

RENDERED: AUGUST 20, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000516-MR
AND
NO. 2002-CA-000524-MR

BARRY KING

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 01-CR-00027 AND 01-CR-00157

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; TACKETT, JUDGE, AND EMBERTON,
SENIOR JUDGE.¹

TACKETT, JUDGE: Barry King appeals from the judgment of the Calloway Circuit Court, finding him guilty of possession of a controlled substance in the first degree (cocaine) and of being a persistent felony offender in the second degree, for which his sentence was enhanced to ten years' imprisonment. King's

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

counsel has filed a brief under Anders v. California, 386 U.S. 738 (1967) stating that her client has instructed her not to raise the issue of the trial court's failure to hold a competency hearing after ordering an evaluation and receiving a psychiatric report, which she believed to be the only meritorious issue after a review of the record. Nevertheless, the brief raises several issues on appeal for this Court's review, and after a careful review of these issues, we affirm.

King was originally charged with trafficking in a controlled substance in the first degree, possession of drug paraphernalia, and possession of a controlled substance in the first degree. At trial, the jury found King guilty only of possession, and found him to be a persistent felony offender and imposed a ten year sentence. These charges were the product of police surveillance of Teresa Carney's apartment in Murray, Kentucky. Police officers observed several cars come to and leave the apartment quickly, and the officers concluded that it was likely that drug trafficking was taking place. The officers stopped a vehicle leaving the apartment, belonging to Brett Harcourt. Harcourt consented to a search and the officers found a pack of gum which contained a piece of crack cocaine. Harcourt told the officers that he bought the cocaine from Teresa Carney in the apartment they had been watching.

Shortly thereafter, the officers stopped Teresa Carney herself as she was leaving the apartment complex. She consented to a search of the apartment. Inside the apartment, the officers found Barry King and Ken Childress playing dominoes at the kitchen table. The officers handcuffed them for safety, and a search by consent of King's person yielded twelve individual pieces of cocaine and \$902 in cash. King was charged as above.

At trial, King's defense was that he was a user of cocaine and not a dealer. On cross-examination, Officer Bowman, who found the cocaine on King, admitted that it would not be unusual for a user to smoke several pieces of cocaine in a day. The officer also admitted that they arrested King and Childress because no one would admit who had sold the cocaine.

Brett Harcourt testified at trial that he purchased the cocaine from Carney and not from King. He also testified that he knew Carney as a cocaine dealer. Harcourt paid with a check made out to Carney. Carney testified that King had sold the cocaine, not her, and that she merely cashed Harcourt's check as a personal favor to Harcourt. She testified that King and Childress were allowed to sell cocaine out of her house in exchange for cocaine. She testified that she had entered a guilty plea to trafficking in cocaine and received a six year sentence, and that she had been on probation at the time of the offense, which had been subsequently revoked. Harcourt, on the

other hand, had received a deferred sentence with an agreement to dismiss the charges entirely if he completed his probation. The Commonwealth described Harcourt's agreement as "fairly standard" since he was a first-time offender.

The jury acquitted Childress entirely, and convicted King only of possession. This appeal followed.

King argues on appeal that the trial court erred when it failed to strike the entire jury panel because black jurors were underrepresented. A motion was made and denied at the trial, and King did not show that the dearth of black jurors was the result of systematic exclusion from the jury pool, as required by Duren v. Missouri, 439 U.S. 357 (1979). King presents no information to this Court that would lead us to a different conclusion, and so we conclude that the court did not err by denying the motion.

King argues that the court should have excluded the testimony of Harcourt and Carney because the Commonwealth allegedly did not disclose the conditions of their plea bargains. The record refutes this contention, as it is clear that both witnesses accurately testified to the terms of their plea bargains (Carney, in fact, received no plea bargain, no doubt due to her violation of probation.) The court did not err when it refused to exclude the witnesses' testimony.

King also argues that the court should have declared a mistrial when Teresa Carney testified that she had seen the defendant sell drugs before. The standard for granting a mistrial is that a manifest injustice would occur if the trial were allowed to continue. In this case, however, King successfully pursued a defense that he was guilty only of possession, not trafficking, and so no prejudice resulted from Carney's testimony. In fact, at trial, counsel was asked if he wanted an admonition to the jury to disregard Carney's testimony, and he said that he did not want anything else said about it - a decision which in hindsight can be judged as correct, since the jury appears not to have believed Carney's testimony.

King argues that the Commonwealth did not properly qualify the state police chemist who identified the substance as cocaine. The chemist, Rebecca Elliott, testified to her education and training, but the Commonwealth apparently forgot to make the motion to qualify her as an expert. After defense counsel called this to the court's attention, the Commonwealth made the motion at the bench conference, which was properly granted by the court. No error occurred and no prejudice to King resulted.

King claims that the court erred by refusing to allow defense counsel to show Teresa Carney to view Harcourt's

statement to the police so that she could explain why Harcourt said what he said. The court held that defense counsel could not use another person's statement to impeach the witness, but that he could use the statement in cross-examination of the witness. The record shows that counsel quite effectively did so. No prejudice to King resulted from the court's ruling.

King argues that the court should not have allowed the Commonwealth to question him about his nickname. The Commonwealth responded to defense counsel's objection by stating that King had put his character in issue, and that it had a right to question him about it. His nickname is "Pistol", and King stated that he received his nickname because he has a sharp tongue. The explanation was benign, and no prejudice resulted from the Commonwealth's question.

Finally, King contends that the court should have directed a verdict on all counts. Clearly, under Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991) a reasonable jury could have concluded from the evidence that King was guilty of all of the charges, depending on which witness the jury believed. It is clear from the jury's verdict that the jury believed Brett Harcourt and not Teresa Carney, but there existed enough evidence to submit the matter to the jury.

For the foregoing reasons, the judgment of the Calloway Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Barry King, *Pro Se*
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

N. Susan Roncarti
Assistant Attorney General
Frankfort, Kentucky