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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: JUNE 19, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 7-10-08 [illegible], D.C.

2006-SC-000185-MR

JOETTA CHARLES APPELLANT

V.

ON APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL T. WRIGHT, III, JUDGE
04-CR-000190, 04-CR-000191, AND 04-CR-000192

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Joetta Charles appeals from her convictions in the Letcher Circuit Court for trafficking in a controlled substance in the first degree, possession of a controlled substance in the first degree and trafficking within 1000 yards of a school, for all of which she was sentenced to a total of twenty years imprisonment. She challenges the trial court's denial of her motion to suppress evidence on grounds that the search warrant was defective, and for failure of the court to hold a hearing on the motion, or enter findings of fact and conclusions of law. She also challenges the court's denial of her motion for a continuance, the informant's "interpretation" of the surveillance audiotapes, failure of the court to grant a mistrial after a prejudicial reference to her nickname, and improper joinder of the indictments for trial. For the reasons hereafter stated, we affirm Appellant's convictions.

The allegations at trial were as follows:

Martha Sexton agreed to act as an informant after having been charged with trafficking. She worked with Letcher County Deputy Sheriff Logan Clemons. On April 29, 2004, Deputy Clemons met with Sexton and set up a controlled purchase of an Oxycontin tablet from Appellant. He searched Sexton and her car, and gave her a recording device. He gave her $80 to make the purchase. Sexton and Clemons drove to a Dollar General Store in Mayking in separate cars. The deputy parked so that he could see what was taking place. Appellant arrived and parked her car next to Sexton's. Sexton got into Appellant's car. Sexton gave Appellant the money and Appellant delivered an Oxycontin tablet. Sexton left the parking lot and met with Deputy Clemons, where he retrieved the pill and the recording device.

On May 5, 2004, Deputy Clemons recorded a telephone conversation between Appellant and Sexton in which Sexton arranged to purchase sixty Xanax tablets from Appellant. Deputy Clemons and Sexton met the next day, and he again searched her and her vehicle and gave her a recording device. He also gave her $180 to make the purchase. They drove to a Rite Aid pharmacy in Whitesburg in separate cars, with Deputy Clemons again parking so that Sexton's car was in view. Appellant arrived and parked next to Sexton's car. Sexton got into Appellant's car and gave her $180 in exchange for the pills. Appellant put the pills in a small box for Sexton, and Sexton left the Rite Aid parking lot. She then met with Deputy Clemons, who retrieved the pills and recording device from her. It was established at trial that the Rite Aid pharmacy is within 1000 yards of the West Whitesburg Elementary School.

On May 11, 2004, Deputy Clemons obtained a search warrant for Appellant's apartment and her vehicle. Execution of the search warrant uncovered a single tablet of

Oxycontin and a single Morphine tablet. Appellant was charged in three separate indictments, later consolidated for trial, with the two incidents of trafficking and one count of possession of a controlled substance.[1]

Appellant first argues that the trial court erred in denying the motion to suppress evidence due to a defective search warrant. She argues that the trial court erred in failing to hold a hearing on her motion to suppress, and further erred in failing to enter findings of fact and conclusions of law in support of its ruling.

When the trial court heard motions on the morning of trial, Appellant moved to suppress the "fruits of the search" because the affidavit for search warrant was insufficient in drawing a nexus between the affidavit and the place to be searched, Appellant's residence. Appellant additionally argued that the affidavit did not establish the veracity or reliability of the confidential informant. Appellant contended that the search warrant was also overbroad in calling for the search of any person on the premises. The trial court denied the motion to suppress. Appellant did not demand a hearing at that time.

On appeal, Appellant argues that the failure to hold a hearing and to make findings of fact and conclusions of law amounts to clear error in this case. The Commonwealth responds that although the court should have held a hearing, failure to do so may not require remand for a hearing if the allegations, even if true, would not require suppression.[2] The Commonwealth states that only an examination of the affidavit was required, which the court performed in its determination that the affidavit

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[1] An additional charge of possession of drug paraphernalia was dismissed by the court on motion of the Commonwealth at the close of the evidence.

[2] Citing Lewis v. Commonwealth, 42 S.W.3d 605 (Ky. 2001)(motion to suppress based on allegation of involuntary confession).

was proper. Thus, the Commonwealth contends that failure to hold a hearing and enter findings was harmless error.

