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RENDERED: OCTOBER 29, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2007-SC-000948-MR

DANNY BURRESS — APPELLANT

V.

ON APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
NO. 04-CR-00259

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Danny Burress, appeals from the December 18, 2007, judgment of the Taylor Circuit Court convicting him of second-degree trafficking in a controlled substance, second offense, and being a second-degree persistent felony offender (PFO II). Appellant was sentenced to twenty years' imprisonment and appeals to this Court as a matter of right.[1] We reverse and remand.

I. BACKGROUND

On February 2, 2004, Detective David Tucker, a narcotics officer with the Campbellsville Police Department, met a confidential informant ("CI"), in order to make a controlled buy at the home of Patricia Smothers in Campbellsville.

[1] Ky. Const. § 110(2)(b).

Tucker searched the CI and found no drugs or weapons on him and placed a recording device on his person. He gave the CI four twenty-dollar bills to use for the buy and dropped the CI off near Smothers' home where he could watch the CI enter the residence. Tucker then pulled into a nearby parking lot where he could view the house and see if anyone entered or left the house.

When the CI emerged from the house, Tucker picked him up once the CI was out of sight of the house. Tucker then retrieved the recording device, four oblong pills, and sixty dollars from the CI (having spent twenty dollars on the four pills). The pills were later analyzed by Kentucky State Police lab and determined to be hydrocodone, a Schedule III narcotic.

The CI informed Tucker that there were four people present in the home during the buy: Patricia "Patty" Smothers, Tony Hardin, an unidentified white female, and a white man whose name the CI did not know. He told Tucker that he had purchased the pills from this unidentified white male. The CI described him as a short, stocky man around 40 years old, who was balding and had sandy reddish hair with some gray. At trial, the CI testified that he had seen the man at Smothers' residence on several occasions prior to February 2, 2004, but he did not know his name.

At this time, Tucker drove back to Smothers' residence and the CI matched up the people inside with the cars parked in the driveway. The CI was able to identify all the cars except for one. Tucker ran the license plate for that car and learned that the owner of the car was Appellant, Danny Burress.

Tucker then had Officer Begley go to the county clerk's office to take a photo of Appellant's driver's license photograph. Begley brought the camera to Tucker and the CI identified Burress as the man who had sold him the pills that day.

In December 2004, a Taylor County Grand Jury indicted Appellant on one count of second-degree trafficking in a controlled substance, second offense, and one count of being a persistent felony offender in the second degree (PFO II).

Appellant was appointed an attorney from the Department of Public Advocacy to represent him. Prior to trial, Appellant filed a motion for expert funds for voice identification analysis of the tape from the buy, but the court denied his motion.

Appellant also filed a motion to suppress the identification of him by the CI. The trial court held a hearing on Appellant's motion to suppress the identification by the CI. After hearing testimony from the CI and Detective Tucker, the trial court denied the motion to suppress, after applying the factors set forth in Neil v. Biggers, 409 U.S. 188 (1972) and considering the totality of the circumstances.

Following a jury trial, Appellant was found guilty of second-degree trafficking in a controlled substance, second offense, PFO II. Appellant was sentenced to twenty years in prison.

On appeal, Appellant alleges that the trial court erred by: 1) not allowing Appellant to cross-examine the CI about whether he had pled guilty to lying to

a police officer; 2) failing to suppress the identification of Appellant by the CI; 3) refusing to grant funds to hire an expert to perform voice identification analysis of the buy tape; and 4) allowing testimony from Detective Tucker that the CI was reliable.

II. ANALYSIS

A. Trial Court Erred in Not Allowing Defendant to Cross-Examine Witness about Prior Conviction for Giving False Name to Police

Appellant contends that the trial court erred when it would not allow Appellant to cross-examine the CI about his past conviction for giving a false name to a police officer. At trial, Appellant's counsel asked the CI, "On or about August of '06, you pled guilty to lying to a police officer . . ." to which the prosecution objected. Appellant's counsel argued that the question rebutted the CI's credibility. After a bench conference, the trial court sustained the prosecution's objection on the grounds that under KRE 609, evidence of a witness' conviction for a crime could not be introduced unless it was a felony. Because the CI's conviction for lying to an officer was a misdemeanor, the trial court would only allow Appellant's counsel to ask the CI if he had been convicted of a felony, to which the CI responded in the affirmative.

