

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-002538-MR

BILLIE JO TURNER

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 05-CR-00062

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ABRAMSON AND STUMBO, JUDGES; KNOPF,¹ SENIOR JUDGE.

STUMBO, JUDGE: Billie J. Turner appeals from a judgment of the Pulaski Circuit Court reflecting a guilty verdict on nine counts of second-degree criminal possession of a forged instrument. Turner argues that the circuit court erred when it admitted business records which had not been previously disclosed by the Commonwealth in violation of RCr 7.24. For the reasons stated below, we affirm the judgment on appeal.

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On February 23, 2005, Turner was indicted by the Pulaski County grand jury on nine counts of criminal possession of a forged instrument pursuant to KRS 516.060. The indictment arose from an investigation into an allegation that Turner signed as drawer the name of her mother, Phyliss Croff, on nine checks drawn on an account at Citizens National Bank of Somerset. The checks totaled \$1,548.05, and were written in May, 2004 and June, 2004.

The matter proceeded to trial in November, 2005. Turner admitted writing the checks in question, but stated that she did so with her mother's consent. During its case-in-chief, the Commonwealth called Rhonda Ramsey to the witness stand. Ramsey was employed by the Commonwealth Journal newspaper, which was the payee of one of the checks written by Turner. While Ramsey was on the stand, the Commonwealth sought to introduce a check which Ramsey had in her possession. This check was the subject matter of Count No. 6 of the indictment, and was given to the newspaper by Turner. Turner, through counsel, objected to the introduction of the check because the Commonwealth had not notified her of its existence prior to trial and had not given her an opportunity to examine it.

In response, the Commonwealth stated that they had not examined the check in Ramsey's possession, but when questioned by the court admitted that it was aware of the check's existence prior to trial. The court then recessed the proceedings in order to give Turner the opportunity to examine the documents. After the examination

was completed, the trial resumed and the circuit court allowed the documents to become part of the record, but refused to allow them to become an exhibit.

Later, evidence was adduced that the check made payable to the Commonwealth Journal was for Father's Day and Parent's Day acknowledgments published in the newspaper recognizing Turner's father and husband. Over Turner's objection, the newspaper's receipts of this transaction were admitted as an exhibit.

At the conclusion of the proceedings, the jury returned a verdict finding Turner guilty on all counts of the indictment. She received a sentence of one year for each of the counts, to be served consecutively for a total sentence of nine years. This appeal followed.

The sole issue now before us is Turner's argument that the trial court committed reversible error when it allowed the newspaper's business records to be admitted into evidence as an exhibit. Turner argues that the Commonwealth violated the court's discovery order as well as RCr 7.24 by failing to give her timely notice of the business records, and that the court erred in failing to so rule. She maintains that the court's remedy, i.e., allowing her to examine the documents, was not reasonable under the circumstances and constituted an abuse of discretion. She claims that the outcome of the proceeding would have been different but for the error, and she seeks an order reversing her conviction and remanding the matter for a new trial. In the alternative, she requests an order dismissing Count No. 6 of the indictment and remanding the matter for re-sentencing.

In response, the Commonwealth notes that it was never in possession of the records at issue and never examined them prior to trial. As such, it claims that it was under no duty to disclose the records and therefore did not violate RCr 7.24. It argues that even if it violated RCr 7.24, the court imposed the proper remedy for curing the violation by allowing Turner to examine the records before re-commencing the proceedings.

We have closely examined the record and the law, and find no error. RCr 7.24 states:

(2) On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable. This provision authorizes pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant).

....

(8) If subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under the rule, that party shall promptly notify the other party or the other party's attorney, or the court, of the existence thereof.

(9) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing

in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.

In order to be subject to the requirements of RCr 7.24, the newspaper's records must have been “in the possession, custody or control of the Commonwealth”, RCr 7.24(2), and the parties center their arguments on whether the Commonwealth's knowledge of the newspaper's possession of these records - and the newspaper's intention to produce them at trial - constitutes possession, custody or control. The circuit court did not expressly rule on this issue, nor on whether the Commonwealth violated RCr 7.24 by not giving Turner notice of the check and the newspaper's log sheet and receipts. It did, however, invoke the RCr 7.24(9) remedy of allowing Turner to examine the documents.

Thus, even if the Commonwealth did violate RCr 7.24, the court properly imposed one of the available remedies set forth in the Rules of Criminal Procedure by giving Turner adequate time to examine the records. It is also worth noting that the imposition of these remedial measures is not mandatory. RCr 7.24 provides in unambiguous terms that the court “may” permit the discovery or inspection of the materials at issue. Furthermore, and as Turner properly notes, the trial court may remedy a discovery violation in a way it deems “just under the circumstances.” In response to Turner's objection, Judge David A. Tapp noted that Turner could not have been unaware of the check's existence because it was set forth in the indictment and she later admitted signing it. Though this by no means relieves the Commonwealth of its duty to provide discoverable materials pursuant to RCr 7.24, when the circumstances are viewed in their entirety, including the court's imposition of the RCr 7.24(9) remedy of allowing Turner's

inspection of the records, we cannot conclude that the circuit court abused its discretion on this issue. As such, we find no error.

For the foregoing reasons, we affirm the judgment of the Pulaski Circuit Court.

ALL CONCUR.

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