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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: AUGUST 23, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000776-MR

JOHNNY D. GREENE — APPELLANT

V.

ON APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
NO. 09-CR-00289

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In November of 2009, Appellant, Johnny D. Greene, was charged with three counts of trafficking in a controlled substance in the first degree (cocaine) and being a persistent felony offender in the second degree. The charges arose out of three separate cocaine transfers made by Appellant to a female confidential informant working with the Mt. Sterling Police Department. The trial was conducted on August 24, 2010, in Montgomery Circuit Court. At trial, Appellant admitted to giving the confidential informant cocaine in exchange for money. Appellant was convicted on all counts and sentenced to twenty (20) years in prison. He now brings this appeal as a matter of right. Ky. Const. § 110(2)(b). His only challenge to the conviction is the chain of custody of the drugs.

Police Captain David Charles and Detective Jimmy Daniels were two of the officers working this case for the Mt. Sterling Police Department. At trial,

Charles testified that after each buy the confidential informant gave him the cocaine she had purchased from Appellant. Charles then turned over the evidence to Detective Daniels. Daniels testified that he received a unique case number for each of the three individual transactions. He placed the cocaine involved in each of the buys in separate sealed manila envelopes with the corresponding case numbers listed on the outside. He then sent the sealed envelopes to the testing laboratory via certified mail. The unique case numbers were also contained in the paperwork requesting testing and on the certified mail cards. Detective Daniels further explained that the paperwork accompanying the cocaine samples referenced "John Doe" instead of Appellant's actual name in order to protect the confidentiality of the case and the identity of Appellant.

When the packages arrived at the crime lab, the certified mail cards were signed by Caleb Leitchfield. Leitchfield is a former employee of the lab who did not testify at trial. Matthew Cross and Christopher Binion, the two lab analysts who conducted the testing of the cocaine samples in this case, did testify at trial. Both Cross and Binion testified that, when evidence is received by the lab, it is assigned a specific lab number and is then placed into the testing analyst's locker to which no one other than the analyst has access. They also explained that, as happened here, when evidence arrives and is assigned to an analyst who is not present at the lab, it is standard lab procedure for a secretary or other analyst to take delivery of the evidence and place it in the testing analyst's locker. The testing analyst then retrieves the

evidence when he returns to the lab. Cross and Binion both explained that the packages were sealed with evidence tape when they were received and there was no indication that they had been tampered with.

Appellant challenges the chain of custody by contending that the trial court erred when it admitted the cocaine and the lab reports into evidence. Based upon this alleged erroneous admission of the evidence, Appellant claims a directed verdict should have been granted in his favor. Appellant moved for a directed verdict at the close of the Commonwealth's case and again at the close of all the evidence. Both motions were denied by the trial court.

Appellant argues that there was a question as to whether the cocaine was the actual evidence from the drug buys and whether the substance "remained materially unchanged from the time of its collection." We note that the trial court has wide discretion in ruling on these matters. *Grundy v. Commonwealth,* 25 S.W.3d 76, 80 (Ky. 2000); *see also United States v. Lane,* 591 F.2d 961, 962–63 (D.C. Cir. 1979) ("So long as the court is persuaded that as a matter of normal likelihood the evidence has been adequately safeguarded, the jury should be permitted to consider and assess it in light of the surrounding circumstances.").

The purpose of requiring that the chain of custody be established, under KRE 901, is to show that the cocaine tested in the laboratory is the same cocaine that was exchanged between Appellant and the confidential informant. *Rabovsky v. Commonwealth,* 973 S.W.2d 6, 8 (Ky. 1998) (citing R. Lawson, THE KENTUCKY EVIDENCE LAW HANDBOOK, § 11.00, p. 592 (3rd ed. Michie 1993)).

