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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: SEPTEMBER 20, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 10-11-07 E.A.Grant,D.C.

2006-SC-000406-TG

MICHAEL LYNN WIMBERLY — APPELLANT

V.

ON APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
NO. 05-CR-000196

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Michael Lynn Wimberly, appeals his conviction of two counts of trafficking in a controlled substance in the first degree, subsequent offense, and of being a persistent felony offender in the first degree. He was also convicted of the misdemeanor offenses of possession of marijuana, possession of drug paraphernalia, and driving on a suspended license. Appellant was sentenced to a term of twenty years' imprisonment. He now appeals as a matter of right. Ky. Const. §110(2)(b).

The Owensboro Police Department began investigating Appellant after a confidential informant revealed his drug dealing operations. The informant subsequently performed a controlled purchase of crack cocaine from Appellant on December 4, 2004. Appellant was not arrested at that time, however, so that the informant's identity would not be compromised. Instead, on February 14, 2005, officers instructed the informant to call Appellant and arrange another cocaine purchase. Following the telephone call, officers watched Appellant's apartment, waiting for him to

set out for the informant's home. As planned, officers made a traffic stop of Appellant's car based on his suspended driver's license. A search of the car revealed a small amount of marijuana and $2,499.00 in cash. In a later search of Appellant's home, police found various items of drug paraphernalia and 99.21 grams of crack cocaine. Thereafter, Appellant was indicted, tried and found guilty of the aforementioned charges. This appeal followed.

In the first of two assignments of error, Appellant argues that he was improperly found guilty of being a persistent felony offender (PFO) in the first degree, where the evidence warranted only a finding that he was a second degree PFO. According to Appellant, the trial court improperly used a single felony conviction for both enhancement and PFO purposes, and improperly failed to merge his felony convictions for PFO purposes. Appellant concedes that this issue is not preserved. Nonetheless, because sentencing is jurisdictional, and subject matter jurisdiction may be raised at any stage of the proceedings, we will address the merits of the argument. Gaither v. Commonwealth, 963 S.W.2d 621, 622 (Ky. 1997). However, upon review of the sentencing phase in this matter, we conclude that Appellant's claim is based on a misperception of the record. No error occurred.

At the time he was convicted of the present offenses, Appellant had six prior felony convictions contained in three case numbers. In Christian Circuit Court case number 00-CR-515, Appellant was convicted of trafficking in a controlled substance in the first degree (offense date September 5, 2000); trafficking in a controlled substance within 1000 feet of a school (offense date August 8, 2000); and trafficking within 1000 feet of a school (offense date September 5, 2000). In Christian Circuit Court case number 98-CR-237, Appellant was convicted of trafficking in a controlled substance

within 1000 yards of a school (offense date April 29, 1998); and possession of a controlled substance in the first degree (offense date April 29, 1998). In Christian Circuit Court case number 98-CR-489, Appellant was convicted of one felony count of bail jumping in the first degree (offense date August 26, 1998). We note that the offenses contained in case number 00-CR-515 occurred subsequent to Appellant's convictions in case numbers 98-CR-237 and 98-CR-489.

By stipulated agreement, Appellant acknowledged his prior conviction for trafficking in a controlled substance (offense date September 5, 2000). He agreed that this conviction would be used for KRS Chapter 218A "second or subsequent offense" enhancement of his present conviction. The jury was instructed to find Appellant guilty of being a PFO in the first degree based on the following prior convictions: the two prior convictions for trafficking in a controlled substance within 1000 feet of a school contained in case number 00-CR-515; the convictions for possession and trafficking contained in case number 98-CR-237; and the conviction for bail jumping.

Appellant was properly sentenced. The convictions contained in case number 98-CR-237 were merged into one conviction for purposes of the PFO status, as required by KRS 532.080(4). For the same reason, the convictions for trafficking within 1000 yards of a school contained in case number 00-CR-515 were merged into a single conviction. Finally, the Commonwealth introduced evidence of Appellant's conviction for felony bail jumping. Thus, the jury considered Appellant's six prior felony convictions as three prior felony convictions for PFO status purposes.

Appellant argues that the bail jumping conviction should have been merged with the other convictions contained in case number 98-CR-237. Because Appellant's sentence for bail jumping ran consecutively and uninterrupted with the remaining

sentences, KRS 532.080(4) requires these three convictions to be considered as one for PFO purposes. However, only two prior felony convictions are necessary to find Appellant guilty of being a PFO in the first degree. KRS 532.080(3). The jury determined beyond a reasonable doubt that Appellant had been convicted of two prior felonies as contained in case numbers 00-CR-515 and 98-CR-237. The fact that they additionally considered his bail jumping conviction in no way undermines the finding with respect to the remaining two felony convictions. Accordingly, no error occurred.

Furthermore, Appellant misperceives the record in arguing that the same felony conviction was used as both a subsequent offender enhancement and as support for the PFO conviction. The subsequent offender enhancement was based on Appellant's conviction for trafficking in a controlled substance contained in case number 00-CR-515. The trial court properly allowed the remaining two felony convictions contained in that case number to be merged and used to support the PFO conviction. See Morrow v. Commonwealth, 77 S.W.3d 558 (Ky. 2002). There was no error.

Appellant next argues that the trial judge erred in refusing to sever the charges. Specifically, Appellant alleges that he was unduly prejudiced by the trial court's refusal to sever the trafficking charge arising from the December 4th purchase from the trafficking charge arising from the February 14th incident. Upon review of the matter, we find no error.

Two or more offenses may be charged in the same indictment if the offenses are "of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan." RCr 6.18. Joinder of offenses is proper so long as the defendant is not unduly prejudiced. RCr 9.16. The trial court enjoys broad discretion in regard to joinder and the decision will not

be overturned absent a demonstration that this discretion was clearly abused. Violett v. Commonwealth, 907 S.W.2d 773, 775 (Ky. 1995). A significant factor in determining whether joinder of offenses for trial is unduly prejudicial is whether evidence of one of the offenses would be admissible in a separate trial for the other offense. Spencer v. Commonwealth, 554 S.W.2d 355 (Ky. 1977).

Here, the trial court determined that the two trafficking offenses were of a similar nature and constituted a common scheme. As Appellant essentially concedes, the evidence of each trafficking count was admissible at a separate trial of the other count to demonstrate Appellant's intent and plan. In both cases, Appellant was engaged in an ongoing scheme to sell cocaine to a particular person. Furthermore, with respect to the second trafficking offense, the Commonwealth was required to prove that Appellant possessed the intent to sell the large quantity of cocaine found in his apartment. Evidence of his prior sales to the informant would have been admissible at a separate trial of that charge to demonstrate Appellant's intent. See Walker v. Commonwealth, 52 S.W.3d 533, 536 (Ky. 2001).

Moreover, Appellant has failed to demonstrate that he was unduly prejudiced by the joinder of these offenses. "In the context of a criminal proceeding [prejudice] can mean only that which is unnecessarily or unreasonably hurtful." Romans v. Commonwealth, 547 S.W.2d 128, 131 (Ky. 1977). In his motion for severance, Appellant argued that he would be unduly prejudiced by the large amount of cocaine found in his apartment. The trial court determined that any prejudice resulting from the admission of this evidence did not warrant severance of the charges. In light of the significant evidence that the two charges constituted two parts of a common scheme,

we find no abuse of discretion in the trial court's ruling on this matter. There was no error.

For the foregoing reasons, the judgment of the Daviess Circuit Court is hereby affirmed.

Lambert, C.J.; Cunningham, Minton, Noble, Schroder, Scott, JJ., concur. Abramson, J., not sitting.

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