait of untruthfulness by introducing evidence of untruthful conduct on more than one occasion.

The Commonwealth responds that the issue of whether or not Appellant should have been permitted to impeach Rogers with his prior misdemeanor convictions was affirmatively waived in the trial court. Indeed, during the bench conference defense counsel did, in fact, state that he was not attempting to impeach Rogers with the

misdemeanors. Rather, counsel noted that those offenses served as a "foundation" for the trial court to consider whether the felonies were still relevant despite being over ten years old. As a result, we agree with the Commonwealth that Appellant did not properly preserve for appellate review the issue he now raises on appeal. As Appellant informed the trial court that he did not intend to use the misdemeanor convictions in the trial court to impeach, he has affirmatively waived on appeal the issue of the propriety of doing so. As a result, we affirm the judgment of the Woodford Circuit Court.

All concur.

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