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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000706-MR

LARRY SMIDDY

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
INDICTMENT NO. 02-CR-00140

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: TACKETT AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, Senior Judge: On the night of October 10, 2002, Detective Danny Payne (Detective Payne) of the Leitchfield Police Department and Detective Corey Knochel of the Kentucky State Police (KSP) met with William Payne (Payne), a confidential informant (CI), in order to conduct a controlled

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

buy for OxyContin, a powerful prescription narcotic that contains oxycodone, a Schedule II controlled substance. The officers gave the CI ten \$10.00 bills, which Detective Payne had previously photocopied to maintain a record of the bills' serial numbers. They also gave Payne a micro-cassette recorder to record the transaction. The CI then went to the home of Larry Smiddy and purchased two OxyContin tablets from Smiddy for a total of \$100.00. Later that night, Detective Payne obtained a search warrant for Smiddy's residence. As a result of the search, the detectives found over one hundred oxycodone tablets. They also found over \$1,600.00 in cash on Smiddy's person, including the ten \$10.00 bills that had been given to Payne. And they found a full bottle of hydrocodone prescribed to Barry Wilkerson.

Smiddy was charged in an indictment with one count of trafficking in a controlled substance in the first degree and one count of being a persistent felony offender in the first degree.

On March 3, 2004, Smiddy's case proceeded to trial. The Commonwealth called the following witnesses: Detective Payne and Detective Knochel, the investigating officers; William Payne, the confidential informant; Denise Elliot, a forensic chemist with the KSP; and Barry Wilkerson, who allegedly obtained drugs from Smiddy. The detectives testified regarding

their investigation into Smiddy's drug activities, and Detective Payne testified extensively about the search of Smiddy's residence. The CI testified about the controlled buy that took place prior to the search. Denise Elliot described the results of the tests she performed on the drugs seized during the search. And Wilkerson testified that, a short time prior to the search, he gave a bottle of hydrocodone to Smiddy in exchange for a small number of OxyContin tablets.

In his defense, Smiddy called two witnesses: Nora Smiddy,² his wife, and Eugene Haycraft. Smiddy also testified on his own behalf. Nora testified that she had previously given pills to both Barry Wilkerson and William Payne. She also testified that Wilkerson had accidentally left his hydrocodone at the Smiddys' home prior to the search. Haycraft testified that on October 10, 2002, before the search was conducted, he had purchased a vehicle from Smiddy for \$1,100.00 in cash. Smiddy took the stand and denied selling drugs to Payne and alleged that a third person, Calvin Scott, was in his home on October 10th, and that Scott may have sold the tablets to Payne.

Smiddy was convicted of trafficking in a controlled substance in the first degree and of being a persistent felony offender in the first degree, and he was sentenced to fifteen

² Nora Smiddy was also indicted for drug offenses and had previously pleaded guilty.

years in prison. Alleging numerous trial errors, Smiddy has appealed his convictions to this Court.

I. THE TRAFFICKING INSTRUCTION

During the search of Smiddy's residence, the detectives found a total of twenty-nine morphine tablets, twenty-one in a prescription container that had been prescribed to Smiddy and eight tablets outside a proper container. Later at trial, a trafficking instruction was tendered that stated that the jurors could convict Smiddy of trafficking if they believed beyond a reasonable doubt that he possessed oxycodone and/or morphine with the intent to sell or transfer. Smiddy objected to this instruction and argued that the Commonwealth had presented no evidence that Smiddy had illegally possessed morphine. The trial court agreed that the Commonwealth had offered no evidence that Smiddy had trafficked in morphine, but the court nevertheless submitted the tendered trafficking instruction.

On appeal, Smiddy insists that the trafficking instruction was not supported by the evidence adduced at trial and argues that the trial court erred because it was required to only give instructions that were supported by the evidence.³

³ Ky. R. Crim. Proc. (RCr) 9.54; Parker v. Commonwealth, 279 S.W.2d 1, 3 (Ky. 1955).

In Hayes v. Commonwealth,⁴ the Supreme Court held that an instruction which presents an alternate theory of guilt is proper and will not violate the requirement of unanimity found in Section 7 of the Kentucky Constitution, if any alternate theory contained in the instruction is reasonably supported by evidence adduced at trial. In Burnett v. Commonwealth,⁵ the same court concluded if such an instruction is submitted to the jury, the Commonwealth must show that it has met its burden of proof regarding all of the alternate theories presented in the instruction.⁶ This insures that all the jurors voted to convict the defendant on a theory that was supported by the evidence.⁷ If an alternate theory is not supported by the evidence, the defendant's constitutional right to a unanimous verdict will have been violated. Such a violation constitutes reversible error and is not subject to harmless error analysis.⁸ In other words, when a jury instruction presents alternate theories of guilt, the Commonwealth is required to prove every element of every alternate theory beyond a reasonable doubt.⁹

In the present case, two theories of guilt regarding trafficking were presented to the jury: (1) Smiddy was guilty of possessing oxycodone with intent to sell or transfer it,

⁴ 625 S.W.2d 583, 584 (Ky. 1981).

