

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-002332-MR

CLARENCE TAPP

APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 01-CR-00207

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: Clarence Tapp appeals from a judgment of the McCracken Circuit Court, entered October 14, 2002, convicting him of first-degree possession of cocaine¹ and sentencing him as a second-degree persistent felon² to seven years' imprisonment. Tapp maintains that the trial court abused its discretion by

¹ KRS 218A.1415(2)(a).

² KRS 532.080.

admitting testimony by a forensic chemist into evidence without a preliminary Daubert hearing.³ We disagree.

In June 2001, the Paducah Police Department conducted a reverse-sting operation, during which police officers posed as illegal-drug salesmen and arrested persons who made purchases from them. Tapp was among the purchasers. He bought what he believed were two "rocks" of crack cocaine from one of the undercover officers. In fact, the "rocks" were primarily wax made to resemble crack cocaine with a small core of actual cocaine. The officers arrested Tapp immediately after the purchase and charged him with the illegal possession.

The officers sent the "rocks" to the state forensic lab for tests to confirm the presence of cocaine. Unaware that most of the "rocks" were wax, the forensic chemist apparently took his samples from the wax portion with the result that his tests indicated the absence of a controlled substance. When he reported these results, the police explained to laboratory personnel how the "rocks" had been prepared and asked that they be retested in a way apt to detect the small amount of cocaine. The "rocks" were then sent to a second laboratory where they were each ground and stirred so as to make homogenized mixtures.

³ Mitchell v. Commonwealth, Ky., 908 S.W.2d 100 (1995) (adopting standards and procedures enunciated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)).

The chemist then tested samples of the two mixtures. Both of these tests indicated the presence of cocaine.

Prior to trial and in the presence of the trial judge, the Commonwealth deposed the chemist from the second lab concerning the successful tests. She testified that she had a bachelor of science degree in chemistry and ten years' experience as a state forensic chemist. She had conducted numerous drug analyses such as this one using gas chromatography and mass spectroscopy techniques, which she characterized as widely accepted and highly reliable. She described the crushing and homogenizing of the "rocks" before taking a sample as standard practice when the matter to be tested was not uniform or was thought to contain only a small concentration of controlled substance. She described the lab's procedures to ensure that the testing apparatus performed accurately.

When the Commonwealth moved to admit this deposition testimony at trial, Tapp objected on the ground, apparently, that the crushing and homogenizing of the "rocks" prior to sampling them had somehow undermined the scientific validity of the tests. He requested a Daubert hearing to address the issue. The trial court denied the request and admitted the chemist's testimony. It is from this ruling that Tapp appeals. He contends that the trial court abused its discretion by admitting into evidence the positive lab results and the chemist's

testimony without first conducting a Daubert hearing. We disagree.

As Tapp correctly notes, under KRE 104 and KRE 702 trial courts have a gatekeeper obligation to screen proposed expert testimony for admissibility.⁴ Generally, the admissibility is to be determined prior to trial at a Daubert hearing where the proponent of the evidence must establish its reliability, scientific or otherwise, as well as its relevance to the issues before the fact finder.⁵ If the evidence consists, however, of the routine application of a test or a technique the reliability of which has been widely recognized, the trial court need not conduct a pre-trial hearing to screen it unless the opponent comes forward with proof that the proffered evidence is unreliable.⁶

Here, a Daubert hearing was not required because testing for the presence of controlled substances by means of gas chromatography and mass spectroscopy has become a routine procedure in forensic labs and is widely regarded as highly

⁴ Goodyear Tire & Rubber Company v. Thompson, Ky., 11 S.W.3d 575 (2000).

⁵ Florence v. Commonwealth, Ky., 120 S.W.3d 699 (2003).

⁶ *Id.*; Johnson v. Commonwealth, Ky., 12 S.W.3d 258 (1999).

reliable.⁷ Even if a preliminary hearing was required, moreover, the chemist's pre-trial deposition in the presence of the trial judge satisfied that requirement. The chemist testified as to the acceptance of the test by those in the field and she explained her performance of the test. In particular, she explained why she ground the "rocks" and mixed them: to obtain a representative sample of the allegedly controlled substance seized from Tapp. Even a lay person can understand the need to obtain a representative sample and why, in order to do so from a non-homogeneous substance, it may be necessary to make the substance homogeneous by grinding and mixing. Absent the proffer by Tapp of proof that this procedure was unreliable, the trial court did not abuse its discretion by admitting the chemist's testimony into evidence without an additional preliminary hearing.

Accordingly, we affirm the October 14, 2002, judgment of the McCracken Circuit Court.

ALL CONCUR.

⁷ State v. Sercey, 825 So. 2d 959 (Fla. App. 2002); Chisum v. State, 988 S.W.2d 244 (Tex. App. 1998).

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