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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000204-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY BARTLETT, JUDGE
ACTION NO. 11-CR-00627

SHANNON LEARY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; THOMPSON AND MAZE, JUDGES.

MAZE, JUDGE: The Commonwealth of Kentucky appeals from a Kenton Circuit Court order ruling on a pretrial motion *in limine*. The circuit court held that the evidence presented by the Commonwealth was not sufficient to sustain a charge of drug trafficking under Kentucky Revised Statutes (KRS) 218A.1412(3)(a), a Class B felony. We reverse and remand for further proceedings.

Shannon Leary was indicted on five counts of drug trafficking, including one charge of trafficking in cocaine, more than four grams, second offense, with a firearm; and one charge of trafficking in heroin, more than two grams, second offense, with a firearm.

Both charges were based on KRS 218A.1412, which defines the offense of first-degree trafficking in a controlled substance. Of particular significance for this appeal are subsections (3)(a) and (b), which classify the level of the felony based on the amount of drugs trafficked:

> (1) A person is guilty of trafficking in a controlled substance in the first degree when he or she knowingly and unlawfully traffics in:
>
> (a) Four (4) grams or more of cocaine;
>
> (b) Two (2) grams or more of heroin or methamphetamine;
>
> (c) Ten (10) or more dosage units of a controlled substance that is classified in Schedules I or II and is a narcotic drug, or a controlled substance analogue;
>
> (d) Any quantity of lysergic acid diethylamide; phencyclidine; gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers, and analogues; or flunitrazepam, including its salts, isomers, and salts of isomers; or
>
> (e) Any quantity of a controlled substance specified in paragraph (a), (b), or (c) of this subsection in an amount less than the amounts specified in those paragraphs.
>
> (2) The amounts specified in subsection (1) of this section may occur in a single transaction or may occur in

> a series of transactions over a period of time not to exceed ninety (90) days that cumulatively result in the quantities specified in this section.
>
> (3) (a) Except as provided in paragraph (b) of this subsection, any person who violates the provisions of this section shall be guilty of a Class C felony for the first offense and a Class B felony for a second or subsequent offense.
>
> (b) Any person who violates the provisions of subsection (1)(e) of this section shall be guilty of a Class D felony for the first offense and a Class C felony for a second offense or subsequent offense.

KRS 218A.1412.

Elsewhere, in the "definitions" section of the controlled substances chapter, cocaine is defined as "a substance containing **any quantity** of cocaine, its salts, optical and geometric isomers, and salts of isomers[.]" KRS 218A.010(5) (Emphasis supplied). Heroin is defined as "a substance containing **any quantity** of heroin, or any of its salts, isomers, or salts of isomers[.]" KRS 218A.010(16) (Emphasis supplied).

The evidence supporting the trafficking charges against Leary consisted of two "lumps" or "rocks" of drugs. The "cocaine lump" weighed 10.9 grams and tested positive for cocaine base, but also contained material that was not cocaine. The laboratory report did not specify what amount of the 10.9 grams was actually pure cocaine, and what amount was filler. The "heroin lump" weighed 7.78 grams and contained a combination of heroin, morphine, cocaine and filler.

The laboratory report did not specify the amounts of drugs or filler contained in the lump.

During pretrial hearings, the Commonwealth maintained that it needed to prove only the presence of cocaine in the 10.9 gram exhibit, and the presence of heroin in the 7.78 gram exhibit, rather than conduct further analysis to determine the exact amounts of pure cocaine and heroin present in those exhibits. It also alluded to the prohibitive expense of performing such additional testing. Leary argued that the Commonwealth had to show that four grams of cocaine and two grams of heroin, respectively, were actually present in the exhibits in order to sustain a conviction for a Class C or B felony.

The Commonwealth filed a pretrial motion *in limine*, requesting a ruling on whether the Commonwealth could withstand a motion for a directed verdict on charges under KRS 218A.1412(3)(a) if it did not prove the actual weight of the pure cocaine and heroin present in the exhibits.

The circuit court held that proof that Leary sold, or possessed with intent to sell, a substance containing some amount of heroin or cocaine, without proof that the substance actually contained more than two grams of heroin or four grams of cocaine, would be insufficient to support a conviction under KRS 218A.1412(3)(a). The circuit court explained its reasoning as follows:

> The Commonwealth's interpretation would negate the clear intent of the Legislature in distinguishing between a Class C felony and a Class D felony based upon the amount of heroin or cocaine sold. By the definitions referred to by the Commonwealth, the Legislature

> apparently intended to clarify the law that any amount of cocaine and heroin would support a conviction for possession. However, the Legislature clearly intended that in first degree trafficking cases, the quantity of drugs involved was a significant determinative factor in the degree of the offense.