⁵ 31 S.W.3d 878 (Ky. 2000).

⁶ Id. at 883.

⁷ Id.

⁸ Id.

⁹ Id. at 884.

and/or (2) Smiddy was guilty of possessing morphine with intent to sell or transfer it. So to sustain a unanimous verdict under this instruction, the Commonwealth was required to prove both theories beyond a reasonable doubt.

During the Commonwealth's case-in-chief, it presented little evidence regarding morphine. In fact, the word "morphine" was only mentioned some eight times. During Detective Payne's testimony, morphine was mentioned twice. Once, while testifying regarding a "laundry list" of prescription containers that had been found in Smiddy's residence, the detective testified that he found a prescription container for morphine, which had been prescribed to Smiddy. And, during cross-examination, Smiddy's attorney asked the detective if he had confiscated this container, and the detective answered "yes". While the detective was testifying, the prosecutor asked him no questions regarding morphine.

Later, during the testimony of Denise Elliot, the prosecutor began handing the forensic chemist various prescription containers, and, with each container, she would testify regarding the results of the tests run on tablets found in each container. During this rather lengthy process, the chemist testified that one container was labeled "morphine," had been prescribed to Smiddy and contained twenty-one morphine tablets. The prosecutor asked Elliot if morphine was a

"scheduled" drug and the chemist answered that it was a Schedule II controlled substance. The prosecutor also asked the chemist to identify again the label on the container, which the chemist did. Later, the chemist testified that another container was labeled "oxycodone", had been prescribed to Nora Smiddy and contained oxycodone tablets along with seven morphine tablets. When asked whether oxycodone and morphine were the same, the chemist replied "no". Later still, the prosecutor handed the chemist an unlabelled container, and the chemist testified that the container contained numerous oxycodone tablets and one morphine tablet. After this, the prosecutor asked no more questions regarding morphine.

According to the Supreme Court of Kentucky, it has never been legally defined how many tablets of a controlled substance must be possessed by a person in order to support a conviction for possession of a controlled substance with intent to sell.¹⁰ The Court stated that possession of several different controlled substances outside their proper containers may be sufficient to support a conviction for unlawful possession of a controlled substance.¹¹ However, the Court held that evidence that a controlled substance was hidden in the ceiling of a criminal defendant's residence was sufficient to support a conviction for possession with intent to sell since hiding a

¹⁰ Dawson v. Commonwealth, 756 S.W.2d 935, 936 (Ky. 1988).

¹¹ Id.

controlled substance in the ceiling was incongruous with possession for personal use.¹²

In the present case, the Commonwealth offered evidence that Smiddy possessed a large quantity of oxycodone. In fact, Detective Payne found two bottles of oxycodone hidden in an open umbrella that was hanging upside down from the ceiling of Smiddy's residence. Like Dawson, this oxycodone found in the umbrella was so incongruous that it was sufficient to convince a jury that Smiddy possessed the oxycodone, not for personal use, but with intent to sell.

However, the Commonwealth presented no such evidence regarding morphine. It merely offered evidence that twenty-one morphine tablets were found in their proper container and that eight tablets were found outside a proper container. In fact, the Commonwealth never tried to connect the morphine to any of Smiddy's other drug activities. In short, the Commonwealth simply failed to adduce sufficient evidence to prove beyond a reasonable doubt that Smiddy was guilty of possessing morphine with intent to sell. Consequently, the instruction was not supported by the evidence, and the trial court erred when it submitted the instruction to the jury. Thus, we reverse Smiddy's conviction and remand to Grayson Circuit Court with directions to grant Smiddy a new trial.

¹² Id.

II. OTHER ALLEGED ERRORS

Since we reverse Smiddy's conviction based on the erroneous jury instruction, it is not necessary for us to address the remainder of Smiddy's alleged errors, but we will address those likely to re-occur during retrial.

A. Prior Bad Acts

At trial, Barry Wilkerson testified that he obtained OxyContin from Smiddy. On appeal, Smiddy argues that the trial court erred when it allowed Wilkerson to testify about this prior drug transaction. According to Smiddy, Wilkerson's testimony was not probative and was highly prejudicial. And since the prior drug transaction between Wilkerson and Smiddy constituted a prior bad act, Smiddy contends, it was inadmissible.

According to Kentucky Rules of Evidence (KRE) 404(b)(1), prior bad acts are admissible if offered to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" In the present case, Wilkerson testified that he gave Smiddy a full bottle of hydrocodone in exchange for a small number of OxyContin tablets. This testimony was relevant and admissible since it tended to prove that Smiddy possessed oxycodone with intent to sell or

transfer it, and intent was genuinely in dispute at trial.¹³ Thus, the trial court did not err when it admitted this testimony.

