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RENDERED: OCTOBER 21, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000566-MR

FINAL
DATE 11-12-10 ATH

RANDY MULLINS — APPELLANT

V.

ON APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK A. FLETCHER, JUDGE
NO. 09-CR-00042

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On August 28, 2009, Appellant, Randy Mullins, was convicted by a Breathitt Circuit jury on two counts of Trafficking in a Controlled Substance, First Degree, Second or Subsequent Offense. KRS 218A.1412. For these crimes, Appellant was sentenced to twenty-five years' imprisonment. He now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). We now affirm.

I. Background

In September 2008, and October 2008, Shane Humphrey, acting with Operation UNITE, participated in a "controlled drug buy" wherein Humphrey proceeded to Appellant's home and purchased controlled substances. As part of the operation, UNITE provided Humphrey with "buy money" and concealed

on his person certain video and audio surveillance equipment so as to record the transaction. The equipment, however, produced poor quality recordings of the transactions.

On the strength of the controlled buys, the Commonwealth indicted Appellant. Thereafter, at trial, just before voir dire, the trial court read the indictment to the perspective jurors, stating:

> The grand jury charges: that as of the 13th day of September 2008, in Breathitt County, Kentucky, the above[-] named Defendant, Randy Mullins:
>
> Count I: Committed the offense of trafficking in a controlled substance in the first degree by knowing[ly] and unlawfully selling methadone, a controlled substance classified in schedule II, *having previously been convicted of a trafficking offense under Chapter 218A of the Kentucky Revised Statutes.*
>
> And the grand jury charges: [t]hat as of the 31st day of October 2008, in Breathitt County, Kentucky, the above-named defendant, Randy Mullins:
>
> Count II: Committed the offense of trafficking in a controlled substance in the first degree by knowing[ly] and unlawfully selling [O]xycontin, a controlled substance classified in schedule II, *having previously been convicted of a trafficking offense under chapter 218A of the Kentucky Revised Statutes.*

(emphasis added). This was the only instance in which Appellant's previous convictions were mentioned and Appellant made no contemporaneous objection.

In the Commonwealth's case-in-chief, Humphrey testified that during the first "buy" he purchased contraband from Appellant. Humphrey also testified

that during the second buy, he gave money to and received contraband from Appellant.

After the Commonwealth rested, the trial court was made aware that the reading of the indictment should not have included Appellant's previous convictions.

Following the conclusion of the trial, the jury found Appellant guilty as charged and sentenced him to twenty-five years' imprisonment. He now appeals his conviction, averring that: (1) the trial court committed palpable error by reading the indictments and including references to his prior convictions; (2) the trial court erred by admitting the video recordings and other evidence of the drug sales as evidence because the Commonwealth did not prove sufficient control of the "buy"; and (3) this case is replete with reasonable doubt and therefore should be reversed.

To the extent that our appellate authority permits us, we address each argument in turn.

II. Analysis

A. Reading of the Indictment

Appellant, recognizing that he did not properly preserve this issue for appellate review, argues that the trial court committed palpable error when it referenced his prior convictions when it read the indictment. He further argues that thereafter the prejudice could not have been repaired or remedied by an

admonition, and thus the error violated his right to a fair and impartial trial as guaranteed by the Sixth Amendment of the United Sates Constitution.

The Commonwealth, while admitting that the trial court erred in this regard, argues that the error was not palpable as Appellant did not suffer a manifest injustice. We agree.

All parties recognize that where a subsequent offense is charged, "[n]o reference shall be made to the prior offense until the sentencing phase of the trial, and this specifically includes reading of the indictment prior to or during the guilt phase." *Clay v. Commonwealth*, 818 S.W.2d 264, 265 (Ky. 1991). Indeed, where such an error occurs and the defendant properly objects, a mistrial is warranted. *Commonwealth v. Pace*, 82 S.W.3d 894, 895 (Ky. 2002). But, where the defendant fails to contemporaneously object to the error, the issue is deemed waived and will only be reversed upon a finding of palpable error. *Id.* (*citing Bell v. Commonwealth*, 473 S.W.2d 820 (1971)).

To reverse a conviction under palpable error, an appellate court must find the error "easily perceptible, plain, obvious, and readily noticeable." *Brewer v. Commonwealth*, 206 S.W.3d 343, 348-49 (Ky. 2006) (citations and quotations omitted); RCr 10.26. Furthermore, the error "must involve prejudice more egregious than that occurring in reversible error, and must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings." *Brewer*, 206 S.W.3d at 349. The ultimate question is whether Appellant has suffered a manifest injustice that is

shocking or jurisprudentially intolerable. *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006). Where a court cannot answer this question in the affirmative, the error cannot be palpable. *Id.*

In *Pace*, we granted discretionary review to decide whether a trial court committed palpable error when it admitted the defendant's prior DUI convictions during the Commonwealth's cross examination of the defendant in a fourth-offense DUI trial. 82 S.W.3d 894. There, the Court of Appeals found palpable error because it was "well-established that prior DUI convictions are inadmissible in the guilt phase of a DUI trial." *Id.* at 895. The Court of Appeals reasoned the error palpable because of the "lack of objective evidence against Appellee since he had refused to submit to a breathalyzer," and because "the verdict hinged on the credibility of Appellee's denial versus the arresting officer's testimony." *Id.* We reversed that decision, noting the other evidence that implicated the defendant in the crime. *Id.* There, the defendant admitted drinking, denied intoxication, and did not deny that his license were suspended for a prior DUI. *Id.* Ultimately, we could not conclude, in light of other evidence in that case, that palpable error occurred. *Id.*

Similarly, here, Appellant claims that he was prejudiced because the jury received information about his prior convictions when the court read the indictment. However, the jury in this case also received direct testimony from a cooperating witness specifically implicating Appellant in these crimes. Moreover, as in *Pace*, Appellant's case boiled down to a credibility issue—the

jury could believe Appellant's version of events or the cooperating witness's. Obviously, they chose to believe the cooperating witness. Thus, we cannot say that Appellant suffered a manifest injustice when the trial court made the single mention of Appellant's prior convictions during an opening reading of the indictment. *See Martin*, 207 S.W.3d at 4.

