RENDERED: October 24, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000335-MR

KIM EMMONS — APPELLANT

v.

APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, JUDGE
ACTION NO. 00-CR-00062

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; McANULTY, JUDGE, AND HUDDLESTON, SENIOR JUDGE.[1]

McANULTY, JUDGE. Appellant Kim Emmons appeals her conviction in the Mason Circuit Court following a bench trial. The court found appellant guilty of two counts of trafficking in marijuana and one count of trafficking in a controlled substance, cocaine.

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

She argues numerous claims of error in this appeal. We have reviewed the allegations, and we affirm.

Appellant first argues that the trial court should have granted her motion to suppress her statements from an interview with Mason County Sheriff Wagner and Agent Reda Harris of the Buffalo Trace narcotics task force. According to Agent Harris, appellant stated to them that her son had the drug connections and that she supplied him with the money. Appellant maintains that she was not informed of her rights prior to the interview, although Agent Harris testified at trial that she read appellant her rights at the beginning of the discussion. Sheriff Wagner did not testify at the suppression hearing, or at trial. The trial court found that appellant was given the proper warnings before questioning.

Appellant argues that since the burden of proof is a preponderance of the evidence, the Commonwealth had to produce more evidence of a waiver of her rights to overcome her denials. She contends that the failure to call Sheriff Wagner is critical since without his testimony the evidence only amounted to a "swearing match" between herself and Agent Harris -- not a preponderance of the evidence. Appellant acknowledges that she did not make this specific argument at trial, but contends that this constitutes palpable error pursuant to RCr 10.26.

The Commonwealth must establish the voluntariness of a confession by a preponderance of the evidence. Tabor v. Commonwealth, Ky., 613 S.W.2d 133, 135 (1981). Appellant relies on the language in Tabor that "Police officers present when the confession was given should be called to testify at the hearing, or their absences accounted for." Id. Sheriff Wagner's absence was never explained by the Commonwealth.

However, we do not perceive a palpable error in this instance. In Henson v. Commonwealth, Ky., 20 S.W.3d 466 (1999), the Supreme Court indicated that the central principle of Tabor is ensuring that the court is presented sufficient evidence to substantiate the Commonwealth's claim of a voluntary confession. We believe the failure to account for all of the officers is not fatal to the Commonwealth's case. In Tabor, the Commonwealth brought forward no witnesses to testify about the circumstances of the confession. In the case at bar, the Commonwealth introduced the testimony of an officer who was present and could testify about reading appellant her rights. In every case, moreover, the trier of fact must make a determination of credibility when faced with witnesses who tell differing versions of events. We find that the Commonwealth's witness satisfied the Commonwealth's burden of proof by a preponderance of the evidence.

Furthermore, if it was error not to call the sheriff, we do not believe that a palpable error has occurred under RCr 10.26. Appellant did not challenge the failure of the sheriff to testify below, or call him as a witness herself. The Commonwealth may easily have been able to call an additional witness following a timely objection. Thus, we do not conclude there was a manifest injustice to appellant.

Appellant further argues that there was not substantial evidence to support the trial court's finding of fact that her statements were voluntary under the totality of the circumstances. Appellant testified that Agent Harris threatened her with the loss of her children if she did not cooperate with the task force. We disagree that this testimony alone establishes an involuntary statement. The testimony by Agent Harris that she read appellant her rights and that she did not make that threat supplied the court with substantial evidence under RCr 9.78 on which to find the statement voluntary. Moreover, the court also cited appellant's testimony that she was not mistreated while there and was free to leave.

Next, appellant argues that the Commonwealth possessed a transcript of audiotapes of the drug buys which should have been provided to her. The informant, Nick Roberts, was equipped with a recording device when he went to appellant's house and attempted to purchase drugs. The parties and the court agreed

in this case that the tapes were largely inaudible after listening to them at trial, and for that reason the court admitted only one of the tapes into evidence. At trial, it came out that the Commonwealth Attorney visited the witness, Roberts, in the jail on the night before the trial. Roberts testified that while they sat at a table and reviewed the audiotapes, he could see a transcript of the tapes prepared by the Commonwealth Attorney. Roberts stated that he did not see or read the entire transcripts. However, he stated that he could see what had been written, and that he pointed out some words on the transcript that were wrong. He affirmed that the Commonwealth Attorney did not hand him the transcript to read. According to Roberts, the audiotapes refreshed his recollection of what occurred during the transactions with appellant.

