

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001107-MR

JASON NOEL

APPELLANT

v. APPEAL FROM GREEN CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
INDICTMENT NO. 01-CR-00011

COMMONWEALTH OF KENTUCKY

APPELLEE

AND

NO. 2001-CA-002648-MR

JASON NOEL

APPELLANT

v. APPEAL FROM WASHINGTON CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
INDICTMENT NO. 01-CR-00055

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

DYCHE, JUDGE. Jason Derek Noel appeals his convictions from
Green and Washington Circuit Courts for trafficking in cocaine.

We affirm.

Sealed indictments were returned versus Noel in August 1996 in Taylor County; this matter was later moved to Green Circuit Court after the defense successfully moved to change venue. Similar indictments were returned in Washington County. In both cases, the Commonwealth's chief witness against Noel was Labron Gaither. Gaither was murdered the day after he testified before the grand jury in Taylor County. Noel was later convicted in Casey Circuit Court for Gaither's murder. Noel is serving a life sentence without the possibility of parole for twenty-five years on that charge.

Noel was found guilty in Green County and sentenced to ten years' imprisonment. He entered a conditional plea of guilty in Washington County and received a sentence of seven years probated for five years. These sentences were ordered to run concurrently with the Casey County life sentence.

Noel's first three arguments on appeal concern the audiotape of the drug transactions. He initially urges that the trial court erred in allowing the jurors to have copies of the manuscript of the audiotape. (This issue is in regard to the Green Circuit Court conviction only.) Noel's singular complaint is that many portions of the tape were inaudible. He does not contend that the Commonwealth's manuscript contains errors. Neither did Noel "request to substitute a version different from that offered by the Commonwealth." Norton v. Commonwealth, Ky.

App., 890 S.W.2d 632, 637 (1994). The trial court did not err nor abuse its discretion in permitting the jury to read along with the manuscript while it listened to the audiotape. Id.

Noel's second allegation about the audiotape is that the trial court erred in admitting it under the residual hearsay exception found in United States v. Houlihan, 92 F.3d 1271 (1st Cir. 1996). Without specifically addressing the Houlihan decision, we hold that the tape was admissible as nonhearsay, as it was evidence of the event itself rather than offered to prove the truth of the matter asserted. Norton, supra at 635. "The Commonwealth had no interest in proving whether such statements were true but rather that [Noel was] present, engaged in negotiations, and [was] involved in the transaction that Officer [Burton] testified occurred." Id. The trial court did not err in admitting the tape.

Noel thirdly asserts that the tape was not properly authenticated. We disagree that the issue was timely preserved, not having been brought to the circuit court's attention until the post trial motion. RCr 9.22; West v. Commonwealth, Ky., 780 S.W.2D 600 (1989). Moreover, we have examined the record and find that the tape was properly authenticated. Noel's chief complaint is that the third portion of the tape, which contained a conversation between him and Gaither, could not have been properly authenticated without the testimony of Gaither. Again

Noel is attempting to benefit from conduct that caused the unavailability of the witness.

Nor do we find that the circuit court erred in its determination that Noel's right to a speedy trial was not violated. The trial court's order demonstrates that due consideration was given to the dictates of Barker v. Wingo, 407 U.S. 514 (1972), and McDonald v. Commonwealth, Ky., 569 S.W.2d 134 (1978).

Noel's final argument, viz., that he was denied the right to conduct individual voir dire of the jury, lacks merit as he fails to prove prejudice. Morris v. Commonwealth, Ky., 766 S.W.2d 58 (1989).

The judgments of the Green and Washington Circuit Courts are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dennis Stutsman
Appeals Branch Manager
Department of Public Advocacy

Lisa Clare
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Anitria M. Franklin
Assistant Attorney General
Frankfort, Kentucky