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RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000929-TG

BENJI MANNS — APPELLANT

V.

ON APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOANN S. COLEMAN, JUDGE
NO. 05-CR-000055

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This case is on appeal from the Magoffin Circuit Court where Appellant, Benji Manns, was convicted of three counts of first-degree trafficking second or subsequent offense. Appellant was also found to be a persistent felony offender (PFO) in the first degree, and was sentenced to three consecutive terms of twenty years each for a total of sixty years' imprisonment. He appeals to this Court as a matter of right. Appellant raises five issues on appeal: (1) the trial court erred by not enforcing a plea agreement allegedly reached by the parties; (2) the trial court should have suppressed the tape recordings made by the undercover police officer; (3) Appellant's request for an instruction on facilitation should have been granted; (4) error occurred to the Appellant's detriment related to the procedure regarding the PFO count; (5) it was error to amend counts 1 and 2 of the indictment to become second or subsequent offenses.

I. Background

On February 9, 2005, Detective Trent Combs was acting as an undercover agent and came into contact with Appellant. The detective and Appellant met at a restaurant in downtown Salyersville, Kentucky, where Appellant agreed to help the detective obtain some oxycodone. The detective, Appellant, and a confidential informant got into the detective's car. Appellant led them to the driveway of a residence that was later identified as that of Michael Williams.

The detective gave $40 to Appellant for the purchase of drugs and remained in the car while Appellant exited the car and met Williams outside the home. Appellant and Williams then entered the home and exited a few minutes later. Williams and Appellant approached the car from the passenger side. Appellant leaned into the car and said that he had two oxycodone pills for $15 each. Appellant then showed the detective other pills, which he claimed were morphine, and asked if the detective wanted them for $10. The detective had witnessed Williams hand the pills to Appellant, who then handed the pills to the detective. Appellant asked the detective if he would like to purchase marijuana because Williams had some, and the detective declined. On the way back to town Appellant produced a marijuana cigarette and smoked it. The origin of the cigarette was never revealed. The detective was wearing a concealed audio recorder throughout this interaction.

On February 23, 2005, the detective met with Appellant on a street corner near the Magoffin County courthouse. Appellant told the Detective that he could get him some morphine pills for $15 each. The pair then walked up a couple of streets to a house. They entered the house and the detective gave $40 to Appellant once again for the purchase of drugs. Once inside the house, Appellant and an unidentified female

went into a bathroom and conducted a private conversation. Appellant exited the bathroom a short while later and told the detective that $5 more was required to purchase three pills. The detective gave him the money, and Appellant returned to the bathroom with the female. Appellant exited the bathroom with morphine pills and offered the detective a syringe to use the drugs, but the detective declined. The detective and the Appellant left the house. The detective once again wore a concealed audio recorder.

On June 20, 2005, the Magoffin County grand jury returned an indictment charging Appellant with nine drug offenses, and the case was assigned to a special judge. Three of the counts, for first-degree trafficking in a controlled substance, were taken to trial in July 2006. Prior to trial, two of the trafficking counts were amended to reflect that they were second or subsequent offenses. The prosecution also obtained a separate single-count indictment charging Appellant with being a persistent felony offender in the first degree. The separate indictment was transferred from the regular Magoffin Circuit Court judge to the special judge already sitting in Appellant's case.

At trial, the detective testified as to the drug deals. The audio recordings he made during the deals were played for the jury. A chemist with the Kentucky State Police testified that the drugs purchased on February 9, 2005 were actually hydromorphone and oxycodone, and that the pills purchased on February 23, 2005 were morphine. The jury found Appellant guilty on all three counts of first-degree trafficking.

The trial then proceeded to a second phase at which evidence was admitted demonstrating that Appellant had been convicted of a prior trafficking offense. The jury found Appellant guilty of being a subsequent offender.

The trial then proceeded to a third phase regarding the PFO charge, at which evidence of prior convictions other than those used in the "subsequent offense" phase described above was presented. The jury found that Appellant was a first-degree persistent felony offender but was deadlocked as to the penalty. The judge imposed the minimum penalty of twenty years on each count, to run consecutively for a total of sixty years in prison.