Appellant argues that under KRE 608(b), he was entitled to question the CI about his conviction to rebut his credibility by showing that he had a character for untruthfulness. We agree. Although the trial court was correct that the conviction was not admissible under KRE 609, the applicable rule here

is KRE 608. KRE 608(b) permits, in the discretion of the trial court, specific instances of conduct of a witness, if probative of character for truthfulness or untruthfulness, to be inquired into on cross-examination, while prohibiting proof thereof by extrinsic evidence. The rule requires the cross-examiner to have a factual basis for the subject matter of his inquiry. Accordingly, even though inadmissible under KRE 609, inquiry on cross-examination of a witness as to a misdemeanor conviction, where such is probative of the witness' character for truthfulness or untruthfulness, is permissible, within the discretion of the trial court, under KRE 608(b). See Fields v. Commonwealth, 274 S.W.3d 375, 400 (Ky. 2008).

Lying to a police officer certainly reflects upon "the witness's character for truthfulness or untruthfulness." KRE 608(b)(1). There were no other eyewitnesses to the alleged buy to testify at trial other than the CI and Patty Smothers.[2] Smothers, who testified for the defense, could not recall whether it was she or Appellant who sold the drugs to the CI on the day in question. The tape recording was unintelligible. Hence, the Commonwealth's case relied solely on the CI's testimony. Therefore, the CI's character for truthfulness was material for the jury in deciding the case. Not allowing the Appellant to inquire as to the CI's relatively recent conviction for lying to a police officer was an abuse of discretion under the circumstances of this case. Because the case turned on belief in the testimony of the CI, we cannot say the error was

[2] Tony Hardin was deceased at the time of trial, and the unidentified woman who was present during the buy has never been identified.

harmless, and reversal is required. We now address any other alleged errors that are likely to recur on remand.

B. The Denial of the Motion to Suppress the Photo Identification of Appellant was Proper

Appellant argues that he was substantially prejudiced and denied due process of law when the trial court denied his motion to suppress the identification of Appellant by the CI, on the grounds that the identification was impermissibly suggestive. When reviewing a trial court's denial of a motion to suppress, we utilize the standard set forth by the United States Supreme Court in Ornelas v. United States, 517 U.S. 690 (1996), which was adopted by this Court in Adcock v. Commonwealth, 967 S.W.2d 6 (Ky. 1998). The approach in Ornelas is a two-step process. First, we review factual findings using the clearly erroneous standard. Strange v. Commonwealth, 269 S.W.3d 847, 849 (Ky. 2008). That is, we must determine whether the findings of fact are supported by substantial evidence. RCr 9.78. Second, we review *de novo* the trial court's application of the law to the facts. Strange, 269 S.W.3d at 849.

The showing of solely Appellant's picture to the CI was undeniably a suggestive identification procedure. See Fairrow v. Commonwealth, 175 S.W.3d 601, 608 (Ky. 2005); Rodriguez v. Commonwealth, 107 S.W.3d 215, 218 (Ky. 2003). Therefore, we must determine whether, under the totality of the circumstances, the identification is nevertheless reliable in light of the five factors enumerated in Neil v. Biggers, 409 U.S. 188 (1972), which are: 1) the

opportunity of the witness to view the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the criminal; 4) the level of certainty demonstrated by the witness at the confrontation; and 5) the length of time between the crime and the confrontation. Id. at 199-200.

The CI had the opportunity to view the person he was purchasing the drugs from. The tape recording of the buy indicates that the CI was in the Smothers residence for approximately two minutes. While it is not clear from the record or tape how much of that time was spent with the person he was buying drugs from, the CI had the opportunity to view the person for at least some of that time while he sat at the kitchen table making the purchase with the seller. We have previously held that even viewing the criminal for five seconds, when viewed with the other four factors from Biggers, was sufficient to consider an identification reliable. Roark v. Commonwealth, 90 S.W.3d 24, 26 (Ky. 2002); Id. at 29.

The CI paid attention to the person he was purchasing narcotics from. He sat at a table with the seller and would have been able to see him at that time. The CI was experienced at making controlled drug buys and knew that he would be asked to identify the person he had purchased the narcotics from upon leaving the home.

The description the CI gave to Tucker matched Appellant. He told Tucker that the person was a short, stocky male around 40 years old who was balding

and had sandy or reddish hair with some gray. Appellant was 46 years old, 5'7" and 250 pounds, and was balding with strawberry blond and gray hair.

The identification occurred shortly after the time of the crime. Just after the CI returned to Tucker's car, Tucker had Officer Begley bring a photo of Appellant's driver's license to them to allow the CI to identify whether Appellant was the man he had purchased narcotics from. The CI was confident that the photo shown was the same person who sold him the narcotics.