This appeal by the Commonwealth pursuant to KRS 22A.020(4) followed.

As the proper interpretation of a statute is purely a legal issue, our review is *de novo*. *Commonwealth v. Long*, 118 S.W.3d 178, 181 (Ky. App. 2003) (internal citations omitted). "Our ultimate goal when reviewing and applying statutes is to give effect to the intent of the General Assembly. We derive that intent from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration." *Commonwealth v. Wright*, 415 S.W.3d 606, 609 (citing *Osborne v. Commonwealth*, 185 S.W.3d 645, 648–49 (Ky. 2006)). We are not, therefore, at liberty to ignore the definitions of heroin and cocaine provided by the Legislature in KRS 218A.010(5) and (16). It is only when "no specific definition is provided for terms contained in a statute" that we may construe the words of a statute "according to their common and approved usage[.]" *Id.* at 608. The Legislature's intent in this regard is further confirmed by the fact that the definitions of cocaine and heroin in KRS 218A.010 were adopted at the same time as the definition of first-degree trafficking under KRS 218A.1412 established the four-gram threshold for cocaine and the two-gram threshold for heroin.

Leary attempts to distinguish Kentucky's first-degree trafficking statute from comparable statutes of Florida, Missouri and Indiana, which specify whether the weight of the drug includes the entire mixture or not as an element of the crime. But simply because the definitions in Kentucky's statutory scheme are found elsewhere in the chapter does not mean they can be disregarded, nor does their placement elsewhere in the chapter create a conflict with the elements of first-degree trafficking. "We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes." *Wright*, 415 S.W.3d at 609 (citing *Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775, 784 (Ky. 2008)).

This interpretation does not lead to an absurd result. Nor does it undermine the purpose of the legislation, which Leary contends was to reduce the incarceration and recidivism rates of drug offenders, by using the quantity of drugs as a significant determinative factor in categorizing the degree of the offense. The actual quantity of pure cocaine or heroin in a mixture is not necessarily of paramount importance, because the customers rarely purchase narcotics in their pure form. "Cocaine as sold on the street is in powder form and almost invariably mixed with another substance. In whatever proportion of the drug to the filler it is prepared, the powder is ingestible and the customer pays for its aggregate weight." *State v. Laino*, 499 So.2d 1189, 1191 (La. Ct. App. 1986). "Heroin sold on the street is 2% to 3% opiate and the rest filler. Sometimes the mixture is even more dilute[.]" *United States v. Marshall*, 908 F.2d 1312, 1316 (7th Cir. 1990) (quoting

Jerome J. Platt, *Heroin Addiction: Theory, Research, and Treatment* 48-50 (1986)). In addressing an equal protection challenge to a statute which punished defendants more harshly for possessing greater amounts of mixtures containing narcotics, the Michigan Court of Appeals stated:

> It is reasonable for the Legislature to impose more severe punishment for those possessing greater amounts of a mixture containing a controlled substance due to the potential for wider dissemination with an increased potential harm to society. . . . . [T]he Legislature intended to punish defendants more severely for possession of greater amounts of "any mixture" containing a controlled substance with the recognition that purchasers of such mixtures often have little or no idea of what percentage of the mixture is filler and what percent is the "pure" drug. The greater the quantity of the mixture, regardless of the degree of purity, the greater the potential harm to society.

People v. Lemble, 303 N.W.2d 191, 193 (Mich. Ct. App. 1981).

The same reasoning can be applied to Kentucky's statute, which punishes more severely those who repeatedly traffic in larger quantities of narcotics. The degree to which those narcotics may be adulterated does not form the basis of the distinction between the different levels of felonies.

Furthermore, the statute anticipates this application, specifically stating the amounts may occur "in a single transaction or may occur in a series of transactions over a period of time not to exceed ninety (90) days that cumulatively result in the quantities specified in this section." KRS 218A.1412(2). This section indicates that the General Assembly intended to focus on street trafficking as well as trafficking for distribution purposes. Finally, we would also point out that any

attempt to separate the cocaine or heroin in a sample in order to weigh it would likely destroy its value as evidence. We find no indication that the General Assembly intended to impose such an onerous burden on the Commonwealth.

