

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**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: SEPTEMBER 18, 2008  
NOT TO BE PUBLISHED

**Supreme Court of Kentucky** **FINAL**

2007-SC-000674-MR

DATE 10-9-08 EWA Grant+D.C.

BOB WILLIAMS

APPELLANT

V.

ON APPEAL FROM MONROE CIRCUIT COURT  
HONORABLE EDDIE C. LOVELACE, JUDGE  
NO. 07-CR-00010

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

Bob Williams appeals as a matter of right from an August 22, 2007 Judgment of the Monroe Circuit Court convicting him of trafficking in a controlled substance in the first degree (2<sup>nd</sup> offense) and sentencing him to twenty years in prison. During Williams's trial, the Commonwealth played an audio tape of the alleged drug transaction between Williams and a confidential informant. On appeal, Williams argues that because the tape the Commonwealth provided to him during discovery did not include a statement made by the informant requesting more drugs, but the tape played for the jury did include this statement, he was unfairly prejudiced in his trial strategy and the trial court's judgment should be set aside. Having concluded that the trial court did not err when it denied Williams's motion to vacate the judgment and that the admission of the additional statement on the audio tape did not constitute palpable error, we affirm

the judgment of the Monroe Circuit Court.

### RELEVANT FACTS

A Monroe County grand jury indicted Williams on February 21, 2007, charging him with one count of first-degree trafficking in a controlled substance (2<sup>nd</sup> offense) and one count of being a persistent felony offender (PFO) in the second degree<sup>1</sup>. The charges arose after Williams allegedly sold 10.76 grams of crack cocaine to a confidential police informant on April 7, 2005. The informant, who was wearing a concealed audio recording device, taped the drug transaction. This tape was entered into evidence and played for the jury at Williams's trial on July 30, 2007. Near the end of the nearly hour-long recording, the informant asked Williams if he "could get an 'o' [ounce] on Sunday."<sup>2</sup> Williams did not reply to this request on the tape, and he did not object to the statement at the time the audio tape was played for the jury. The jury found Williams guilty of the trafficking offense.

On August 8, 2007, Williams moved to alter, amend or vacate the judgment pursuant to CR 59.05, and requested a new trial pursuant to CR 59.01. He argued that although the Commonwealth had provided him with a copy of the recording of the alleged drug sale during the discovery process, the copy he received did not contain the informant's last-minute request about a future transaction. Williams claimed that the introduction of the additional statement was a surprise that ordinary prudence could not

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<sup>1</sup>The Commonwealth dismissed the PFO 2<sup>nd</sup> charge before the case went to trial due to a lack of necessary predicate offenses.

<sup>2</sup>Williams claims this statement can be heard on the videotaped record at 2:25:10-2:29:33. Upon review of the record, the informant's request is not audible at this or any other point in the tape. However, the Commonwealth stipulated in its brief that the request was a part of the tape played at trial. Therefore, we will accept this as fact for the purposes of our analysis.

have guarded against and resulted in an unfair trial. The trial court denied Williams's motion on August 22, 2007, stating that Williams should have objected to the tape at the time it was played and that failing to do so resulted in a waiver of any objection regarding the additional statement. The court then sentenced Williams to twenty years in prison in accordance with the jury's recommendation.

On appeal, Williams argues that the trial court erred when it failed to set aside the verdict and order a new trial due to the informant's additional statement on the audio tape. Williams contends that despite his failure to object at trial, the admission of the informant's additional request on the tape constitutes palpable error and entitles him to a new trial. We disagree.

## **ANALYSIS**

### **I. The Trial Court Did Not Err When It Denied Williams's Motion To Alter, Amend Or Vacate The Judgment and Order a New Trial.**

#### **A. Williams Waived Any Claim Of Prejudicial Surprise By Failing To Object To The Statement At Trial.**

On January 17, 2007, Williams filed a Motion for Additional Discovery/Bill of Particulars, requesting a copy of all recorded statements made during the course of the alleged drug sale.<sup>3</sup> In its response, filed on January 29, 2007, the Commonwealth stated that "all recorded statements of the Defendant have been provided." Williams claims he listened to the tape provided by the Commonwealth "several dozen" times before trial, but never heard the portion of the tape in which the informant attempted to

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<sup>3</sup>This motion was made as part of a different proceeding for the same alleged offense. The Commonwealth dismissed the first indictment, Commonwealth v. Williams, 06-CR-00064, on February 15, 2007. Williams was, as noted above, re-indicted for the same crime on February 21, 2007. However, the discovery that was underway in the original action was also used in the subsequent action.

set up the future drug deal until the tape was played for the jury. Williams now argues that the introduction of the previously unheard statement implicates CR 59.01(c), which states that a trial court may set aside a verdict for “[a]ccident or surprise which ordinary prudence would not have guarded against.”

