Cite as 2018 Ark. App. 13

ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-16-985

BOBBY LEE ROBERTSON APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered:** January 24, 2018 APPEAL FROM THE ASHLEY COUNTY CIRCUIT COURT [NO. 02CR-15-167] HONORABLE SAM POPE, JUDGE AFFIRMED; MOTION GRANTED

RITA W. GRUBER, Chief Judge

Bobby Lee Robertson was convicted by a jury on four counts of delivery of a Schedule I or Schedule II controlled substance that is not methamphetamine or cocaine, Ark. Code Ann. § 5-64-426 (Repl. 2016), and was sentenced to an aggregate of 336 months' imprisonment in the Arkansas Department of Correction. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(k)(1) of the Rules of the Arkansas Supreme Court and Court of Appeals, his attorney has filed a no-merit brief and a motion to withdraw, asserting that there is no issue of arguable merit for an appeal. Counsel explains in his brief why none of the trial court's rulings that were adverse to Robertson constitute grounds for appeal. Robertson has filed pro se points for reversal, and the State has filed a brief responding to his points.

We affirm Robertson's convictions and grant counsel's motion to withdraw. Our discussion begins with counsel's no-merit appeal.

I. *Counsel's No-Merit Appeal*

A. Motions for Directed Verdict

Counsel addresses the denial of his motions for a directed verdict in which he argued that the State had "failed to make a prima facie case that the delivery occurred [or] that there was an actual transaction between my client and the confidential informant." Counsel summarizes the evidence as follows, acknowledging that the evidence is viewed on appeal in the light most favorable to the conviction. *Flemister v. State*, 2016 Ark. App. 180, at 1, 487 S.W.3d 386, 392.

The alleged drug transactions were recorded by a hidden camera carried by a confidential informant, Shundra Williams, and the videos were shown at trial. Williams testified that she acted as the confidential informant because criminal charges were pending against her, and she would be "concerned for her children" if she were to face jail time. She acknowledged that someone viewing the video might not be able to see the actual exchange of money or drugs and that on two occasions the video "was deactivated" before she returned to Detective Bobby Linder's vehicle with the drugs. She stated that the drug transactions indeed occurred; that detectives searched her before her meetings with Robertson; that she did nothing "sinister" after the recording cut off; and that she did not intentionally turn off the camera, or know that it was cut off, before she got back to the vehicle. She testified that the video showed "what was in her hand" and that she gave those items to detectives. Detectives Linder and David Tumey testified that Williams was searched before each transaction with Robertson. Linder testified that he had no evidence she ever "slipped pills in" or had extra money on her in more than a hundred cases she had

done. The substances in this case were identified as "morphine C-II" and "amphetamine C-II" on Arkansas State Crime Laboratory documents entitled "Evidence Submission Form" and "Drugs/Report of Laboratory Analysis," and chemists from the lab testified that they had identified those substances. Counsel concludes that it was up to the jury to weigh the witnesses' testimony and choose particular testimony to believe, a choice that the appellate court will not question. *Hicks v. State*, 327 Ark. 652, 658–659, 941 S.W.2d 387, 391 (1997).

B. Objection to Lack of Discovery

Detective Tumey testified that Williams had done more than ten buys for Detective Linder and him, and Robertson objected that he had not been provided the information in discovery. The court overruled the objection, finding that the State need not provide any "information that they don't use as evidence. It's just an oral question." Counsel notes that Arkansas Rule of Criminal Procedure 17.1 requires the State to provide names and addresses of witnesses it intends to call but not the substance of their testimony, and that a criminal defendant cannot rely upon discovery as a total substitute for his or her own investigation. *Hicks v. State*, 340 Ark. 605, 612, 12 S.W.3d 219, 223 (2000).

C. Objection to Admission of Laboratory Report

Robertson objected to the admission of State's exhibit 8, a "Report of Laboratory Analysis" by a chemist at the state crime laboratory, because of a discrepancy between its reference to "4 round purple tablets" and the reference to "4 round burgundy pills" in the "Evidence Submission Form" signed by Detective Linder. The court ruled that a partial identification or misidentification of colors did not require exclusion. Because decisions on

evidentiary issues fall within the trial court's broad discretion and are not to be reversed absent an abuse of discretion, *Smith v. State*, 351 Ark. 468, 95 S.W.3d 801 (2003), counsel asserts that admission of this evidence would be an abuse of discretion only if the descriptions of color would unfairly prejudice Mr. Robertson or confuse the jury. Ark. R. Evid. 403 (2017). The weight of this particular evidence was a determination for the jury rather than an appellate court. *Kelly v. State*, 350 Ark. 238, 241, 85 S.W.3d 893, 895 (2002); *Marvel v. Parker*, 317 Ark. 232, 234, 878 S.W.2d 364, 365 (1994).