The transcripts were not introduced by the Commonwealth at trial. The Commonwealth contends that the transcripts were not required to be produced because they are the work product of the Commonwealth Attorney under RCr 7.24. Appellant alleges that it is not protected as work product because it is fact-based rather than opinion, and also asserts that the transcript should have been provided under RCr 7.26(1).[2]

[2] Appellant filed motions in the trial court and in this Court to be permitted to view the sealed transcripts for purposes of appeal, and also sought a writ of mandamus from the Kentucky Supreme Court to unseal the transcript, all of which were denied in favor of submission of the appeal on the merits. At oral argument of this appeal, counsel for appellant indicated that counsel

Having examined the transcripts in the record on appeal, we disagree with appellant that the Commonwealth should have provided the transcript to her. In our opinion, the information had already been provided by the Commonwealth. The audiotapes of the transactions were provided to defense counsel, and were played at trial. There was nothing contained in the transcripts which was not in the tapes which were provided. The transcripts were merely the attempt of the Commonwealth to put the words from the tapes onto paper. In Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 540-41 (1988), the court held that the "verbatim tapes" of an event are the "best evidence" of what occurred and that a prosecutor's summary does not suffice as a replacement. Therefore, we believe that prosecution acted properly in providing the verbatim tapes to the defense. Appellant's copies of the tapes were of the same quality as the Commonwealth's tapes. We discern no requirement that defense counsel obtain the Commonwealth's attempt to write down what was said on the tapes. Appellant has failed, moreover, to show that she was prejudiced in not receiving the transcripts.

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for this Court, George Fowler, represented to the Supreme Court that this Court had agreed to unseal the transcript if this issue were decided against appellant on appeal. However, we have reviewed the Response to Petition filed by Mr. Fowler, and the Supreme Court's Opinion and Order denying the writ of mandamus, which are the only documents of record of any such alleged agreement, and we do not identify any such assurance by counsel for this Court which would bind us to unseal the transcripts following our opinion in this case.

Additionally, the Commonwealth's rather haphazard review of the tapes with the witness was not an effort to produce an accurate copy for the jury of everything that was said in the tapes, as in Norton v. Commonwealth, Ky. App., 890 S.W.2d 632 (1994).

Appellant also asserts that the transcripts had to be provided pursuant to RCr 7.2(1). That Rule states:

> Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

As part of a supplemental record on appeal, the trial court found that there was no evidence that Roberts signed or otherwise adopted or approved the notations made by the Commonwealth Attorney in the transcript. Appellant argues that the transcript fits under (b), as it is a "substantially verbatim statement" of what Roberts said while conducting the drug buys.

We disagree with appellant's characterization of the Commonwealth's transcript as a substantially verbatim statement. The Commonwealth Attorney stated at trial that it was a transcript prepared by him, and his secretary, from the

audiotapes. He and the witness stated that they did not go through the entire transcript to verify the accuracy of what was written against the tapes and the witness' memory. Therefore, it is difficult to regard the transcript as substantially verbatim, and the transcript did not have to be produced under RCr 7.26(1). Moreover, even if this was a witness statement, which we do not believe it is, a violation of RCr 7.26 does not require reversal unless some prejudice is found. Gosser v. Commonwealth, Ky., 31 S.W.3d 897, 905 (2000). We have already stated that appellant has not demonstrated prejudice.

Next, appellant makes two claims of error concerning Roberts' invocation of the Fifth Amendment right against self-incrimination during his testimony at trial. Before trial, appellant had asked the court to appoint counsel for the witness. The court stated prior to Roberts' taking the stand that it had spoken with Roberts and determined that he would not need counsel. The court concluded that Roberts only requested an attorney because he did not want to testify and was afraid of repercussions if he testified, but he was not concerned that he would incriminate himself. However, during cross-examination, Roberts invoked the Fifth Amendment repeatedly.

Appellant's first argument on this subject is that the trial court erred in failing to include the attorneys in the in camera discussion with the witness prior to trial. Appellant's

counsel asserted at trial that he knew the line of questioning he followed would lead to appellant's refusal to testify. Appellant did not make this specific objection at trial, but she argues on appeal that it was palpable error.