II. Analysis

A. The Alleged Plea Agreement Will Not be Enforced

Appellant claims the trial court erred by denying his motion to compel the Commonwealth to honor a plea agreement that Appellant contends was entered into by both parties. Multiple plea offers appear in the record, but the one that Appellant seeks to compel is not. The offer purportedly included a nine-year sentence to run concurrently with time Appellant faced for a prior conviction for which he was on parole. While there is a nine-year offer in the record, it does not state whether the sentence was to be consecutive or concurrent with the other time that Appellant faced.

The issue of the supposed plea bargain was brought before the trial court on multiple occasions. During a hearing on April 26, 2006, the prosecutor (who was new to the case and was not the attorney who had supposedly made the offer) stated that she could not ethically recommend an offer that was in direct contradiction to statute. The statute in question is KRS 533.060, which provides in essence that if a defendant commits a felony while on parole, then any sentence he receives as a result shall not run concurrently with any other sentence. Appellant continued to assert that the former prosecutor had made the offer and had confirmed the offer via email. The email was

never produced. The trial court denied Appellant's request to enforce the alleged oral plea offer, finding that it directly violated the statute.

Boiled down to its most basic elements this issue is simple: Appellant seeks to have this case reversed and remanded because the trial court did not enforce an alleged plea agreement, which does not appear anywhere in the record. Furthermore, the supposed plea agreement is contrary to the requirements of KRS 533.060.

The Appellant relies heavily upon Workman v. Commonwealth, 580 S.W.2d 206 (Ky. 1979). In Workman, the defendant struck a deal with the Commonwealth in which his charges would be dropped if he passed a lie detector test. The defendant passed three such tests, but the Commonwealth proceeded to trial and obtained a guilty verdict. This Court reversed the conviction and upheld the plea bargain, citing detrimental reliance by the defendant and notions of public policy in having the Commonwealth held to its word. Id. at 207.

In the present case, there is no such detrimental reliance by Appellant. In fact, Appellant does not appear to have taken any action that shows a particular reliance upon the supposed agreement. More importantly, there is no agreement in the record to which the Court can look. The alleged email acceptance referred to by Appellant is not in the record. There simply is no evidence upon which this Court could reasonably compel the Commonwealth to uphold the alleged agreement.

Alternatively, had Appellant and the Commonwealth proceeded with the alleged plea agreement, the trial court would not have been bound by such merely because the parties had delivered it to her. RCr 8.08 states clearly that "[t]he court may refuse to accept a plea of guilty. . . ." In Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004), the Court examined a case in which the trial judge had rejected a plea agreement as being too

lenient. The Court laid out a lengthy survey of both Kentucky and federal cases in upholding the trial judge's ruling. The Court there stated:

> "The proposition that a facially proper plea agreement must be approved unless disapproval is required by a concern for the rights of the defendant is a far too restrictive view of the court's proper concerns. The plea bargaining process is an essential component of the administration of justice, and if the court has reasonable grounds for believing that acceptance of the plea would be contrary to the sound administration of justice, it may reject the plea."

Id. at 25 (quoting United States v. Severino, 800 F.2d 42, 46 (2d Cir. 1986)).

Though the Court in Hoskins was specifically embracing the judge's discretion to reject a proffered plea agreement for being too lenient, it also supported the precedent that a trial judge has discretion to reject plea agreements which are contrary to the "sound administration of justice." In the present case, Appellant objects to the trial judge's refusal to enforce a plea agreement that would have directly contradicted statutory requirements, which she could not ethically do. The enforcement of such a plea "agreement" in these circumstances would certainly have been contrary to the sound administration of justice.

B. Admission of Audio Recordings was Proper

At trial, the Commonwealth introduced into evidence and played for the jury the audio recordings of the drug transactions made by the detective. There were two tapes, one of each transaction, and the Appellant objected to both on the ground of untimely discovery. Appellant also objected to the tape of the February 9th transaction on the grounds that it contained hearsay from the non-testifying confidential informant, and that it included unrelated, inflammatory subject matter and an unidentified male voice. In his objection at trial, Appellant's counsel stated that the Commonwealth's attorney had done everything in his power to provide quality tapes to him, but that they had arrived

too late regardless. The trial court overruled Appellant's motion to suppress the tapes because of untimely discovery stating that the Commonwealth had complied with the rule requiring disclosure no later than 48 hours prior to trial, RCr 7.26.