D. Objection That Only One Pill Was Identified via Analytical Testing and the Other Three Identified via Reference to the *Drug Identification Bible*

Robertson objected that particular pills could not be introduced into evidence because, according to the chemist's testimony, only one tablet was identified by analytical testing while the others were identified through the *Drug Identification Bible*. The court overruled the objection. Counsel notes that the statute under which Robertson was convicted did not require a minimum amount of the controlled substance and that evidence of one pill would be sufficient proof for each count. *See* Ark. Code Ann. § 5-64-426(c)(1) (entitled "Delivery of less than two grams of a Schedule I or Schedule II controlled substance"). Counsel further states that "reference to the *Drug Identification Bible* instead of chemical analysis would not necessarily be required to identify the pills." *See Armstrong v. State*, 5 Ark. App. 96, 633 S.W.2d 51 (1982).

E. Objection That the Laboratory Report Did Not Indicate That Substances Were Chemically Analyzed

Robertson objected to the introduction of State's exhibit 3, a "Report of Laboratory Analysis," which included a statement that identification results "were obtained by

comparing the item's code imprint to imprint records and not by analytical testing." Robertson argued that the report stated that the laboratory tested "one white round tablet" but did not specify that the testing was by chemical analysis. Counsel notes that the chemist who prepared the report explained that the imprint-records notation referred only to four pills whose identification was marked with an asterisk and that the report indicated that a fifth pill was tested.[1] Counsel explains that the missing words "tested by chemical analysis" went to the weight of the witness's credibility, a matter within the purview of the jury. Counsel also notes that under *Armstrong*, 5 Ark. App. at 97, 633 S.W.2d at 52, no chemical analysis is required.

F. The Trial Court's Refusal to Appoint New Counsel

At a pretrial hearing, Robertson requested that new counsel be appointed. Robertson stated that he had asked counsel to file a motion "to suppress the affidavit on the basis of perjured testimony," but counsel did not file it because he believed it had no merit. Robertson told the court that he had filed a grievance against counsel in regard to a revocation proceeding because Robertson believed that counsel had allowed him to be subjected to an illegal sentence, but counsel advised him that the issue could be raised on appeal because it might have merit. The trial court determined that Robertson could have pursued his grievance against trial counsel after the proceedings had been completed but had chosen not to do so, and that trial counsel could continue to fulfill his responsibilities to Mr. Robertson. The trial court ruled that it would not allow Robertson to create a conflict with his appointed counsel and then have new counsel appointed.

[1]All pills in exhibit 3 were described as "white round tablets."

Counsel cites *Hall v. State*, 2016 Ark. App. 351, at 3, 498 S.W.3d 342, 344, in which we upheld the trial court's finding that a defendant complaining of inadequate representation "could not create his own conflict and then complain about it." Counsel also notes that "the right to counsel of one's choosing is not absolute" and that once competent counsel is obtained, a request for a change "must be considered in the context of the public's interest in the prompt dispensation of justice." 2016 Ark. App. 351, at 4, 498 S.W.3d at 345. Counsel concludes that filing a complaint against one's trial counsel does not automatically warrant withdrawal and the appointment of new counsel.

G. Conclusion

The test for filing a no-merit brief is not whether there is any reversible error but whether an appeal would be wholly frivolous. *House v. State*, 2015 Ark. App. 280. Here, counsel states that after thoroughly reviewing the record and exploring potential defenses, he has found no nonfrivolous arguments to support an appeal. His brief lists the rulings below that were adverse to Robertson, and counsel explains "why each adverse ruling is not a meritorious ground for reversal." Ark. Sup. Ct. R. 4-3(k)(1) (2017). From our review of the record and the brief presented to us, we find compliance with Rule 4-3(k).

