

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000561-MR

ROBERT D. GRAY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE GEOFFREY P. MORRIS, JUDGE  
ACTION NO. 01-CR-002235

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, KNOPF, and TACKETT, Judges.

COMBS, JUDGE. Robert Gray appeals a judgment of the Jefferson Circuit Court convicting him of trafficking in a controlled substance in the first degree and of being a persistent felony offender in the second degree. He is currently serving a sentence of ten (10) years in the penitentiary. After our review of the record, we affirm.

In the early hours of June 17, 2001, several officers of the Louisville Police Department began a sweep of the Park

Hill neighborhood, a high-crime, governmental housing project. According to police testimony, the appellant, while bicycling through the area, was observed to attempt to avoid uniformed officers who were patrolling on foot. Sergeant Chris Gay indicated that Gray appeared startled when he noticed Gay approaching him. However, Gray complied when he was asked to stop. According to Gay, Gray dismounted the bike, dropped it to the ground, and appeared ready to flee.

Having approached from another direction, Officer Lamont Dunn asked Gray why he was running from the officer. According to Dunn, Gray indicated that there might be outstanding warrants against him. Gray was then detained, and after some investigation, he was taken into custody. Sergeant Gay testified that near Gray's bike, he then observed part of a brown paper sack containing many individually-wrapped pieces of what he believed to be crack cocaine. Officers Gay and Dunn gave inconsistent testimony with respect to whether the paper sack had dislodged from under the bicycle seat or from inside its handlebars. Gray denied that the crack cocaine belonged to him.

Gray was indicted and began preparing for trial. Arguing that officers lacked an articulable, reasonable suspicion to justify the initial stop, Gray filed a motion to suppress the drug evidence. The trial court did not rule

immediately after the suppression hearing, but it did grant Gray's request to be permitted to submit a written memorandum in support of his position. However, before that hearing ended, the trial court reviewed the testimony aloud and indicated that it was not inclined to grant the motion to suppress.

Immediately prior to trial, the trial court denied Gray's motion to suppress the drug evidence, and the Commonwealth presented its case. Following its deliberation, the jury convicted Gray of trafficking and of being a persistent felony offender.

On appeal, Gray asserts five claims of error: (1) the trial court should have suppressed the drug evidence because the officer's initial stop violated state and federal protections against unreasonable searches and seizures; (2) the trial court should not have permitted the introduction of seventeen individually-wrapped pieces of crack cocaine because the Commonwealth failed properly to authenticate or to identify the items as crack cocaine; (3) the trial court should not have admitted the testimony of a police officer as an expert in illegal narcotics; (4) the trial court should have granted Gray's motion for a directed verdict; and (5) the trial court should not have assessed court costs against him. After carefully considering each of Gray's arguments, we are not persuaded that he is entitled to a new trial.

RCr<sup>1</sup> 9.78 provides the procedure for conducting suppression hearings as well as setting the standard of appellate review of the determination of the trial court. In their review, appellate courts utilize a two-part analysis to inquire as to: (1) whether the findings of fact made by the trial court are supported by substantial evidence and (2) if so, whether the trial court applied the appropriate legal analysis. Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998). Aif supported by substantial evidence the factual findings of the trial court shall be conclusive.@ RCr 9.78. In this case, the appellant did not testify or introduce any evidence that contradicted the testimony of Sergeant Gay and Officer Dunn as to the events leading to the stop. While the trial court did not set forth specific findings of fact, the evidence introduced by the Commonwealth was uncontroverted. Therefore, we must assume that those were the facts upon which it based its order.<sup>2</sup> Thus, our task is to decide Whether the rule of law applied to

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1 Kentucky Rules of Criminal Procedure.

<sup>2</sup> In his reply brief, Gray argues that the trial court failed to make findings of fact as required by the provisions of RCR 9.78. Criminal Rule 9.78 provides that at the end of a suppression hearing the trial court shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling.@ The ruling issued by the trial judge in this case does not comply with this requirement. However, a remand is not required since the only evidence presented with respect to the facts surrounding the stop was the uncontroverted testimony of the police officers. The trial judge was required to accept the uncontroverted facts provided by the Commonwealth, and those facts constituted substantial evidence supporting the trial judge's decision. Since the trial judge's decision is supported by uncontradicted facts, a remand for findings of fact is unnecessary.

the established facts is or is not violated.@ Adcock, supra, at 8 (quoting Ornelas v. United States, 517 U.S. 690, 697, 116 S.Ct. 1657, 1662, 134 L.Ed.2d 911 (1996)).

Gray argues that the actions of Sergeant Gay on June 17, 2002, amounted to an unlawful seizure since he did not have a reasonable, articulable suspicion to justify an investigatory stop. We agree that Gray was indeed subjected to an investigatory stop and that he was Aseized@in the constitutional sense. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); United States v. Mendenhall, 446 U.S. 544, 553, 100 S.Ct. 1870, 1876, 64 L.Ed.2d 497 (1980). However, we do not agree that the investigatory stop was unreasonable under the Fourth Amendment of the United States Constitution or Section 10 of the Kentucky Constitution.

