

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000526-MR

JAMES M. HARRIS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 05-CR-000527

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DIXON, STUMBO, AND WINE, JUDGES.

DIXON, JUDGE: James M. Harris appeals from a Jefferson Circuit Court judgment sentencing him to twelve years' imprisonment. Harris raises several issues before this Court, and after thoroughly reviewing the record, we affirm.

On November 29, 2004, Harris resided at 2734 Bank Street in Louisville, Kentucky. His mother, Alice Westbay, owned the house next door, at 2728 Bank Street, and rented it to Jeffrey Becker. The two houses were connected by a deck and shared a swimming pool. A three-story garage, also allegedly

owned by Alice Westbay, was located behind the two houses.

Alice Westbay rented space in the garage to Billy Sears.

That evening, Officer Tracy Goins of probation and parole, along with Louisville police officers, arrived at Harris's home to conduct a "night vision" search of the residence. Harris's son answered the door and advised Officer Goins that Harris was not at home. Harris's son then attempted to contact Harris by telephone. While Officer Goins waited, police officers intercepted Jeffrey Becker in the rear of the property, between the garage and his rental house. Becker was in possession of methamphetamine and drug paraphernalia. Following Becker's arrest, Detective Steven Healey returned to the front of Harris's house to check-in with Officer Goins. At that point, Alice Westbay advised Detective Healey that she owned the garage. She produced the key and executed a written consent to search.

Upon entering the garage, officers found Billy Sears's automobile. On the second level, the police found a large bar, big-screen television, aquarium, and pool table. Officers found mail addressed to Harris on the bar. At that point, Detective Healey stopped the search and obtained a search warrant.

When the search resumed, officers found a concealed compartment inside the bar and seized a small baggie containing approximately five grams of cocaine. Also inside the compartment was a large envelope containing dozens of letters and photographs addressed to Harris. Around the bar area,

officers found "grow lights," cocaine powder residue, two marijuana "roaches," and other mail addressed to Harris.

On February 15, 2005, a Jefferson County Grand Jury indicted Harris, Billy Sears, and Alice Westbay on one count of trafficking in a controlled substance (cocaine) by complicity and one count of possession of drug paraphernalia by complicity. Additionally, Harris was indicted on one count of being a persistent felony offender (PFO), first degree.

Prior to trial, Harris moved to exclude all evidence seized during the search of the garage. Harris also filed a motion in limine objecting to the Commonwealth's proposed introduction of recorded phone conversations and Harris's prior conviction for trafficking in cocaine. The court subsequently denied Harris's pretrial motions.

The trial court granted the Commonwealth's motion to sever the co-defendants, and Harris's trial began on January 16, 2007. The jury found Harris guilty of possession of cocaine by complicity and acquitted him of the other charges. Thereafter, Harris agreed to plead guilty to the PFO charge in exchange for the Commonwealth's recommendation of a twelve-year sentence. On February 26, 2007, the trial court sentenced Harris to twelve years' imprisonment, and this appeal followed.

I. Suppression Hearing

Harris first argues the trial court erred by denying his motion to suppress the evidence obtained during the search of the garage. When this Court reviews a trial court's denial

of a motion to suppress, we consider the court's findings of fact conclusive if supported by substantial evidence. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001). We then review *de novo* the application of the law to the facts. *Id.*

Here, Harris does not contest the legality of the search based on Alice Westbay's consent, nor does he contest the validity of the search warrant. Instead, Harris argues Officer Goins had no legal reason to approach his home, thereby tainting the subsequent search of the garage.

It is well-settled that a probationer is entitled to protection from unreasonable searches under the Fourth Amendment; however, a diminished expectation of privacy necessarily attaches. *Riley v. Commonwealth*, 120 S.W.3d 622, 627 (Ky. 2003). Furthermore, pursuant to Department of Corrections Regulation, a probation officer may conduct a warrantless search of a probationer's home where the officer has reasonable suspicion to believe the probationer is in violation of the terms of probation. *Id. citing* Kentucky Corrections Policy No. 27-16-01 (Search; Seizure; Chain of Custody; Disposal of Evidence) IV(1)(A)(1), at 3.

Harris contends Officer Goins did not have reasonable suspicion he was violating the terms of his supervision. We disagree.

