

RENDERED: December 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-001865-MR

CEDRICK JONES

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 01-CR-00199

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOPF AND SCHRODER, JUDGES; MILLER, SENIOR JUDGE.¹

SCHRODER, JUDGE: This is an appeal from a judgment convicting appellant of two counts of trafficking in cocaine. Appellant argues that the trial court erred in failing to authorize funds for the employment of a voice analysis expert and by allowing

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

the admission of evidence of prior bad acts (drug dealing) of appellant. We reject these arguments and thus affirm.

On May 24 and 31, 2001, Tandy Sullivan, acting as a confidential informant for the Mayfield Police Department and while wearing a wire, purchased crack cocaine from appellant, Cedric Jones. Consequently, Jones was indicted for and ultimately convicted by a jury of two counts of first-degree trafficking in cocaine. Jones was sentenced to two ten-year terms to run concurrently. This appeal followed.

Jones first argues that he was erroneously denied funds to employ an expert on voice analysis to analyze the audiotapes of the drug buys in this case. While Jones did file a motion for funds to hire a voice analysis expert, the record does not indicate a hearing was held on the motion or that a ruling was ever made on the motion. It is the duty of the party who moves for relief to insist that the court make a ruling thereon, and failure to do so is regarded as a waiver. Dillard v. Commonwealth, Ky., 995 S.W.2d 366 (1999), cert. denied, 528 U.S. 1009, 1205 S. Ct. 508, 145 L. Ed. 2d 393 (1999). Accordingly, this issue was not preserved.

Notwithstanding the waiver of the issue, the claim also fails because Jones failed to establish that he was entitled to the funds pursuant to KRS 31.110(1)(b). That statute has been interpreted to allow the defendant to receive

funds only when he makes a showing that the requested funds are "reasonably necessary". Hicks v. Commonwealth, Ky., 670 S.W.2d 837 (1984), cert. denied, 469 U.S. 1040, 105 S. Ct. 521, 83 L. Ed. 2d 409 (1984). In Jones's motion for the funds, he fails to state why a voice analysis expert was reasonably necessary to his defense. Hence, even if the court had denied the motion, it would not have been in error.

The next issue raised by Jones is that the trial court erred in allowing testimony that Jones had previously sold drugs to the informant. Sullivan explained on direct how she came to be an informant in the case. She testified that while she was in jail on some forged check charges, she contacted Detective George Workman about helping the police with drug investigations so she could get some help with her situation. She confessed to Detective Workman that she used drugs and knew many people in the area who sold drugs. Detective Workman asked her if she would be willing to name and conduct controlled buys from people she knew to be drug dealers. She agreed to wear a wire and make the drug buys for the police. Sullivan testified that she subsequently made two controlled buys from Jones. She stated that at that time, she knew Jones and knew that he sold drugs.

On appeal, Jones argues that the testimony that he had previously sold drugs was evidence of prior bad acts, which is inadmissible under KRE 404(b). However, it is undisputed that

Jones never objected to this testimony at trial. Hence, this issue was likewise unpreserved. RCr 9.22; Conover v. Commonwealth, Ky., 473 S.W.2d 825 (1971). Nevertheless, Jones urges us to review the issue for palpable error under RCr 10.26.

KRE 404(b) provides:

(b) Other crimes, wrongs, or acts.
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

At the trial in this case, Jones's sole defense was that Sullivan and Detective Workman were mistaken when they identified him as the person who sold Sullivan the crack cocaine. Sullivan's testimony that she had known him from previous drug dealings was thus necessary to establish that she was sure it was Jones who sold her the drugs to counter his claim that he had been misidentified. Under the exceptions in KRE 404(b)(1), evidence of prior bad acts is admissible to prove identity. Hence, there was no error in the admission of this evidence.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael C. Lemke
Appellate Public Advocate
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Carlton S. Shier, IV
Assistant Attorney General
Frankfort, Kentucky