

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000729-MR

DANNY WADE YORK

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 03-CR-00477

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; POTTER, SENIOR JUDGE.¹

COMBS, CHIEF JUDGE: Danny Wade York appeals from a final judgment and sentence of imprisonment of the McCracken Circuit Court. On January 6, 2005, a jury found York guilty of complicity to possession of a methamphetamine precursor, complicity to possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine, and

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

giving a false name to a police officer. He was sentenced to serve a total of ten (10) years at hard labor and was fined \$250.00. On appeal, York raises arguments relating to the sufficiency and admissibility of the evidence presented at his trial.

In the early morning hours of November 4, 2003, Deputy Sergeant John Parks of the McCracken County Sheriff's Department received a call reporting suspicious activity at Lot 43 in the Woodlawn Mobile Home Park. The mobile home on that lot belonged to Monty Kim Turner, a friend of York's. When Sergeant Parks arrived at Lot 43, he observed three men leaving the mobile home. The men placed two duffle bags into the back of a nearby pickup truck. When Parks attempted to detain the men, he succeeded in taking only one into custody -- Michael Burgess. Although the other two ran away, Parks was able to get a good look at one of them and identified him as Monty Kim Turner. He could not identify the second man. Burgess later identified Turner and York as the two men who had fled when Parks arrived. Turner and York were arrested several weeks later.

Captain John Hayden testified that the two duffle bags recovered from the back of the truck contained many items that are associated with the manufacture of methamphetamine: baggies, a new siphon pump with tubing, coffee filters, spoons, three pitchers, a strainer, Reynolds wrap, tarps, Liquid Fire,

camp fuel, tubing, a funnel, plastic bowls with lids, a folding stove, sterno stove fuel, and two two-liter bottles. Also in the duffle bags were four Ziploc bags containing 7.9 ounces of ground Sudafed (the equivalent of approximately 231 boxes of Sudafed or 11,000 tablets). The search also revealed nineteen lithium batteries with their metal casings removed -- some with the lithium strip exposed. A retro-fitted fire extinguisher containing anhydrous ammonia (not in an approved container) was recovered from the bed of the truck.

Inside the mobile home, police found a .38 semi-automatic handgun, a retro-fitted propane tank, an empty fire extinguisher cylinder, and paraphernalia for smoking methamphetamine. There was also a Wal-Mart receipt for the purchase of a coffee grinder, a folding stove, a plier set, a siphon pump, some spoons, and a CD case.

Evidence was presented at trial that Turner, York, and Burgess had gone on a shopping trip to Wal-Mart on the evening before the arrest. Burgess would not enter the store because he had recently been caught shoplifting there. He allegedly directed York to purchase a pair of pliers and two plastic pitchers (items which may be used in the manufacture of methamphetamine). York claimed that he did not pay attention to the details of the shopping because his presence at the Wal-Mart store was dictated by a different motive: to discover from

Burgess information regarding incidents in which York's van and Turner's trailer had been shot up. Nevertheless, York admitted that he purchased a tea pitcher and a set of pliers; he also acknowledged that he returned to the store to purchase a second pitcher after Burgess told him that the first one he had purchased was the wrong kind.

York, Turner, and Burgess were indicted together on various drug charges. York was charged with Unlawful Possession of a Methamphetamine Precursor (KRS 218A.1437); Possession of Anhydrous Ammonia in a Container Other than a Approved Container with the Intent to Manufacture Methamphetamine (KRS 250.991(2)); Use/Possession of Drug Paraphernalia, Second or Subsequent Offense (KRS 218A.500); Possession of Marijuana (KRS 218A.1422(2)); and Giving False Name/Address to a Police Officer (KRS 523.110(1)).

York's first argument on appeal concerns the testimony of Michael Burgess. Immediately prior to the commencement of the trial, Burgess entered a conditional guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). After entry of the plea, counsel for Burgess argued to the court that he should not be permitted to testify because his Fifth Amendment right to be free from self-incrimination should not be compromised despite the entry of a guilty plea. The court ruled that Burgess should be permitted to testify as

he had essentially waived his right to remain silent by virtue of a "straight up" plea (a plea without an underlying agreement). Although the court held that Burgess could testify, it agreed to allow him to assert his privilege at the appropriate time, reserving its ruling for that occurrence.

