

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000252-MR

AND

NO. 2002-CA-002246-MR

JANICE E. FORD

APPELLANT

v. APPEALS FROM MCCrackEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 01-CR-00032

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART,

VACATING AND REMANDING IN PART

** ** *

BEFORE: COMBS, CHIEF JUDGE; KNOFF, AND McANULTY, JUDGES.
McANULTY, JUDGE. Appellant Janice E. Ford (hereinafter
appellant) has filed two separate appeals which will be heard
together. Appeal No. 2002-CA-000252-MR appeals her conviction
in the McCracken Circuit Court for trafficking in a controlled
substance, possession of drug paraphernalia, and being a
persistent felony offender in the first degree. Appeal No.
2002-CA-002246-MR pertains to the court's denial of a Motion
pursuant to CR 60.02. Appellant asserts numerous errors were

committed in her trial. We have reviewed her arguments on appeal, and we affirm in part and vacate in part the Court's judgment and remand for a new trial.

The charges in this case were brought against appellant following an undercover drug buy arranged by the Paducah police department. A police detective sent a confidential informant to make a buy from appellant at the Mini-Mo motel in Paducah. The detective and another officer conducted electronic surveillance by both monitoring over a receiver and recording the conversations between the informant and appellant. They also observed the informant enter and leave appellant's room at the motel. Following the transaction, the detective met with the informant and recovered a baggie containing a substance from her. The detective performed a field test which indicated that the substance purchased at the motel was cocaine. The detective obtained a search warrant, and later that same night searched appellant's motel room. Appellant was present and was in possession of the buy money from the informant which had been photocopied by police.

The police laboratory tested the baggie the informant obtained from appellant, and other baggies from the room containing white powder suspected of being cocaine. The lab also tested electronic scales and a makeup bag containing a

mirror, all with a white residue. The baggies and the electronic scales tested positive for cocaine.

Appellant first alleges that the trial court erred in failing to transfer her case to another division of the McCracken Circuit Court. As grounds for the motion to transfer, appellant's counsel stated that Judge Clymer's son was a material witness in the case. KRS 26A.015(2)(d)4 states that any judge of the Court of Justice shall disqualify himself in any proceeding where the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the knowledge of the judge likely to be a material witness in the proceeding. The court held a hearing on the motion on October 25, 2001.

At the hearing, the Commonwealth stated that Deputy Sam Clymer's sole involvement in the case was transporting the drug evidence to the laboratory. The Commonwealth acknowledged that the witness was in law school out of state, and it was believed they did not need him to testify. The Commonwealth identified the general rule with respect to substances which are not clearly identifiable or distinguishable is that it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification so long as there is persuasive evidence that "the reasonable probability is that the evidence has not been altered in any

material respect." See Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6, 8 (1998), citing United States v. Cardenas, 864 F.2d 1528, 1532 (10th Cir. 1989). The Commonwealth stated that consequently in Kentucky it is not necessary to prove every link in the chain of custody.

Appellant responded that Kentucky case law does not excuse those who transported the item from one place to another from having to testify. Appellant asserted she would only know if the chain of custody was objectionable after hearing the witnesses. The court ultimately denied the defense motion, adjudging that the witness was not crucial to the Commonwealth's case. At trial, appellant argued for a directed verdict based on a "flaw in the chain of custody," due to an absent witness.

First, we note that appellant should have filed a motion to recuse under the statutes rather than a motion to transfer divisions. KRS 26A.015(3)(a) provides that any judge of the Court of Justice disqualified under the statute shall be replaced by the Chief Justice. KRS 26A.020 provides that when a judge cannot properly preside in an action pending in the court, the circuit clerk shall at once certify the facts to the Chief Justice who shall immediately designate a special judge. In addition, we believe that if appellant felt the court's decision was erroneous, she should have sought disqualification of the judge under KRS 26A.020(1). Nichols v. Commonwealth, Ky., 839

S.W.2d 263, 265 (1992). If a party files with the circuit clerk an affidavit that the judge will not afford a fair and impartial trial, the circuit clerk shall at once certify the facts to the Chief Justice who shall immediately review the facts and determine whether to designate a special judge. Id. A party may either file a motion to recuse or an affidavit pursuant to KRS 26A.020, or both. Nichols, 839 S.W.2d at 265. The statute provides a separate and distinct opportunity to a party to complain that the judge will not be fair and impartial. Id.

The judge is generally considered to be in the best position to determine whether questions regarding his impartiality are reasonable. Jacobs v. Commonwealth, Ky. App., 947 S.W.2d 416 (1997). There is no hard and fast rule as to whether a witness who will testify to the chain of custody is a material witness. The integrity of the evidence becomes an issue in the case if there is an imperfect chain of custody and insufficient evidence that the substance was probably not altered in any way. The trial court must keep in mind that if the chain of custody becomes an issue in the case, a witness who will testify to a portion of it may be a material witness. On remand, appellant may again seek recusal by filing a proper motion to recuse under the statute and/or seeking disqualification by filing an affidavit with the circuit clerk. Nichols, 839 S.W.2d at 265.