Police officers may conduct a Terry stop if they have a reasonable, articulable suspicion that criminal activity is afoot. Terry, supra at 21, 88 S.Ct. at 1880; Baker v. Commonwealth, Ky., 5 S.W.3d. 142, 145 (1999). The existence of a reasonable suspicion is determined by examining the totality of the circumstances. Terry, supra at 20-23, 88 S.Ct. at 1878-81; Stewart v. Commonwealth, Ky. App., 44 S.W.3d 376, 380 (2000). This standard is considerably less demanding than the grounds required for probable cause. United States v. Sokolow, 490 U.S. 1, 7, 1009 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989);

Stewart, supra at 381. Law enforcement officers are entitled to rely upon their specialized training and familiarity with the customs of the drug culture in evaluating the circumstances. See United States v. Arvizu, 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002).

Gray asserts that Sergeant Gay's brief observations of him were insufficient to create a reasonable, articulable suspicion to justify an investigatory stop. We disagree. A series of uncontradicted facts was available to Sergeant Gay on the day in question: namely, that Gray was bicycling (a common mode of transportation among drug couriers) through a high-crime area during the very early hours; that he appeared to change his direction of travel several times in an effort to evade or avoid police officers; and that when he was stopped, his body motion suggested that he might flee. From these circumstances, we conclude that there was a specific, rational reason to believe that criminal conduct may have occurred or was occurring at the time Gray was stopped. Since Sergeant Gay was sufficiently justified in initiating the Terry stop, the trial court correctly concluded that the evidence obtained at the scene had not been obtained as the result of an unlawful seizure and that it was, therefore, admissible. We cannot agree that the court's ruling violated the established rule of law. Thus, Gray is not entitled to a new trial on this basis.

Gray next argues that the trial court erred by admitting the individually packaged pieces of crack cocaine into evidence. We disagree. Gary Boley, a Kentucky State Police Laboratory chemist, testified that he received seventeen pieces of an unknown substance for testing -- each individually wrapped. The material weighed 2.63 grams. Boley conducted three separate tests of samples randomly taken from five, six, or perhaps seven of the individually wrapped pieces. The tests confirmed each sample as crack cocaine.

Since only a portion of the material was tested, Gray contends that the introduction of all of the evidence purporting to be crack cocaine deprived him of a fair trial. He argues that the jury could not have concluded beyond a reasonable doubt that the remaining untested material (some ten or twelve bags) was crack cocaine. Consequently, he maintains that the jury could not have convicted him of the more serious offense of trafficking (as opposed to possession) of a controlled substance.

Where the weight of a suspected controlled substance is critical to the determination of whether the crime to be charged is trafficking or the lesser-included offense of possession of a smaller amount, issues related to the means of sampling and to the precise amount of material submitted and tested in the laboratory are highly relevant. However, where

the determination of whether one is guilty of trafficking or possession hinges less upon the specific weight of the controlled substance and more upon such factors as how the material is packaged, the weight becomes less relevant.

Boley analyzed a sample of material taken from each of five, six, or even seven of the individually wrapped packages submitted to the laboratory. The tested samples indicated that the all packages contained crack cocaine. Gray does not dispute this result. Because the remaining packages of material were not tested and remained "unidentified," it is arguable that the trial court may have erred by admitting them into evidence.<sup>3</sup> However, even though we note the potential of this error, we hold that it was harmless under the circumstances of this case.

An error is considered harmless or nonprejudicial when -- upon review of the whole case -- there is not a ~~A~~substantial possibility that the result would have been any different@had the error not occurred. Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983). The quantity of the recovered crack cocaine (as determined by the tested samples derived from five to seven of the individual bags) was sufficient to support Gray's conviction for trafficking. Additionally, the manner of

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<sup>3</sup>The Commonwealth relies on our holding in Taylor v. Commonwealth, Ky. App., 984 S.W.2d 482 (1998), where we ruled that not all suspected marijuana plants had to be tested. However, we find that reliance to be misplaced due to the vast difference in the composition of a marijuana plant as opposed to a less easily identifiable substance suspected to be crack cocaine.

packaging of those tested bags also indicated that the cocaine was intended for sale rather than for personal use. See Dawson v. Commonwealth, Ky., 756 S.W.2d 935 (1988). In light of the evidence against him, there was not a substantial possibility that Gray would have been acquitted of trafficking even if the untested material had been excluded from evidence.

Consequently, the trial court's ruling to permit the introduction of all seventeen of the bags does not constitute reversible error. Gray cannot receive a new trial on this basis.