B. Commonwealth's Control of an Orchestrated Drug Buy

Appellant next contends that the trial court erred by admitting the video recordings of the drug transactions as evidence because the Commonwealth did not prove to the jury that the officers searched the cooperating witness before and after the "buy"; the officers searched the cooperating witness's vehicle before and after the "buy"; and, finally, that the officers kept the cooperating witness under observation, and monitored the entrances and exits of the location of the "buy." In support of his position, Appellant relies on *Iddings v. State*, 772 N.E.2d 1006 (Ind. Ct. App. 2002).

The Commonwealth responds by noting that these search criteria and observations are not requisite elements of the crimes charged and that the Commonwealth bears no such burden.[1] And with regard to the Appellant's reliance on *Iddings*, the Commonwealth avers it is legally distinguishable from the case at bar.

KRS 218A.1412 provides:

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[1] Notwithstanding the fact that these issues are irrelevant to proving Trafficking in a Controlled Substance, the Commonwealth also notes that there indeed was evidence these searches were conducted. Both UNITE Detective Easter and the cooperating witness testified to this effect.

> (1) A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance, that is classified in Schedules I or II which is a narcotic drug; a controlled substance analogue; lysergic acid diethylamide; phencyclidine; a controlled substance that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers; gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers, and analogues; or flunitrazepam, including its salts, isomers, and salts of isomers.

As is evident from a plain reading of this provision, nothing in this statute requires the Commonwealth to prove that the cooperating witness, his vehicle, or other effects were properly searched before or after the "buy"—and neither does the statute require the Commonwealth to monitor the event. While such proof may create an issue of credibility for the cooperating witness, rebutting such is not a mandatory responsibility of the Commonwealth. Indeed, Appellant cites no pertinent authority supporting this proposition and this Court can find no case imposing such a burden upon the Commonwealth. And although Appellant relies on *Iddings* in support of his position, we find his argument meritless.

In *Iddings*, an Indiana intermediate court of appeals addressed whether a magistrate should have issued a search warrant. 772 N.E.2d 1006. There, the appellant argued that because the police did not have sufficient control of the "buy" (outlining the search criteria Appellant now argues), the warrant should not have been issued and thus the fruits of the search were unconstitutional. *Id.* at 1011-12. We simply do not have that here; nor do we express an opinion relative to the *Iddings* holding under similar circumstances.

The issue here is simply whether a trial court can properly admit videos and other physical evidence where, allegedly, the Commonwealth has not proven that the buy was sufficiently controlled. We hold that the Commonwealth bears no such burden.

C. Reasonable Doubt

Next, we address Appellant's argument that reversal is required because this case is "replete with reasonable doubt." We pause to note that it is not within the purview or authority of this Court to make a determination of reasonable doubt absent a showing of insufficiency of the evidence presented at trial. Thus, although Appellant frames this issue as one questioning the existence of reasonable doubt, we frame the question as whether sufficient evidence existed to convict Appellant of the crimes charged.

The crux of Appellant's argument surrounds the notion that because the Commonwealth's only eyewitness was not credible, and because the audio and video were of such poor quality, the jury could not have found him guilty of the crimes charged beyond a reasonable doubt. We disagree. An appellate court in this Commonwealth cannot reevaluate the evidence or substitute its judgment as to the credibility of a witness for that of the trial court and the jury. *Commonwealth v. Bivins*, 740 S.W.2d 954, 956 (Ky. 1987).

On appellate review, the relevant question with respect to a sufficiency of the evidence argument is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt." *Potts v. Commonwealth*, 172 S.W.3d 345, 349 (Ky. 2005). In this case, the Commonwealth presented a cooperating witness who testified that he bought contraband from Appellant on two occasions. It was in the province of the jury to weigh the complaining witness's credibility. And assuming, arguendo, that the jury may not have been able to convict Appellant solely on the strength of the video tapes due to their poor quality, that does not negate the fact that the Commonwealth offered the jury a participating eyewitness.

Viewing these facts in a light most favorable to the Commonwealth, we conclude that a reasonable trier of fact could have found Appellant guilty beyond a reasonable doubt based on the eyewitness testimony in this case. *Baker v. Commonwealth*, 234 S.W.3d 389 (Ky. App. 2007); *People v. Calabria*, 816 N.E.2d 1257 (N.Y. 2004); *State v. Davis*, 848 So.2d 557 (La. 2003).

III. Conclusion

For the aforementioned reasons, we affirm Appellant's conviction in all respects.

All sitting. Minton, C.J.; Cunningham, Noble, Schroder, Scott, and Venters, JJ., concur. Abramson, J., concurs in result only.

COUNSEL FOR APPELLANT:

Michael A. Stidham
Stidham Law Office
500 Brown Street
P.O. Box 732
Jackson, KY 41339

COUNSEL FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Jeanne Deborah Anderson
Executive Director
Office of the Attorney General
Office of Criminal Appeals
1024 Capital Center Drive
Frankfort, KY 40601-8204