

RENDERED: DECEMBER 15, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001509-MR

CECIL BAKER

APPELLANT

v. APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE SAMUEL TODD SPALDING, JUDGE
ACTION NO. 14-CR-00009

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND TAYLOR, JUDGES.

KRAMER, CHIEF JUDGE: Cecil Baker appeals the Wayne Circuit Court's judgment convicting him of two counts of trafficking in a controlled substance.

After a careful review of the record, we affirm because Baker's request for a

change of venue did not conform to the requirements of KRS¹ 452.220(2), and the circuit court did not abuse its discretion in denying his motion for a mistrial.

I. FACTUAL AND PROCEDURAL BACKGROUND

Following two controlled drug buys² of methamphetamine from Cecil Baker by police informant Christy Stinson, Baker was indicted on two counts of first-degree trafficking in a controlled substance, second or subsequent offense. A jury trial was held, during which defense counsel orally moved for a change of venue, but the motion was denied. Counsel also moved for a mistrial on the basis that one of the Commonwealth's witnesses testified that Ms. Stinson had executed a written statement concerning one of the controlled buys, but that statement had not been disclosed to the defense before trial. The circuit court denied the motion for a mistrial and determined that a "missing evidence" instruction was warranted. Baker was ultimately convicted on both counts of first-degree trafficking in a controlled substance, second or subsequent offense. He was sentenced to ten years of imprisonment on each count, and those sentences were ordered to run concurrently with each other.

Baker now appeals, contending that the circuit court erred: (a) in denying defense counsel's motion for a change of venue; and (b) in denying the

¹ Kentucky Revised Statute.

² The drug buys were "controlled" in the sense that Ms. Stinson and her vehicle were searched by police before she went to buy the drugs; the police provided her with marked money to use to buy the drugs; and the police provided her with an audio and video recording device upon which to record the drug buys.

defense's motion for a mistrial based upon the discovery violation concerning Ms. Stinson's written statement.

II. ANALYSIS

A. CHANGE OF VENUE

Baker first alleges that the circuit court erred in denying defense counsel's motion for a change of venue. The motion was made orally during *voir dire* after one potential juror told the court privately during a bench conference that she grew up in the area, and she had heard that "you [do not] mess around with" Cecil Baker. That juror was excused from the venire panel. The court denied Baker's motion for a change of venue because that juror had been the only person who had indicated she knew of Baker up to that point in *voir dire*. Subsequently, another juror told the court during a bench conference that she knew Baker had "dealt meth" in the past because he had dated someone that she knew. That juror was likewise dismissed from the venire panel. Defense counsel then moved a second time for a change of venue, contending that the potential juror had spoken loudly at the bench and that other potential jurors may have overheard her. The court stated there was no reason to believe the other potential jurors had overheard her,³ so the court denied the motion.

³ We pause to note that other potential jurors were seated immediately behind counsel for both sides and the member of the venire panel who said, and not in a whispered tone, that she knew Baker had "dealt meth" in the past. The other potential jurors were seated in an area that appeared to be two to three feet behind where the attorneys and the member of the venire panel stood at the bench. We are uncertain why the other potential jurors were seated so closely to the bench, considering that the court clearly wanted to hold private bench conferences with each venire person who might know something or someone involved in the case before deciding whether to strike that venire person. Additionally, the court did not ask any of the potential jurors whether they had overheard what the venire panel member said before the court concluded

Pursuant to KRS 452.220(2), an application for a change of venue, when made by the defendant,

shall be made by petition in writing, verified by the defendant, and by the filing of the affidavits of at least two (2) other credible persons, not kin to or of counsel for the defendant, stating that they are acquainted with the state of public opinion in the county objected to, and that they verily believe the statements of the petition for the change of venue are true.

The Kentucky Supreme Court has held that “it is not error to deny a motion which is not supported by a verified affidavit or petition.” *Welborn v. Commonwealth*, 157 S.W.3d 608, 615 (Ky. 2005). In fact, the Court found that Welborn’s “failure to file the affidavit is fatal to the petition because compliance with KRS 452.220 is mandatory.” *Id.*

In the present case, Baker’s motion for a change of venue was made orally. Therefore, because it was not in writing, verified, and supported by at least two affidavits from credible persons as mandated by KRS 452.220(2), the circuit court did not err in denying Baker’s motion.

B. MISTRIAL

Baker also contends that the circuit court erred in denying defense counsel’s motion for a mistrial based upon the discovery violation concerning Ms. Stinson’s written statement. During the defense’s cross-examination of Agent

that there was no reason to believe that any of them had overheard her. We further note that the two people who were seated the closest behind the attorneys and the venire person were ultimately selected to serve as jurors in this case. Regardless, for reasons we will discuss *infra*, Baker’s claim that the court should have granted his motion for a change of venue fails.

Wayne Conn of the Lake Cumberland Area Drug Task Force, counsel asked the agent if he had received a written statement from Ms. Stinson concerning the controlled buy in which she participated on September 3, 2013. Agent Conn responded that he did have a written statement from her, which stated that she had bought the drugs from Baker. This was the first time that defense counsel had been informed that Ms. Stinson had written a statement concerning that event. Incidentally, Ms. Stinson was in the hospital and unavailable to testify at trial.

Upon learning about the existence of Ms. Stinson's written statement, defense counsel moved for a mistrial. The Commonwealth explained to the court that it was unaware of Ms. Stinson's written statement, so it had not provided the statement to the defense during discovery.⁴ The circuit court denied the motion for a mistrial, stating that instead of granting the mistrial, it would give the jury a "missing evidence" instruction with the jury instructions when it came time for deliberation. Defense counsel responded that this solution was "okay."⁵

The Kentucky Supreme Court has stated the standard of review of a denial of a mistrial as follows:

A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity. The standard for reviewing the denial of a mistrial is

⁴ Regardless of whether the Commonwealth was aware of the statement, the fact that the police officer was aware of it is sufficient to impute the officer's knowledge of the statement on the Commonwealth. *See Anderson v. Commonwealth*, 864 S.W.2d 909, 912-13 (Ky. 1993).

