

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2007-CA-001253-MR

KIMBERLY LYNN HOLLAN

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT  
HONORABLE FRANK ALLEN FLETCHER, JUDGE  
ACTION NO. 06-CR-00175

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER, THOMPSON, AND WINE, JUDGES.

KELLER, JUDGE: Kimberly Lynn Hollan (Hollan) appeals from her conviction of trafficking in a controlled substance. In her appeal Hollan argues that the trial court abused its discretion by limiting her questioning on *voir dire*; that the trial court abused its discretion by permitting testimony of a police officer by deposition; and that the trial court should not have permitted a portion of a surveillance videotape to be played to the jury. For the reasons set forth below, we affirm.

## FACTS

A cooperating witness, Shirley Howard (Howard), was working with Officer Greg Brandenburg (Officer Brandenburg) on April 20, 2006. Howard, who was wearing audio and video surveillance equipment, approached Hollan's car and purchased what appeared to be an Oxycodone tablet.<sup>1</sup> On October 20, 2006, the grand jury indicted Hollan for trafficking in a controlled substance. At trial, Hollan noted that there was a passenger in her car at the time of the exchange. Hollan argued that the Oxycodone was not hers but the passenger's and that she was acting simply as a conduit for the exchange between the passenger and Howard. On May 16, 2007, a jury convicted Hollan and recommended five years' imprisonment and a drug rehabilitation program. Subsequently, the trial court entered a judgment and sentence consistent with the jury's recommendation. The remaining facts will be set forth, as necessary, in the analysis of each issue raised by Hollan on appeal.

## ANALYSIS

### A. Deposition Testimony of

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<sup>1</sup> We note that, Hollan was initially indicted for trafficking in Oxycontin. However, in a pre-trial conference, the trial court granted the Commonwealth's motion to amend the indictment from Oxycontin to Oxycodone. Throughout the trial, the parties referred to the substance as Oxycontin. However, for the sake of accuracy, we will refer to the substance as Oxycodone.

At the outset, we note that,

[w]hether a witness is "unavailable," *i.e.*, whether the Commonwealth has made a "good faith effort" to obtain the witness's presence at trial, is a matter committed to the sound discretion of the trial judge whose decision will not be reversed unless it is clearly unreasonable. *Ruppee v. Commonwealth*, Ky., 821 S.W.2d 484, 486 (1991); *Carter v. Commonwealth*, Ky., 782 S.W.2d 587, 600 (1990); *overruled on other grounds by Norton v. Commonwealth*, Ky., 37 S.W.3d 750, 753 (2001).

*Lovett v. Commonwealth*, 103 S.W.3d 72, 83 (Ky. 2003). With the above standard in mind, we will review the issues raised by Hollan regarding the testimony of Officer Earl Michael Luttrell (Officer Luttrell).

On the Friday before trial was scheduled to begin, the Commonwealth made an oral motion to present the testimony of Officer Luttrell by deposition. In support of its motion, the Commonwealth stated that Officer Luttrell was scheduled to be at a training seminar in Gatlinburg, Tennessee, the week of trial. Over Hollan's objection, the trial court granted the Commonwealth's motion and ordered that the deposition take place that afternoon. Hollan renewed her objection by way of a motion *in limine* on the day of trial. The trial court denied that motion.

Hollan argues that the trial court should not have permitted the introduction of Officer Luttrell's deposition testimony on procedural and substantive grounds. First, Hollan

argues that the Commonwealth did not follow the provisions set forth in the Rules of Criminal Procedure (the Rules) when it moved to introduce the deposition. Second, Hollan argues that the Commonwealth did not set forth sufficient justification under the Rules to permit introduction of the deposition in lieu of live testimony. Finally, Hollan argues that the introduction of the deposition in lieu of live testimony was unfairly prejudicial. We will address each issue in order.

The Rules set forth a scheme for the taking of depositions and for the use of depositions at criminal trials. RCr 7.10(1) provides that

[i]f it appears that a prospective witness may be unable to attend or is or may be prevented from attending a trial or hearing or is or may become a nonresident of the Commonwealth, that the witness's testimony is material and that it is necessary to take the witness's deposition in order to prevent a failure of justice, in any pending proceeding the court may upon motion and notice to the parties order that the witness's testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place.