Other evidence supports the reliability of the identification. The CI informed Tucker that although he did not know the name of the man from whom he purchased the narcotics, he had seen him at the Smothers' residence on several other occasions prior to February 2, 2004. In addition, the car at the residence was registered in Appellant's name. Having considered the five factors set out in Biggers and the totality of the circumstances, we conclude the trial court's finding of reliability was supported by substantial evidence. Hence, the trial court did not err in denying Appellant's motion to suppress the identification.

C. Denial of Funds for Expert Voice Analysis was Not Abuse of Discretion

Appellant claims he was substantially prejudiced by the trial court's denial of his motion to fund an expert in voice analysis. The standard for review of a trial court's denial of funds under KRS 31.110 is abuse of discretion, and the reviewing court must limit its analysis to the reasons presented to the trial court. Davenport v. Commonwealth, 177 S.W.3d 763, 773

(Ky. 2005) (citing Dillingham v. Commonwealth, 995 S.W.2d 377, 381 (Ky. 1999)).

KRS 31.110(1)(b) provides that an indigent defendant "is entitled . . . to be provided with the necessary services and facilities of representation including investigation and other preparation." The trial court, in deciding whether an indigent defendant is entitled to receive funding for the expert under KRS 31.110(1)(b) "will consider 1) whether the request has been pleaded with requisite specificity; and 2) whether funding for the particularized assistance is 'reasonably necessary'; 3) while weighing relevant due process considerations." Benjamin v. Commonwealth, 266 S.W.3d 775, 789 (Ky. 2008) (citing Davenport, 177 S.W.3d at 773; Dillingham, 995 S.W.2d at 381).

At a pretrial hearing on April 18, 2006, Appellant indicated to the court that he planned to use a voice analysis expert to prove that none of the voices on the tape was his. The trial court told Appellant he would have to work with his attorney on obtaining such an analysis and gave Appellant two months to get the voice analysis done.

On June 5, 2006, Appellant filed a motion for expert funds for voice identification which asked for $3,500.00 to be paid by the state of Kentucky to Owl Investigations, Inc., a "nationally recognized expert in this field . . ." because this expert "will assist in getting this case resolved." The trial court denied the motion, finding that because Appellant was now employed full-time, it would not require the state to pay for Appellant's expert.

Appellant contends that the trial court abused its discretion in denying funds for the expert witness. Although Appellant had been appointed a public defender, he still had a duty to pay a portion of his own defense if possible. KRS 31.211(1). This court has noted that KRS 31.110(1)(a) "certainly cannot mean that an indigent defendant is entitled to have any and all defense-related services, scientific techniques, etc., that a defendant with unlimited resources could employ." McCracken County Fiscal Court v. Graves, 885 S.W.2d 307, 313 (Ky. 1994). We believe the "scientific techniques" mentioned in Graves refers to KRS 31.110(1)(b) as well. Cf. Foley v. Commonwealth, 17 S.W.3d 878, 885 (Ky. 2000), overruled on other grounds by Stopher v. Conliffe, 170 S.W.3d 307 (Ky. 2005) (noting that a reasonable investigation does not mean an investigation that the best defense lawyer in the world would conduct if blessed with unlimited time and resources).

The court gave Appellant two months to obtain a voice analysis, and the tape of the buy was played for the jury at trial. Despite not having the voice analysis, Appellant was able to present his theory at trial that he was not at the house during the drug buy. Appellant could have testified that it was not his voice on the tape, or he could have cross-examined the CI and Detective Tucker. Appellant called Patty Smothers, who was present during the buy, as a witness, but did not ask her to identify the voices on the tape, despite the fact that the tape recording took place in her home while she was present. In addition, Appellant was employed full-time at the time of his motion for funds

for an expert witness and made no showing that he could not afford to pay for his expert himself. Based on the above, we conclude Appellant was not deprived of due process, and denying the motion was not an abuse of discretion.

D. Testimony that the CI was Reliable was Error

Appellant claims that the trial court erred by allowing Detective Tucker to testify that the CI was a reliable informant whose work had resulted in numerous convictions. Our recent decision in Fairrow v. Commonwealth, 175 S.W.3d 601 (Ky. 2005), is factually similar to the case at hand. In Fairrow, we held that an officer's testimony that a confidential informant was reliable and had led to convictions was inadmissible character evidence. Id. at 605. Similarly, in the present case, the admission of Tucker's testimony that the CI was reliable was inadmissible character evidence as well. This testimony was error, and should not be permitted on retrial.

III. CONCLUSION

For the foregoing reasons, the judgment of the Taylor Circuit Court is reversed and the case remanded for a new trial.

All sitting. Minton, C.J.; Abramson, Cunningham, Noble, Schroder, and Venters, JJ., concur. Scott, J., dissents without opinion.

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