The Commonwealth had timely supplied tapes to Appellant's original attorney (who withdrew prior to trial). Apparently, those tapes were not transferred to Appellant's new attorney. However, the Commonwealth is not responsible for an effective transfer of files between defense attorneys. Even so, the Commonwealth supplied tapes to Appellant's attorney well before the 48-hour time limit ended, and when those tapes were found to be of poor quality, the Commonwealth supplied another set. Defense counsel argued that weekends did not count when calculating the 48-hour time period, and thus he had not received the second set of tapes 48 hours prior to the trial. However, no authority has been presented to support such statement. Criminal Rule 7.26 does not indicate that weekends should not be counted when measuring the 48-hour period. It is clear from the facts in this case that the Commonwealth did not commit a discovery violation related to timeliness.

The Appellant next contends that the tape of the February 9th transaction should be excluded because it contained hearsay statements from a non-testifying confidential informant. The trial court overruled the objection, noting that the statements contained in the tape were not hearsay since they were not being offered to prove the truth of the matter asserted.

The trial court was correct in this regard. In Norton v. Commonwealth, 890 S.W.2d 632 (Ky. App. 1994), the Commonwealth sought to enter into evidence tape recordings of a drug transaction which, like the present case, contained the voices of non-testifying witnesses. The court there held that the tapes did not constitute hearsay,

because they were not offered for the truth of the matter asserted, and, instead, "were evidence of the event itself, introduced for a non-hearsay purpose." Id. at 635. That purpose was to show that the events had occurred and that the statements testified to had been made; the tapes were not being used to prove that the statements made were in fact true. See also Turner v. Commonwealth, 248 S.W.3d 543 (Ky. 2008) (holding that informant's statements in audiotape of controlled buy were not hearsay); cf. Fields v. Commonwealth, 12 S.W.3d 275, 279-80 (Ky. 2000) (disallowing a recording as hearsay only because it was offered for truth of the matter asserted).

The present case presents a situation similar to that in Norton. With an officer on the stand, these tapes were introduced and played for the jury. The tapes were entered for the purpose of proving that the events testified to by the officer did in fact occur. The tapes were not entered into evidence for the purpose of proving the truth of any statement contained therein, and the trial court did not abuse its discretion by allowing the tapes to be played.

Finally, Appellant objects to the playing of the February 9th audio tape on the grounds that it contains conversations unrelated to the drug transaction and that it contains the voice of an unidentified male. The argument is essentially that the conversations were irrelevant and prejudicial.

The Appellant offers no authority to support his reasoning that the presence of an unidentified male voice on the recording renders it inadmissible, at least where the statements by the person are immaterial. While the tape also contained a conversation regarding the defendant's sexual exploits, it is within the discretion of the trial court to determine the admissibility of evidence and the extent to which prejudice is created by the admission of evidence. In this case, the trial court overruled Appellant's objection to

the tape for prejudice and irrelevance. The record reveals no prejudice from Appellant's conversations, and this Court finds no abuse of discretion in the trial court's ruling.

C. Denial of Instruction on Lesser-Included Offense was Proper

The Appellant next alleges error in the ruling of the trial court denying an instruction on the crime of facilitation as defined in KRS 506.080. Appellant argues that the facts show him to be a middle man who merely directed the detective to where he could buy drugs and that he did not profit from the transactions. Appellant argues that he was entitled to a facilitation instruction and that a reasonable jury could have found him guilty of that crime rather than trafficking.

