

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-000674-MR

KENNY RAY LEE

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT  
HONORABLE JOHN L. ATKINS, JUDGE  
ACTION NO. 01-CR-00402

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: BARBER, SCHRODER AND TAYLOR, JUDGES.

BARBER, JUDGE: Appellant Kenny Ray Lee appeals from a judgment convicting him of trafficking in a controlled substance in the first degree. We reverse the conviction due to admission of evidence where the prejudicial effect of such evidence outweighed its probative value.

Lee was originally indicted for trafficking in a controlled substance in September, 2001. The offense date given in the indictment was June 8, 2001. In December, 2001, the

Commonwealth provided Lee's counsel with a document identified as a transcription of an audio taped transaction which took place on June 8, 2001. When counsel reviewed the actual audiotape, it was different from the document provided in discovery. In April, 2002, the Commonwealth provided a notice stating that it intended "to admit into its case in chief all drug activity involving this Appellant, including but not limited to the aforesaid actions." In that notice, the Commonwealth proposed to introduce records of an additional drug transaction which allegedly took place on June 5, 2001. The record shows that the Commonwealth claimed that Lee was involved in four separate drug sale transactions, but indicted him for only one of the transactions.

In May, 2002, the trial was rescheduled over Lee's objections. At that time the Commonwealth provided a second document identified as a transcription of an audio taped transaction which allegedly took place on June 5, 2001. A review of the actual audiotape revealed differences between the audiotape and the identified transcription. The trial was again rescheduled over Lee's objection in December, 2002, as the Commonwealth claimed that a key witness would be unavailable.

Lee filed a motion requesting a hearing on the admissibility of all evidence of uncharged crimes proposed to be admitted at trial by the Commonwealth. Lee also requested an in

camera review of all audiotapes which the Commonwealth proposed to play for the jury at trial. In January, 2003, Lee filed a motion seeking dismissal of the indictment on the basis that the Grand Jury had been presented with false evidence. Lee asserted that the testimony of an officer of the Pennyrile Narcotics Task Force was at odds with his investigative report, and the testimony of the witnesses to the transaction. The officer asserted to the Grand Jury that Lee helped weigh the illegal substances at the time the drug transaction took place. The report by the investigating officer, made contemporaneously with the transaction, stated that Lee was merely present when the transaction took place. The record shows that during interviews with the confidential informant and the individual charged with selling the drugs, the witnesses stated that Lee did not weigh the drugs or otherwise involve himself in the transaction. The trial court denied Lee's motions. The trial was held, and Lee was convicted of the charge asserted in the indictment.

Lee argues that the trial court erred in allowing the Commonwealth to present evidence of other crimes and wrongdoings by Lee during its case in chief. Lee was charged with a specific offense occurring on June 8, 2001. The indictment asserts that Lee violated the law on that date by "selling a quantity of . . . a Schedule II Controlled Substance" to various persons. In addition to evidence regarding the June 8

transaction, the Commonwealth presented evidence at trial that a confidential informant and a drug seller engaged in additional drug transactions at Lee's residence on June 1, June 5, and June 20. Those transactions were not the same as the charged offense and involved other illegal substances, "free" samples of drugs, or discussions between the "buyer" and "seller" regarding other proposed future drug transactions. Lee asserts that the introduction of this evidence was in violation of KRE 404(b). Lee argues that "one's mere presence at the scene of a crime is not evidence that such one committed it or aided in its commission." Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998). He complains about the evidence of the other transactions being admitted at trial of the charged offense. The trial court ruled that Commonwealth's evidence was admissible, stating that the evidence was relevant to show a common plan or scheme.

KRE 404(b) precludes evidence of other bad acts by a defendant if such evidence is offered to show that the defendant acted in conformity therewith. Philips v. Commonwealth, Ky., 17 S.W.3d 870, 877 (2000). Evidence of prior bad acts claimed to be similar to the charged offense may be admitted where there is a question as to whether the defendant actually committed the charged offense. The prior bad acts are admitted to show that there is a reasonable probability that the acts were committed

by the same person. Commonwealth v. Maddox, Ky., 955 S.W.2d 718, 722 (1997). In the present case it was undisputed that Lee was present at the time the transactions occurred. There was no showing that Lee was involved in either the charged transaction or the other transactions detailed by the Commonwealth. He was merely present in his home when the transactions occurred. Under such circumstances, prior bad acts are not properly admitted into evidence to show common plan or scheme.

Evidence of participation in a prior controlled buy may be presented only where the defendant denies participation in the charged offense, and the prior bad act evidence shows participation by the defendant. Walker v. Commonwealth, Ky., 52 S.W.3d 531, 533 (2001). Here, Lee did not participate in any of the prior or subsequent bad acts, and similarly did not participate in the charged offense of June 8, 2001. The evidence regarding the prior bad acts did not add anything to the Commonwealth's charges, but was merely cumulative and prejudicial. The evidence was not shown to be relevant, and for that reason, should not have been admitted into evidence. Walker v. Commonwealth, supra., 52 S.W.3d at 536.

Prior bad acts evidence cannot be admitted where it does not clarify any question before the court as to the intent of the defendant on the date of the charged offense. Grimes v. McAnulty, Ky., 957 S.W.2d 223, 226-227 (1997). No such

questions were raised in the present action, and the proffered evidence clarified no issue before the court. It is improper to allow evidence as to other uncharged bad acts "in order to show conformity therewith." Rodriguez v. Commonwealth, Ky., 107 S.W.3d 215, 219 (2003). The Commonwealth must show that the evidence is necessary for some other purpose. Colwell v. Commonwealth, Ky., 37 S.W.3d 721, 725 (2000). The evidence of other crimes, to be admissible, must be so inextricably intertwined with the admissible evidence as to prohibit separating the acts. Norton v. Commonwealth, Ky. App., 890 S.W.2d 632, 638 (1994). Where the prior bad acts are not shown to be essential to the Commonwealth's case in chief, the evidence must be excluded. Commonwealth v. Ramsey, Ky., 920 S.W.2d 526, 528 (1996).

Kentucky law holds that:

Ultimate fairness mandates that an accused be tried only for the particular crime for which he is charged. An accused is entitled to be tried for one offense at a time, and evidence must be confined to that offense. The rule is based on the fundamental demands of justice and fair play.

O'Bryan v. Commonwealth, Ky., 634 S.W.2d 153, 156 (1982).

Where, as here, the evidence offered by the Commonwealth is neither relevant nor probative, it should not be admitted into evidence. Brown v. Commonwealth, Ky., 983 S.W.2d 513, 516 (1999). For this reason, the conviction of the Appellant is

reversed and remanded to circuit court for retrial in conformity with this Opinion.

ALL CONCUR.

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