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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000762-MR

LEONA WILLIAMS — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN DANIEL COMBS, JUDGE
ACTION NO. 02-CR-00262-002

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 2004-CA-000763-MR

RONNIE WILLIAMS — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN DANIEL COMBS, JUDGE
ACTION NO. 02-CR-00262-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE: These appeals arising from the same criminal prosecution have been designated to be heard together and we have elected to resolve them in one opinion. Ronnie and Leona Williams, husband and wife, appeal their convictions for possession of a controlled substance in the first degree and possession of drug paraphernalia for which they were sentenced to five years' imprisonment on the felony charge and twelve months on the misdemeanor, to be run concurrently. The primary issues, which are common to both appeals, focus upon 1) alleged discovery violations by the Commonwealth; 2) error in permitting introduction of evidence of prior bad acts; 3) error in allowing impermissible bolstering of the testimony of confidential informants; and 4) the cumulative effect of these errors. Appellant Ronnie Williams also complains that he was denied effective assistance of counsel by joint representation with his wife and that there was insufficient evidence to convict him of possession of either controlled substances or drug paraphernalia. Finding no reversible error in any of these contentions, we affirm the judgment of conviction in each appeal.

[1] 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.

The Williamses were indicted by the Pike County grand jury on charges of trafficking in a controlled substance in the first-degree and possession of drug paraphernalia stemming from an investigation by the Kentucky State Police Drug Task Force. In the course of executing a search warrant on the appellants' residence on September 24, 2002, detectives found evidence of controlled substances (oxycontin and cocaine) and a significant amount of cash in Mrs. Williams' purse which was located in a bedroom adjacent to the kitchen. During the pre-trial phase of the proceedings, appellants entered into a waiver of dual representation and each executed the form required by RCr 8.30. Appellants were ultimately convicted of the lesser included offense of possession of a controlled substance and possession of drug paraphernalia.

Prior to sentencing, appellants sought a new trial on the basis that the Commonwealth had failed to provide them with a document styled "Witness Instructions, Guidelines and Restrictions" outlining restrictions placed upon a cooperating witness in the course of work as a drug informant for the Kentucky State Police. The alleged relevance of the failure to provide the defense with this document is that it deprived appellants of an opportunity to present to the jury, through cross-examination, a true picture of the credibility of a cooperating prosecution witness, Robin Cavins. After hearing

two oral arguments and reviewing memoranda on this issue, the trial judge denied the requested relief on the basis that appellants had failed to demonstrate prejudice in not having been given the document prior to trial. The subsequent imposition of sentences of five years' imprisonment precipitated these appeals.

Appellants' first argument centers upon the alleged discovery violation. We, like the trial judge, find no basis for concluding that their ability to properly cross-examine informant Robin Cavins was materially compromised by the Commonwealth's failure to provide them with pre-trial access to her agreement with the task force. Review of the witness's testimony, in particular the thorough cross-examination into her criminal history and history of drug use, dispels any suggestion that appellants were prejudiced by not having this document pre-trial. At best, the document would have permitted appellants to show that Cavins was in violation of several terms of the agreement, information which was in fact brought to the attention of the jury in another form. Thus, we fully concur in the trial judge's assessment that the failure to provide the document is subject to a harmless error analysis[2] and appellants' objection cannot overcome that hurdle. Citing the criteria set

[2] Weaver v. Commonwealth, 955 S.W.2d 722 (Ky. 1997).

out in Strickler v. Greene,[3] the trial judge correctly concluded that the document did not on its face provide any favorable impeaching information. While it had the potential to be utilized for impeachment purposes, denial of the ability to use it for that purpose constituted harmless error because appellants' cross-examination of Cavins, and of the investigating officers, had previously placed before the jury information relative to the substance of her violations of task force rules. The impact of this information on the witness's credibility was the same whether introduced to show she violated the terms of her agreement with the task force or introduced to outline a substantial history of criminal behavior and drug abuse. On these facts, the trial judge did not err in concluding appellants had failed to demonstrate the essential element of prejudice.