York argues that Burgess should not have been allowed to testify because he had not yet been **sentenced** pursuant to his plea. York contends that the gap in time between entry of Burgess's plea and his sentencing amounts to a period during which Burgess's Fifth Amendment privilege against self-incrimination remained viable and that it could not be deemed waived or extinguished until final punishment was formally imposed.

Burgess chose to testify against York and Turner, identifying York as one of the three men leaving the mobile home when Sergeant Parks arrived. Burgess also provided the only testimony that York had handled any of the incriminating items found in the two duffle bags.

York argues at some length that Burgess's Fifth Amendment privilege against self-incrimination was violated when he was allowed to testify. Admitting that the issue was not preserved, he contends that it warrants review under the

palpable error standard (RCr² 10.26) because the result of York's trial would have been substantially different if Burgess had not testified. York, however, lacks standing to raise this argument because the Fifth Amendment privilege is wholly personal and may be asserted by Burgess alone. York may not invoke on his own behalf Burgess's right to remain silent. See Bellis v. United States, 417 U.S. 85, 89-90, 94 S.Ct. 2179, 2183-2184, 40 L.Ed.2d 678 (1974). "[A] litigant may only assert his own constitutional rights or immunities." United States v. Raines, 362 U.S. 17, 22, 80 S.Ct. 519, 523, 4 L.Ed.2d 524 (U.S. 1960).

York next challenges the sufficiency of the evidence supporting his conviction, contending that the Commonwealth did not prove the elements of complicity to possession of a methamphetamine precursor and anhydrous ammonia with the intent to manufacture methamphetamine.

In a prosecution pursuant to KRS 592.020(1) [the complicity statute], in addition to having to prove that it was the defendant's intention to promote or facilitate the charged offense, the Commonwealth has the burden of proving the commission of the charged offense **by another person and proving that the defendant participated** in that offense. (Emphasis added.)

Harper v. Commonwealth, 43 S.W.3d 261, 265 (Ky. 2001).

York argues that the Commonwealth failed to prove:
(1) that Turner possessed pseudoephedrine with the intent to use

² Kentucky Rules of Criminal Procedure.

it as a precursor to methamphetamine; (2) that he possessed anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine; (3) that York intended for Turner to possess both substances for the criminal purposes involved.

This issue also was not properly preserved and can be reviewed only for palpable error so affecting the substantial rights of the defendant as to result in manifest injustice. See RCr 10.26. Upon undertaking review pursuant to RCr 10.26, we are governed by the following standard of review: "If under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) citing Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983). This standard of review applies regardless of preservation infirmities.

A substantial amount of evidence was presented to establish that Turner possessed the pseudoephedrine and the anhydrous ammonia with the intent to manufacture methamphetamine and that York was indeed participating in this endeavor. The evidence revealed that York and Turner spent a great deal of time together and that they regularly shared Turner's mobile home. When they exited the trailer, they were carrying duffle bags containing more than 221 grams of pseudoephedrine.

Pursuant to the version of KRS 218A.1437(2) then in effect, possession of more than 24 grams of a drug product containing pseudoephedrine constituted *prima facie* evidence of the intent to use the drug as a methamphetamine precursor. Burgess testified that Turner and York carried the "mobile meth lab" contained in the duffle bags out to the pickup truck where other precursors and equipment for manufacturing methamphetamine were also found. Additionally, that same evening, York had purchased the two pitchers and a set of pliers (which are known to be used in the manufacture of methamphetamine). The batteries seized by police had had their lithium strips exposed for removal. Consequently, in light of all the evidence, it was not unreasonable for the jury to conclude that York was so involved as to be complicit in Turner's plan to manufacture methamphetamine pursuant to the statutory elements defining complicity.