Officer Goins testified at the suppression hearing. She planned the November 29, 2004, night vision search at

Harris's home because, during a previous search on November 3, she found alcohol and small swords in the house. Because the prior search ended abruptly, Officer Goins was suspicious that Harris had not complied with her order to dispose of the prohibited items. Additionally, Harris's supervising officer, Paula Carron, testified that she had received "community complaints" that Harris was engaged in criminal activity, and Harris had failed to report for a scheduled meeting with Officer Carron. Consequently, we conclude that Officer Goins arrived at Harris's home with the necessary reasonable suspicion to conduct a warrantless search.

We note, though, that Officer Goins did not actually search Harris's home. When Officer Goins arrived, Harris was not home. Harris's teen-aged son answered the door and then telephoned Harris to come home. Thereafter, Alice Westbay arrived and invited Officer Goins inside the house because of the weather. While Officer Goins waited with Alice Westbay, the intervening incident with Jeffrey Becker occurred behind the house. Thereafter, Detective Healey inquired about the garage, and Alice Westbay claimed ownership, agreed to unlock the garage and consented to a search. After Detective Healey found items in plain view belonging to Harris, he stopped the search and secured a search warrant. The officers then searched the remainder of the garage and Harris's house pursuant to a valid warrant.

We conclude the court properly denied Harris's motion to suppress the evidence seized. The officers were lawfully on the premises and searched the property pursuant to Alice Westbay's consent and a valid search warrant.

II. Admissibility of Magazines and Letters

Harris next contends the trial court erred by admitting as evidence magazines and letters seized from the garage. Specifically, several "High Times" magazines were found on the bar, and an envelope containing letters written to Harris while he was incarcerated was found in the hidden compartment with the cocaine. Harris claims this evidence was irrelevant, and he alternatively argues it was more prejudicial than probative and should have been excluded pursuant to Kentucky Rules of Evidence (KRE) 403.

Our standard of review of a trial court's evidentiary decision is abuse of discretion. *Barnett v. Commonwealth*, 979 S.W.2d 98, 103 (Ky. 1998). Accordingly, we will not disturb the court's ruling unless it was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Here, the magazines contained articles explaining how to operate marijuana "grow lights" similar to the ones seized from the garage.

Likewise, the envelope of Harris's letters was concealed with the cocaine. We conclude the court did not err in finding the evidence relevant.

However, KRE 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury"

Harris complains the magazines unduly prejudiced him by portraying him as a "pot head," and cast him in a negative light. We disagree, and conclude the trial court properly admitted the evidence due to its probative value concerning how to operate the "grow lights."

Harris likewise argues the personal letters were more prejudicial than probative. After reviewing the record, we note that the jury did not have the opportunity to inspect the letters; rather, Detective Healey testified where he found the letters and that they were addressed to Harris.

The location of the letters indicated that Harris had access to the hidden compartment. Further, the jury was not aware the letters were written while Harris was incarcerated. Accordingly, we find no error.

III. Evidence of other Crimes

Harris's third claim of error relates to evidence of uncharged crimes and evidence of his prior trafficking conviction. Harris argues the court erred in allowing the Commonwealth to play an audio recording of phone calls Harris

made from jail following his arrest. The Commonwealth redacted the phone calls to preclude any mention of incarceration, and the tape lasted approximately ten minutes. During the conversations, Harris referred to buying and selling drugs. As such, Harris contends the evidence of uncharged "bad acts" was an improper attack on his character. Harris alternatively contends the phone conversations should have been excluded as irrelevant.

Harris also argues the trial court erred in allowing the Commonwealth to advise the jury that he had a prior conviction for trafficking in cocaine. Harris argues this information was unduly prejudicial and caused the jury to convict him based on his prior criminal history.

KRE 404(B) states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible: (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]"

A. Phone Calls

Harris argues the phone calls were not relevant to the charged crimes and only proved his criminal disposition to sell drugs. We disagree.

During one conversation with Jeffrey Becker, Harris berated Becker for not taking the blame for the "six grams" found in the garage. Harris then exclaimed to Becker, "Why

don't ya'll use your brains once in a while?" Harris also admitted that he put the letters in the garage and "hid them real good [sic]." Further, during a conversation with Todd Westbay, Harris's stepbrother, the two men used coded language to discuss drug transactions.