Our review of the affidavit convinces us that it was harmless error for the trial court to cursorily determine that it was sufficient. A hearing is mandatory when the court is faced with a motion to suppress.[3] The Commonwealth is correct that we have determined that in some instances the lack of a hearing does not require remand. The standard to be applied to determine the sufficiency of an affidavit is whether the "totality of the circumstances" stated in the affidavit demonstrates probable cause to search either the premises or the person.[4]

The affidavit for the search warrant sought to search Appellant's apartment, her car, and the person of "any and all inside suspected to be in possession of controlled substance." The affidavit stated:

> On the 28th day of April 2004, at approximately 4:00 p.m., affiant received information from: a cooperating witness, whose information is known to be reliable, that Joetta Charles was selling Oxycontin 80 m.g. for $80.00 each[.]
>
> Acting on the information received, affiant conducted the following independent investigation: On 04-29-04 by means of a controlled purchase a cooperating witness purchased a quantity of Oxycontin from Joetta Charles. On 05-06-04 by means of a controlled purchase a cooperating witness purchased a quantity of Xanax from Joetta Charles within 1000 yds. of a school. During the purchase Joetta Charles stated that on Monday 05-10-04 that she would be filling her prescriptions and that she would have more Xanax and also some Lorcet 10 mg to sell.
>
> On both occasions Joetta was operating a gold 4DR Saturn passanger [sic] car.

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[3] RCr 9.78; Moore v. Commonwealth, 634 S.W.2d 426 (Ky. 1982).

[4] Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983).

The affidavit did not refer to the location of the two controlled purchases. The search of Appellant's residence turned up an Oxycontin and Morphine pill, but no Lorcet or Xanax.

Probable cause exists for the issuance of a search warrant if there is a fair probability that contraband or evidence of criminal activity will be found in the place to be searched.[5] In our review of a search warrant we give great deference to the finding of probable cause by the judge issuing the warrant and do not reverse unless the judge's authority was arbitrarily exercised.[6] Probable cause does not require certainty that a crime has been committed or that evidence will be present in the place to be searched.[7] Courts should review the sufficiency of the affidavit underlying the search warrant in a common sense, rather than hyper-technical manner.[8]

Here, the affidavit for search warrant set forth the facts surrounding the two drug transactions which appellant conducted from her vehicle. Importantly, the affidavit provided the additional information that Appellant had stated she would be filling her prescriptions and would have additional drugs to sell. It was reasonable for the issuing judge to conclude that appellant subsequently would have her prescription medications in her home or car. Additionally, although the informant was not named in the affidavit, her veracity and reliability did not need to be established since the officer corroborated the information from the informant by conducting the controlled purchases described in the affidavit. Furthermore, a magistrate is simply required to determine whether the "totality of the circumstances" provides a substantial basis for concluding that a search

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[5] Moore v. Commonwealth, 159 S.W.3d 325, 329 (Ky.2005).

[6] Id. at 329.

[7] Id.

[8] Id.

pursuant to warrant will uncover evidence of wrongdoing, rather than adhere to particular tests of reliability.[9] A common sense reading of the totality of the facts in the affidavit provides a substantial basis for the issuing judge to conclude a fair probability existed that illegal controlled substances would be found in the places to be searched. Thus, we conclude the error in failing to hold a hearing and make findings of fact was harmless.

Appellant next complains because she was not granted a continuance on the morning of trial due to an alleged discovery violation. She had not received the grand jury tapes or a record of the informant's plea deal before trial. Where discovery orders have not been complied with, continuance may be used by the court as a remedy.[10] Whether to grant a continuance is within the sound discretion of the trial court, and a conviction will not be reversed for failure to grant a continuance unless that discretion has been plainly abused and manifest injustice has resulted.[11] Appellant has not shown that the court abused its discretion in denying the continuance as she has not shown any prejudice therefrom.

Next, Appellant argues that it was error for the informant to be permitted to interpret the audiotape of the drug transactions as it was played at trial. When tapes are partially inaudible, a witness may testify from recollection as to what was said, and the tape may be played, but the witness may not interpret what he claims to have been stated in the tape.[12] It is for the jury to determine as best it can what is said on the tape

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[9] Beemer v. Commonwealth, 665 S.W.2d 912 (Ky. 1984).