When evidence surprises a defendant at trial, the defendant has a duty to make the surprise known to the court and move for a continuance or other appropriate relief. Taylor v. Commonwealth, 269 Ky. 656, 108 S.W.2d 645, 650 (1937). The defendant may not await the final result and then apply for a new trial on grounds of surprise. Id. In this case, Williams made no motion or objection regarding the surprise until his motion for a new trial. While Williams argues that this was due to not having had access to the additional statement in the first place, he acknowledges in his brief that he noticed the discrepancy in the audio tape “at trial.” Therefore, he should have objected to the statement at that time. Williams also claims that any objection would have been pointless since the jury had already heard the informant’s request. However, if Williams had objected to the statement at trial and the court had determined that it was admitted erroneously, the problem could have been corrected by an admonition to the jury to disregard the evidence. See Graves v. Commonwealth, 17 S.W.3d 858, 865 (Ky. 2000). Because Williams failed to call attention to the discrepancy at trial, he waived his right to claim surprise on appeal. Thus, the trial court did not err in refusing to set aside the verdict for this reason.

**B. The Introduction of the Informant’s Request Did Not Violate KRE 404(b).**

Williams further claims that the trial court erred in not setting aside the jury’s verdict and ordering a new trial because the informant’s request to purchase additional

drugs on Sunday was inadmissible evidence of other crimes or wrongs under KRE 404(b). However, the informant's attempt to arrange a future drug transaction does not fall within this category. Stated differently, Williams did not commit a crime or wrong by being asked to conduct a future drug deal. Had Williams consented to the transaction, such evidence might fall within KRE 404(b)'s purview. However, because the part of the tape in question contains only the informant's request with no response from Williams, it does not constitute evidence of another crime or wrong and, as such, was not governed by KRE 404(b). The trial court did not err in refusing to set aside the verdict on this basis.

**C. The Omission Of The Final Portion Of The Tape Was Not A Reversible Error.**

Williams also argues that the Commonwealth committed a discovery violation by failing to provide him with the audio tape in its entirety. Even assuming the omission of the final portion of the tape violated the trial court's discovery order, it does not supply adequate grounds for setting aside the jury's verdict. A conviction may be set aside for a discovery violation "only where there exists a 'reasonable probability' that had the evidence been disclosed the result at trial would have been different." Wood v. Bartholomew, 516 U.S.1, 5, 116 S. Ct. 7, 10, 133 L. Ed. 2d 1 (1995) (internal quotations omitted); Weaver v. Commonwealth, 955 S.W.2d 722, 725 (Ky. 1997). Such "reasonable probability" is not present in this case. It is highly unlikely that the outcome of the trial would have differed given the overwhelming evidence that led to Williams's conviction and sentence.

The primary evidence against Williams consisted of the nearly hour-long audio tape containing the recording of his drug sale to the confidential informant. In addition,

the confidential informant testified about the exchange, detailing what happened during the transaction and stating that he gave money to Williams in exchange for drugs. The substance the informant acquired during the drug deal was also entered into evidence, along with the testimony of a Kentucky State Police chemist who confirmed that it was crack cocaine. In addition, during the penalty phase of Williams's trial, the Commonwealth informed the jury of Williams's prior conviction for trafficking cocaine.

Given this evidence, there is no reasonable probability that the informant's brief statement at the end of the tape had much, if any, bearing on the ultimate outcome of the trial. Even if the informant's additional statement had been disclosed prior to trial and Williams had succeeded in having it excluded, the jury still would have heard nearly an hour's worth of incriminating evidence on the audio tape, the confidential informant's testimony detailing what happened during the alleged transaction, and, at sentencing, information about Williams's prior offense. Because no reasonable probability exists that a different result would have been reached at trial, there was no reversible discovery violation.

## **II. The Trial Court's Decision To Allow The Omitted Portion of the Tape to be Played Was Not Palpable Error.**

Williams raised no objections to the tape when it was played in court, drawing attention to the apparent discrepancy only in his motion to set aside the verdict. Thus, any alleged error is unpreserved, and will be reviewed only for palpable error. A palpable error is one so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. RCr 10.26. Such manifest injustice will be found and a new trial will be granted if the movant shows a "probability of a different result or [an] error so fundamental as to threaten a defendant's entitlement to due process of

law.” Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006).

Even if an error did occur in the admission of the final portion of the audio tape, there is no substantial probability that it changed the ultimate result of the trial. As noted above, the questionable portion of the tape represented only a tiny fraction of the evidence the Commonwealth presented to prove its case. Even if Williams had successfully challenged the introduction of the informant’s request, there is little likelihood the result of the trial would have been different. Furthermore, Williams’s entitlement to due process of law was not threatened and his trial did not become fundamentally unfair simply by the introduction of the informant’s additional request to purchase drugs in the future. Thus, there was no palpable error.

### **CONCLUSION**

The trial court did not err in denying Williams’ motion to set aside the jury’s verdict. Williams waived his right to claim prejudicial surprise when he failed to object to the introduction of the previously unheard statement at trial. Furthermore, the statement does not constitute KRE 404(b) evidence, and the discrepancy between the tapes did not amount to a reversible error. Williams’s claim of palpable error simply is not supported by the record. Thus, we affirm the August 22, 2007 Judgment of the Monore Circuit Court convicting Williams of trafficking in a controlled substance (2<sup>nd</sup> offense) and sentencing him to twenty years in prison.

All sitting, except Venters, J., not sitting. All concur.

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