In light of all of these considerations, we conclude that the trial court's interpretation of KRS 218A.1412(3)(a) was clearly erroneous. On remand, the Commonwealth shall have the burden of proving that Leary trafficked in more than four grams of cocaine and two grams of heroin. As long as the Commonwealth proves the presence of cocaine and heroin, the quantity may be proven by the total weight of the substance sold, without regard to its purity.

Accordingly, the order of the Kenton Circuit Court on the motion *in limine* is reversed, and this matter is remanded for further proceedings in accordance with this opinion.

ACREE, CHIEF JUDGE, CONCURS.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. I agree with the circuit court's ruling that the evidence presented by the Commonwealth was not sufficient to sustain a charge of Class B drug trafficking under KRS 218A.1412(3)(a) because the Commonwealth failed to establish that the amount of cocaine and heroin contained in the "lumps" seized satisfied the quantity required under KRS 218A.1412(1)(a) and (b).

In 2011, through House Bill 463, the General Assembly made sweeping changes to the Kentucky Penal Code and Controlled Substances Act. Alterations to KRS Chapter 218A relating to the trafficking of controlled substances established different classes of felonies depending upon the amount of drugs trafficked, in order to punish serious offenses more severely. Legislative Research Commission, *Report of the Task Force on the Penal Code and Controlled Substances Act*, Research Memorandum No. 506, at 17 (2011). Felons are now subject to higher felony classifications, Class C for a first offense and Class B for subsequent offenses, when four grams or more of cocaine, two grams or more of heroin or methamphetamine, or ten or more dosage units of a controlled substance were trafficked, and Class D for a first offense or Class C for subsequent offenses when a lesser quantity of those substances were trafficked. KRS 218A.1412(1)(a)(b)(c)(e), (3)(a)(b).

In analyzing the effect of these changes, I am guided by the precept that "doubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruous results or impose punishments totally disproportionate to the gravity of the offense[.]" *Holland v. Commonwealth*, 192 S.W.3d 433, 436 (Ky.App. 2005) (quoting *Commonwealth v. Colonial Stores, Inc*., 350 S.W.2d 465, 467 (Ky. 1961)). While under KRS 218A.1412(1)(d) "any quantity of lysergic acid diethylamide, phencyclidine; gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers, and analogues; or flunitrazepam, including its salts,

isomers, and salts of isomers[,]" is sufficient for conviction of a Class C or Class B felony under KRS 218.1412(3)(a), this "any quantity" language is not contained in the provisions relating to trafficking the larger amounts of cocaine and heroin, KRS 218A.1412(1)(a), (b). Instead, the statute provides two categories of punishment for trafficking in these substances. The "any quantity" language is only contained in the provision regarding lesser penalties for amounts below those listed in (1)(a)(b) and (c). KRS 218A.1412(1)(e), (3)(b). Therefore, had the General Assembly intended that "any quantity" of cocaine or heroin support a conviction under section (3)(a) under that same statute, it would have used identical language in section (1)(a), (b) and (c). Although cocaine and heroin are defined in KRS 218A.010(5) and (16) to include a substance containing "any quantity" of these drugs, the wording of the trafficking statute itself, which uses the "any quantity" language solely in reference to the substances listed in KRS 218A.1412(1)(d) and to amounts less than those specified in (a), (b) and (c), indicates that the General Assembly did not intend the more severe penalty described in (3)(a) to apply to an individual who traffics in a mixture that meets the weight requirement but may be comprised almost entirely of adulterants.

I would follow the lead of the North Carolina Court of Appeals which interpreted its former comparable trafficking statute which included the clause "any mixture containing such substance" for other controlled substances but omitted in reference to methamphetamine, as showing a legislative intent to require proof as to the actual weight of methamphetamine, rather than proof of the weight

of a mixture containing methamphetamine, to sustain a trafficking conviction. *State v. Conway*, 194 N.C.App. 73, 84-85, 669 S.E.2d 40, 47 (2008).

I recognize North Carolina amended the applicable statute in 2009 and it now allows a conviction based on the weight of the entire "mixture." *See State v. Davis,* 762 S.E.2d 886, 893-94 (N.C.App. 2014). However, the reasoning in *Conway* applies to the current wording of Kentucky's statute.

