

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000284-MR

LEE HENSLEY

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NOS. 02-CR-00280 & 02-CR-00285

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; DIXON AND VANMETER, JUDGES.

VANMETER, JUDGE: Lee Edward Hensley appeals from the Harlan Circuit Court's judgments sentencing him to a total of ten years' imprisonment on two counts of first-degree trafficking in a controlled substance. Hensley argues on appeal that the trial court erred by failing to grant a directed verdict in his favor on both charges because the Commonwealth failed to prove that he was the man who sold the pills in question. For the following reasons, we affirm.

Kentucky State Police Detective Roy Pace testified at trial that he worked with cooperating witness Darryl Hall, some three years earlier, in making two controlled drug buys in Wallins, Kentucky during the early and later afternoon of September 17, 2002. Before each buy, Pace searched Hall's vehicle and person and asked him whether he had any drugs or money. Pace then gave Hall money, and he equipped Hall's vehicle and person with a video and an audio recorder, respectively. Pace followed Hall part but not all of the way to Wallins because of the likelihood that he would be recognized there. After the buys, Pace followed Hall to predetermined locations. Both times, Hall gave Pace four pink tablets which later were determined to contain oxycodone,¹ and Pace paid Hall \$100. Pace further testified that the attempt to videotape the first drug buy was unsuccessful and that the money used to purchase the pills was never recovered.

Next, Darryl Hall testified that he worked at one time as a cooperating witness for several policemen. On one occasion Pace searched and prepared Hall and his vehicle, as described above, as Hall believed Willy Simpson could find someone to sell pills to Hall. Hall went to Simpson's house in Wallins, and the two men went to buy pills from an unknown man. As that attempt failed, Hall and Simpson returned to Simpson's house, where they eventually were visited by a man who identified himself as Lee Hensley. Through Simpson, Hall passed money to Hensley in exchange for four pills which Hall believed were OxyContin. Hall then left Simpson's residence, verbally recording the license plate number of a red Mustang which he believed Hensley was

¹ At trial the parties stipulated that the pills relating to both drug buys contained oxycodone and that there was sufficient proof of chain of custody.

driving. Hall met Pace at a predetermined location, where he gave Pace the pills and informed him of the events that had transpired.

Although Hall initially testified that he neither knew nor had seen Hensley before this encounter, he later stated that he had previously seen Hensley at a friend's house and driving a red Mustang. Hall believed the red Mustang bore a Kentucky license plate, but Pace subsequently testified that there was no car registered in Kentucky with the number provided by Hall. However, a red Mustang belonging to Lee Hensley of Speedwell, Tennessee, was registered with that plate number in Tennessee.

Hall also testified regarding a second occasion when he bought pills from Hensley. Hall thought this occurred about a week after the first buy but testified that he had no reason to dispute evidence indicating that both buys occurred on the same day. In any event, Pace again searched and prepared Hall and his vehicle, and Pace followed Hall part of the way to Wallins, where he picked up Hensley. Hall gave Hensley money in exchange for four pills. After Hall dropped Hensley off, he met Pace at a predetermined location where he again gave Pace four pills and described the events that had occurred. Hall testified that Hensley wore a hat and blue jeans during the car ride and that he had a mustache or beard and long hair. However, Hall did not remember the color of Hensley's hat or shirt, and he was uncertain as to whether the shirt was long or short-sleeved. Perhaps Hensley was wearing a short-sleeved shirt and had a tattoo on his arm. Hall testified that he was a convicted felon but that he neither was on probation nor had a suspended license at the time of the alleged drug buys.

Finally, Hensley's mother, Avon Hensley, testified in support of his defense that he was not the man from whom Hall allegedly purchased the pills. Avon testified that on the date of the alleged drug buys, she, her husband, and Hensley lived in Speedwell, Tennessee, where they had moved after their home in Wallins burned down. While they lived in Wallins, Avon was aware of drug activity occurring at a neighbor's house.