Appellants next challenge as error admission into evidence testimony concerning other crimes or bad acts in violation of KRE 404(b). Again, we perceive no error. Appellants cite as violations of this rule the prosecutor's comment that appellants are a "family of drug dealers;" testimony that appellants' son had been convicted of trafficking in oxycontin and cocaine; testimony from informants that appellants' son had told them that he had gotten the drugs he

[3] 527 U.S. 263, 144 L.Ed.2d 286, 119 S.Ct. 1936 (1999).

was selling from his parents; testimony that appellants kept drugs in their home; testimony concerning previous drug use by appellant Ronnie Williams; admission into evidence testimony concerning untested substances found during the search of appellants' house; and testimony concerning "illusory" drugs never found during the search of appellants' house.

KRE 404(b) proscribes introduction of other crimes, wrongs or bad acts "to prove the character of a person in order to show action in conformity therewith" subject to exceptions such as those delineated in subsection (1) of that rule. Evidence of this type may be admissible however:

> If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

In Bell v. Commonwealth,[4] the Supreme Court of Kentucky reaffirmed its prior holding that:

> [E]vidence of criminal conduct other than that being tried, is admissible only if probative of an issue independent of character or predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character.

Quite recently, the Supreme Court cited Bell in reiterating the criteria for admission of such evidence:

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[4] 875 S.W.2d 882, 889 (Ky.1994).

> In determining the admissibility of other crimes evidence, three inquires need to be separately addressed: (1) relevance, (2) probativeness, and (3) prejudice. We will not disturb a trial court's decision to admit evidence absent an abuse of discretion, and there was no such abuse here.[5]

Applying the Bell criteria to the admission of the allegedly improper evidence in appellants' case, we find no abuse of the discretion afforded the trial court.

First, as to the prosecutor's statement, comment by the prosecutor is not evidence and, although it might be objectionable on some other basis, it would not fall within the purview of KRE 404(b). As to the remaining allegations of objectionable evidence, we are convinced each constitutes proper KRS 404(b) plan or "course of conduct" evidence and as such was properly admissible. The proper application of this type of evidence in a controlled substance case was examined by the Supreme Court in Fulcher v. Commonwealth.[6] The rationale under which the Court upheld admission of similar evidence proves instructive in this situation:

> Appellant moved to exclude any evidence of his having ingested or manufactured methamphetamine on another occasion, citing KRE 404(b). That rule proscribes admission of other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith. However,

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[5] Matthews v. Commonwealth, 163 S.W.3d 11, 19 (Ky. 2005).

[6] 149 S.W.3d 363, 379 (Ky. 2004).

> such evidence is admissible if relevant for a purpose other than to prove character, *e.g.,* to prove motive, opportunity, intent, etc. KRE 404(b)(1); *Tamme v. Commonwealth,* Ky., 973 S.W.2d 13, 29 (1998). Evidence that Appellant had participated in the manufacture of methamphetamine on his property only two days before the July 24th search was relevant to disprove his defense that he was "framed," *i.e.,* someone else had "planted" the chemicals and equipment on his property without his knowledge. *Cf. Young v. Commonwealth,* Ky., 25 S.W.3d 66, 71 (2000) (evidence that defendant had previously manufactured methamphetamine admissible to disprove his claim that he did not know how to manufacture methamphetamine). Evidence that Appellant had ingested methamphetamine was relevant to prove a motive to manufacture it. *United States v. Cunningham,* 103 F.3d 553, 557 (7th Cir.1996) (evidence of nurse's Demerol addiction admissible to show motive to tamper with Demerol-filled syringes); *State v. Kealoha,* 95 Hawaii 365, 22 P.3d 1012, 1027 (App.2000) ("Evidence that Defendant sold methamphetamine to finance her cocaine use is probative of whether Defendant had a motive to manufacture methamphetamine and her intent to do so."); *cf. Adkins v. Commonwealth,* Ky., 96 S.W.3d 779, 793 (2003) (evidence of drug habit, along with evidence of insufficient funds to support habit, relevant to show motive to commit robbery in order to obtain money to buy drugs). The trial judge did not abuse his discretion in determining that the prejudicial effect of this evidence did not substantially outweigh its probative value. KRE 403; *Commonwealth v. English,* Ky., 993 S.W.2d 941, 945 (1999).