We fail to find any authority which directs that the trial court must meet with the witness in chambers in the presence of counsel for the parties. The general rule is that the trial court should endeavor for a complete examination of the questions to be asked and possible responses, and then determine what crimes might be elicited by the answers. Commonwealth v. Gettys, Ky. App., 610 S.W.2d 899, 901 (1980). While the court may have to learn from the parties what their inquiries of the witness will be, and may want counsel to be present, we cannot say that it was palpable error for the court to meet with the witness alone. The trial court did talk with the witness and attempted to resolve the question of his need for counsel. We do not find any right of appellant or her counsel to be present at the in camera hearing.

Appellant also argues that it was error to allow Roberts to "selectively" invoke the Fifth Amendment protection during his testimony. Appellant objected to this at trial and moved to strike Roberts testimony in its entirety. We conclude that there was no error. Striking the entirety of a witness's testimony is a "'drastic remedy not lightly invoked,' but that

may be necessary 'when refusal to answer the questions of the cross-examiner frustrates the purpose of the process.'" Combs v. Commonwealth, Ky., 74 S.W.3d 738, 743 (2002)(citations omitted). The rule is that when cross-examination is precluded with respect to collateral issues, the court need not strike the testimony to protect the defendant's sixth amendment right of confrontation. Id. at 744.

At trial, Roberts invoked his privilege not to testify first when asked if he brought back all of the drugs to the task force members after the transactions were completed. On another occasion, Roberts attempted to invoke the Fifth Amendment when the court asked if he had been obtaining drugs other than on the five occasions he worked for the task force. (The court directed him to answer the question and Roberts said he didn't recall.) After appellant moved to strike his entire testimony, the prosecutor argued that the line of questioning was not material. The Commonwealth argued that even if the witness skimmed off some of the drugs for himself, it did not affect the critical question of whether or not appellant was involved in the transaction. We agree, and conclude the matter was collateral. The questions for which Roberts invoked his fifth amendment rights did call into question his trustworthiness and credibility. Yet his refusal to answer fully did not prevent the court from examining his credibility in this case.

Furthermore, appellant was able to cross-examine Roberts freely about his involvement with appellant and about the transactions. We do not find that appellant's right of confrontation was violated by allowing the witness to invoke the Fifth Amendment in part during his testimony.

Appellant next argues that there was insufficient evidence to support her convictions, and a directed verdict should have been granted on all of the charges. Appellant cites the fact that at one point the trial court proclaimed that Roberts had "been such a totally incredible witness." She contends the audiotapes of the transactions were largely inaudible, and the police were not able to observe or listen in on the transactions and so could offer no evidence that appellant committed the offenses charged. Therefore, she reasons that it was not shown that appellant participated in the transfer of drugs to the informant, rather than the other person present in her residence, her son.

On appellate review, the standard of review for a directed verdict is if under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 5 (1983). We conclude that the trial court weighed the problems appellant raises with the evidence, but found that there was sufficient

evidence to believe that she committed the offenses as charged. The court properly relied on Agent Harris's testimony regarding her interview with appellant, and believed her version that appellant admitted involvement in the offenses. The tape which was admitted as being audible was significant in establishing appellant's presence at the scene and the extent of her participation. We believe that a jury could properly find guilt from all the evidence, and so we conclude the trial court properly denied a directed verdict.

Finally, appellant argues that it was palpable error for the trial court to fail to obtain a written waiver of her right to a jury trial in accordance with RCr 9.26(1). This was error, since that Rule requires any waiver of a jury trial in a criminal case to be in writing with the approval of the court and the consent of the Commonwealth. However, since the trial court questioned appellant about her desire for a bench trial on the record, we cannot agree that a manifest injustice resulted. The court elicited from appellant on the record that she was aware of her right to a jury trial and she wished to waive that right. Since appellant has demonstrated no prejudice, we find no palpable error.

For the foregoing reasons, we affirm appellant's conviction in the Mason Circuit Court.

EMBERTON, CHIEF JUDGE, CONCURS.

HUDDLESTON, SENIOR JUDGE, DISSENTS.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Euva Hess
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Brian T. Judy
Assistant Attorney General

ORAL ARGUMENT FOR APPELLEE:

Brian T. Judy
Frankfort, Kentucky