

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000497-MR

CHARLES DAVIS

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE WILLIAM L. GRAHAM, JUDGE  
ACTION NO. 01-CR-00108

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART AND  
REVERSING IN PART

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BEFORE: JOHNSON, MINTON AND TACKETT, JUDGES.

JOHNSON, JUDGE: Charles Davis has appealed from a final judgment and sentence of the Franklin Circuit Court entered on February 11, 2003, which found Davis guilty on two counts of trafficking in a controlled substance in the first degree<sup>1</sup> and on one count of criminal attempt to commit trafficking in a controlled substance in the first degree,<sup>2</sup> and sentenced him to

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<sup>1</sup> Kentucky Revised Statutes (KRS) 218A.1412.

<sup>2</sup> KRS 506.010.

15 years' imprisonment in accordance with the jury's recommendations. Having concluded that the trial court did not err by denying Davis's motions for a directed verdict of acquittal with respect to the charges of trafficking in a controlled substance in the first degree, but that the trial court erred by denying Davis's motions for a directed verdict of acquittal with respect to the charge of criminal attempt to commit trafficking in a controlled substance in the first degree, we affirm in part and reverse in part.

On July 18, 2001, Davis was indicted by a Franklin County grand jury on two counts of trafficking in a controlled substance in the first degree and on one count of criminal attempt to commit trafficking in a controlled substance in the first degree. The grand jury charged that on or around May 22, and May 29, 2001, Davis sold a quantity of cocaine to Stacy Obertate, a paid confidential informant. The grand jury further charged that on or around June 18, 2001, Davis attempted to sell cocaine to Obertate. Davis entered pleas of not guilty to all three charges and the case proceeded to trial.

A jury trial was held on September 4 and 5, 2002, during which the following evidence was presented. Obertate testified that she began working as a paid confidential

informant for the Frankfort Police Department in early 2001.<sup>3</sup> Obertate stated that on May 22, 2001, she met with Detective Brian Willhoite, who gave her \$100.00 in cash for the purpose of buying cocaine. Obertate further testified that she then contacted Davis on his cellular phone with the number that Davis had provided her. Following this conversation in which a meeting place was agreed upon, Obertate left to meet Davis at the designated location.

Obertate claimed that after arriving at the arranged location, she approached a vehicle being driven by Anthony Carrigan and saw Davis in the back seat of the car. According to Obertate, Carrigan handed her a bag containing cocaine, and she gave Carrigan the \$100.00 that Det. Willhoite had given her. After the transaction was complete, Obertate returned to meet with Det. Willhoite and gave him the bag containing the cocaine.

Obertate further stated that one week later, on May 29, 2001, she once again met with Det. Willhoite who gave her another \$100.00 with which to purchase cocaine. Obertate stated that she called Davis on the same cellular phone number to arrange another drug transaction. Obertate testified that she then met Davis at the designated location, and that he personally handed her a bag containing cocaine in exchange for \$100.00. Obertate testified that she then left the scene and

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<sup>3</sup> Obertate stated that she was paid \$100.00 by the Frankfort Police Department for each completed drug transaction.

met with Det. Willhoite, who took possession of the bag containing the cocaine.

Obertate also testified that she tried to arrange a third drug transaction with Davis on June 18, 2001, but that Davis did not want to meet with her. As a result, no further meetings between Obertate and Davis took place.

Det. Willhoite also testified, and played several audiotapes of the phone calls made between Obertate and Davis on the dates in question. Det. Willhoite identified Davis's voice on the audiotapes. On these audiotapes, Davis can be heard discussing the times and locations with Obertate regarding the planned drug transactions.

The Commonwealth next offered the testimony of Anthony Carrigan. Carrigan testified that he drove Davis to meet with Obertate on May 22, 2001. Carrigan stated that as Obertate approached the vehicle, Davis got in the back seat of the car. Carrigan further testified that he took the bag containing the cocaine from Davis and gave it to Obertate, and that he took the \$100.00 in cash from Obertate and gave it to Davis. Carrigan stated that Davis paid him \$10.00 for his role in this transaction.<sup>4</sup>

Finally, the Commonwealth offered the testimony of Jennifer Melton, an expert in the field of identifying

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<sup>4</sup> Carrigan stated during his testimony that he had been indicted on drug trafficking charges as a result of his role in the May 22, 2001, transaction.

controlled substances. Melton testified that the substance in each of the two bags that Det. Willhoite confiscated tested positive for cocaine.

