

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000944-MR

BRYANT A. MILLER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 01-CR-00977

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE, KNOPF, AND SCHRODER, JUDGES.
SCHRODER, JUDGE. This is an appeal from a judgment pursuant to
a jury verdict convicting appellant of two counts of first-
degree trafficking in a controlled substance and one count of
being a persistent felony offender in the first degree ("PFO
1"). Appellant argues that the trial court erred in refusing to
hold a suppression hearing on the credibility of the paid
informants and on his claim that the chain of custody of the
evidence could not be established. Appellant also contends that

the trial court erred in joining the two trafficking offenses and in refusing to grant a continuance. We reject all of the appellant's claims of error and, thus, affirm.

On the evenings of July 10 and 11, 2001, paid informants William Little and Melissa Critchfield arranged and participated in two controlled drug buys for the Lexington Police Department in which appellant, Bryant Miller, procured crack cocaine for the informants. At that time, Little had been a paid informant for the police for thirteen years and had conducted between six and seven hundred drug buys for various law enforcement agencies over the years. Prior to both buys, police searched Little, Critchfield, and their vehicle. Both buys were prompted by Little calling Miller and asking him if he could get them some crack cocaine. Miller responded that he had a friend from whom he could get some crack cocaine for them. On both nights, Little and Critchfield went to Miller's residence and picked him up. Miller was given \$60 by the informants for the July 10 buy and \$100 for the July 11 buy.

On July 10, Miller directed Critchfield to drive to the Sportsman's Liquor Store. Once there, Miller then exited the vehicle and went over to a Cadillac. When Miller returned to the informants' car, he gave Little a baggy containing crack cocaine.

On July 11, after he was picked up by Little and Critchfield, Miller got into the driver's seat and drove them to an apartment complex in Wood Hill. Upon arriving, Miller exited the car and went into one of the apartments. When he returned to the car, Miller gave Little a baggy containing crack cocaine.

Police officers attempted to follow the informants on both nights to observe as much of the transactions as possible. However, on the night of July 10, the officers lost sight of the informants and Miller en route to the liquor store and did not re-establish visual contact with the informants' vehicle until they arrived back at Miller's residence. On July 11, the officers were able to maintain visual contact with informants at all times. Additionally, the events of July 10 and 11 were tape-recorded by authorities, although neither recording was introduced at trial.

According to the informants, after both buys, Miller was dropped off at his house and thereafter Little and Critchfield immediately returned to the police department. At that point, the informants gave the crack cocaine to the authorities and they and their car were again searched.

Miller was ultimately indicted on two counts of first-degree trafficking in a controlled substance and one count of PFO 1. Pursuant to a jury trial, Miller was convicted of all

three charges and sentenced to a total of ten years' imprisonment. This appeal followed.

Miller first argues that the trial court erred in refusing to grant him a suppression hearing. Prior to trial, Miller moved to suppress the evidence obtained in the July 10 buy due to the fact that the police lost sight of the informants during that buy and therefore chain of custody of the cocaine could not be established. Miller claims that because of the questionable credibility of the informants, their testimony alone could not establish that the cocaine was received from Miller. Although the court heard Miller's counsel's argument on this issue, the court refused to grant Miller a full suppression hearing thereon because it deemed the argument not a proper basis for a suppression hearing. The trial court noted that Miller did not raise a constitutional issue regarding an unlawful search or an involuntarily obtained confession. Rather, the court reasoned that Miller's argument was essentially a challenge to the sufficiency of the evidence based on the lack of credibility of certain witnesses. The court recognized that it was the fact finders' responsibility to assess the credibility of the witnesses.

We agree that Miller's argument was not a proper basis for a suppression motion and therefore he was not entitled to a suppression hearing in this case. RCr 9.78 provides that the

court shall conduct a suppression hearing when the defendant moves to suppress "(a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities or (b) the fruits of a search," Here, the evidence sought to be suppressed was neither a confession nor the fruit of a search.

Further, Miller's chain of custody argument is without merit. Miller seems to argue that the police must always witness a drug transaction from the outset in order to establish the full chain of custody of the drugs, i.e. who initially transferred possession of the drugs. We do not agree. Here, the two informants testified that Miller sold them the cocaine and that it was in their possession until they turned it over to the police immediately after the buy. We believe that was sufficient evidence of the initial chain of custody of the cocaine, until it was turned over to police. It should be noted that the parties stipulated at trial as to the chain of custody of the cocaine after it was received by the police.

As to Miller's assertion that the questionable credibility of the informants rendered their testimony incompetent or required that their testimony be corroborated by police, we agree with the trial court that the credibility of the informants and the weight to be given their testimony were issues for the jury to decide. Commonwealth v. Smith, Ky., 5

S.W.3d 126 (1999); Young v. Commonwealth, Ky., 50 S.W.3d 148 (2001).

Miller next argues that the trial court improperly joined the two trafficking offenses. RCr 6.18 provides that two or more offenses may be charged in the same indictment "if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of the common scheme or plan." This rule and RCr 9.12 have been construed to prescribe joinder where the offenses are closely related in character, circumstances, and time. Seay v. Commonwealth, Ky., 609 S.W.2d 128 (1980). Miller maintains that the two drug buys were not sufficiently related to warrant their joinder for trial. We do not agree. The two offenses were closely related in character in that they both involved the sale of crack cocaine to the same individuals. The circumstances were also similar in that the informants initially met the defendant at his residence, after which the defendant directed and went with the informants in their automobile to an area location where he procured the cocaine for sale to them. Finally, the offenses were sufficiently related in time by occurring on two consecutive evenings. The trial court has broad discretion in permitting the joinder of related offenses. Brown v. Commonwealth, Ky., 458 S.W.2d 444 (1970). In the case

at bar, we cannot say that the trial court abused its discretion in joining the two trafficking offenses for trial.

Miller's remaining argument is that the trial court abused its discretion in failing to grant his motion for a continuance. At a pre-trial hearing, Miller was represented by new counsel who sought a continuance because the case had only been recently assigned to him and he already had a trial scheduled on the date set for Miller's trial. The trial court inquired of Miller's counsel if there was any other attorney available in the public defender's office who could represent Miller at trial without the need to continue the trial. Miller's then counsel responded that he would make such an inquiry. Ultimately Miller obtained another attorney from the public defender's office who represented him at trial. Said attorney never raised any objection to the trial proceeding and never made any claim that he was not fully prepared for trial. The decision on whether or not to grant a continuance under RCr 9.04 lies within the sound discretion of the trial court, and unless it appears that the trial court has abused that discretion, a reviewing court will not disturb that ruling. Stump v. Commonwealth, Ky. App., 747 S.W.2d 607 (1987). Miller claims that the trial court's refusal to grant the continuance resulted in his only being able to meet with his trial counsel two times before trial. From our review of the trial, we cannot

say that the court abused its discretion in not granting the motion for continuance. There was no indication that Miller's trial counsel was unprepared for trial or that Miller was prejudiced by receiving new counsel a month before trial.

For the reasons stated above, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Matthew W. Boyd
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler, III
Attorney General

William L. Daniel, II
Assistant Attorney General
Frankfort, Kentucky