II. *Robertson's Pro Se Points*

Robertson raises several points concerning the admission of exhibit 8, the analysis form stating that "4 round purple tablets" were submitted to the state crime laboratory, that one tablet was tested, and that all the tablets were identified as morphine. Robertson contends that the chain of custody was faulty and that the trial court therefore abused its discretion in failing to exclude the evidence.

In counsel's no-merit appeal, we have the discrepancy between the color descriptions in exhibit 8, the crime lab's analysis form, and exhibit 5, the submission form. The analysis form shows that one tablet was confirmed as morphine and that items not analytically tested were identified through the imprint code. Kelly Jarrell, the chemist who performed the testing and prepared the report, testified that she determined the untested tablets to be morphine through a process of "tablet identification" and reference to the 2014–2015 *Drug Identification Bible*. Robertson argues that the discrepancy in color, as described on the analysis form and submission form, shows a break in the chain of custody and was reversible error.

The decision to admit or exclude evidence is within the sound discretion of the trial court, and we will not reverse that decision absent a manifest abuse of discretion. *Chatmon v. State*, 2015 Ark. 28, at 10, 467 S.W.3d 731, 737. The abuse-of-discretion standard is a high threshold that does not simply require error in the trial court's decision but requires that the court act improvidently, thoughtlessly, or without due consideration. *Id.* Here, we agree with the State that the minor discrepancy in color description does not meet the threshold requirement of improvidence, thoughtlessness, or lack of due consideration.

Nor did the minor discrepancy in the color description require that the trial court find a break in the chain of custody. Officer Bobby Linder described a "burgundy, purple-ish morphine tablet" in his trial testimony; regarding the discrepancy between the submission and analysis forms, he acknowledged that he had used the terminology "burgundy" and the crime lab had used "purple." The purpose of the chain-of-custody rule is to prevent the introduction of evidence that is not authentic. *Gardner v. State*, 296

Ark. 41, 65, 754 S.W.2d 518, 530 (1988). Minor uncertainties in the chain of custody of physical evidence do not render the evidence inadmissible as a matter of law, and the effect of minor discrepancies in the chain of custody are for the trial court to weigh. *White v. State*, 290 Ark. 130, 143, 717 S.W.2d 784, 791 (1986); *Nash v. State*, 267 Ark. 870, 872, 591 S.W.2d 670, 672 (Ark. App. 1979).

Robertson cites *Crisco v. State*, 328 Ark. 388, 393, 943 S.W.2d 582, 585 (1997), in which our supreme court held that the trial court abused its discretion by receiving a substance into evidence that was not properly authenticated. There, the law-enforcement officer testified that the substance he had submitted to the crime lab was an off-white powder substance; the forensic chemist described it as a tan rock-like substance and stated that he would not have described it as off-white powder. *Id.* at 391, 943 S.W.2d at 584. The *Crisco* court concluded:

> [T]he marked difference in the description of the substance by Officer Hanes and the chemist leads us to the conclusion that there is a significant possibility that the evidence tested was not the same as that purchased by Officer Hanes. This is especially so when we consider that the drug involved is a readily interchangeable substance. Under these circumstances, where the substance at issue has been described differently by the undercover officer and the chemist, we believe the State was required to do more to establish the authenticity of the drug tested than merely trace the route of the envelope containing the substance.

Id. at 392, 943 S.W.2d at 585.

There was no evidence in the present case that the substances submitted by the detective and those tested by the chemist differed in consistency or differed significantly in color, and each of them described the pill's shape as round. Robertson presents no convincing argument that this slight discrepancy in color description is an abuse of discretion, and we find no merit to this point for reversal.

Robertson also argues that the circuit court "failed to order the State to establish that the evidence was authentic." The State fairly characterizes Robertson's argument as a challenge to proper authentication of the evidence. To prove authenticity, the State must demonstrate a reasonable probability that the evidence has not been altered in any significant manner. *White v. State*, 290 Ark. 130, 143, 717 S.W.2d 784, 791 (1986). There was significant and lengthy testimony from both Officer Linder and Chemist Kelly regarding the handling and packaging of the drugs in State's exhibit 8. We find no abuse of discretion in the trial court's admission of this evidence.

Affirmed; motion granted.

ABRAMSON and KLAPPENBACH, JJ., agree.

Scholl Law Firm, P.L.L.C., by: *Scott A. Scholl*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Michael A. Hylden*, Ass't Att'y Gen., for appellee.