As Harris correctly points out, "evidence of criminal conduct other than that being tried is admissible only if probative of an issue independent of character or criminal predisposition, and only if its probative value on that issue outweighs the unfair prejudice with respect to character." *Billings v. Commonwealth*, 843 S.W.2d 890, 892 (Ky. 1992). Here, however, the Commonwealth offered the evidence for one of the exceptions listed in KRE 404(B) - to show Harris's intent to traffic in cocaine.

At trial, Harris's intent was squarely at issue. His defense was that he did not own the garage and several other people had access to the area where the cocaine was found. Harris further elicited testimony from Detective Healey that Billy Sears, who stored his car in the garage, was a known cocaine dealer.

Where intent is in dispute, evidence of other crimes is admissible for that limited purpose. *Walker v. Commonwealth*, 52 S.W.3d 533, 535-36 (Ky. 2001). Furthermore, the tape was redacted to limit the prejudicial effect, and the court admonished the jury to consider drug references as evidence only of Harris's intent to commit the charged offense of trafficking.

We conclude the trial court did not abuse its discretion by admitting the redacted phone calls.

i. Evidentiary Hearing

Harris also contends he was entitled to an evidentiary hearing for the court to consider the admissibility of the phone calls. This argument is curious because the record clearly shows Harris presented this issue to the court on two different occasions.

First, Harris raised the issue at the suppression hearing held on December 19, 2006. Harris argued to exclude the phone calls, and the trial judge reserved ruling on the issue until he had the opportunity to listen to the recording. Thereafter, on January 4, 2007, the court issued a written order, stating in part:

After having listened to the redacted tapes, the Court believes that the Commonwealth has taken appropriate measures to protect the Defendant from undue prejudice and that the tapes as redacted do not unfairly misrepresent the totality of the conversations.

On the morning of trial, Harris raised this issue again and argued to exclude the recording. The trial court reiterated its prior written ruling that the phone calls were admissible.

As the record reflects the court's evidentiary considerations, we find no error.

ii. Foundation

Harris also contends Detective Healey failed to provide a proper evidentiary foundation for the recordings. Harris erroneously relies on *Commonwealth v. Brinkley*, 362 S.W.2d 494, 497 (Ky. 1962), which delineated a seven-factor test for authentication of recordings.

In the years following *Brinkley, supra*, the Court relaxed the requirements for authenticating a recording. See *Poteet v. Commonwealth*, 556 S.W.2d 893 (Ky. 1977); *Campbell v. Commonwealth*, 788 S.W.2d 260 (Ky. 1990). Indeed, KRE 901(a), which was adopted in 1992, states:

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Here, Detective Healey testified he was familiar with Harris's voice, and he was capable of identifying Harris's voice on the tape recording. Likewise, we do not find the reliability of the recording to be in issue, and Harris does not allege the Commonwealth tampered with the recording. See *Campbell*, 788 S.W.2d at 265. The calls were recorded during Harris's incarceration, and the Commonwealth provided Harris with copies of both the entire recording and the redacted version, well in advance of trial. Consequently, we agree with the court that the recordings were properly authenticated.

iii. Witness Interpretation

Harris next contends the court erred by allowing an expert witness to "interpret" portions of the audio recording. We disagree.

Near the close of its case, the Commonwealth called Steven Farmer, a veteran police officer with the Jefferson County Sheriff's Department drug task force. During Officer Farmer's testimony, the Commonwealth played a brief portion of the audio tape where Harris used certain code words to discuss a drug transaction. Over Harris's objection, Officer Farmer explained the meaning of the terms within the drug culture.

Harris points out, "[i]t is for the jury to determine as best it can what is revealed in the tape recording without embellishment or interpretation by a witness." *Gordon v. Commonwealth*, 916 S.W.2d 176, 180 (Ky. 1995). In *Gordon, supra*, the Court held it was reversible error for a witness to interpret an inaudible recording of a controlled drug buy, rather than testify from his own recollection of events. *Id.*

However, in the case at bar, Officer Farmer was clearly qualified as an expert. He testified that a "motor" was a kilogram, or 2.2 pounds, of cocaine and that to "nickel dime it" meant to sell small amounts of poor quality cocaine. On the tape, Harris claimed he obtained the last part of the "motor," and Todd Westbay referred to "nickel dime it."

In *Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky. 2004), our Supreme Court approved expert testimony by a narcotics officer who interpreted the defendant's hand-written notes as

code for drug transactions in a trafficking case. *Id.* at 430. Similarly, in the case at bar, Officer Farmer explained the illicit meanings behind otherwise innocuous terms in Harris's phone calls.

