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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000879-MR

ANTHONY JOHNSON

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 02-CR-00210

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

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

TACKETT, JUDGE: Anthony Johnson appeals from a judgment of the Graves Circuit Court convicting him of trafficking in cocaine and sentencing him to ten years' imprisonment. He argues that the trial court erroneously allowed the prosecution to comment on his post-arrest silence, improperly refused to allow cross-

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.

examination of the confidential informants, and failed to hold a competency hearing after ordering a mental evaluation on him. We find that the only error committed by the trial court, the failure to hold a competency hearing, was harmless and, thus, the judgment is affirmed.

Johnson was arrested as the result of a drug sale to two confidential informants, a father and son duo named Larry Wilson and Larry Wilson, Jr. The Wilsons were facing trafficking charges when they agreed to work with police in an undercover operation. They informed their handler that they could buy drugs from a man they called Shuteye. After Kentucky State Police Detective John Saylor determined Shuteye's identity (Johnson), he authorized the Wilsons to attempt a buy. Johnson was not on a list of targets that police were investigating.

The transaction took place on March 12, 2002, and police procedures were followed to insure that the informants were not carrying any contraband when they went into Johnson's home. Wilson, Jr. wore a recording device and carried the money Saylor gave them. After buying half an ounce of cocaine from Johnson, the Wilsons met with Saylor and another officer who again searched them and their car. They each gave an account of what happened during the buy, and Saylor later listened to the tape. Johnson was arrested eight days later and charged with trafficking and some misdemeanor charges which were severed.

Prior to the trial, Johnson requested a competency evaluation which was performed by Kentucky Correctional Psychiatric Center (KCPC). No evidentiary hearing was held after the competency report was sent to the trial court.

During the trial, the Wilsons testified for the Commonwealth about the events surrounding their purchase of cocaine from Johnson. On cross-examination, the Commonwealth objected to certain questions about Wilson, Jr.'s charges and Wilson's mental health counseling. The trial court sustained these objections. Johnson testified in his own defense. He also presented the testimony of Woody Frazier, a surprise alibi witness whose name was not even mentioned in *voir dire*. Frazier told the jury that Johnson had attended a birthday party with him on the day the Wilsons bought cocaine and, thus, could not have been the person who sold them drugs. The prosecutor questioned both Frazier and Johnson about the failure to inform anyone of Frazier's existence prior to trial. Johnson objected claiming that this amounted to improper commentary on his post-arrest silence, but the trial court overruled the objection. The jury convicted Johnson. He was sentenced to ten years' imprisonment, and this appeal followed.

Johnson argues that the trial court allowed the Commonwealth to improperly comment on his post-arrest silence. During the defense portion of the case, Johnson called Frazier

as an alibi witness. As his name had not previously been mentioned, the trial court first questioned the jury to make sure that none of them knew him, then allowed him to be called as a witness. Frazier testified that Johnson accompanied him to a birthday party in Fulton on March 12, and this party was always held the same date each year. On cross-examination, the Commonwealth asked, over the defense's objection, whether Frazier had heard about Johnson's charges for the first time that day and whether they had talked about the charges. While Johnson was on the witness stand, the Commonwealth asked why he had never mentioned Frazier before. In closing argument, the prosecutor expressed his opinion that Frazier was Johnson's supplier for the cocaine sold to the Wilsons and that Johnson failed to mention him earlier in order to prevent the Commonwealth from investigating Frazier's background.

The Fifth Amendment grants criminal defendants the right against self incrimination, and the prosecution is not allowed to draw an inference that a defendant's choice to exercise that right implies guilt. However, the prosecution is allowed to test on cross-examination a witness's veracity. The tenor of the questions objected to by Johnson does not demonstrate an intent to imply that he was guilty because he failed to make a statement to police after his arrest. These questions were intended to cast doubt on the credibility of

Frazier's testimony. The Commonwealth sought to draw attention to the fact that Frazier was attempting to account for Johnson's whereabouts on the date of the offense almost two years after it occurred. The trial court was within its discretion to allow questions of this sort aimed at challenging the witness's memory and suggesting a possible last-minute fabrication.