Appellant cites several cases in support of his claim that he was entitled to an instruction on facilitation as a lesser-included offense. E.g., Webb v. Commonwealth, 904 S.W.2d 226 (Ky. 1995). These cases hold that the defendant is entitled to an instruction on facilitation when he is charged with committing the object offense (e.g., trafficking) by way of complicity. The problem with Appellant's theory is that he was charged only as a principal, not as an accomplice (even as an alternative, as is commonly seen in indictments), and facilitation simply is not a lesser-included offense of trafficking in a controlled substance. In Houston v. Commonwealth, 975 S.W.2d 925 (Ky. 1998), this Court examined the offenses of trafficking and facilitation within the context of the requirements of lesser-included instructions and concluded that facilitation is not a lesser-included offense to trafficking, and thus the defendant was not entitled to such instruction.

> The offenses of trafficking in or possession of a controlled substance require proof that the defendant, himself, knowingly and unlawfully committed the charged offense. The offense of criminal facilitation requires proof that someone other than the defendant committed the object offense and the defendant, knowing that such person was committing or intended to commit that offense, provided that person with

> the means or opportunity to do so. Thus, criminal facilitation requires proof not of the same or less than all the facts required to prove the charged offenses of trafficking in or possession of a controlled substance, but proof of additional and completely different facts. A fortiori, it is not a lesser included offense when the defendant is charged with committing either of the object offenses.

Id. at 930 (citations omitted).

Because Appellant was charged as a principal, at best, criminal facilitation would be an alternative charge to the trafficking charge that he faced, and the Commonwealth chose to pursue the charge with the higher penalty. This does not mean Appellant was entitled to a separate or lesser-included instruction on that alternative offense.

Since he was charged only as a principal, much of Appellant's argument for why he was entitled to a lesser-included instruction was really an argument in favor of a directed verdict on the trafficking charge (that is, he committed facilitation of trafficking, a wholly inchoate and separate offense, rather than trafficking). However, he does not present the argument as one for a directed verdict and he does not cite anywhere in the record where he did so at the trial court.

Even if he had, however, the facts in this case clearly supported an instruction on trafficking, meaning a directed verdict would have been improper. Though Appellant and the Commonwealth differ on the level of the Appellant's profit motive in the completion of the drug transactions, it seems that his actions fall somewhere in between the descriptions offered by the parties. The Appellant tells the story of a disinterested guide (facilitator) pointing the way to drugs—Magoffin County's own oxycodone oracle. The Commonwealth describes a business partner to drug dealers (trafficker) who jets about brokering deals on the fly in exchange for a reasonable commission of drugs for himself.

It is a stretch to call the Appellant a mere facilitator. A facilitator under these facts perhaps would have stayed in the car while the officer entered the homes of drug dealers or would have given the dealers' addresses to the detective and nothing more. However, under these facts there is a person who not only went with the detective to the dealers' homes but also entered the homes alone and initiated the transactions, carried the buyer's money, and served generally as a trustworthy middle man for both parties to the transactions. It is not clear from the evidence whether the Appellant received actual consideration for his participation, but it is clear that he is not a mere facilitator.

Looking to the record, it is apparent that the Appellant was neither disinterested nor was he the ringleader of the operation. Appellant seems to have been something more of a runner or agent for the drug dealers with which he was familiar. In this light, the Commonwealth's account is a reasonable (and ultimately better) representation of the facts. But whatever Appellant's role, it is clear that his actions supported an instruction for trafficking and did not require that he instead receive an instruction on mere facilitation.

Appellant was not entitled to an instruction on facilitation as a lesser-included offense because facilitation is not a lesser-included offense of trafficking in a controlled substance, and the facts of his case do not bear out an inference which would support an instruction on facilitation. The trial court did not err in refusing to give the requested instruction.

D. The PFO Procedure was Proper or, Alternatively, Harmless Error

The Appellant alleges errors in the procedure surrounding the persistent felony offender (PFO) charge. Specifically, he objects to the timeliness of the charge and the failure to consolidate the underlying trafficking case with the PFO case.

As to the first claim, Appellant was indicted and arraigned on a single count of first-degree PFO on Thursday, July 20, 2006, and the trial began on Monday, July 24, 2006. Appellant argues that this late charge prevented him from organizing an adequate defense to the PFO charges. The Appellant's argument fails for two reasons.

