

RENDERED: FEBRUARY 3, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002354-MR

KENNETH WAYNE THOMAS

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
INDICTMENT NO. 04-CR-00123

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM AND McANULTY, JUDGES; PAISLEY, SENIOR JUDGE.¹

PAISLEY, SENIOR JUDGE: Kenneth W. Thomas appeals from a judgment of conviction and sentence entered by the Hardin Circuit Court. Thomas was convicted of two counts of trafficking in a controlled substance in the first degree, one count of trafficking in a controlled substance near a school and of being a persistent felony offender. Finding no error, we affirm.

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

In 2002, Barry Howard was a paid confidential informant for the Hardin County Sheriff's Office. According to the record, Howard had participated in roughly 106 controlled drug purchases. On July 30, 2002, Howard arranged to buy drugs from Thomas. Prior to the drug buy, Howard met with Detectives Randy Gibbs and Steve Witte. The detectives searched him and gave him money to buy drugs. Howard then met with Thomas and purchased some marijuana from him. On August 5, 2002, Howard arranged another drug buy with Thomas. Once again, prior to the buy, Howard met with the detectives. After being searched, the detectives gave Howard \$100.00 to purchase drugs. Howard then purchased methamphetamine from Thomas. On August 14, 2002, Howard again purchased methamphetamine from Thomas.

In February 2004, a Hardin County Grand Jury indicted Thomas on two counts of trafficking in a controlled substance in the first degree, one count of trafficking in a controlled substance near a school and of being persistent felony offender in the first degree. Thomas proceeded to trial on September 10, 2004 and was convicted on all counts. In October 2004, the Hardin Circuit Court sentenced Thomas to serve a total of ten years in prison. Now, Thomas seeks relief from his criminal conviction.

SUFFICIENCY OF THE EVIDENCE

On appeal, Thomas questions the sufficiency of the evidence. Thomas avers that there were numerous discrepancies between Detective Gibbs's testimony at trial, his testimony before the grand jury and his testimony at the preliminary hearing. And there were numerous discrepancies between Howard's testimony at trial and Detective Gibbs's testimony at trial.

Relying on State v. Phillips, 585 S.W.2d 517 (Mo. Ct. App. 1979), an opinion from the Missouri Court of Appeals, Thomas argues that the uncorroborated testimony of a confidential informant is not sufficient to sustain a conviction. Thomas also cites Sisson v. State, 710 N.E.2d 203 (In. App. 1999), an opinion from the Indiana Court of Appeals, for the proposition that if a witness's testimony is very uncertain, then an appellate court may substitute its judgment regarding the witness's credibility for that of the jury's. According to Thomas, Detective Gibbs's testimony was very uncertain. In addition, Thomas insists that Howard's testimony was the only evidence that connected Thomas to drug trafficking. And he insists that Howard's testimony was not only uncorroborated but was also very uncertain. Thus, Thomas reasons that the evidence adduced at trial was insufficient to sustain his conviction.

Although Thomas claims to take issue with the sufficiency of the evidence, in reality, he is arguing that the

Commonwealth's witnesses were not credible. Relying on Sisson, he urges us to substitute our judgment regarding the witnesses' credibility for that of the jury's. However, the holding in Sisson is contrary to the law here in the Commonwealth of Kentucky. In the Commonwealth, it has long been held that the jury, not an appellate court, has the sole responsibility to weigh the evidence and judge the credibility of all witnesses that testify before it. Dunn v. Commonwealth, 151 S.W.2d 763, 764-765 (Ky. 1941). While a jury is not bound to accept the testimony of any witness as true, it has the discretion to believe all of a witness's testimony, some of it or none of it. Dunn v. Commonwealth, supra and Gillispie v. Commonwealth, 279 S.W. 671, 672 (Ky. 1926). The numerous minor discrepancies set forth in Thomas's brief do not cast doubt on the sufficiency of the evidence. They merely reflect on the credibility of the Commonwealth's witnesses. We cannot substitute our judgment regarding credibility for that of the jury's. Thus, we defer to the jury, which obviously found the Commonwealth's witnesses to be credible since it convicted Thomas on all counts.

PROSECUTORIAL MISCONDUCT

According to Thomas, the prosecutor made the following remarks during his closing argument:

Have you heard one thing that should cause you to question the truth and veracity of

Mr. Howard? Have you heard one thing?
You've heard nothing.

Have they brought anything in here?

It's unrefuted.

The only person who knows if there was a
hand to hand transfer of drugs in the car
with tinted windows is Kenny Thomas.