B. Photographs

During the Commonwealth's case-in-chief, photographs were introduced of a video camera, a saw and various pieces of jewelry found during the search of Smiddy's home. Smiddy's objection to the introduction of these photographs was overruled.

On appeal, Smiddy argues that these photographs were irrelevant. Since the photographs were of expensive items, the Commonwealth introduced them to suggest that the only way Smiddy could have afforded such items was by selling drugs. Smiddy argues that the photographs were not relevant and were prejudicial. Thus, he contends, his due process rights were violated when the photographs were admitted in evidence.

Smiddy is correct that for a photograph to be admitted into evidence it must have some probative value.¹⁴ However, the photographs were relevant since they were probative regarding Smiddy's ability to afford such items when he appeared to have no occupation. Smiddy is also correct that just because a photograph is probative does not mean it is admissible. If a photograph's prejudicial effect outweighs its probative value,

¹³ See Walker v. Commonwealth, 52 S.W.3d 533 (Ky. 2001).

¹⁴ Wager v. Commonwealth, 751 S.W.2d 28, 31 (Ky. 1988).

it is inadmissible.¹⁵ But Smiddy has failed to show any prejudicial effect. Since courts in the Commonwealth follow a liberal policy regarding the admissibility of photographs that are otherwise relevant, the trial court did not err when it admitted these photographs.¹⁶

C. Witness' comment regarding Smiddy's culpability

At trial, during direct examination, the prosecutor asked the CI how Smiddy earned his "living". Payne replied, "[b]y selling drugs." Smiddy objected and moved for a mistrial. The trial court denied Smiddy's motion for mistrial but did admonish the jury to disregard Payne's statement.

On appeal, Smiddy contends that Payne had commented on the ultimate issue, whether or not Smiddy was guilty. Smiddy insists that the Commonwealth, through the CI's testimony, intruded on the jury's exclusive province to determine culpability. Thus, when the trial court denied Smiddy's motion for a mistrial, it violated his due process rights.

We agree that the CI's testimony was inadmissible. However, the trial court admonished the jury to disregard the CI's testimony. And a court's admonition is presumed to remove the prejudice which prompted it in the first place.¹⁷ Since the

¹⁵ Clay v. Commonwealth, 867 S.W.2d 200, 204 (Ky. App. 1993).

¹⁶ Gall v. Commonwealth, 607 S.W.2d 97, 106 (Ky. 1980).

¹⁷ Clay v. Commonwealth, supra, note 15, at 204.

trial court properly admonished the jury, it cured any defect that was caused by the CI's testimony.

D. Impeachment with prior felony convictions

At trial, Haycraft, one of Smiddy's witnesses, was asked on cross-examination if he had been convicted of a felony. Haycraft responded that he had. The prosecutor then moved the trial court for permission to further explore Haycraft's felony convictions since she believed he was biased against the prosecution. Over Smiddy's objection, the court granted the Commonwealth's motion. The prosecutor then asked in what court and by what prosecutor had Haycraft been convicted. Haycraft responded that he had been convicted in the same court by the same prosecutor.

During direct examination, Smiddy testified that he had been charged with "everything" but never with dealing drugs. On cross-examination, the prosecutor asked whether he had been convicted of criminal possession of a forged prescription on three previous occasions. Smiddy answered that he had been so convicted, but he explained that his prior convictions stemmed from his addiction to pills.

On appeal, Smiddy points out that, according to Commonwealth v. Richardson,¹⁸ a prosecutor may ask a witness if he has been convicted of a felony in order to impeach the

¹⁸ 674 S.W.2d 515, 517 (Ky. 1984).

witness. If the witness answers "yes", then the prosecutor may not inquire any further, and the court must inform the jury that it may only consider the witness' prior conviction if it affects his credibility. But, if the witness answers "no", then the prosecution may impeach the witness with all of his prior felony convictions. In the present case, the prosecutor, according to Smiddy, went beyond the scope of the holding in Richardson and solicited inadmissible testimony from both Haycraft and himself, thereby violating his due process rights.

Regarding the use of Smiddy's prior convictions, Smiddy opened the door for their introduction when he testified that he always used controlled substances as prescribed. Smiddy's prior convictions for possession of forged prescriptions directly contradict this assertion.

As to Haycraft, the Commonwealth went beyond the scope of the holding in Richardson. The Commonwealth asked if Haycraft had a prior felony and he answered "yes". When the prosecutor inquired further, she violated Richardson. Despite this, the violation was harmless error.¹⁹ However, the Commonwealth is cautioned, upon retrial, to adhere to the requirements set forth in Richardson.

¹⁹ See Hodge v. Commonwealth, 17 S.W.3d 824, 848 (Ky. 1999).

CONCLUSION

Since the trafficking instruction was not supported by the evidence, we reverse the judgment of conviction and remand this case to Grayson Circuit Court with directions to grant Smiddy a new trial.

ALL CONCUR.

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