

Commonwealth Of Kentucky

Court Of Appeals

NOS. 2002-CA-000150-MR & 2002-CA-000152-MR

NANNIE ELIZABETH BROWN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NOS. 00-CR-01236 & 01-CR-00165

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING
** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Nannie Brown appeals from a judgment of the Fayette Circuit Court, entered January 9, 2002, convicting her of two counts of first-degree trafficking in a controlled substance,¹ as well as several related offenses, and sentencing her as a first-degree persistent felony offender² to fifteen years in prison. Brown contends that hearsay evidence introduced during the testimony of several police officers

¹ KRS 218A.1412.

² KRS 532.080.

marred her trial and requires that her conviction be reversed.
We agree.

The Commonwealth charged Brown with having sold cocaine from a tent in the back-yard of a residence on East Third Street in Lexington in October 2000. In December 2000, while the prior charge was pending, Lexington police again arrested Brown, at the time free on bail, and she was eventually indicted a second time and charged with possessing cocaine with the intent to sell it. Apparently the two indictments were consolidated, for in December 2001, Brown stood trial on both trafficking charges and numerous related offenses.

During the trial, the testimony of no fewer than four police officers included references to the particulars of complaints lodged against Brown. The police claimed to have heard of "a subject selling narcotics from a tent in the back yard"; of "a female subject supposedly selling crack cocaine out of a tent in back of a house off of Third Street, or Race Street, in that area"; of "crack being sold out of the back area"; and, in December 2000, of Brown's being "still involved in criminal activity." Each time, Brown objected to the hearsay, and each time the court instructed the Commonwealth to steer its witnesses clear of such statements. The court denied Brown's motions for a mistrial, however, in part at least because in the court's view the statements were not hearsay;

they were offered not to prove the truth of what the police had heard, the court reasoned, but to account for the officers' actions.³ Brown contends that the statements were inadmissible and in their cumulative effect at least amounted to reversible error.

Because of the obvious danger that juries will perceive criminal complaints to the police as evidence of the alleged crime and not merely evidence tending to show why the police did what they did, our Supreme Court has repeatedly and consistently held that such crime reports are inadmissible unless they bear on "an issue about the action of the police officer."⁴ Where, as in this case, there is no issue about the officer's action, the officer is permitted to explain his initial interest in the defendant by "testimony that he acted 'upon information received,' or words to that effect," but he is not allowed "to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports."⁵

As the Commonwealth essentially concedes, the officers' testimony quoted above, replete with hearsay allegations of criminality and of particular historical facts,

³ KRE 801.

⁴ Gordon v. Commonwealth, Ky., 916 S.W.2d 176, 179 (1995) (citing Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988) and Hughes v. Commonwealth, Ky., 730 S.W.2d 934 (1987)).

⁵ *Id.* at 178-79.

violates this precedent. The question then becomes, to what relief was and is Brown entitled. In the wake of each violation at trial, Brown declined a corrective admonition, sought a mistrial, and settled for the Commonwealth's assurance, at the court's insistence, that no further violation would occur. By the fourth violation, the Commonwealth's assurances rang hollow indeed. Nevertheless, even then the court declined to declare a mistrial, apparently believing, as noted above, that the officers' testimony could be thought to serve a legitimate, non-hearsay purpose. That belief was erroneous, and we are persuaded that by the fourth violation the court should have granted Brown's request for a mistrial. We are well aware that a mistrial is a drastic remedy to be resorted to only in cases of manifest necessity⁶ and that the trial court's discretion in assessing that necessity is broad.⁷ The court's assessment in this case, however, seems to have been skewed by its misunderstanding of the error, which, as our Supreme Court has noted, cuts to the heart of a defendant's right to confront the evidence against her.⁸ Both the serious insult to Brown's right

⁶ Commonwealth v. Scott, Ky., 12 S.W.3d 682 (2000).

⁷ Grundy v. Commonwealth, Ky., 25 S.W.3d 76 (2000).

⁸ Hughes v. Commonwealth, Ky., 730 S.W.2d 934 (1987) ("Appellant now [after the admission of police hearsay] stands convicted, in part at least, because of the statement of an unknown person without any showing of the reliability of the statement and without any opportunity of the appellant to cross-examine the person who allegedly implicated him in the crime. This is precisely the situation which the confrontation clauses of the Sixth

to a fair trial and the Commonwealth's repeated disregard of that right necessitate a drastic remedy.

The other errors Brown alleges are not apt to recur at a new trial, and therefore we need not address them. Because Brown was not afforded the fundamentally fair trial our system guarantees, we reverse the January 9, 2002, judgment of the Fayette Circuit Court and remand to that court for additional proceedings.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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Amendment to the United States Constitution and Section 11 of the Kentucky Constitution were designed to prevent."). Cf. Brison v. Commonwealth, Ky., 519 S.W.2d 833 (1975) (Although the jury was admonished to disregard improper testimony, the cumulative effect of repeated errors required a mistrial.).