At the close of the Commonwealth's proof, Davis moved for a directed verdict of acquittal on all three charges. The basis for Davis's motion was that the Commonwealth had failed to offer sufficient evidence which would warrant a conviction for any of the alleged offenses. The trial court denied Davis's motion.

Following the denial of his motion for a directed verdict of acquittal, Davis offered the testimony of Angela Douglas, who was Davis's girlfriend at the time of his trial. Douglas testified that the phone number Obertate used to call Davis was not the same cellular phone number that Davis had given her. Douglas further stated that she did not believe the voice on the audiotapes belonged to Davis. Following Douglas's testimony, Davis's renewed motion for a directed verdict of acquittal on all charges was denied by the trial court.

After hearing the evidence, the jury returned a verdict of guilty on all three charges. The jury recommended that Davis be sentenced to five years' imprisonment for the first conviction for trafficking in a controlled substance in the first degree, ten years' imprisonment for the second conviction for trafficking in a controlled substance in the

first degree, and 12 months in jail and a \$500.00 fine for the conviction for criminal attempt to commit trafficking in a controlled substance in the first degree. The jury also recommended that the sentences for each conviction for trafficking in a controlled substance in the first degree be served consecutively. On February 11, 2003, after a pre-sentence investigation had been completed, the trial court followed the jury's recommendations and sentenced Davis to a total sentence of 15 years' imprisonment and a fine of \$500.00.<sup>5</sup> This appeal followed.

Davis argues on appeal that the Commonwealth failed to proffer sufficient evidence which could have sustained a guilty verdict for any of the three charges against him. Davis therefore claims that the trial court erred by denying his motions for a directed verdict of acquittal.

In Commonwealth v. Benham,<sup>6</sup> our Supreme Court explained the test for a trial court to follow when ruling on a motion for a directed verdict of acquittal:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that

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<sup>5</sup> Pursuant to KRS 532.110(1)(a), Davis's sentence for criminal attempt to commit trafficking in a controlled substance in the first degree was ordered to run concurrently with his other sentences.

<sup>6</sup> Ky., 816 S.W.2d 186, 187 (1991).

the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

The Court went on to state the appropriate standard for an appellate court to follow when reviewing a trial court's ruling on a motion for a directed verdict of acquittal:

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

With these principles in mind, we turn to each charge in Davis's indictment, and the evidence presented by the Commonwealth with respect to those charges.

First, with respect to the May 22, 2001, transaction, Davis argues that there was no evidence presented which could have supported a finding that he was the person who sold cocaine to Obertate on that date. Hence, according to Davis, since he was not charged with complicity to traffic in a controlled substance in the first degree, the trial court erred by not granting his motions for a directed verdict of acquittal on this charge. We disagree.

We first note that Davis acknowledges in his brief that this argument was not presented at trial. As a general

rule, arguments not raised at trial will not be considered for the first time on appeal.<sup>7</sup> Regardless of this procedural defect, however, Davis's argument with respect to this issue is clearly without merit.

Obertate testified that on May 22, 2001, she called Davis at a number that Davis had given her, for the purpose of arranging a drug transaction. Det. Willhoite testified that he recognized the voice on the audiotape of this conversation as belonging to Davis. Obertate stated that she approached a vehicle at the designated location and saw Davis in the back seat of the car.<sup>8</sup> Obertate further stated that Carrigan, the driver of the vehicle, got out of the car and handed her a bag containing cocaine in exchange for \$100.00. Further, Carrigan testified that he had acted as the "middleman" in this transaction, by taking the bag from Davis to give to Obertate, and by taking the money from Obertate to give to Davis.

Therefore, it was not "clearly unreasonable" for the jury to find Davis guilty of trafficking in a controlled substance in the first degree for the May 22, 2001, transaction.

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<sup>7</sup> Johnson v. Commonwealth, Ky., 892 S.W.2d 558, 562 (1994)(stating that certain issues were not preserved for appellate review where the matters were not brought to the attention of the trial court or where no relief was requested). See also Kentucky Rules of Criminal Procedure (RCr) 9.22.

