

COURT OF APPEALS OF VIRGINIA

Present: Judges Benton, Annunziata and Senior Judge Cole
Argued at Richmond, Virginia

CLIFFORD O'NEAL KING

v. Record No. 1130-96-2

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY
JUDGE ROSEMARIE ANNUNZIATA
JANUARY 28, 1997

FROM THE CIRCUIT COURT OF HANOVER COUNTY
Richard H. C. Taylor, Judge

Hugh S. Campbell (Campbell, Campbell, Herbert &
Harris, on brief), for appellant.

Daniel J. Munroe, Assistant Attorney General
(James S. Gilmore, III, Attorney General, on
brief), for appellee.

Following a bench trial, appellant, Clifford O'Neal King, was convicted of distribution of cocaine and conspiracy to distribute cocaine. On appeal, he contends the evidence is insufficient to support his conviction for conspiracy to distribute. We agree and reverse.

Lloyd Evans, acting undercover as a Special Agent of the Virginia State Police, met with appellant and discussed with him the possibility of purchasing cocaine. Appellant asked Evans for a quarter, which he used to place a telephone call. Evans overheard appellant refer to the person he called as "Ben." With that exception, there is no evidence concerning the content of the phone conversation. After completing the call, appellant

*Pursuant to Code § 17-116.010 this opinion is not designated for publication.

told Evans appellant could obtain drugs from a person named Ben.

Appellant, Evans, Charles Brown (Charles) and another man drove to the nearby home of Benjamin Harris (Ben). When they arrived, Evans gave appellant eighty dollars. Appellant took the money, exited the vehicle, approached the house and was met by Ben. Evans witnessed appellant and Ben exchange something, but the record contains no evidence concerning any communication made between appellant and Ben during the transaction. Following the transaction, appellant returned to the vehicle and presented Evans with crack cocaine. Appellant testified that, following the transaction, Ben walked to the car and spoke to Charles.

"Conspiracy is defined as `an agreement between two or more persons by some concerted action to commit an offense.'" Wright v. Commonwealth, 224 Va. 502, 505, 297 S.E.2d 711, 713 (1982) (quoting Falden v. Commonwealth, 167 Va. 542, 544, 189 S.E. 326, 327 (1937)). There is no dispute that the relevant agreement in this case is the alleged agreement between appellant and Ben to distribute cocaine; any "agreement" between appellant and Evans is irrelevant. See Fortune v. Commonwealth, 12 Va. App. 643, 648, 406 S.E.2d 47, 49 (1991) ("agreement" with government agent insufficient to support conviction for conspiracy).

An agreement requires plurality of intent, a meeting of the minds. "[I]t must be shown that the requisite intent existed as to at least two persons. That is, there must

be a common design, so that if only one party to the agreement has the necessary mental state then even that person may not be convicted of conspiracy."

Id. at 647, 406 S.E.2d at 49 (citation omitted). "As a general rule a single buyer-seller relationship, standing alone, does not constitute a conspiracy." Zuniga v. Commonwealth, 7 Va. App. 523, 528, 375 S.E.2d 381, 385 (1988). Accordingly, in the present case, the Commonwealth was required to prove an agreement between appellant and Ben to distribute cocaine to a third party.

Here, the record contains no direct evidence of an agreement between appellant and Ben to distribute cocaine to a third party.

The evidence of the phone call showed only that appellant spoke to a man named Ben; the evidence of the transaction showed only that appellant and Ben exchanged something.

The Commonwealth argues that circumstantial evidence and inferences to be drawn therefrom, viewed in the light most favorable to the Commonwealth, supports the trial court's finding that a conspiracy to distribute existed. We disagree.

"[W]here the Commonwealth's evidence as to an element of an offense is wholly circumstantial, 'all necessary circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence.'" Moran v. Commonwealth, 4 Va. App. 310, 314, 357 S.E.2d 551, 553 (1987) (citation omitted). The Commonwealth argues that the

evidence of the phone call and the resulting exchange of money for drugs led the trial court to the "logical conclusion" that "Ben indicated he was able to supply cocaine to the others in exchange for \$80."¹

The evidence supports the finding that appellant arranged to purchase cocaine from Ben and did, in fact, exchange the money Evans gave him for drugs. However, the evidence fails to exclude the hypothesis that Ben was aware only of the transaction between himself and appellant. Accordingly, the Commonwealth failed to prove the requisite agreement, and appellant's conviction must be reversed.

Reversed and dismissed.

¹The Commonwealth relied on a similar argument at trial. It argued to the court that "[appellant] calls [Ben] and says I've got a buyer, will you sell us drugs."