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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000086-MR

I. B. EMBRY, JR. — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NOS. 01-CR-00054 & 01-CR-00193

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: I. B. Embry, Jr. appeals his conviction of first-degree trafficking in a controlled substance, possession of marijuana, use of drug paraphernalia and first-degree persistent felony offender. Having reviewed the record and the applicable law, we affirm.

On December 6, 2000, at approximately 3:00 a.m., Detective Billy Edwards of the Hardin County Drug Task Force, along with three officers of the Elizabethtown Police Department,

executed a search warrant at the residence of Tameka Barnett at 519 Glencrest Avenue in Elizabethtown, Kentucky. The search warrant resulted from information provided by a confidential informant. Appellant, who had an on and off relationship with Barnett, was living at Barnett's residence at the time, along with Barnett's three young children. Appellant was the father of Barnett's middle child. Carl Pruitt, suspected by appellant to be the informant, also had an on and off relationship with Barnett, and was the father of her youngest child. Upon searching the residence, the officers found 19 individually packaged pieces of crack cocaine, a ball of marijuana, and $73 in cash in a sock in the bedroom used by Carl Pruitt's child. Additionally, a marijuana cigarette, rolling papers, and cash were found in the master bedroom, a ball of marijuana was found in a box in the hall closet, and two partially burned marijuana cigarettes were found in an ashtray in the living room. At the residence, and subsequently at the police station, appellant made statements admitting that the drugs were his.

Appellant moved the court to order the Commonwealth to disclose the identity of the confidential informant, whom he believed was Carl Pruitt. Additionally, appellant moved to suppress the incriminating statements which he made to police. Following hearings thereon the morning of trial, which commenced September 21, 2001, the court denied both motions. At trial,

appellant testified that the drugs were not his, and that he believed that Carl Pruitt could have put them there. Appellant testified that he did make the statements admitting the drugs were his, but explained that he did so to prevent the officers from arresting Barnett and taking the three children away, as the officers had threatened to do. Appellant was found guilty of first-degree trafficking in a controlled substance, possession of marijuana, use of drug paraphernalia, and being a first-degree persistent felony offender. Appellant was sentenced to a total of eleven years' imprisonment. This appeal followed.

On appeal, appellant first argues that the trial court erred in failing to require the prosecution to make any evidentiary showing to support its claim of privilege in withholding the name of the confidential informant. Avowal testimony by Detective Edwards at the conclusion of the trial indicated that the informant was, in fact, Carl Pruitt, as appellant had suspected.

KRE 508 provides, in pertinent part:

> (a) General rule of privilege. The Commonwealth of Kentucky and its sister states and the United States have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer . . .

> . . . .
>
> (c) Exceptions:
>
> (1) Voluntary disclosure; informer as a witness. . . .
>
> (2) Testimony on a relevant issue. If it appears that an informer may be able to give relevant testimony and the public entity invokes the privilege, the court shall give the public entity an opportunity to make an in camera showing in support of the claim of privilege . . .

The trial court denied appellant's motion to disclose the identity of the confidential informant on grounds that the Commonwealth was not going to call the informant as a witness, KRE 508(c)(1), and that there was not a reasonable probability that Pruitt, if the informant, could give relevant testimony, KRE 508(c)(2), because he would likely not come to court and confess that he was the one who put the drugs in the residence. The trial court further found that since appellant knew Pruitt's identity, he would, nevertheless, have the ability to present a defense pertaining to Pruitt and his actions independent of whether or not he was the confidential informant.

> The Kentucky rule in KRE 508 reflects the decision of the United States Supreme Court in Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), which indicates that a proper balance regarding nondisclosure must depend on the particular circumstances of each case, taking into consideration the crimes charged, the possible defenses, the possible significance

> of the informer's testimony and other relevant factors.