⁵ Because no argument is made on appeal regarding the propriety of a "missing evidence" instruction in this case, we do not address it.

abuse of discretion. It is well established that a discovery violation may form the basis for a mistrial[.]

Slone v. Commonwealth, 382 S.W.3d 851, 858 (Ky. 2012) (internal quotation marks and citations omitted).

Pursuant to RCr⁶ 7.26(1),

Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

In the present case, Ms. Stinson did not testify at trial, so her written statement does not fall within the ambit of RCr 7.26(1) because it does not relate to subject matter about which she would testify. Moreover, even if she had testified, the “[f]ailure to comply with RCr 7.26 does not require automatic and absolute reversal. Some prejudice must be found; otherwise, the error, if any, is harmless.”

Hicks v. Commonwealth, 805 S.W.2d 144, 149 (Ky. App. 1990) (citations omitted).

Baker did not allege during trial, nor does he allege on appeal, that his case was prejudiced by the failure of the Commonwealth to provide Ms. Stinson's written statement during discovery. In fact, even if Baker had alleged that his case was prejudiced, he could not prove prejudice. During trial, the video/audio

⁶ Kentucky Rule of Criminal Procedure.

recordings of the controlled drug buys were played for the jury. Although the recordings were not of the best quality, the face of the man in the vehicle with Ms. Stinson could briefly be seen in each video, as well as a \$100 bill (which appeared to be held by Ms. Stinson). Additionally, Agent Conn testified that before the drug buys, Ms. Stinson and her vehicle were searched, she was given a marked \$100 bill with which to buy the drugs, and she was provided a video/audio recorder.

Agent Conn also attested that after Ms. Stinson was sent to conduct the first drug buy, she was followed by him and Kentucky State Police Detective Jason Browning to a car wash that was to serve as the location of the buy. The two officers watched from a nearby restaurant parking lot as Baker drove up to Ms. Stinson's vehicle, stepped off his motorcycle, and climbed into her vehicle, where he stayed for two to five minutes before exiting the vehicle, climbing onto his motorcycle, and driving away. Agent Conn recognized Baker. Ms. Stinson then drove away in the opposite direction from Baker. Agent Conn did not lose sight of Ms. Stinson from the time she left the officers after they gave her the money and the recording device, through the drug buy with Baker, and up until she drove away. Although he lost sight of her when she drove away, Ms. Stinson immediately called Agent Conn from her cellular telephone as she was driving away. The officers remained in the restaurant parking lot for a couple of minutes for Ms. Stinson's safety, in case Baker doubled back and followed her. The officers then drove to where they had previously agreed to meet Ms. Stinson after the buy. Agent Conn remained on the telephone with Ms. Stinson the entire time

as she was leaving the car wash after the drug buy until the officers met up with her, and he did not hear her speak to anyone else or stop anywhere. She handed the officers the drugs that she had bought from Baker and Detective Browning searched her vehicle again. The drugs were tested, and they tested positive for methamphetamine.

As for the second drug buy, after Ms. Stinson and her vehicle were searched and she was given the marked \$100 bill and the video/audio recorder, she drove to Cumberland Green, where she was supposed to meet Baker. From the time she left Agent Conn and the other agent who was working with him that day, to the time she arrived at Cumberland Green, Agent Conn had constant visual contact with Ms. Stinson. The agents drove in separate vehicles to places near Cumberland Green. Agent Conn pulled into a nearby business's parking lot because he was able to see Ms. Stinson from there. When Ms. Stinson arrived at Cumberland Green, the drug seller was already there in a vehicle with dark tinted windows. Ms. Stinson got out of her vehicle and into the seller's vehicle. Agent Conn attested that he was not able to see if the seller was Baker, so he could not positively identify the person in the vehicle as Baker based upon his vantage point of observing the transaction from his vehicle in the parking lot of a nearby business. Agent Conn testified that Ms. Stinson remained in the seller's vehicle for three to four minutes, then she climbed back into her vehicle. She drove away and the other agent followed behind her while Agent Conn waited a few minutes to see if the seller was going to double back and follow Ms. Stinson. The officers and

Ms. Stinson drove separately back to the location where they had previously agreed to meet after the transaction, and Ms. Stinson remained on her cellular telephone with Agent Conn the entire time from when she left Cumberland Green until the officers met back up with her at the meeting location. Ms. Stinson's vehicle was searched again. Agent Conn retrieved the drug evidence and the recording device from Ms. Stinson. The drug evidence tested positive for methamphetamine.

Although Agent Conn did not actually see Baker during the second drug buy because the windows of the seller's vehicle were tinted, the face of the drug seller can briefly be seen in the video recording of the second drug buy, and it resembles Baker's. The video also shows the seller divvying out the drugs, then cooking them by holding a lit cigarette lighter underneath a strip of aluminum foil which contained the drugs. Ms. Stinson can also be overheard on the video asking the seller "how much is that," to which the seller replied, "one gram."

Based upon the strength of the evidence against Baker, he cannot show that he was prejudiced by the Commonwealth's failure to turn over Ms. Stinson's written statement during discovery. Consequently, the circuit court did not abuse its discretion when it denied Baker's motion for a mistrial.

Accordingly, the judgment of the Wayne Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Linda Roberts Horsman
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky
Frankfort, Kentucky

Megan Kleinline
Assistant Attorney General
Frankfort, Kentucky