RCr 7.14(1) sets forth the procedure for providing notice of a deposition in a criminal matter and states that

[i]n the absence of agreement the party at whose insistence the deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. In the absence of good cause shown, notice of less than 72 hours shall not be deemed reasonable for the purposes of this rule.

Based on the above, the Commonwealth properly moved to take Officer Luttrell's deposition because it appeared that Officer Luttrell was going to be unable to attend the trial. However, the Commonwealth should have given Hollan at least 72 hours notice of the deposition, which it failed to do.

We have been unable to find any case law in Kentucky on point regarding deficiency of notice. However, we are mindful that the purpose of taking and using depositions in criminal proceedings is to "preserve the evidence in the event the witness becomes unavailable to testify." *Commonwealth v. Willis*, 716 S.W.2d 224, 231 (Ky. 1986). Furthermore, we are mindful that the use of depositions at trial is within the sound discretion of the trial court. Taking these factors into consideration, we discern no error in the trial court's order granting the Commonwealth's motion to depose Officer Luttrell. In doing so, we note that Officer Luttrell's testimony concerned chain of custody only and that Hollan's defense was not premised on any issues that might have arisen because of problems with the chain of custody. Furthermore, we note that Hollan was present at the deposition, thus preserving her right to confront the witness. Finally, we note that, although the Commonwealth did not give 72 hours notice, based on the nature of the deposition the notice was sufficient to permit Hollan to prepare. Therefore, we hold that the trial court did not abuse its discretion in permitting the Commonwealth to take Officer Luttrell's deposition.

However, our analysis of this issue does not stop at that point. We must consider whether the trial court abused its discretion in permitting Officer Luttrell's deposition to be read at trial. Hollan again raises both procedural and substantive issues. Procedurally, Hollan argues that Officer Luttrell's absence did not fall within one of the provisions of RCr 7.20(1). RCr 7.20(1) provides that

[a]t the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: that the witness is dead; or that the witness is out of the Commonwealth of Kentucky, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition had been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, any other party may require the offering party to introduce at that time all of it which is relevant to the part introduced or may later introduce any other parts so relevant.

Taking the above literally, Hollan is correct, Officer Luttrell does not fall within any of the enumerated provisions of RCr 7.20(1). However, the Supreme Court of Kentucky has held that the rule "should not be so narrowly construed to preclude other circumstances when a witness is unavailable." *Commonwealth v. Willis*, 716 S.W.2d 224, 231 (Ky. 1986); see also *Wells v. Commonwealth*, 562 S.W.2d 622, 624 (Ky. 1978). We hold that the

facts in this case present just such a circumstance. As noted above, Hollan was present for the deposition and she did not raise chain of custody as an issue in her defense. Therefore, we discern no abuse of discretion on the part of the trial court.

Substantively, Hollan argues that the reading of Officer Luttrell's deposition unduly prejudiced her because the jury could not observe Officer Luttrell's demeanor and thereby assess his credibility. If Hollan had raised any issue with regard to chain of custody, we might agree. However, Officer Luttrell's credibility was not at issue; therefore, the jury had no particular reason to assess it. Furthermore, had Hollan thought the jury needed to assess Officer Luttrell's demeanor she could have requested that the deposition be taken by videotape or moved for a continuance. She did neither.

B. Limitation of Hollan's Questioning  
During *Voir Dire*

During *voir dire*, Hollan began questioning potential jurors regarding her defense of entrapment. The Commonwealth objected and, although the audio quality of that portion of the videotape is basically inaudible, the trial judge sustained that objection. Hollan argues on appeal that this limitation of her *voir dire* impeded her ability to obtain a fair and impartial jury and, ultimately, a fair trial.

While it is within the discretion of the trial court to limit the scope of *voir dire*, that discretion is not boundless. Appellate review of such limitation is for abuse of discretion. *Webb v. Commonwealth*, 314 S.W.2d 543, 545 (Ky.1958) (trial court

abused discretion by not permitting defendant being tried for the murder of his father to examine jurors on their views concerning patricide and self-defense). However, "[t]o be constitutionally compelled . . . it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." *Mu'Min v. Virginia*, 500 U.S. 415, 425-26, 111 S.Ct. 1899, 1905, 114 L.Ed.2d 493 (1991). The test for abuse of discretion in this respect is whether an anticipated response to the precluded question would afford the basis for a peremptory challenge or a challenge for cause.

