

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002300-MR

WILLIAM THORNTON HAYES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
ACTION NO. 02-CR-00549

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI and SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: William Thornton Hayes appeals from a judgment of the Fayette Circuit Court wherein he was convicted of first-degree possession of a controlled substance (cocaine) and was sentenced to three years in prison.<sup>1</sup> The sole issue in the case concerns whether the circuit court erred in denying Hayes' suppression of evidence motion. We conclude the court did not err and thus affirm.

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<sup>1</sup> Hayes entered a conditional guilty plea to the charge pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09.

The incident which gave rise to this case occurred on March 31, 2002. Officer Danny Paige of the Lexington Police Department testified that on that date he and another officer were engaged in an undercover investigation concerning drug trafficking. The officers were at or near 208 Rose Street in Lexington because of a complaint from the apartment building manager at that address regarding drug activity by his tenants. The officers were sitting on the steps of a building opposite the 208 Rose Street address when Hayes approached them from their left and initiated a conversation. Hayes asked the officers if there was anything he could do for them, and the officers, who were in plain clothes, asked Hayes what he meant. Hayes then informed the officers that he had marijuana and cocaine.

Hayes asked the officers if they were police officers, and they responded that they were not. He advised the officers that he could meet their needs, and he reached into his pocket and pulled out a hollowed-out cigarette and a brown paper bag containing cocaine. Officer Paige asked Hayes if \$20 would make the buy, and Hayes responded affirmatively.

When the officers identified themselves as police officers, Hayes fled. The officers chased Hayes and eventually caught him. After apprehending him, they noticed that he had a small amount of a white substance on his mouth. The officers

surmised that Hayes was trying to ingest what they believed to be cocaine, and they field-tested the substance. The substance tested positive for a cocaine base.

The officers then returned to the scene of the incident and retrieved 0.10 gram of a substance which also field-tested positive for cocaine. In addition, the officers seized a broken cigarette, a plastic cup, and a piece of a brown paper bag. Hayes was arrested and eventually indicted on charges of first-degree trafficking in a controlled substance (cocaine), tampering with physical evidence, and drinking alcohol in a public place. The trafficking charge was a Class C felony, and the tampering with physical evidence charge was a Class D felony. The drinking charge was a violation.

Hayes filed a suppression motion, and a hearing was held pursuant to RCr 9.78. At the hearing, Officer Paige testified that the field testing of the white substance around Hayes' mouth resulted in the substance being totally consumed. Therefore, none of the substance could be lab tested, and the Commonwealth could not use the results of the field test as evidence that the white substance around Hayes' mouth was cocaine.

Hayes argued to the circuit court that the field test for the substance was not conclusive for cocaine and that, since there was no positive lab test of such substance for cocaine,

all evidence with respect to the substance had to be suppressed. The Commonwealth responded that the jury was entitled to hear about the presence of the white substance even though the field-test result was inadmissible.

The circuit court ruled that the testimony was admissible even though there was no evidence that the substance was illegal. The court stated that whether the substance was or was not cocaine was not the issue. Rather, the court stated that the issue was "whether any article, object or other thing of physical substance was about to be seized which could have been produced at trial." The court further noted that it "must find that an object may be physical evidence, and yet not be an illegal substance." The court stated that "tampering with a substance can be tampering with physical evidence if the Defendant so acts out of a belief that the substance is about to be seized as evidence." Thus, the court denied the suppression motion. This appeal by Hayes followed.

KRS<sup>2</sup> 524.100 states as follows:

- (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
  - (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in

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<sup>2</sup> Kentucky Revised Statutes.

the official proceeding with intent to impair its verity or availability in the official proceeding; or

(b) Fabricates any physical evidence with intent that it be introduced in the official proceeding or offers any physical evidence, knowing it to be fabricated or altered.

(2) Tampering with physical evidence is a Class D felony.

KRS 524.100(1) and (2).

Hayes argues that the circuit court erred in not granting his suppression motion because of the absence of "physical evidence." Hayes essentially argues that since the white substance was totally consumed by the field-testing process, then there is a lack of proof of evidence to be tampered with.<sup>3</sup>

We agree with the circuit court's ruling. The officers would have been allowed to testify as to what they observed concerning the white substance around Hayes' mouth. However, because the substance was consumed by field-testing, they could not testify as to the nature of the substance.

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<sup>3</sup> The Commonwealth does not respond to Hayes' argument other than to state that the issue is moot because the tampering with physical evidence charge was dismissed as a part of the conditional guilty plea agreement. We disagree with the Commonwealth's position that the issue is moot.

Nevertheless, they can testify as to the physical evidence and Hayes' attempt to conceal or destroy it.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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BRIEF FOR APPELLEE:

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