Evidence that by its nature is not readily identifiable, such as drugs, requires that a more elaborate foundation be laid. *Beason v. Commonwealth*, 548 S.W.2d 835, 837 (Ky. 1977). "[T]he more fungible the evidence, the more significant its condition, or the higher its susceptibility to change, the more elaborate the foundation must be." *Thomas v. Commonweath*, 153 S.W.3d 772, 779 (Ky. 2004). However, "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in any material respect.'" *Rabovsky* at 8 (citing *United States v. Cardenas*, 864 F.2d 1528, 1532 (10th Cir.1989)); *see also Thomas* at 779-81. Thus, the issue presented in this case is whether the Commonwealth proved there was a reasonable probability that the cocaine samples were the same as purchased in the drug buys and were not materially altered.

In his brief, Appellant relies on *Rabovsky v. Commonwealth.* In *Rabovsky*, the prosecution introduced reports of blood tests ordered while the victim was in the hospital. The hospital contracted with an outside laboratory (N.H.L.) in Louisville, Kentucky to perform blood tests. The victim's blood samples were initially sent to N.H.L., but the tests were actually performed by N.R.L., an affiliate of N.H.L., located in Nashville, Tennessee. At trial, "[n]o evidence was introduced to prove who collected the blood samples, how they were stored, how they were transported to N.H.L., how they were transported (if they were) to N.R.L., or what method was used to test the samples." *Rabovsky*

at 7. On appeal, this Court held that it was error to admit the blood test reports where the Commonwealth completely failed to establish the chain of custody for the blood samples.

In this case, unlike *Rabovsky*, there was evidence presented by the Commonwealth at trial as to the chain of custody of the cocaine. Captain Charles and Detective Daniels testified as to having custody of the cocaine from the time they received it from the confidential informant to the time Daniels sealed it and sent it via certified mail to the testing laboratory. The laboratory analysts who conducted all of the testing testified that the standard lab procedures for receiving the cocaine samples were followed; that after the former employee signed for the samples, they were placed into a locker which no one had access to other than the testing analyst; and that when the envelopes containing the samples were received at the lab, each was sealed with tamper revealing evidence tape that had no indication whatsoever of any tampering having occurred.

Although the former employee who signed for the packages did not testify at trial, "[g]aps in the chain normally go to the weight of the evidence rather than to its admissibility." *Rabovsky* at 8 (citing *United States v. Lott,* 854 F.2d 244, 250 (7th Cir.1988)). "It is unnecessary . . . that the police account for every hand-to-hand transfer of the items; it is sufficient if the evidence demonstrates a reasonable assurance the condition of the item remains the same from the time it was obtained, until its introduction at trial." *Penman v. Commonwealth,* 194 S.W.3d 237, 246 (Ky. 2006) (quoting *State v. Price,* 731

S.W.2d 287, 290 (Mo. Ct. App.1987) (overruled on other grounds by *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010))). Thus, the fact that the person who signed for reception of the evidence did not testify at trial did not prevent the Commonwealth from establishing a sufficient chain of custody to admit the cocaine.

Appellant additionally argues that because the paperwork listed him as "John Doe" instead of by his actual name, it calls into question whether all three of the cocaine samples actually came from someone other than Appellant. However, each of the envelopes containing the samples and their accompanying paperwork contained the case numbers specific to the individual samples. Regardless of the name listed, the samples were identifiable by their respective case numbers.

Here, "Appellant makes no specific claim of tampering by intermeddlers, and 'speculation . . . is not enough to destroy . . . integrity.'" *Thomas* at 782 (quoting *Brown v. Commonwealth*, 449 S.W.2d 738, 740 (Ky. 1969)). The testimony of the officers and the lab analysts was sufficient to create a reasonable probability that the cocaine had not been materially altered in any way. *Rabovsky* at 8. We find no abuse of discretion by the trial court in admitting the cocaine samples and the corresponding lab reports.

Accordingly, the judgment of the Montgomery Circuit Court is hereby affirmed.

All sitting. All concur.

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