

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001029-MR

JOSEPH FAIN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 06-CR-01344

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; KNOPF,¹ SENIOR JUDGE.

DIXON, JUDGE: Joseph Fain appeals from a Fayette Circuit Court judgment entered upon a jury verdict convicting him of first-degree trafficking in a controlled substance. We affirm.

On August 8, 2006, the Narcotics Enforcement Unit of the Lexington Police Department organized an undercover "buy and ride" operation. Detective William Goldie drove an undercover

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 KRS 21.580.

vehicle in the area of Whitney Avenue and Ash Street in Lexington, Kentucky. Detective Goldie's vehicle was outfitted with concealed video and audio recorders. In addition, Detective Joseph Eckhart, who was hiding across the street, videotaped Detective Goldie's undercover operation.

Detective Goldie noticed Jaqueda Perry standing on the sidewalk near a cemetery. Perry approached Detective Goldie's vehicle, and the detective asked for a "twenty." Perry turned away from Detective Goldie and walked toward Fain, who was sitting a short distance away. A few moments later, Perry returned to the car with a rock of crack cocaine worth twenty dollars. Detective Goldie completed the transaction and drove away from the area. A few minutes later, narcotics officers arrived in the neighborhood and approached Perry and Fain. Both Fain and Perry matched the physical descriptions relayed over the radio by Detective Goldie. The officers compiled personal information provided by Perry and Fain and then left the area.

A Fayette County Grand Jury indicted Fain on one count of trafficking in a controlled substance first degree, and being a persistent felony offender (PFO) in the first degree.²

On April 9, 2007, a jury trial was held. Perry testified she had been at the cemetery "waving people down" to facilitate drug transactions and hoping to get drugs for herself. She also identified Fain as the individual who gave

² The grand jury also indicted Perry for trafficking in a controlled substance. In February 2007, Perry agreed to testify against Fain. In exchange, the Commonwealth amended Perry's charge to a misdemeanor.

her the crack cocaine she sold to Detective Goldie. Detective Goldie and Detective Eckhart both testified, and both officers positively identified Fain as being involved in the transaction. The jury also viewed the surveillance video of the transaction.

The jury found Fain guilty of trafficking in a controlled substance first degree. Fain waived jury sentencing and pled guilty to being a first-degree PFO. The court sentenced him to an enhanced sentence of ten years' imprisonment in accordance with the Commonwealth's recommendation. This appeal followed.

Fain first contends the trial court erred by allowing Perry to identify Fain at trial because the identification was based on an unduly suggestive photographic "show up."

Prior to trial, Fain moved to suppress Perry's "show-up" identification of him. Fain argued his photograph was unduly suggestive because it depicted him wearing an orange prison jumpsuit while the other five photos depicted men in civilian clothing. The court overruled Fain's motion to suppress the identification.

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.*

The Kentucky Supreme Court addressed a similar issue in *King v. Commonwealth*, 142 S.W.3d 645 (Ky. 2004). The Court stated:

The determination of whether identification testimony violates a defendant's due process rights involves a two-step process. First, the court examines the pre-identification encounters to determine whether they were unduly suggestive. If not, the analysis ends and the identification testimony is allowed. If so, the identification may still be admissible if under the totality of the circumstances the identification was reliable even though the [identification] procedure was suggestive.

Id. at 649 (internal citations and quotation marks omitted).

In the case at bar, the trial judge viewed the photographs and concluded the "show up" was not unduly suggestive. The court noted that Fain's photograph depicted only his head and neck, and he appeared to be wearing an orange shirt with the collar turned under.

After reviewing the record before us, it is apparent the trial judge thoroughly reviewed the photographs in light of Fain's argument. However, the photographs were not made a part of the record at the hearing, nor were the photographs used as evidence during trial. Consequently, "when the complete record is not before the appellate court, [we] must assume that the omitted record supports the decision of the trial court."

Commonwealth v. Thompson, 697 S.W.2d 143, 145 (Ky. 1985). As we are unable to view the photographs, we must conclude the trial court correctly determined the "show up" identification was not

unduly suggestive. Accordingly, the court properly allowed Perry to identify Fain at trial.

Fain next contends the court erred by allowing an expert witness to testify regarding "profile" evidence.

Detective Keith Ford of the Lexington Police Department testified as a narcotics expert based on his lengthy experience investigating drug trafficking cases. Detective Ford explained the purpose of the department's "buy and ride" undercover operation, as well as various slang terms used by drug dealers. Specifically at issue here, Detective Ford stated that street-level drug dealers typically use a "runner" to facilitate the hand-to-hand transaction with the customer. Fain objected, asserting that the testimony "profiled" drug dealers and invited the jury to conclude Fain fit the "profile" of a drug dealer. The court overruled Fain's objection, noting that the testimony was helpful in explaining police procedure and typical scenarios encountered by narcotics officers.

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).

In *Sargent v. Commonwealth*, 813 S.W.2d 801, 802 (Ky. 1991), the Court approved of an officer's expert opinion that

the defendant possessed a large quantity of marijuana for sale, rather than personal use. The Court noted:

Both detectives testified about the marijuana trade which is certainly specialized in character and outside the scope of common knowledge and experience of most jurors. The opinion of the police aided the jury in understanding the evidence and resolving the issues. The trial judge did not abuse his discretion when he determined that both police officers were sufficiently qualified to give expert testimony. There was no invasion of the province of the jury as the ultimate factfinder and there was no error.

Id.

We believe the logic of *Sargent* applies to the case *sub judice*. After reviewing the record, it is clear that Detective Ford, based on his training and experience, was qualified to testify as an expert. See KRE 702. Likewise, we agree with the trial judge that Detective Ford's testimony assisted the jury in understanding uncommon aspects of street-level drug culture. We conclude the trial court did not abuse its discretion by allowing the testimony.

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

ALL CONCUR.

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