

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000283-MR

ELIZABETH SMITH-MASON

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 04-CR-00264

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: LAMBERT, TAYLOR, AND WINE, JUDGES.

TAYLOR, JUDGE: Elizabeth Smith-Mason brings this appeal from a November 3, 2005, judgment sentencing her to ten-years' imprisonment following a jury verdict finding her guilty of first-degree trafficking in a controlled substance. We affirm.

In June 2004, a confidential informant advised a detective that he could arrange a drug buy between appellant and an undercover detective. On June 2, 2004, Detective Sam Johnson and the confidential informant went to a residence on Church Street in Lynch, Kentucky. The confidential informant was wired with a tape recorder.

The informant introduced Detective Johnson to appellant. While Detective Johnson and appellant were inside the residence, the doorbell rang. Appellant answered the door and returned with the cocaine. Detective Johnson paid appellant \$50.00 for the cocaine.

Appellant was ultimately indicted by a Harlan County Grand Jury upon one count of first-degree trafficking in a controlled substance (Kentucky Revised Statutes (KRS) 218A.1412). Following a jury trial, appellant was found guilty of the indicted offense and sentenced to ten-years' imprisonment. This appeal follows.

Appellant's first argument in this appeal is that the Commonwealth made improper statements during closing argument of the penalty phase of trial that resulted in manifest injustice under Ky. R. Crim. P. (RCr) 10.26. Specifically, appellant argues the prosecutor engaged in flagrant misconduct when he emphasized that the maximum available sentence of ten years must be imposed to ensure that appellant would actually serve two years in prison. Appellant acknowledges this contention was not preserved for appellate review but submits that the issue be reviewed for palpable error. RCr 10.26. A palpable error is one that affects the substantial rights of a party and results in manifest injustice. RCr. 10.26.

KRS 532.055(2), referred to as the “truth-in-sentencing” act, provides in part:

(a) Evidence may be offered by the Commonwealth relevant to sentencing including:

1. Minimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor;

.....

4. The maximum expiration of sentence as determined by the division of probation and parole for all such current and prior offenses[.]

Pursuant to KRS 532.055, parole eligibility and parole guidelines are generally admissible during the penalty phase of trial. *See Whitaker v. Com.*, 895 S.W.2d 953 (Ky. 1995).

Appellant relies upon *Perdue v. Commonwealth*, 916 S.W.2d 148 (Ky. 1995) to support her position that the Commonwealth's closing argument was improper. We view *Perdue* as clearly distinguishable from the facts of this case. *See id.* In *Perdue*, the Commonwealth was seeking the death penalty. *Id.* During closing argument of the penalty phase, the Commonwealth argued that unless the jury sentenced Perdue to death there existed a chance he would be released on parole. *Id.* The *Perdue* Court addressed the issue as follows:

Without repeating an exhaustive analysis, it is sufficient to say that parole eligibility information which is fully admissible under KRS 532.055 has no place in a death penalty hearing pursuant to KRS 532.025. Under no circumstances should parole eligibility enter into death penalty deliberations.

Id. at 164. Thus, the Court merely determined that evidence regarding parole eligibility is not admissible in a death penalty case. As such, *Perdue* has no application to the facts of the case *sub judice*, and we reject appellant's argument. *See id.*

Appellant next argues in this appeal that the circuit court erred by denying her motion for a directed verdict of acquittal upon the charge of first-degree trafficking in

a controlled substance due to insufficient evidence. A directed verdict of acquittal is proper if viewing the evidence in a light most favorable to the Commonwealth, it would have been clearly unreasonable for a jury to have found guilt. CR 50.01; *Thacker v. Com.*, 194 S.W.3d 287 (Ky. 2006). Appellant acknowledges that she did not renew her motion for a directed verdict at the conclusion of her case but requests that the error be reviewed for palpable error pursuant to RCr 10.26. Our review shall proceed accordingly.

Specifically, appellant argues that the testimony of Detective Johnson was insufficient to support a conviction. Appellant asserts that the Commonwealth's entire case rested upon Detective Johnson's identification of appellant as the individual who sold the crack cocaine. Appellant contends that Detective Johnson “had not seen, talked to, or ever heard of her” before the confidential informant offered to arrange the drug buy. Appellant further contends that Detective Johnson's interaction with her was very limited – less than five minutes – and that Detective Johnson did not even speak to her. We view appellant's contention to be without merit.

The record demonstrates that Detective Johnson unequivocally identified appellant as the individual who sold him the drugs. The issue of whether Detective Johnson's identification of appellant was credible was clearly a question for the jury. *See Com. v. Benhan*, 816 S.W.2d 186 (Ky. 1991). Additionally, we observe that Detective Johnson's testimony was also corroborated by the audiotape of the transaction. Viewing the evidence most favorably to the Commonwealth, we conclude there existed

sufficient evidence for a jury to reasonably find appellant guilty of trafficking in a controlled substance. Thus, we hold that the circuit court properly denied appellant's motion for a directed verdict of acquittal.

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

ALL CONCUR.

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