Taylor v. Commonwealth, Ky., 987 S.W.2d 302, 304 (1998). "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Roviaro, 353 U.S. at 60-61, 77 S. Ct. at 628. See also, Schooley v. Commonwealth, Ky., 627 S.W.2d 576 (1982). Appellant's defense appears to be premised on the theory that the drugs belonged to or were planted by Carl Pruitt, who was motivated to set up appellant because Pruitt disliked appellant due to appellant's relationship with Barnett. We believe that, under the circumstances of this case and in light of appellant's defense theory, the testimony of Pruitt would have been relevant. Pruitt and appellant both had a relationship with Barnett. Additionally, Pruitt was the father of the child in whose room the crack cocaine was found and had access to the residence. Additionally, at the September 21, 2001, hearing on the motion to disclose, appellant's counsel asserted that Pruitt had gotten back together with Barnett after Barnett and appellant had broken up in November, that Pruitt had made threatening statements that appellant would never get back in Barnett's house, that the events at issue occurred shortly after appellant and Barnett once again got back together, and

that Pruitt had been previously charged with drug trafficking himself. Further, although we would assume, as did the trial court, that Pruitt would not admit to possessing or planting the drugs, his response to such an inquiry, even if negative, would, nevertheless, be relevant.

For the aforementioned reasons, we believe that the trial court erred in finding that Pruitt could not give relevant testimony, and hence, per KRE 508(c)(2), erred in not requiring the Commonwealth to make a showing in support of the privilege to withhold his identity. However, we believe the error to be harmless. Although appellant was not told the name of the informant, his defense was premised upon a theory involving Carl Pruitt, and hence, appellant knew Pruitt would be a material witness independent of whom the informant was. Therefore, appellant should have subpoenaed Pruitt, or, in light of defense counsel's argument at the hearing that she did not know where Pruitt was, requested a continuance to locate him. The record indicates that defense counsel did neither.

Appellant next argues that the trial court erred in failing to suppress statements elicited from him by threatening him with the loss of his children. At the September 21, 2001, suppression hearing, Detective Edwards testified as to the following version of events. At approximately 3:00 a.m. on December 6, 2000, he and the three Elizabethtown police officers

executed the search warrant at Barnett's residence. The officers knocked on the door, after which Barnett came to the door and was told that the officers had a search warrant. The officers entered the residence, and found appellant asleep in the master bedroom. Because there was an outstanding arrest warrant for appellant from Jefferson County, appellant was immediately handcuffed, and then taken to the living room. Appellant and Barnett were read their Miranda rights and responded that they understood their rights. Detective Edwards inquired as to whether there were any controlled substances or money in the house, to which appellant and Barnett replied that there were not. The officers proceeded to search the house, and discovered the aforementioned crack cocaine, marijuana, paraphernalia, and cash. When confronted about what was found, appellant replied that the drugs were his, but that he was not a large scale drug dealer and was not "busting out at the seams." Additionally, appellant stated that the money found was from the sale of drugs and that he used it to provide assistance to Barnett with whom he had a child. After being transported to the police station, appellant again alluded to the fact that he was not a big time drug dealer and that the cocaine seized only had a value of $300-$350.

Appellant moved to suppress the statements made at the residence and the police station on grounds that they were made

under duress and were involuntary. Following the suppression hearing, the trial court denied the motion.

On appeal, appellant asserts a variety of factors in support of his contention that his incriminating statements were made under duress and therefore were not voluntary. In particular, appellant contends that his confession was involuntary as it was elicited through the use of threats by police at 3 a.m. to remove his child and the other children from their home and their mother during the Christmas season. In order to determine if a confession was the result of coercion, and therefore not voluntary, a court must look at the totality of the circumstances surrounding the confession. Allee v. Commonwealth, Ky., 454 S.W.2d 336, 341 (1970); Henson v. Commonwealth, Ky., 20 S.W.3d 466, 469 (2000). "The three criteria used to assess voluntariness are 1) whether the police activity was 'objectively coercive;' 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant showed that the coercive police activity was the 'crucial motivating factor' behind the defendant's confession." Henson, 20 S.W.3d at 469.

We conclude that the trial court was correct in finding that appellant's statements were voluntary. Considering the totality of the circumstances surrounding the making of the statements, we do not consider the police actions in this case

to be objectively coercive. With regard to appellant's argument that the officers' threats to place the children in foster care were coercive, we believe the aforementioned case of Henson v. Commonwealth to be directly on point. In Henson, as in the present case, the appellant argued that his confession was coerced because he was told by a detective if he did not fully cooperate and tell the police "everything they asked" that his girlfriend would be arrested and she could lose custody of her daughter. However, because under the circumstances it would have been proper to arrest the girlfriend as well, the Court found that the detective's comment that the girlfriend would be arrested and lose custody of her child was more a statement of fact, rather than a coercive threat. The Court stated:

> Here, Appellant, claims his confession was coerced, and therefore involuntary, because he felt threatened by a true statement of fact. In other words, he was a victim of police misconduct because the true statement of fact unfairly impaired his capacity to make a rational choice and contributed to a confession which he otherwise would not have made.

