

RENDERED: September 24, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000808-MR

CHARLES MITCHELL

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE GREGORY M. BARTLETT, JUDGE  
ACTION NO. 02-CR-00681

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>  
EMBERTON, SENIOR JUDGE. This is a direct appeal brought by Charles Mitchell after a judgment was entered convicting him of first-degree trafficking in a controlled substance and sentencing him to the maximum term of ten years' imprisonment. He raises six issues on appeal: (1) that the conviction was not supported by sufficient evidence; (2) that the trial court erred when it did not consider probation; (3) his rights to due

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

process and a fair trial were denied when the court admonished defense counsel for being tardy; (4) the Commonwealth was permitted to introduce evidence of the length of his prior conviction and that probation had been revoked; (5) it was improper to admit certified copies of his prior Ohio conviction; and (6) that the Commonwealth made an inappropriate closing argument. Except for the first issue raised, all others were not preserved by proper objection and review is urged pursuant to RCr<sup>2</sup> 10.26. We affirm.

Officer Doug Haubner observed Mitchell meeting with a male and female on a street corner in Covington, Kentucky. He saw the male hand money to Mitchell who then gave to the male something so small the officer was unable to identify the object. Haubner then called for assistance and when the other officers arrived, Mitchell ran. He was caught, arrested and a pat down search performed revealing \$436.00 in cash but no drugs. After Mitchell exited the cruiser at the police station, a plastic bag with cocaine was discovered on the backseat floorboard. When asked if he had any more drugs Mitchell acknowledged that he had cocaine in his shoe. The couple who Officer Haubner had seen with Mitchell were questioned and admitted that they had possessed cocaine.

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<sup>2</sup> Kentucky Rules of Criminal Procedure.

Mitchell contends that there was insufficient evidence to support the trafficking conviction because Officer Haubner was unable to specify that he saw Mitchell hand cocaine to the couple in exchange for cash. We find this issue was sufficiently preserved for review by Mitchell's motion for directed verdict. A motion for directed verdict is properly denied if there is sufficient evidence to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty.<sup>3</sup> It is not necessary for a conviction of trafficking in a controlled substance that the officer actually see the controlled substance exchanged for money. "Conviction can be premised on circumstantial evidence of such nature that, based on the whole case, it would not be clearly unreasonable for a jury to find guilt beyond a reasonable doubt."<sup>4</sup> Officer Haubner witnessed money being given to Mitchell and Mitchell hand an object to another party. When the police officers approached, Mitchell ran and after finding substantial cash on Mitchell's person, he was arrested and placed in the cruiser. The officer testified that he checked his cruiser prior to placing Mitchell in the back seat and there were no drugs. But after Mitchell's transport to the police station, drugs were found in the cruiser and on his person. The couple that had been seen with Mitchell

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<sup>3</sup> Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

<sup>4</sup> Graves v. Commonwealth, Ky., 17 S.W.3d 858, 862 (2000).

admitted that they had drugs that night. There was sufficient evidence on which the jury could find Mitchell guilty.

The remaining issues are unpreserved for review. RCr 10.26 can be used as a means of review of an unpreserved error only if it meets the palpable error test. In Brock v. Commonwealth,<sup>5</sup> our Supreme Court explained the requirements of the rule:

[T]he requirement of 'manifest injustice' as used in RCr 10.26 (formerly RCr 9.26) [ ] mean[s] that the error must have prejudiced the substantial rights of the defendant, i.e., a substantial possibility exists that the result of the trial would have been different. One federal court has interpreted FRE 103(e), which is identical to KRS 103(e), as requiring that the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. (Citations omitted.)

Mitchell contends that the trial court violated KRS<sup>6</sup> 533.010 when it failed to consider probation. While we agree that the statute required the court to consider probation, the record does not support Mitchell's conclusion that it did not consider the possibility. The record reveals that probation was considered and the trial court, in its discretion, chose not to grant probation.<sup>7</sup>

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<sup>5</sup> Ky., 947 S.W.2d 24, 28 (1997).

<sup>6</sup> Kentucky Revised Statutes.

<sup>7</sup> Brewer v. Commonwealth, Ky., 550 S.W.2d 474 (1977).

We find nothing in Mitchell's remaining allegations that warrant review under the palpable error rule. Although the trial court spoke harshly to defense counsel about his tardiness for trial, it also explained to the jury that counsel's behavior must not influence their decision as to Mitchell's guilt. The introduction of Mitchell's prior Ohio conviction and the length of sentence during the penalty phase were not prejudicial.<sup>8</sup> Nor can Mitchell complain that the Commonwealth introduced the prior conviction through a copy certified by the State of Ohio. The conviction was not used to enhance his sentence but was admitted pursuant to KRS 532.055. Finally, the Commonwealth's statements regarding Mitchell's prior probation violations and for the maximum punishment does not warrant review under the palpable error rule. Prosecutors are given wide latitude to persuade jurors to not deal lightly with a matter.<sup>9</sup>

The judgment is affirmed.

ALL CONCUR.

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<sup>8</sup> Brooks v. Commonwealth, Ky., 114 S.W.3d 818, 825 (2003).

<sup>9</sup> Jacobs v. Commonwealth, Ky., 551 S.W.2d 223, 226 (1977).

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