Johnson further contends that the trial court improperly limited his cross-examination of the two confidential informants. Wilson, Jr. testified that he was acting as a confidential informant because he had been arrested for trafficking in narcotics. He stated that he told police he would be able to buy cocaine from Johnson, who lived a few blocks from the Wilson home. On the Wilsons' first visit to Johnson, no one was home, so they went back later that afternoon. Wilson, Jr. told the jury that he and his father waited a few minutes for Johnson's supplier to bring the cocaine. He said he paid Johnson \$600.00 that Detective Saylor had given him in exchange for half an ounce of cocaine. The transaction took place in Johnson's bathroom while Wilson, Jr.'s father waited in another room.

On cross-examination, Wilson, Jr. admitted to using cocaine, although he denied being addicted. He stated that, before working as a confidential informant, he had been arrested for two trafficking charges. Wilson, Jr. testified that his

charges had been dismissed without prejudice; however, the Commonwealth objected to Johnson's attempt to ask Wilson, Jr. whether he knew that the charges could be reinstated at any time. The objection was sustained. Johnson cites Adcock v. Commonwealth, 702 S.W.2d 440 (Ky. 1986), in support of his argument that the trial court impermissibly limited his cross-examination. We disagree. The jury was furnished with the information that Wilson, Jr., who was facing serious criminal charges, received an extremely favorable disposition after he became a confidential informant. It would be insulting to contend that jurors had insufficient evidence to determine whether Wilson, Jr.'s bias in favor of the Commonwealth distorted his testimony against Johnson.

Wilson testified that he was not present in the bathroom when his son bought the cocaine, but he looked at the bag afterward and stated that it did not look like half an ounce. On cross-examination, he admitted that he had been charged with two counts of trafficking before he began working as a confidential informant. He stated that he could have received up to twenty years' imprisonment, but he believed that his plea agreement had resulted in a fine and probation with a condition that he receive treatment. Defense counsel introduced the judgments against Wilson showing that he had been sentenced to two twelve-month terms, to be served concurrently. Wilson

stated that he did not recall that being his sentence. He denied any problems with memory or mental illness, but admitted that he was receiving counseling. The trial court sustained the Commonwealth's objection to any further questions along those lines. Johnson argues that he was entitled to place before the jury information that Wilson was mentally deficient.

Commonwealth v. Huber, 711 S.W.2d 490 (Ky. 1986). However, Johnson had failed to show any abuse of the trial court's discretion to limit cross-examination and, moreover, has not placed any evidence of Wilson's alleged mental deficiency into the record by avowal.

Johnson's most persuasive argument relates to the trial court's failure to hold a competency hearing after ordering him to be evaluated. Kentucky Revised Statute 504.100 states as follows:

(1) If upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition.

(2) The report of the psychologist or psychiatrist shall state whether or not he finds the defendant incompetent to stand trial. If he finds the defendant is incompetent, the report shall state:

(a) Whether there is a substantial probability of his attaining competency in the foreseeable future; and

(b) What type treatment and what type treatment facility the examiner recommends.

(3) After the filing of a report (or reports), the court shall hold a hearing to determine whether or not the defendant is competent to stand trial.

Johnson correctly points out that the language of the statute is mandatory; therefore, the trial court erred by failing to hold a competency hearing after Johnson was evaluated. The standard of review on appeal is whether a reasonable judge, in the same situation as the trial judge whose failure to hold the hearing is being evaluated, would have doubted the defendant's competency. West v. Commonwealth, 161 S.W.3d 331 (Ky. App. 2004). If a reasonable judge would not have experienced doubt about Johnson's competency, then the error is harmless.

An initial evaluation reported that Johnson had moderate mental retardation and was possibly not competent to stand trial, but also the evaluator felt that Johnson was not performing up to his capacity and suggested a full evaluation at KCPC. The trial judge then ordered a thirty-day stay at KCPC in order to have Johnson more fully evaluated. This second report showed only mild mental retardation. Further, the examining doctor stated that Johnson's performance on a test designed to detect malingering had strongly indicated that he was deliberately underperforming. The report also stated that Johnson seemed to have an adequate understanding of the charges against him and the judicial process. Consequently, the KCPC

report found Johnson competent to stand trial. Upon receiving this report, Johnson's trial counsel did not ask for a competency hearing, nor did the trial court schedule one. During trial, Johnson cooperated with his attorney and was able to testify coherently in his own defense. Since a reasonable judge would not have doubted Johnson's competency based on these facts, the trial court's failure to order a competency hearing is harmless error.

For the foregoing reasons, the judgment of the Graves Circuit Court is affirmed.

ALL CONCUR.

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