After considering the totality of Officer Farmer's brief testimony, we conclude his expert opinion assisted the jury in understanding the evidence presented in the audio recording. See KRE 702. Consequently, the trial court did not abuse its discretion by allowing Officer Farmer to testify as an expert to explain the double-meanings of the terms used in Harris's conversations.

B. Prior Conviction

Next, Harris asserts it was reversible error for the trial court to allow the jury to consider his prior conviction for trafficking in cocaine. He claims the evidence was inadmissible under KRE 404(b) and that he was undoubtedly prejudiced in the eyes of the jury. Under the circumstances presented here, we disagree.

Just before the close of the Commonwealth's case, the prosecutor moved to admit Harris's prior conviction for trafficking in cocaine, for the limited purpose of showing intent. The judge then admonished the jury to consider the conviction as evidence only of Harris's intent to traffic in the cocaine seized from the garage.

We reiterate that KRE 404(B) allows evidence of prior crimes if offered to show "proof of motive, opportunity,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]” Here, Harris’s prior conviction was admissible to prove his intent and plan to traffic in cocaine. *Hayes v. Commonwealth*, 175 S.W.3d 574, 588-89 (Ky. 2005) (evidence of prior trafficking in a controlled substance conviction admissible as evidence of intent to manufacture methamphetamine).

Furthermore, any prejudice that resulted from this evidence was minimal, as the jury acquitted Harris of the trafficking charge. See *McGinnis v. Commonwealth*, 875 S.W.2d 518, 523 (Ky. 1994) (overruled on other grounds).

IV. Directed Verdict

Harris further assigns error to the trial court’s denial of his motion for a directed verdict. Harris contends the Commonwealth presented insufficient evidence to support a conviction for possession of cocaine by complicity.

“On appellate review, the test of a directed verdict is, 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).

We first note that, “[p]ossession sufficient to convict under the law need not be actual; a defendant may be shown to have had constructive possession by establishing that the contraband involved was subject to his dominion or

control." *Hargrave v. Commonwealth*, 724 S.W.2d 202, 203 (Ky. 1986) (internal quotations and citation omitted).

In the recorded conversations, Harris claimed he wanted to sell the garage, and he was angry that he had hidden the letters in the secret compartment. Likewise, documents belonging to Harris, such as ADT bills, insurance bills, and cell phone bills were seized from the top of the bar.

Furthermore, pursuant to the Commonwealth's theory of complicity, the phone calls provided circumstantial evidence that Jeffrey Becker and/or Todd Westbay were co-conspirators. "Conspiracy may be and is often necessarily proved by circumstances. Though each incident taken by itself would not be sufficient, if all of them considered as a whole afford a reasonable inference of the existence of a conspiracy . . . there is a question for the jury." *Canada v. Commonwealth*, 281 Ky. 641, 136 S.W.2d 1061, 1065 (Ky. 1940).

Despite Harris's argument to the contrary, we find the Commonwealth introduced ample evidence to submit the case to the jury. Accordingly, the trial court properly denied Harris's motion for a directed verdict.

V. Complicity Instruction

In his final argument, Harris contends he was denied a unanimous verdict because the jury was allowed to convict him as either a principal or accomplice under the instruction for possession of cocaine by complicity.

Kentucky Revised Statutes 502.020 states in pertinent

part:

(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense . . .

Harris complains that the Commonwealth failed to produce evidence that he conspired with anyone else to possess cocaine.

"In a prosecution pursuant to KRS 502.020(1), 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 of proving that the defendant participated in that offense." *Harper v. Commonwealth*, 43 S.W.3d 261, 265 (Ky. 2001).

Here, a reasonable juror could have inferred from the evidence that Harris was guilty by complicity for commanding and conspiring with Jeffrey Becker and/or Todd Westbay to possess cocaine. On the audio recording, Harris berated Becker for not taking the blame for the cocaine found in the garage. Likewise, the jury heard the coded discussion between Harris and Todd Westbay were the two men spoke about possessing cocaine.

Conversely, ample evidence also existed that Harris acted as a principal in possessing the cocaine. "A verdict cannot be attacked as being non-unanimous where both theories

are supported by sufficient evidence." *Halvorsen v.*

Commonwealth, 730 S.W.2d 921, 925 (Ky. 1986).

We conclude the instruction on complicity to possess cocaine was proper.

For the reasons stated herein, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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