On the morning of the alleged drug buys, Avon drove Hensley from Speedwell to London for a doctor's appointment regarding his work-related broken ankle, as he was in a cast and on crutches. Hensley wore beige shorts to accommodate his cast, as well as a white t-shirt and a blue cap, both of which had Kentucky wildcat emblems. Avon drove her standard transmission Ford Fiesta because the red Mustang which she and her husband owned would not run. Hensley's counsel introduced a September 17 sign-in sheet from Injury and Rehab Centers of Kentucky in London, which indicated that Lee Hensley signed in at 9:15 and signed out at 10:02. Avon testified that after the appointment, she and Hensley ate lunch and then drove to her daughter's house in Williamsburg, where they stayed "just about all day" because Avon's mother-in-law was in the hospital dying. Avon and Hensley did not return to their home in Speedwell until about 11:30 p.m.

Avon testified that she and Lee were not in Harlan County on September 17 and that she was in Harlan County that month only on the 28th to make funeral arrangements. Finally, Avon testified that Hensley does not own a vehicle but drives the

cars which she and her husband own, all of which have Tennessee plates. Hensley has burn scars on his arms and hands, always has short hair, and has no tattoos of which she is aware. He is called Brother or Pedro rather than Lee, and he is often mistaken for his former brother-in-law.

Based on this evidence, the jury found Hensley guilty of two counts of first-degree drug trafficking and recommended that he serve five years on each count, with the sentences to run consecutively. The trial court subsequently imposed the recommended sentence. This appeal followed.

Hensley argues that the trial court erred by failing to grant his motion for a directed verdict as the Commonwealth did not prove that he was the person who allegedly sold the pills to Hall. We disagree.

The standard for considering a motion for directed verdict was plainly set forth in *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Further, “there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.” *Id.* at 187-88. On appeal, a defendant is entitled to a directed

verdict in his favor “if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]” *Id.* at 187 (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)).

Here, it was not clearly unreasonable for a jury to find guilt, considering all of the evidence. Regardless of whether Hall had ever seen Hensley prior to the day of the drug buys, Hall testified that on September 17 Hensley drove to Simpson's house in a red Mustang which was later determined to be registered to him, and he identified himself as Hensley. Further, Hall testified that he had no doubt that the man who sold him the pills was Hensley. Although Avon provided conflicting testimony, it was for the jury to decide the credibility and weight to be given to each person's testimony, as well as the ultimate question of whether Hensley sold the pills to Hall. Similarly, the fact that the audio and video tapes of the drug transactions introduced during Hall's testimony may have been of poor quality does not compel a different result, as the weight of the evidence was for the jury to determine.

Finally, the analysis utilized in *Savage v. Commonwealth*, 920 S.W.2d 512 (Ky. 1995), does not compel a different result. In *Savage*, a police officer on his way to a store that had just been robbed saw a man who matched the description of the robbery suspect. The officer immediately took the man to the scene, where the store's clerks separately identified the man as the one who had just robbed the store. Applying the five factors set forth in *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972), the Kentucky Supreme Court held that the trial court did not err by failing to

suppress the clerks' in-court or out-of-court identifications of the man. *Savage*, 920 S.W.2d at 514. Here, by contrast, Hensley does not argue that the trial court erred by failing to suppress Hall's testimony. Instead, he argues that Hall's testimony was noncredible and insufficient to support the jury's verdict. *Biggers* therefore is inapplicable, as the factors therein are to be utilized when a court has found a pretrial confrontation procedure to be suggestive. *Wilson v. Commonwealth*, 695 S.W.2d 854, 857 (Ky. 1985).

Although we agree with Hensley that Hall's testimony contained inconsistencies and Hall's recollection of the drug transactions was at times wanting, Hensley exercised his right to cross-examine Hall regarding all of these issues, and it was for the jury to determine the weight and credibility of Hall's testimony. His testimony was simply not so incredible or wanting that it could not form the basis of a conviction.

The Harlan Circuit Court's judgments are affirmed.

ALL CONCUR.

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