

**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**NOT TO BE PUBLISHED OPINION**

**THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.**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 25, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2008-SC-000449-MR

DATE 7/16/09 Kelly Klaber D.C.  
APPELLANT

JOHN WILLIAM WHEAT

V.  
ON APPEAL FROM BARREN CIRCUIT COURT  
HONORABLE PHILLIP R. PATTON, JUDGE  
NO. 07-CR-00047

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

**AFFIRMING**

John William Wheat appeals as a matter of right from a judgment of the Barren Circuit Court convicting him of first-degree trafficking in a controlled substance (methamphetamine), and being a first-degree persistent felony offender (PFO I). Appellant raises one issue on appeal, that the trial court failed to properly examine a witness to determine whether he was competent to testify. The witness was allegedly under the influence of drugs during his testimony. We conclude that the trial court did not abuse its discretion, and affirm its judgment.

Melvin David Pedigo, Jr., who had a history of drug use and was on probation for a felony involving methamphetamine, worked as a confidential informant with the Barren County Drug Task Force. At trial, Detective Chris

Wyatt testified that on February 8, 2006, Pedigo notified the task force that he had arranged to purchase a gram of methamphetamine from Appellant. Police met with Pedigo prior to the buy. They searched Pedigo and his vehicle, placed two recording devices on his person, and provided Pedigo with \$100 to make the drug buy. Pedigo then went to a local motel to make the buy. From a location about one hundred yards away, police observed and videotaped Pedigo enter the motel room. Pedigo emerged from the motel room after approximately five minutes. Police followed Pedigo to a predetermined location. Pedigo provided them with two small bags of methamphetamine he alleged were purchased from Appellant.

At trial, Pedigo testified as to his participation in the alleged buy. In summary, he testified that he contacted the task force on February 8, 2006, met with the detectives, had his person and vehicle searched, and had recording devices placed on his person. Pedigo testified that he went to the motel, knocked on the door, and gained entry. Pedigo testified that in the motel room he paid \$100 to Appellant for one gram of methamphetamine, which was in two baggies. Pedigo testified that he met with the detectives after the buy, gave them the methamphetamine, and collected his \$100 fee.

Pedigo admitted that he was a convicted felon as a result of his own methamphetamine addiction. Pedigo did not dispute that he tested positive for methamphetamine in a drug test conducted by his probation officer the day of the alleged transaction. He stated he could not recall, but admitted that there

was a “possibility” that he was using methamphetamine on that day, or that he was under the influence when he went to the motel. He could not remember if his probation had been revoked as a result of failing the drug test. However, he admitted that one of the reasons he worked for the task force was to make sure he did not go back to jail on his own charges.

Pedigo admitted he is addicted to methamphetamine and has had relapses. On re-cross, after Pedigo denied that he was using methamphetamine now, defense counsel requested that the trial court require Pedigo to submit to a drug screening. As grounds, defense counsel stated that he had been noticing possible indications, in particular, that Pedigo’s eyes were bloodshot, that caused him to believe Pedigo might be under the influence. Defense counsel argued that whether or not Pedigo was under the influence went to his competency to testify. The trial court acknowledged that, while it was not an expert, it had not noticed anything. The trial court denied defense counsel’s request, but told counsel he was free to argue to the jury that Pedigo was under the influence during his testimony.

Appellant was convicted of first-degree trafficking in a controlled substance (methamphetamine), and being a first-degree persistent felony offender, and sentenced to twenty years’ imprisonment. He appeals to this Court as a matter of right. Appellant raises as his sole issue on appeal, that the trial court erred by failing to examine Pedigo to determine if he was competent to testify, after defense counsel alerted the court that he believed

Pedigo might be under the influence of drugs.

KRE 601 provides, in part:

(b) Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:

(1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;

(2) Lacks the capacity to recollect facts;

(3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or

(4) Lacks the capacity to understand the obligation of a witness to tell the truth.

KRE 601 establishes a presumption of competency and allows disqualification of a witness “only upon proof of incompetency.” Price v. Commonwealth, 31 S.W.3d 885, 891 (Ky. 2000).

Appellant contends that Pedigo’s repeated failure to remember significant events (in particular whether he was on methamphetamine when the alleged sale occurred and if his probation had been revoked), along with his bloodshot eyes, created a duty for the trial court, when alerted by defense counsel, to examine Pedigo to determine if he was, in fact, under the influence of drugs, which could render him incompetent to testify. Appellant points to this Court’s cases related to child witnesses, which hold that, when the issue of competency to testify is properly raised, the trial judge has a duty to carefully examine the witness to ascertain competency. See Bart v. Commonwealth, 951 S.W.2d 576,

579 (Ky. 1997); Moore v. Commonwealth, 384 S.W.2d 498, 500 (Ky. 1964).

While our cases clearly establish that the trial court has such a duty with regard to child witnesses, no case has extended this as a duty to adult witnesses.

We review a trial court's determination of witness competency under an abuse of discretion standard. Whitehead v. Stith, 268 Ky. 703, 105 S.W.2d 834, 837 (1937). A review of Pedigo's testimony shows that he testified clearly as to the pertinent facts surrounding the alleged buy. His testimony was corroborated by that of Detective Wyatt. A witness's inability to recollect all of the specific details surrounding the event affects only the credibility of the witness's testimony, not his competency to testify. Price, 31 S.W.3d at 891. Pedigo's claimed inability to remember details such as whether he was on methamphetamine when he made the alleged buy, or whether he had his probation revoked, put his credibility, not his competency, at issue. Even where a witness is known to be under the influence of drugs, if he can think and is responsive, the influence does not render him incompetent to testify, but rather, the influence goes to his credibility. Brown v. Commonwealth, 511 S.W.2d 209, 211 (Ky. 1974) (witness on medication), citing Travis v. Commonwealth, 457 S.W.2d 481 (1970).

The trial court is in a unique position to observe witnesses and to determine their competency. Pendleton v. Commonwealth, 83 S.W.3d 522, 525 (Ky. 2002), citing Kotas v. Commonwealth, 565 S.W.2d 445, 447 (Ky. 1978).

The trial court had observed Pedigo and listened to his entire testimony, and found no cause for concern. Having reviewed Pedigo's testimony, we see nothing in Pedigo's testimony or demeanor that would indicate the trial court abused its discretion in not examining Pedigo further as to his competency to testify.

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

All sitting. All concur.

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