Next, Gray contends that the trial court erred by permitting a police officer to offer expert testimony pertaining to narcotics and customs of the drug culture. We disagree.

Over defense objections, Louisville Police Detective Mike Halbleib testified at trial that Louisville-area drug dealers package crack cocaine for sale by separately wrapping each rock in the corner of a plastic sandwich bag. He indicated that crack cocaine consumers generally possess only one to three rocks and that they carry paraphernalia. He stated that the 2.63 grams of cocaine seized from Gray could be expected to deliver fifteen uses and that crack cocaine users often visited the Park Hill neighborhood in order to purchase cocaine.

The standard for admitting expert opinion evidence was announced by the Kentucky Supreme Court in Stringer v. Commonwealth, Ky., 956 S.W.2d 883 (1997), cert. denied 523 U.S.

1052, 118 S.Ct.1374, 140 L.Ed.2d 522 (1998). Expert testimony is admissible when: (1) the witness is qualified to render an opinion on the subject matter; (2) the subject matter satisfies the requirements of KRE<sup>4</sup> 702; and (3) the subject matter satisfies the test of relevance set forth in KRE 401 -- subject to the balancing of probativeness against unfair prejudice as required by KRE 403. Id.

In evaluating whether the expert is qualified to offer an opinion, the trial judge must determine if an expert has "adequate" qualifications. Lawson, The Kentucky Evidence Law Handbook, ' 6.15 (3d ed.). The decision as to the qualifications of an expert lies within the discretion of the trial judge. Ford v. Commonwealth, Ky., 665 S.W.2d 304, (1983).

At the time of trial, Detective Halbleib had ten years of experience with the Louisville Police Department -- seven of which were spent in narcotics. Halbleib had worked on major narcotics cases in the Metro Narcotics Unit for three years. He had attended numerous training classes and was familiar with crack cocaine, its value, how it is handled, how it is ingested, and how it is generally packaged for resale. He was also familiar with the quantity of crack cocaine normally purchased for personal use as opposed to a quantity customarily possessed for resale. He was a certified police instructor specializing

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4 Kentucky Rules of Evidence.

in the area of narcotics. In view of his education, training, and experience, the trial court did not err by concluding that Detective Halbleib was qualified to offer his expert opinion in this case.

When faced with a proffer of expert testimony under KRE 702, the trial judge is also required to determine "whether the expert is proposing to testify as to: (1) scientific, technical or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 578 (internal quotation marks omitted), quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469, 482 (1993). The trial court is required to assess whether the proffered testimony is both relevant and reliable. Id. This assessment does not require a trial court to hold a hearing on the admissibility of the expert's testimony. Commonwealth v. Christie, Ky., \_\_\_\_\_ S.W.3d \_\_\_\_\_ (Rendered December 19, 2002), citing Clay v. Ford Motor Co., 215 F.3d 663 (6th Cir. 2000), cert. denied, 531 U.S. 1044, 121 S.Ct. 644, 148 L.Ed.2d 549 (2000).

In this case, the court did conduct a Daubert hearing. It did not err by concluding that the proposed testimony was both relevant and reliable under KRE 702. It was firmly demonstrated that Detective Halbleib had acquired specialized

knowledge -- knowledge that was helpful to the jury in determining whether Gray possessed the crack cocaine for personal use or for resale. The trial court did not err by determining that the evidence was admissible under KRE 702.

KRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Considering the weight and nature of the evidence against Gray, the trial court did not err by concluding that the probative value of Detective Halbleib's testimony was not substantially outweighed by the danger of undue prejudice to the defense. Having analyzed the opinion evidence under the criteria of Stringer, supra, we conclude that the trial court did not abuse its discretion and that it did not err by permitting the expert opinion testimony. A new trial cannot be ordered on this ground.<sup>5</sup>

Next, Gray contends that the evidence against him was insufficient to support his conviction and that, therefore, the court erred by denying his motions for a directed verdict. Because the case involved conflicting police testimony, he argues that the jury's verdict was clearly unreasonable. We disagree.

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<sup>5</sup>We also reject Gray's argument that the testimony should have been excluded since the Commonwealth failed adequately to disclose the detective as a potential witness. The record refutes this allegation.

When ruling on a motion for a directed verdict, a trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. Id. Questions as to credibility and the weight to be given to the evidence presented are reserved to the jury. Id.

There was sufficient evidence presented in this case to justify the court's decision to submit the case to the jury, and it was not clearly unreasonable for the jury to find Gray guilty of the charged offenses. Thus, Gray was not entitled to a directed verdict.

Finally, we address Gray's argument that the trial court erred by assessing court costs against him because he was indigent. Gray argues that his attorney's decision to forego collection of a fee in this matter renders the imposition of courts costs unlawful. We can find no support for Gray's position. Consequently, the trial court's exercise of its discretion in assessing costs against Gray shall not be disturbed.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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