York's next argument challenges the admissibility of a surveillance tape provided by Wal-Mart showing York and Turner shopping at the store on the night in question. Mark Anderson, the employee in charge of loss prevention at the Wal-Mart, testified that different parts of the store and the parking lot are recorded around the clock on videotape. The tapes are kept for thirty days and then re-used. He also testified that at the request of the police, he created a compilation tape showing

Turner and York making their purchases at the Wal-Mart, heading to a pickup truck in the parking lot, and then driving away. He testified that the particular tape for that day (which covered the period up until midnight) had not been re-used and that it was in the Commonwealth's possession.

Upon hearing this testimony, York's counsel told the court that he wanted to view the original tape which showed the entire day. He explained that it was part of the defense theory that Burgess had returned to the store on his own at some time between eleven-thirty and twelve-thirty. He stated that he had not even known that this original tape existed but that it indeed might be able to substantiate his theory of an independent return trip by Burgess.

The Commonwealth explained that the original tape could not be viewed on ordinary video equipment, but it offered to allow defense counsel to view it on special equipment. The court refused to stop the trial but allowed defense counsel to view the tape during the lunch break. Although it is unclear from the record whether York's counsel took advantage of this opportunity to view the entire tape, the issue was never raised again.

York's allegations on appeal consist of purely speculative assertions that there might have been exculpatory material on this tape. We find no support for these allegations

in the record; nor is there any evidence that the Commonwealth deliberately withheld the tape from York's defense counsel in violation of its duty to reveal exculpatory evidence.

York's final argument concerns the testimony of Captain Hayden. After he and Sergeant Parks took Burgess to the jail, they obtained mug shots of them that were apparently on file. Defense counsel objected to the statement about the photographs as having come from the jail -- even though the jury was made aware that York was not yet under arrest for the current allegations. Defense counsel refused an offer of an admonition by the trial court and properly preserved this issue for our review.

York argues that the failure to grant a mistrial on this issue was reversible error, contending that Hayden's testimony regarding the existence of mug shots constituted inadmissible evidence of prior bad acts and crimes. See KRE³ 404(b). He also notes that the judge failed to conduct the three-part analysis outlined in Bell v. Commonwealth, 875 S.W.2d 882, 889-90 (Ky. 1994), in order to determine whether the evidence was admissible.

Since the evidence came into being unexpectedly through Hayden's testimony, the court had no prior opportunity to rule on its admissibility pursuant to Bell. Although York

³ Kentucky Rules of Evidence.

alleges error in the failure of the Commonwealth to give notice of the introduction of this evidence, there is absolutely no indication that the Commonwealth even intended to introduce it or expected that it would be produced in testimony. Therefore, our analysis is restricted to whether the trial court abused its discretion in refusing to grant a mistrial after the "surprise" testimony was presented.

It is presumed that an admonition will cure this type of alleged error.

If an admonition is offered in response to a timely objection but rejected by the aggrieved party as insufficient, the only question on appeal is whether the admonition would have cured the alleged error.

Sherroan v. Commonwealth, 142 S.W.3d 7, 17 (Ky. 2004) citing Graves v. Commonwealth, Ky., 17 S.W.3d 858, 865 (2000). As the Supreme Court observed in Johnson v. Commonwealth, 105 S.W.3d 430, 431 (Ky. 2003):

There are only two circumstances in which the presumptive efficacy of an admonition falters: (1) when there is an overwhelming probability that the jury will be unable to follow the court's admonition and there is a strong likelihood that the effect of the inadmissible evidence would be devastating to the defendant, or (2) when the question was asked without a factual basis and was inflammatory or highly prejudicial.

(Citations and quotation marks omitted).

In applying these tests to the circumstances of this case, we are persuaded that Hayden's comment was not sufficiently devastating to warrant a mistrial. The statement in question was neither inflammatory nor highly prejudicial. The fact that York's attorney declined the offer of an admonition arguably may indicate that he believed at that time that the remark was so innocuous as to elude the attention of the jury. We find no abuse of discretion in the refusal of the trial court to grant a mistrial.

We affirm the final judgment and sentence of the McCracken Circuit Court.

ALL CONCUR.

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