

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002532-MR

CHARLES M. KIRBY

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 02-CR-00288

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

TACKETT, JUDGE: Charles M. Kirby appeals from the judgment of the Harlan Circuit Court finding him guilty of trafficking in a controlled substance in the first degree, for which he was sentenced to eight years' imprisonment. Kirby argues on appeal that a key piece of evidence, the recording of the transaction with the confidential informant, should not have been admitted because it was "mostly inaudible", rendering it untrustworthy.

We disagree that the court erred in admitting the recording, and affirm.

Kirby was charged with selling two eighty-milligram oxycodone pills to confidential informant Alfred Darrell Hall. Hall was a paid informant, making \$100 for each controlled sale in which he participated on behalf of the state police. Hall testified at trial that he had spoken with Kirby's granddaughter on the morning of June 25, 2002, about buying drugs. Hall contacted State Trooper Chris Thompson to set up the controlled purchase. On the evening of June 25, Hall was fitted with a recording device, searched, and given money to purchase the drugs. He met with Kirby at Kirby's home, purchased the pills, and returned to Thompson. Hall informed Thompson that he had purchased them from "Shorty" Kirby. The Appellant was indicted in December 2002, and convicted at trial in September 2004. This appeal followed.

At the trial, the Commonwealth produced testimony from Hall and Thompson about the controlled purchase. Hall identified Kirby as the man who sold him the drugs. The Commonwealth also introduced the tape recording of the transaction, with no objection from Kirby. Kirby's sole argument on appeal is that the recording was mostly inaudible during the actual controlled purchase, and that it was palpable error to admit the recording because of its poor quality. The

Commonwealth responds that at trial, counsel waived any objection, stating that the recording was "fairly clear" and not "mostly inaudible" in pre-trial conference. The Commonwealth points out that even though there is background noise and static, the tape shows that the conversation concerned the sale of drugs, and that the informant can be heard asking for two "eighties", discussing the price with the Appellant, asking for change, and if Appellant had any more pills left.

The trial court has the discretion to determine whether a tape should be excluded due to the quality of the recording. Norton v. Commonwealth, 890 S.W.2d 623, 636 (Ky. 1994). We perceive no clear error in the court's decision to admit the tape, especially given the lack of objection from defense counsel. There was no manifest injustice as required by R.Cr. 10.26 in reviewing an unpreserved issue for appeal. Accordingly, the judgment is affirmed.

ALL CONCUR.

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