[10] RCr 7.24(9).

[11] Hudson v. Commonwealth, 202 S.W.3d 17, 22 (Ky. 2006).

[12] Gordon v. Commonwealth, 916 S.W.2d 176, 180 (Ky. 1995).

recording without embellishment or interpretation by a witness.[13] It is not considered interpretation of the tape recording if the witness testifies to what was personally heard at the same time the recording was being made.[14]

The trial court overruled the objection to the informant's testimony on the basis that it was permissible for the witness to testify to what she heard. The informant, Sexton, testified that the first set of voices heard on the tape belonged to Deputy Logan and to her, and thereafter the voices were Joetta Charles' and her own in her car. She affirmed that the conversation heard on the recording the jury had just listened to accurately conveyed or depicted the conversation in the car between Appellant and herself. Next, the Commonwealth Attorney asked the witness, "You indicated that you asked her if she would have any tomorrow for that price, and you were referring to the Oxy 80?" Sexton said, "Yes." "And what was her response to that?" The witness responded, "Yes, she probably would." Next, the Commonwealth asked what Appellant was referring to when she stated, "It's in there." The witness explained that Appellant was referring to the fact that the item was wrapped up in paper. Next, Sexton answered that she knew what Appellant meant when she said she had been "ripped off again" the day before, because she knew what people who sell drugs mean by that. Sexton explained that when she asked Appellant if it was "on an 80?" she was asking Appellant if the incident concerned an 80mg Oxycontin.

Next, the tape of a phone call between Appellant and Sexton was played. Afterward, the informant testified that she told Appellant that she had 40 Oxycontin tablets for sale at $60 each because she knew Appellant could not afford that many and

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[13] Id. at 180.

[14] Clifford v. Commonwealth, 7 S.W.3d 371 (Ky. 1999).

it was an excuse to talk to her. The Commonwealth Attorney asked what Appellant was referring to when Appellant said on the tape that she had the "little footballs that you like." Sexton stated that was a reference to Xanax. She explained that when Appellant mentioned that she was going to West Virginia, she was referring to the doctor she visited to get pills. The Commonwealth's Attorney asked what Appellant had on her arm. Sexton testified that Appellant had a cast on her arm, and explained that Appellant said on the tape that she was getting 10 mg Hydrocodone from the doctor for that injury.[15]

A tape was played of a second phone call between Appellant and Sexton. After that tape was played, the informant only identified who was speaking in the conversation.

Finally, a tape was played of the last drug transaction. The Commonwealth's Attorney asked the informant about a container mentioned on the tape that she kept in her glove compartment. The Commonwealth's Attorney asked Sexton who said on the tape, "Will they all fit in there?" When Sexton testified that it was Appellant, the Commonwealth's Attorney asked what she was referring to. Sexton said Appellant was asking if the pills would all fit in the little container. Appellant objected that the witness could not testify to what someone else meant. The court overruled the objection.

We conclude that the witness' testimony in this case did not constitute improper interpretation or embellishment since she only testified to what occurred rather than testifying to an inaudible tape. This case is distinguishable from the "interpretation" cases since the tape in this case was mostly audible and the informant only explained

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[15] Appellant testified in the penalty phase of trial that she had been in a car accident resulting in a broken arm and a diagnosis of trigeminal neuralgia.

what was happening as heard on the tape but did not fill in details that could not be heard. The questioning of the informant mainly consisted of asking her to explain the references to drugs. It is permissible to have a person with knowledge of drug matters assist the jury by explaining the meaning of drug language.[16] Thus, we observe no improper interpretation of the audiotape.

Next, Appellant argues that the court erred in allowing Appellant to be referred to by the nickname, "Morphine Granny." In cross-examining the informant, Sexton, the defense attorney asked questions in an alleged attempt to elicit whether the officer had personal knowledge of Appellant or whether he relied on Sexton's identification of her as Joetta Charles. When asked if Deputy Clemons knew Appellant previously, Sexton replied that she did not know if Deputy Clemons knew her, but that Appellant was known as "Morphine Granny." Appellant objected and moved for a mistrial due to a highly inflammatory and irrelevant response. The Court overruled the objection and denied the motion for mistrial. The nickname came up a second time in the penalty phase of the trial. The prosecutor asked Appellant if she had any nicknames. Appellant stated that she had the nickname the informant gave her, "Morphine Granny." There was no objection.

Appellant notes that the nickname was not probative of a fact at issue in the trial, and was prejudicial in portraying Appellant as "an avid drug seller." The Commonwealth answers that the nickname was elicited by the defense's questions, and was responsive to the question. While we agree with Appellant that the nickname was prejudicial in nature, it did not necessitate a mistrial. Placing labels on an accused has been

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[16] Howard v. Commonwealth, 787 S.W.2d 264, 265 (Ky.App. 1990).

denounced by this Court.[17] Nevertheless, a mistrial is a drastic remedy that should only be granted if the circumstances present a "manifest necessity" for it.[18] We do not perceive a manifest necessity for the mistrial.

Appellant did not seek an admonition from the court to direct the jury to disregard the evidence following either disclosure of the nickname. An admonition would have been a preferable remedy to mistrial to address the prejudice. Appellant believes the trial court should have *sua sponte* admonished the jury following the informant's remark. Appellant directs us to no rule that the court had a duty to *sua sponte* admonish the jury, and in fact, avoidance of an admonition may be trial strategy to draw no more attention to a prejudicial comment. The trial court thus acted properly in not acting when Appellant sought no further relief. We affirm the actions of the trial court.

Finally, Appellant argues that the court erred by allowing the three indictments to be combined to be heard in a single trial. The Commonwealth requested consolidation in the interest of judicial economy and to avoid hardship to the witnesses and officers who would have to testify repeatedly if there were multiple trials. Appellant objected that trying all the allegations at once would prejudice her by allowing the jury to convict on cumulative evidence, and noted that the offenses occurred on different days about a week apart, at different locations, and involved different substances for each transaction. She contends the length of her sentence shows she was prejudiced by the joinder.

RCr 9.12 permits joinder of two or more indictments for trial if the indictments could have been joined in a single indictment. RCr 6.18 permits the joinder of two or

[17] Brown v. Commonwealth, 558 S.W.2d 599 (Ky. 1977).

[18] Commonwealth v. Scott, 12 S.W.3d 682, 684 (Ky.2000).

more offenses "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." The trial judge has broad discretion in regard to joinder of indictments for trial and the decision will not be overturned without a demonstration of a clear abuse of discretion.[19] The issue is whether the joinder of the offenses resulted in undue prejudice to the accused.[20] One consideration for determining whether joinder constitutes undue prejudice is whether evidence necessary to prove each offense would have been admissible in a separate trial of the other.[21] Joinder is proper where the two crimes are closely related in character, circumstance and time.[22]

We perceive no error in the joinder of these indictments for trial. The offenses were closely related in character, circumstances and time. The incidents all involved the sale of illegal prescription medications. The trafficking charges involved the same purchaser, and the same deputy oversaw the controlled buys. The possession charges arose from the execution of a search warrant which cited the incidents of trafficking. The controlled substances were submitted to the state crime lab together and a single examiner testified at trial to the results. Moreover, these events occurred relatively close in time.[23]

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[19] Violett v. Commonwealth, 907 S.W.2d 773, 775 (Ky. 1995).

[20] Roark v. Commonwealth, 90 S.W.3d 24 (Ky. 2002).

[21] Debruler v. Commonwealth, 231 S.W.3d 752, 760 (Ky. 2007).

[22] Id.

[23] Cf. Penman v. Commonwealth, 194 S.W.3d 237 (Ky. 2006)(incidents of trafficking which all occurred within a time span of 60 days not considered remote in time).

There is reason to combine indictments for trial when "promotion of economy and efficiency in judicial administration by avoidance of needless multiplicity of trials [is] not outweighed by any demonstrably unreasonable prejudice to defendant."[24] In this case, the same witnesses would have been required to testify at three separate trials if the indictments were not tried together. The trial court did not abuse its discretion in the decision to combine the indictments for trial.

For the foregoing reasons we affirm Appellant's convictions in the Letcher Circuit Court.

All sitting. All concur.

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[24] Brown v. Commonwealth, 458 S.W.2d 444, 447 (Ky. 1970); Penman, 194 S.W.3d at 253-254.

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