Id. at 469.

In the present case, the drugs were found in Barnett's residence. Under these circumstances, we would similarly characterize the statements at issue, that Barnett could be arrested and the children placed in foster care, as statements

of fact, rather than coercive threats.[1] Id. Having considered the totality of the circumstances, we conclude that appellant's incriminating statements were voluntary. Accordingly, the trial court did not err in denying the motion to suppress.

Appellant next argues that the trial court erred in overruling his motion for directed verdict on the trafficking charge. Appellant contends that the Commonwealth failed to prove the elements of trafficking, KRS 218A.1412, because it did not prove that he had dominion and control over the drugs, nor that he actually sold the drugs. "On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

The definition of "trafficking" as used in KRS 218A.1412, under which appellant was charged, is set forth in KRS 218A.010(28) as follows:

> "Traffic" . . . means to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance. (emphasis added.)

[1] The record indicates that Barnett was subsequently charged as a result of the search as well.

Under the above definition of "trafficking," the Commonwealth is not required to prove that the defendant was actually selling a controlled substance if there is evidence of possession with the intent to sell. Constructive possession may be shown by establishing that the drugs were subject to the defendant's dominion and control. Clay v. Commonwealth, Ky. App., 867 S.W.2d 200, 202 (1993). The evidence that the crack cocaine was found in the residence where appellant was living, along with appellant's statements that the drugs were his, was sufficient for a jury to reasonably infer that appellant exercised dominion and control over the drugs. Further, in light of the evidence that cocaine was found in the form of 19 individually wrapped pieces, along with appellant's statements that the cash found was from the sale of drugs and that he was not a big time drug dealer, we believe there was sufficient evidence from which a jury could reasonably infer that appellant possessed the crack cocaine with the intent to sell. Accordingly, the trial court did not err in denying appellant's motion for directed verdict.

Finally, appellant argues that prejudicial error occurred when Detective Edwards was allowed to repeatedly imply that appellant's failure to waive his constitutional right to remain silent was "noncooperative." Appellant concedes that the issue is not preserved but requests review for palpable

error. At trial, Detective Edwards made statements to the effect that appellant would not help to "further the investigation," and characterizing appellant as being uncooperative, in reference to appellant's declining to answer Detective Edwards' questions about where the drugs came from. Appellant contends that the remarks were an improper comment on his right to remain silent.

"The test concerning indirect comments is 'whether the comment is reasonably certain to direct the jury's attention to the defendant's exercise of his right to remain silent.'" Crowe v. Commonwealth, Ky., 38 S.W.3d 379, 385 (2001), quoting Sholler v. Commonwealth, Ky., 969 S.W.2d 706, 711 (1998). The statements with which appellant takes issue were made in the context of Detective Edwards' explaining why, after questioning appellant and appellant's having admitted to the crimes, he chose not to conduct a formal interview with appellant at the police station. Having reviewed the testimony at issue, and considering the fact that appellant confessed to the crimes, we believe that Edwards' comments did not improperly call attention to appellant's exercise of the right to remain silent. Accordingly, no palpable error occurred.

For the aforementioned reasons, the judgment of the Hardin Circuit Court is affirmed.

McANULTY, JUDGE, CONCURS.

BUCKINGHAM, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

BUCKINGHAM, JUDGE, CONCURRING IN RESULT. I concur with the majority opinion affirming Embry's conviction and sentence. However, I respectfully disagree with the majority's conclusion that the trial court erred in not requiring the Commonwealth to disclose the identity of the confidential informant. Embry knew of Pruitt and that he was likely the informant. Pruitt could have been subpoenaed to testify by Embry had he desired to do so. However, pursuant to Schooley v. Commonwealth, Ky., 627 S.W.2d 576 (1982), I do not believe the Commonwealth was required to disclose the identity of the informant, whether or not it was Pruitt.

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