Similarly, the evidence admitted in the course of the testimony of the detectives and confidential informants concerning the very recent drug conviction of appellants' son, as to what he

told informants as to the source of those drugs, as to there routinely being drugs in appellants' home and as to Ronnie's previous drug use was all relevant to and probative of Ronnie's claim that he had no idea there were drugs in the house (knowledge).

Furthermore, the evidence complained of was plainly admissible under the "common scheme or plan" exception to the general prohibition of KRE 404(b). Application of that component of the exception has also been the subject of Supreme Court analysis:[7]

> The "common scheme or plan" exception to the general rule of exclusion first appeared in our jurisprudence in a dissenting opinion in *Raymond v. Commonwealth,* 123 Ky. 368, 96 S.W. 515 (1906). "The rule is that where several felonies are connected together as part of one common scheme and all tend to a common end, they may be given in evidence." *Id.,* 96 S.W. at 518 (Hobson, C.J., dissenting) (citing *People v. Stout,* 4 Parker, Cr.R. 71 (N .Y.), 1 Wigmore on Evidence § 304, and 1 Jones on Evidence § 144). In *Douglas v. Commonwealth,* 307 Ky. 391, 211 S.W.2d 156 (1948), our predecessor court, quoting from 20 Am.Jur. *Evidence* § 310, referred to a common scheme or plan as one "embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others." *Id.,* 211 S.W.2d at 157. Thus, "common scheme or plan" was intended to refer to the fact that the charged offense was but one of two or more related criminal acts.
> The label "common scheme" was used under pre-existing law to explain the

[7] Commonwealth v. English, 993 S.W.2d 941, 943-44 (Ky. 1999).

> admissibility of evidence revealing the commission of uncharged crimes which were part and parcel of a greater endeavor which included the charged offense. For example, in a case involving a charge of armed robbery evidence is introduced to show that the getaway car had been stolen by the defendant shortly before the robbery; it is possible to see the auto theft (the uncharged other crime) and the armed robbery (the charged offense) as part of a common scheme.
> Commentary to KRE 404(b)(1), Evidence Rules Study Committee, Final Draft (1989).

Clearly, the testimony was directed to proving that the drugs found in the search of appellants' residence were part of an on-going course of conduct related to the possession of and trafficking in controlled substances. The relevance and probative value of the testimony clearly outweighed its prejudicial impact.

Finally, we are of the view that the reference in the detectives' testimony as to what was not found in the search of the residence and as to what substances were not tested, did not constitute evidence against appellants. In any event, even if admission of this testimony was error, in view of the totality of the evidence presented, it must be considered harmless.

Turning to Ronnie's complaint about dual representation, his execution of the proper waiver obviates his current claim of error, as does the fact that he never brought any subsequent complaint about his counsel to the attention of

the trial judge. A legitimate claim of ineffective assistance of counsel cannot be predicated upon mere hindsight. Because it appears that Ronnie's theory of the case was placed before the jury, we find no palpable evidence of the deprivation of a fair trial.

Ronnie also argues that there was insufficient evidence to support a finding that he was guilty of possessing the illegal substances or paraphernalia. We disagree. Present in this record is ample evidence of constructive, if not actual, possession. The fact that the items seized had been located in Leona's purse does not, in and of itself, preclude a finding of constructive possession. When coupled with the testimony of the confidential informants, the fact that the contraband was located in an area subject to Ronnie's dominion and control is clearly sufficient to establish the requisite connection with items seized in the search of his residence.[8]

Appellants' penultimate complaint is that the Commonwealth undermined the fairness of the trial by engaging in a highly prejudicial tactic of bolstering the testimony of their cooperating witnesses. Unfortunately, appellants have failed to specify exactly what testimony constituted improper bolstering or how that issue has been preserved for review. Given those shortcomings, we decline to address this contention.

[8] Clay v. Commonwealth, 867 S.W.2d 200 (Ky.App. 1993).

Finally, appellants argue that the cumulative effect of errors and misconduct on the part of the Commonwealth deprived them of a fair trial. Our review of appellants' contentions in this case has failed to disclose any error, much less multiple errors, which could be said to have infringed their constitutional rights.[9] They received a fundamentally fair trial with assistance of counsel who succeeded in limiting their convictions to the lesser included offense of possession. Accordingly, appellants are not entitled to a new trial.

The judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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[9] Sholler v. Commonwealth, 969 S.W.2d 706 (1998).