*Hayes v. Commonwealth*, 175 S.W.3d 574, 583 (Ky. 2005).

We are somewhat concerned about the trial court's limitation of Hollan's *voir dire* on the issue of entrapment, particularly in light of the fact that entrapment was Hollan's primary defense. However, in light of the fact that the trial court instructed the jury on entrapment, permitted Hollan to argue entrapment, and the overwhelming evidence that Hollan committed the acts for which she was charged, we discern no abuse of discretion on the part of the trial court.

#### C. Introduction of the Videotape

The Commonwealth introduced the videotape of the interaction between Hollan and Howard. The videotape contains footage of Howard and Officer Brandenburg driving and of Howard approaching Hollan's car and purchasing an Oxycodone tablet. The audio portion of the videotape contains a conversation between Officer Brandenburg and Howard regarding what Howard should do when approaching Hollan. Additionally, there is audio

of the conversation between Hollan and Howard when Howard is making the purchase. After she made the purchase, Howard returned to Officer Brandenburg's car, where the following conversation took place:

Officer Brandenburg: What did you purchase?

Howard: A 40 mg Oxycontin.

Officer Brandenburg: Alright. The cooperating witness purchased a 40 mg of Oxycontin from Kim Roberts. We pulled in right behind Kim in a maroon, I think it was a Ford Crown Victoria. I did witness the transaction because they were sitting right in front of me. I witnessed the cooperating witness hand Kim the money and Kim hand the Oxycontin back to her.

It is the preceding audio to which Hollan objects. We note that Hollan states in her brief that the Commonwealth played the videotape twice during the trial and in closing argument.

During Howard's testimony on direct, the Commonwealth played the entire videotape. During Howard's testimony on re-direct, the Commonwealth only played a portion of the videotape. That portion did not include the above conversation but stopped before Howard returned to Officer Brandenburg's car. Finally, during closing argument, the Commonwealth played only that portion of the videotape showing the purchase of the Oxycodone.

The standard of review on evidentiary issues is abuse of discretion. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999); *Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996). The test for discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by

sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000). See also *Simpson v. Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994), *Woodard v. Commonwealth*, 147 S.W.3d 63 (Ky. 2004).

Hollan argues on appeal that the statement by Howard amounted to inadmissible hearsay. In support of her argument, Hollan cites *Fields v. Commonwealth*, 12 S.W.3d 275 (Ky. 2000). Although *Fields* is somewhat supportive of Hollan's position, it is distinguishable. In *Fields*, the Commonwealth played a videotape of a murder scene to the jury. On the videotape, a police officer who testified at trial, not only described the scene being depicted but stated that Fields had confessed to the murder. Furthermore, the Commonwealth played the videotape, complete with the offensive narration, several times to the jury, including during opening statement and closing argument.

In the case before us, there is no narration from a third party on the videotape. It simply contains the voices of the participants. Furthermore, although Hollan states in her brief that the Commonwealth played the offending portion of the videotape two times and referred to it one other time, the complained of portion was only played during Howard's direct testimony. The other two times the Commonwealth played a portion of the videotape, the complained of portion was not played. Therefore, the complained of portion of the videotape was only played to the jury once.

Regardless of whether the complained of portion of the videotape was played more than once to the jury or constituted hearsay, we find that any error was harmless. In doing so, we note that the jury instructions, consistent with KRS 218A.010 and 218A.140, provided for a finding of guilt if the jury found that Hollan "sold, dispensed, distributed, or transferred" Oxycodone. The statement by Howard simply reiterated what the videotape showed, Hollan transferring a substance that later was identified as Oxycodone to Howard. In light of the videotape showing the transfer, Howard's statement to Officer Brandenburg regarding that transaction did not unduly prejudice Hollan. Therefore, we find no abuse of discretion by the trial court regarding the admission of the videotape.

#### CONCLUSION

Based on the above, we discern no abuse of discretion by the trial court in its admission of the videotape testimony of Officer Luttrell, its limitation of Hollan's questioning on *voir dire*, or its admission of the videotape statement by Howard. Therefore, we affirm.

ALL CONCUR.

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