According to Thomas, by making these four statements, the prosecutor was impermissibly commenting upon Thomas's Fifth Amendment right to remain silent and not testify at trial. Thomas insists these statements show that the prosecutor hammered repeatedly on what Thomas did not say and did not prove at trial. Thomas reasons that this was prosecutorial misconduct so egregious that the trial court erred in not granting a mistrial.

We note that, at trial, Thomas only objected to the first comment listed above. The prosecutor made this statement in response to Thomas's attack on Howard's credibility during Thomas's closing argument; therefore, it was not a comment on Thomas's silence. The other three statements were not preserved for appellate review. However, since we initially found the fourth statement listed above to be the most troubling, we will briefly address it. The record reflects that, during one of the drug transactions, Thomas approached a vehicle owned by a Miss Grissim, interacted with an unknown occupant in the vehicle and

then gave Howard a small quantity of methamphetamine. During Thomas's closing argument, he complained that the evidence which the Commonwealth used to indict him was somehow insufficient for the Commonwealth to seek an indictment against Miss Grissim. In response to Thomas's complaint, which questioned the sufficiency of the evidence, the prosecutor made the last remark listed above. This remark was not a comment of Thomas's silence but was a rebuttal to Thomas's attack on the sufficiency of the evidence.

To determine if a prosecutor's remarks commented on a criminal defendant's right to remain silent, we look to see if the remarks were "manifestly intended to reflect on the accused's silence or of such a character that the jury would naturally and necessarily take [them] as such." Bowling v. Commonwealth, 873 S.W.2d 175, 178 (Ky. 1993). For a trial court to grant a mistrial there must be a manifest necessity for one. Kirkland v. Commonwealth, 53 S.W.3d 71, 76 (Ky. 2001). The record demonstrates that the prosecutor's statements were not intended to comment on Thomas's silence and did not render Thomas's trial fundamentally unfair. Id. Since there was no manifest necessity for a mistrial, the trial court did not err.

CHAIN OF CUSTODY

According to Thomas, a person known as Danny Payne picked up the drug evidence that had been tested by the Kentucky

State Police's forensic lab and delivered it to a person only known as E. Wilson. Thomas points out that neither Payne nor Wilson testified at trial; however, Thomas concedes that both individuals signed the bottom of the sheet showing the record of evidence.

On appeal, Thomas argues that because eighteen months has passed between the commission of the crimes and the indictment, the chain of custody was vitally important. Since neither Payne nor Wilson testified, Thomas insists that there was a fatal break in the chain of custody. Thus, he reasons that the trial court erred when it denied his motion for mistrial based on the alleged break in the chain of custody.

When reviewing a trial court's decision regarding the chain of custody, we will not reverse absent an abuse of the trial court's discretion. Thomas v. Commonwealth, 153 S.W.3d 772, 781 (Ky. 2004). The purpose for establishing a chain of custody is to insure that the physical evidence proffered is the same physical evidence that was involved in the alleged crime and that this physical evidence has remained materially unaltered. Id. at 779. However, having said that, it is not necessary for the party offering the evidence to establish a perfect chain of custody. Rabovsky v. Commonwealth, 973 S.W.2d 6, 8 (Ky. 1998). Nor is the party required to eliminate all possibility of tampering or misidentification. Id. The party is

required to demonstrate with reasonable probability that the evidence has not been altered in any material way. Id. In addition, any gaps in the chain of custody go to the weight of the evidence not its admissibility. Id. Here, the Commonwealth produced evidence tracing the drugs from Detective Gibbs's possession to the possession of the chemist who tested and identified them. At trial, the chemist testified that once she had finished testing the drugs she re-packed them and re-sealed their package. Prior to opening the package at trial, she testified that the package showed no signs of tampering and appeared to be in the same condition as when she had re-sealed it. Thus, the Commonwealth demonstrated with reasonable probability that the drugs introduced at trial were the same drugs tested by the chemist and that the drugs tested by the chemist were the same drugs sold by Thomas. Moreover, the Commonwealth demonstrated with reasonable probability that the drugs had not been materially altered. The trial court did not abuse its discretion in admitting the drugs into evidence and denying Thomas's motion for mistrial.

KENTUCKY RULES OF CIVIL PROCEDURE (CR) 76.28

We note that CR 76.28(4)(c) states, "Opinions that are not to be published shall not be cited or used as authority in any other case in any court of this state." Despite the clear prohibition against citing unpublished opinions, Thomas's

counsel, a seasoned appellate attorney, violated CR 76.28(4)(c) and cited an unpublished opinion in Thomas's brief. We admonish appellate counsel for ignoring this civil rule and caution her against future violations.

The judgment of conviction is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa Bridges Clare
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky