

RENDERED: October 8, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001796-MR

THOMAS WADE WATKINS

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 91-CR-00167

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND BUCKINGHAM, JUDGES; AND MILLER, SENIOR
JUDGE.¹

BARBER, JUDGE: Appellant, Thomas Wade Watkins (Watkins),
appeals the trial court's vacation of an order requiring a
resentencing after its initial determination that resentencing
was necessary. We affirm the determination of the Jessamine
Circuit Court.

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.50.

In an earlier RCr. 11.42 appeal, Watkins appealed his conviction of second degree persistent felony offender. This charge was based on an unrelated criminal conviction in Texas. Watkins argued in post-judgment proceedings that defense counsel had been ineffective when he failed to object to introduction of documents from the Texas case as those documents had not been authenticated. The Court of Appeals found that counsel's failure to object prejudiced Watkins. This Court remanded the case for review of the authenticity of the documents. The trial court held a hearing on 2/25/00 and determined that Watkins should be resentenced.

A year later, the Commonwealth filed a motion stating that the Texas criminal documents had been properly certified in 1992, when the trial was held, and that therefore no resentencing was necessary. The Commonwealth claimed that the authentication for the Texas documents was "found" in a box of documents from the trial. The boxes containing evidence were not monitored from the date of trial until 1994. In 1994, the boxes were given to the court reporter to keep. In 2001, the Commonwealth retrieved the boxes from the court reporter. It was at that point that the prosecutor claimed to have found that the trial exhibits had actually been properly authenticated at trial.

Based upon the statement by the prosecutor that authentic documents had been found, the Commonwealth asked that the trial court change its earlier determination that Watkins should be resentenced. Watkins objected to the Commonwealth's request. Watkins argued that the trial court was bound by the earlier Court of Appeals opinion, and could not fail to hold a sentencing hearing. Watkins also objected to the Commonwealth's claim to have found evidence showing authenticity of the Texas documents. Watkins asserts that the claim to have found evidence at this late date is suspect. Watkins additionally argues that the Commonwealth's lack of diligence in locating the documents which allegedly authenticated the Texas conviction bar reliance thereon.

The Commonwealth argues that when the prosecutor belatedly reviewed the relevant sentencing exhibits, he determined that the Texas documents had been authenticated at the time of trial. The Commonwealth claims that both parties and the appellate court were operating under a "misconception" when they reviewed the Texas judgment and did not find it certified as authentic. The Commonwealth claims that when the documents were introduced at the original trial and sentencing, they were, in fact, authenticated. The Commonwealth bases this argument on the claim that the prosecutor found authenticated copies in the boxes of trial record.

Watkins asserts that even if the Texas documents were authenticated at the time of trial, the fact that the Commonwealth did not raise that issue on appeal, or at the hearing following remand, bars the trial court from denying him a resentencing hearing. He argues that the law of the case doctrine prevents the trial court from accepting the earlier sentencing as valid. The Commonwealth denies that the law of the case doctrine applies, as the authentication of the documents was not an issue determined by law on appeal, but rather a fact shown on the face of the documents. The Commonwealth argues that a resentencing hearing will simply result in the same sentence for Watkins, as the Texas documents were treated as authentic at the original sentencing, and were found to be authentic upon later review. The Commonwealth asserts that the trial court was correct in denying a resentencing. We affirm the trial court's finding that the law of the case doctrine does not apply here to require a new sentencing.

The Commonwealth contends that there is a sufficient chain of custody to show that the documents the prosecutor found in the box were actually part of the trial record. The Commonwealth cites to testimony of the prosecutor and employees in the prosecutor's office who were present at the time the box was opened, and observed discovery of the trial exhibits showing

authentication of the Texas conviction. The Commonwealth argues that a perfect chain of custody is not required for admissibility of the evidence. See: Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6, 8 (1998). Evidence that is clearly identifiable and distinguishable requires no chain of custody proof. Beason v. Commonwealth, Ky., 548 S.W.2d 835 (1997). The trial court found that the documents at issue had, in fact, been properly authenticated at the time of trial and sentencing, and found no reason to hold another sentencing hearing. We affirm the trial court's determination.

BUCKINGHAM, JUDGE, CONCURS.

MILLER, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MILLER, SENIOR JUDGE, DISSENTING: I dissent. I would remand this case with directions to void the PFO conviction and re-sentence on the underlying convictions.

BRIEFS FOR APPELLANT:

Elizabeth Shaw
Richmond, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky
Frankfort, Kentucky

Samuel J. Floyd, Jr.
Assistant Attorney General
Frankfort, Kentucky