

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000023-MR

SHAWN BLYTHE

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 04-CR-00290

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,¹ SENIOR JUDGE.

THOMPSON, JUDGE: Shawn Blythe appeals his conviction in the Graves Circuit Court for possession of marijuana. Having concluded that the trial court did not commit reversible error, we affirm.

In September 2004, Parole Officer Shannon Powers made a routine home visit to Blythe's residence. After determining that no one was home, Powers inspected

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

the perimeter of the residence and observed empty beer bottles in the yard and in a trash can located beside the residence. Because Blythe was prohibited from possessing alcohol and illegal drugs as a condition of his release on parole, Powers noted the potential infraction and planned another home visit.

Subsequently, Powers learned that Blythe's girlfriend, Jackie Hayes, was living with him at his residence. For assistance in visiting a residence with two adults, Powers contacted the Mayfield Police who informed him that there were reports that Blythe was selling marijuana out of his residence. Soon thereafter, Powers, accompanied by three Mayfield police officers and a drug-sniffing dog, arrived at Blythe's residence to search for alcohol and illegal drugs. Upon arrival at the residence, Hayes greeted them and consented to a search of the residence. She then called Blythe, who was at work, and informed him of the search. Blythe returned home shortly after this call.

As a result of the search, officers found a baggy that contained crack cocaine residue in a trash can in the master bathroom and some plastic baggies containing small amounts of marijuana in the laundry room. Additionally, during the search, Powers administered a urine test on Blythe which was negative for marijuana and cocaine.

After the search was concluded, Blythe and Hayes were arrested and indicted for trafficking in marijuana within 1,000 yards of a school and for possessing crack cocaine. Eventually, Hayes pled guilty to possessing marijuana in exchange for the dismissal of the possession of crack cocaine charge. Later, the trial court amended down Blythe's indictment from trafficking in marijuana to possessing marijuana.

On the day of trial, during an in camera hearing, Blythe requested that the trial court permit him to introduce the negative urine test results into evidence. He argued that the negative results were probative of whether he possessed marijuana or crack cocaine. Citing doubts about the scientific reliability of the test results, the trial court decided to reserve its ruling on the admissibility of the urine test results until after the trial was underway. Ultimately, the trial court excluded the urine test because the test was unreliable.

During trial, Hayes, Blythe's lone witness, testified that she had exclusive control over and use of the master bathroom where the crack cocaine was discovered. However, she invoked her Fifth Amendment right against self-incrimination when asked if the baggy of crack cocaine belonged to her. Further, on multiple occasions, Hayes testified that the baggies of marijuana belonged to her and that Blythe was not aware that any marijuana was in the residence.

Additionally, during trial, Blythe sought the introduction of Hayes' guilty plea to possessing the baggies of marijuana found in the laundry room of Blythe's residence. The trial court excluded this evidence, and Blythe introduced the guilty plea by avowal through Hayes. At the conclusion of the trial, Blythe was found not guilty of possessing crack cocaine. However, he was found guilty of possessing marijuana. In accordance with the jury's recommendation, Blythe was not sentenced to jail time but was fined five hundred dollars. This appeal followed.

On appeal, Blythe raises two assignments of error: (1) that the trial court erred by excluding the negative urine test results from the evidence; and (2) that the trial court erred by excluding Hayes' guilty plea to possessing marijuana. We address each issue in turn.

When scientific evidence is offered for admission, trial courts must determine whether the reasoning or methodology underlying the offered evidence is scientifically valid and whether such evidence will assist the trier of fact in reaching a proper factual finding. *Ragland v. Commonwealth*, 191 S.W.3d 569, 575 (Ky. 2006). Essentially, the trial court must ensure that the expert testimony is reliable and relevant. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (U.S. 1993).

In *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995), overruled on other grounds by *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999), the court held that the party offering scientific evidence has the burden of proving its reliability before such evidence is admitted. The proponent's burden remains in place unless the proposed evidence has already been accepted as reliable by an appropriate appellate court. *Johnson v. Commonwealth*, 12 S.W.3d 258, 262 (Ky. 1999).

On appellate review, a trial court's finding on the scientific reliability of evidence is reviewed under the clear error standard, and its determination of whether or not the evidence will aid the trier of fact is reviewed under the abuse of discretion standard. *Ragland*, 191 S.W.3d at 575.

In this case, Blythe requested the admission of his negative urine test results into evidence. However, when he sought this admission, Blythe failed to introduce any testimony to the trial court to demonstrate that the urine test results were scientifically reliable. By his own admission, in his appellate brief, no evidence was put before the trial court regarding the scientific reliability of the urine test.

Based on these facts, we conclude that the trial court did not err by excluding the urine test results. The trial court was not presented with scientific evidence regarding the test's reliability or cited to any appropriate appellate decision recognizing the acceptance of the type of urine test given to Blythe as reliable scientific evidence. Therefore, the trial court properly functioned as a “gatekeeper” and kept out evidence that was not proven by its proponent to be reliable. *Miller v. Eldridge*, 146 S.W.3d 909, 913 (Ky. 2004).

Blythe's second assignment of error is that the trial court improperly excluded Hayes' guilty plea to possessing the baggies of marijuana for which he was convicted for possessing. Citing *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998), and *St. Clair v. Commonwealth*, 140 S.W.3d 510 (Ky. 2004), Blythe alleges that he should have been permitted to introduce Hayes' guilty plea as part of his trial strategy.

After reviewing the record, however, we conclude that we need not reach the question as to whether the trial court erred by excluding Hayes' guilty plea. Even if we assume that the trial court did error, we must apply harmless error analysis and disregard any error in the trial that did not affect Blythe's substantial rights. Kentucky

Rules of Criminal Procedure 9.24. “Under the harmless error doctrine, if upon consideration of the whole case it does not appear that there is a substantial possibility that the result would have been any different, the error will be held non-prejudicial.” *Gosser v. Commonwealth*, 31 S.W.3d 897, 903 (Ky. 2000), citing *Abernathy v. Commonwealth*, 439 S.W.2d 949, 952 (Ky. 1969).

After applying this analysis, we conclude that any error by the trial court was harmless. In this case, at multiple times during her testimony, Hayes stated that the marijuana baggies belonged to her and that Blythe was unaware of their presence in the residence. Consequently, the jury was clearly made aware that a particular person, namely Hayes, was claiming sole responsibility for possessing the baggies of marijuana.

Moreover, we cannot see how the introduction of Hayes' guilty plea would have bolstered her claim of ownership since the Commonwealth was entitled to explain to the jury that Hayes' conviction for possession did not preclude Blythe's conviction for possessing the same drugs. *Franklin v. Commonwealth*, 490 S.W.2d 148, 149-150 (Ky. 1972). Accordingly, even had the guilty plea been admitted, we conclude that there is no substantial possibility that the outcome of this case would have been any different.

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

ALL CONCUR.

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