First, he was well aware that the Commonwealth was seeking the PFO charge, and the indictment on July 20 should not have come as a surprise. The trial record reflects that the Commonwealth had informed the trial court and defense counsel in a pretrial conference on January 19, 2006 that the prosecutor would be seeking a PFO first degree charge. Also, the Appellant is expected to be familiar with his own criminal record. Luna v. Commonwealth, 571 S.W.2d 88, 89 (Ky. App. 1977). The Appellant had knowledge of his own record and six months' notice that he would be indicted on a PFO charge; the indictment four days prior to trial did not rob him of any opportunity to prepare for the charge that he would have had if the indictment had been issued earlier.

Secondly, Appellant could have requested a continuance if he had a legitimate defense for which he needed time to prepare; however, Appellant's counsel expressly declined to pursue a continuance because the Appellant was waiting in prison and had filed a pro se motion for a speedy trial. Appellant's imprisonment was not a new factor, as he had been there since June 2005. If the Appellant had had a serious argument against the legitimacy of the prior convictions, he would have requested a continuance as a few more weeks or months in jail would have been a small price to pay to avoid the enhanced sentence he received due to the PFO charge. It is interesting to note that the Appellant has yet to bring any challenge to the legitimacy of the prior convictions, and he neglected to mention in his brief that he has previously been convicted of being a second-degree PFO.

The Appellant next argues that the PFO charge should be vacated because it was never consolidated with the underlying criminal case pursuant to RCr 9.12. On the first morning of trial, the PFO case was "transferred" from the Magoffin Circuit Court to the special judge hearing the case. After arguments were presented by both parties, the Commonwealth made a motion to "amend" the criminal case so that it would include the PFO charge. The motion was granted, and from that point forward the PFO charge and the underlying criminal case were handled jointly. This is also reflected in the jury instructions and verdicts which clearly show that the same jury handled the evidence, instructions, and verdict for the criminal and PFO charges and sentencing. This Court agrees with the Commonwealth that the handling of the two cases was "poorly styled" by the trial court. Though the trial court may have used an awkward method, the effect was to consolidate the cases and they were handled as such. Any error in this procedure was a technicality and undoubtedly harmless under RCr 9.24.

E. The Amendment to the Indictment to Reflect Second or Subsequent Offense was Not Error

The Appellant also claims error in the amendment of counts 1 and 2 of the indictment to reflect that each count was a second or subsequent offense. The basic rule with regard to amendment of an indictment is that the amendment may not reflect a new offense, but it may alter a defendant's status which would require a greater penalty at sentencing. See RCr 6.16 ("The court may permit an indictment . . . to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."); Riley v. Commonwealth, 120 S.W.3d 622, 631-32 (Ky. 2003).

Appellant's specific complaint was addressed by the Court of Appeals in Luna v. Commonwealth, 571 S.W.2d 88 (Ky. App. 1977). In Luna, the defendant was charged

with first-degree trafficking, and during direct examination admitted to a previous conviction for trafficking in a controlled substance. The indictment was amended at that point to reflect the second or subsequent offense and thus to subject the defendant to the higher penalties. The Court of Appeals interpreted the enhancement provision "to mean that this provision is not a separate or additional offense under the Kentucky Penal Code, but is merely a means that permits evidence to be entered that may be helpful to the court or jury in fixing the term of punishment." Id. at 89.

The current version of the trafficking in controlled substances statute includes a similar penalty enhancement for subsequent offenses. First offenses are sentenced as Class C felonies and second or subsequent offenses are sentenced as Class B felonies. KRS 218A.1412(2). However, KRS 218A.1412(1) only creates one offense: first-degree trafficking in a controlled substance. The amended indictment then did not charge a new crime, including instead a sentence enhancement. Also, Appellant "is presumed to know his previous record. In no way was he prevented from preparing his defense more adequately, nor were there any surprises." Luna, 571 S.W.2d at 89. Appellant was not prejudiced by the amendment. This Court thus concludes that the amendment of the indictment was proper.

III. Conclusion

For the foregoing reasons, the judgment and sentence of the Magoffin Circuit Court are affirmed.

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

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