<sup>8</sup> In his brief, Davis points out that Obertate can be heard on the audiotape telling Det. Willhoite that she "assumed" Davis was the person in the back seat of the car. However, this purported inconsistency in the evidence was merely a factor for the jury to consider in weighing the credibility of Obertate's testimony.

The mere fact that Carrigan may have acted as a "middleman" for this transaction did not preclude the jury from finding that Davis was the individual who sold Obertate cocaine on this occasion. Accordingly, the trial court did not err by denying Davis's motions for a directed verdict of acquittal for this charge.

Davis next argues that there was insufficient evidence to support the jury's finding that he was guilty of trafficking in a controlled substance in the first degree for the May 29, 2001, transaction. Specifically, Davis argues that since his voice could not be heard on the audiotape during the actual cocaine-for-money exchange, there was not sufficient evidence presented to support a finding that he was the individual who sold Obertate the drugs on this occasion. Davis claims that Obertate's testimony identifying Davis as the person who sold her cocaine on May 29, 2001, was uncorroborated, and that the trial court therefore erred by denying his motions for a directed verdict of acquittal with respect to this charge. We disagree.

We first note that the uncorroborated testimony of even a single witness has been held to be sufficient evidence to support a criminal conviction.<sup>9</sup> Further, as Benham makes clear,

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<sup>9</sup> See La Vigne v. Commonwealth, Ky., 353 S.W.2d 376, 378-79 (1962)(holding that the victim's testimony identifying the defendant as one of the two men

issues related to the credibility of a witness's testimony and the weight to be given to such testimony are matters that are within the province of the jury.<sup>10</sup> Thus, even if Obertate's testimony was the only evidence linking Davis to the drug transaction that took place on May 29, 2001, this testimony would have been sufficient to support the jury's finding that Davis was the person who sold Obertate cocaine on this date.

However, there was other evidence implicating Davis in this crime. Det. Willhoite identified Davis's voice on the audiotapes in which Obertate and Davis can be heard arranging a time and location to meet. Accordingly, there was sufficient evidence upon which the jury could have concluded that Davis was the individual who sold Obertate cocaine on May 29, 2001, and the trial court did not err by denying Davis's motions for a directed verdict of acquittal with respect to this charge.

Finally, Davis argues that there was insufficient evidence to support the jury's finding that he was guilty of criminal attempt to commit trafficking in a controlled substance in the first degree for the events that transpired on June 18, 2001. Specifically, Davis claims that there was no "overt act" on his part which would have indicated that he had a "firm purpose" to commit the crime in question. We agree.

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who had robbed him was sufficient to support the defendant's conviction for armed robbery).

<sup>10</sup> Benham, 816 S.W.2d at 187.

Criminal attempt is defined in pertinent part under  
KRS 506.010 as follows:

(1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct shall not be held to constitute a substantial step under subsection (1)(b) unless it is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting.

In Commonwealth v. Prather,<sup>11</sup> our Supreme Court further defined the "substantial step" requirement:

[T]he substantial steps directed by the statute are overt acts ". . . which convincingly demonstrate a firm purpose to commit a crime, while allowing police intervention, based upon observation of such incriminating conduct, in order to prevent the crime when criminal intent becomes apparent."

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<sup>11</sup> Ky., 690 S.W.2d 396, 397 (1985)(quoting State v. Woods, 357 N.E.2d 1059, 1063 (Ohio 1976)).

In the case sub judice, we hold that there was insufficient evidence upon which the jury could have found Davis guilty for criminal attempt to commit trafficking in a controlled substance in the first degree.

During Obertate's testimony, she stated that on June 18, 2001, she called Davis three or four times for the purpose of arranging another drug transaction, but that Davis was "upset" with her and that he "refused" to meet with her. Further, our review of the audiotape of these conversations reveals that Obertate and Davis did discuss the possibility of meeting on that day, but that the two could not agree upon a time or location. Finally, it is undisputed that no meeting between Obertate and Davis took place on June 18, 2001. In short, there was no "overt act" on the part of Davis evincing a "firm purpose to commit a crime." Accordingly, it was clearly unreasonable for the jury to find Davis guilty of criminal attempt to commit trafficking in a controlled substance in the first degree, and the trial court therefore erred by denying Davis's motions for a directed verdict of acquittal with respect to this charge.

Based on the foregoing, the judgment of the Franklin Circuit Court is affirmed in part and reversed in part.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR  
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