We find reversible error in appellant's second argument on appeal. Appellant argues that the Commonwealth erred in having the informant interpret the audio tape during her testimony. The Commonwealth argues that the issue is not preserved because appellant objected only at the beginning of the testimony. We do not agree that appellant had to continue to object during the informant's testimony, since her objection was that the informant should not have been allowed to interpret the tape at all. Thus, we find the error was preserved. Bailey v. Bailey, 297 Ky. 400, 406, 180 S.W.2d 316, 319 (1944).

We agree that the Commonwealth's use of the informant to interpret the audio tape was error. The law on this issue is straightforward. It is for the jury to determine as best it can what is revealed in a tape recording without embellishment or interpretation by a witness. Gordon v. Commonwealth, Ky., 916 S.W.2d 176 (1995). The tape is audible but, as is typical for a surveillance tape, it is unclear at times. The trial court ruled that the witness could testify to those portions of the tape which were hard to understand. However, the fact that portions of a tape are difficult to understand is a reason for refusing to allow one party's version of the tape for the jurors' use, rather than a reason for providing it. Sanborn v. Commonwealth, Ky., 754 S.W.2d 534, 540 (1988).

The witness did not testify only to her recollection of the transaction. The witness obviously attempted to interpret the tape in response to the Commonwealth Attorney's questions. The Commonwealth would play part of the tape, stop it, and ask the witness to tell the jury what they had just heard. The informant testified to what she and every person present in the room said. The informant explained the street terminology used to refer to various drugs. She testified about the background noises on the tape, and distinguished for the jury appellant's voice from the television in the room. She told the jury what actions were taken at various times during the tape even when little could be heard. We believe the Commonwealth's approach of having the witness tell the jury what it heard throughout the tape usurped the jury's fact-finding function. As a result, we find that this was reversible error.

Appellant's next claim is that the trial court should have suppressed the evidence from the search because of a defect in the warrant and abuse of the "knock and announce" rule. Appellant concedes that she did not object to admission of the evidence below. We find these arguments are unpreserved for appellate review.

Appellant also complains that the Commonwealth Attorney used denigrating language to refer to her in closing argument. This claim is unpreserved as well. An objection to

improper statements made during closing arguments must be contemporaneous so that the court is given the opportunity to consider whether an admonition would cure the error. Weaver v. Commonwealth, Ky., 955 S.W.2d 722, 728 (1997). Appellant alleges this issue amounts to palpable error under RCr 10.26, but we do not believe the complained of statements amounted to a manifest injustice under that Rule.

Appellant additionally argues there were errors in her indictment on persistent felony charges. However, the Commonwealth was permitted to amend the indictment to correct error, and appellant does not show prejudice to her substantial rights. RCr 6.16. Appellant's remaining claim of error under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), as to the Commonwealth's removal of a black juror from the jury panel by peremptory challenge is rendered moot by our reversal of this case.

In Appeal No. 2002-CA-002246-MR, appellant claims that it was error for the court to dismiss the pro se CR 60.02 motion she filed after her trial. CR 60.02 allows defendants to raise issues that were unknown and could not have been known to the moving party by exercise of reasonable diligence and in time to have been otherwise presented to the court. Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983). CR 60.02 provides relief that is not available by direct appeal or in

post-conviction relief proceedings. Id. It is not intended to give defendants additional opportunities to challenge a judgment. Id.

Appellant does not allege recent discovery of the issues she raised in her CR 60.02 motion. Her motion alleged that an officer committed fraud and perjured testimony in the grand jury proceedings and at trial. In fact, the officer was cross-examined by appellant's counsel at trial on the same matters he testified to before the grand jury. Therefore, these are not proper allegations for a CR 60.02 motion.

Moreover, courts ordinarily do not attempt to scrutinize the quality or sufficiency of the evidence presented to the grand jury. Commonwealth v. Baker, Ky. App., 11 S.W.3d 585, 588 (2000). Courts will not go behind an indictment for the purpose of inquiring into the competency of evidence before the grand jury, even if it is averred that no legal evidence was produced before the grand jury. Jackson v. Commonwealth, Ky., 20 S.W.3d 906 (2000). The purpose of an indictment is merely to inform the accused of the essential facts of the charge so he will be able to prepare a defense. Malone v. Commonwealth, Ky., 30 S.W.3d 180 (2000).

Appellant's other main argument in the CR 60.02 was that the Commonwealth never informed appellant, the grand jury or petit jury that the informant was charged with theft and drug

charges subsequent to working as an informant in the case at bar. This claim is refuted by the record. The record shows that a week before trial the Commonwealth informed appellant in continuing discovery of the informant's name and her indictment for theft by unlawful taking and possession of marijuana, which apparently occurred after the grand jury met in this case.

For the foregoing reasons, we vacate appellant's conviction in the McCracken Circuit court and remand for a new trial.

ALL CONCUR.

BRIEF FOR APPELLANT:

Euva D. Hess
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BRIEF FOR APPELLEE:

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