Followed to its logical conclusion, the Commonwealth's interpretation would allow arbitrary classifications unrelated to the seriousness of the crime committed. A defendant with 4.1 grams of 10% pure cocaine could be convicted of a Class C or B felony, while a defendant with 3.9 grams of 90% pure cocaine could only be convicted of a D or C felony. Such an outcome would undermine the General Assembly's intent to classify a defendant's punishment based on the quantity of drugs trafficked and have the odd result of punishing low-level traffickers with drug mixtures of lower purity but of higher weight more severely than source dealers with pure uncut drugs of a much higher street value of relatively low weight.

I note that many of the states which explicitly include mixtures in the minimum quantities required for trafficking have much higher minimum quantities, which also suggests the General Assembly intended that the weight of the pure drugs be used. For example, several states require twenty-eight-gram minimums of mixtures containing cocaine for trafficking convictions and then provide increased penalties for additional amounts. *See* Ga. Code Ann. § 16-13-

31(a)(1), (2) (felony trafficking requires "28 grams or more of cocaine or of any mixture with a purity of 10 percent or more of cocaine" or "any mixture with a purity of less than 10 percent of cocaine . . . if the total weight of the mixture multiplied by the percentage of cocaine contained in the mixture exceeds any of the quantities of cocaine specified in paragraph (1) of this subsection."); Fla. Stat. Ann. § 893.135(1)(b) (twenty-eight grams of cocaine or a mixture necessary for trafficking in cocaine); Ala. Code § 13A-12-231(2) (same); Idaho Code Ann. § 37-2732B(2) (same); Nev. Rev. Stat. Ann. § 453.3395(1) (same); Mass. Gen. Laws Ann. 94C § 32E(b)(1) (eighteen grams or more of a controlled substance or any mixture); Ark. Code Ann. § 5-64-440(b)(1) (trafficking requires 200 grams or more of cocaine "by aggregate weight, including an adulterant or diluent").

Using 4.0 grams of a cocaine mixture to qualify for the most serious felony classifications for first-degree trafficking would provide no higher gradation for trafficking in a bulk concentrated product valued at many thousands of dollars committed by high-level dealers, as compared with relatively small amounts of diluted cocaine worth only hundreds of dollars trafficked by minor street-level dealers. *See Graves v. Commonwealth*, 17 S.W.3d 858, 864 (Ky. 2000) (trafficking in one kilogram of cocaine for $27,000); *Johnson v. Commonwealth*, 277 S.W.3d 635, 637, 640 (Ky.App. 2009) ("the quantity of cocaine recovered [31.1 grams of crack cocaine and 6.6 grams of powder cocaine with a street value of more than $3,000] indicated that its possessor was a mid-level dealer;") *Christian v. Commonwealth*, 2003 WL 22872326 (Ky.App. Dec. 5, 2003)(2002-

CA-002305-MR), at *1, *3 (unpublished) (upholding trafficking conviction under the prior version of the statute because while "amount of crack cocaine [4.4 grams of crack cocaine] was relatively small, it nonetheless had a street value of more than $200.")

I believe the majority opinion's concern that "any attempt to separate the cocaine or heroin in a sample in order to weigh it would likely destroy its value as evidence" is unfounded and not supported by evidence of record. The results would be inadmissible only if there is an unnecessary destruction of the total drug sample where the defendant is not provided with a reasonable opportunity to participate in the testing or given access to information from the testing sufficient to enable him to obtain his own expert evaluation. *Green v. Commonwealth*, 684 S.W.2d 13, 16 (Ky.App. 1984). There is no requirement that an entire lump be tested; instead testing a random sample from it is sufficient. *See Taylor v. Commonwealth*, 984 S.W.2d 482, 484-485 (Ky.App. 1998). Additionally, appropriate testing exists to determine purity. *See, e.g., Collins v. Commonwealth*, 574 S.W.2d 296, 297 (Ky. 1978) (heroin tested to be 58% pure); *Brown v. Commonwealth*, 914 S.W.2d 355, 357 (Ky.App. 1996) (rocks of crack cocaine tested to be 99.9% pure). The majority's statement that testing for purity is of high cost is mere opinion based on conjecture and speculation and not supported by any evidence of record.

Accordingly, I would affirm the order of the Kenton Circuit Court on the motion *in limine* and leave it to the General Assembly to amend KRS

218A.1412 if it desires to punish trafficking in cocaine and heroin based on the total weight of a mixture.

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