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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000417-MR

CAROL ANDERSON — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 09-CR-00300

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CAPERTON, JUDGE: Carol Anderson appeals from her conviction of Trafficking in a Controlled Substance, First Degree and her subsequent guilty plea to Persistent Felony Offender, First Degree, for which she was sentenced to ten years. Anderson claims that her constitutional rights were violated when the trial court curtailed her cross-examination of the chief witnesses against her. After a

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

thorough review of the parties' arguments, the record, and the applicable law, we disagree with Anderson and accordingly, affirm her conviction and sentence.

Anderson was indicted by a Campbell County Grand Jury for Trafficking in a Controlled Substance, First Degree and for Persistent Felony Offender, First Degree after a confidential informant ("CI"), Rachel Singleton, purchased oxycodone from Anderson. The three police officers involved in the routine controlled drug buy testified at Anderson's trial. Sergeant Leonard Stephens testified that he had participated in a couple of hundred controlled drug buys. Sergeant Stephens testified that the routine procedure was to search the CI at the police station by going through any pockets or purse the CI had, but did not include a strip search of the CI. Sergeant Stephens testified that this was the procedure that was followed in this particular case.

Officer Darin Arnberger searched Singleton and did not find any drugs on her prior to the controlled buy. [2] Singleton was given money to purchase the drugs.

Sergeant Stephens dropped off Singleton sixty yards from Anderson's residence. The officers remained in visual contact with Singleton until she went into Anderson's residence. Singleton was inside Anderson's residence for less than a minute.[3] She then returned to the unmarked police car and gave the officers the pills she had purchased. They returned to the police station where Singleton

[2] Officer Arnberger did not search inside Singleton's bra or groin.
[3] Singleton did wear a body wire and small digital recording device in her pocket. Both recordings were admitted into evidence.

was again searched and the officers did not find additional drugs or money on Singleton. Tests from the KSP laboratory confirmed that the drugs contained oxycodone.

Singleton testified that she knew Anderson because they were neighbors and that she had purchased the drugs from Anderson. Singleton admitted that she was arrested in Kenton County on December 8, 2008, on drug charges and she was placed on felony diversion in Kenton County in January 2009. Thereafter, Singleton was arrested again in February 2009 in neighboring Campbell County for Trafficking in Second Degree in a Controlled Substance. Singleton testified that she was a CI and that she had a deal with Officer Arnberger[4] that if she set up three other people in drug buys her charge of Trafficking in a Controlled Substance, Second Degree in Campbell County would be dismissed. Due to Singleton's cooperation with authorities in Campbell County that trafficking charge was later dismissed without prejudice.

On cross-examination Singleton testified that she did not like jail and that she did what she had to do to stay out of jail. She testified that she was desperate to stay out of jail and that she had a "pretty good motive" to come into court and help herself. She understood that the Campbell County charges could be brought back if she did not testify. She again confirmed that she was on felony

[4] Officer Arnberger testified that Singleton agreed to work as a CI and that she would be expected to buy drugs from two or three individuals. Officer Arnberger testified that he had made no promises to Singleton other than to let the Commonwealth know of her cooperation. Singleton had fulfilled her agreement and Officer Arnberger informed the Commonwealth of her cooperation. Prior to the Anderson buy, Singleton signed a written agreement that required her to refrain from additional criminal acts and to testify if necessary. This agreement was admitted into evidence.

diversion in Kenton County. Anderson began to ask about her pending diversion revocation hearing when the Commonwealth objected.

At the ensuing bench conference, Anderson argued that he could impeach a witness for bias if the witness were on probation or parole citing *Adcock v. Commonwealth, infra* and *Davis v. Alaska, infra.* Anderson argued that Singleton was facing a diversion revocation hearing and wondered what would happen if Singleton did not testify the way "they" wanted her to because this would not make the diversion officer happy. The trial court questioned how counsel knew this and ruled that unless the diversion officer testified to this, counsel was just speculating.[5] The trial court ruled that the case law established that counsel could use the fact of probation or parole for impeachment purposes but that he had already established that Singleton was on diversion. The court ruled that counsel could only utilize the line of questioning sought if specific evidence was offered that the diversion in Kenton County was dependent on Singleton's testimony in Campbell County.

In response to the trial court's ruling, Anderson offered Singleton's testimony, through avowal, that her diversion officer knew that she was

[5] This was a re-hash of the arguments presented to the court the morning of trial wherein the parties discussed Singleton's felony diversion program in Kenton County and whether it could be used for impeachment purposes. The Commonwealth was unsure if the diversion was considered a conviction for impeachment purposes. The trial court ruled the diversion would be considered a conviction and that Anderson could so inquire. Anderson also argued that it would show general bias on the part of the witness because if Singleton made her diversion officer in Kenton County upset, then her diversion that was pending a revocation hearing could be affected. Anderson argued that if she changed her testimony in the current case in Campbell County it would make the probation officer in Kenton County unhappy and Singleton would be taken off diversion. The trial court said this was speculation unless the diversion officer testified to this and reserved ruling.

cooperating with the Commonwealth and that she would be testifying in the current case. However, she had not spoken with her diversion officer in months but did have contact with her caseworker. She testified that she assumed the caseworker had informed the diversion officer of the current situation. Singleton testified that she was also facing a hearing to revoke her diversion. When asked if her diversion officer would be pleased if she recanted her allegation against Anderson, Singleton answered "No".[6] It is from this ruling that Anderson appeals.

On appeal Anderson presents one alleged error, namely, that reversible error occurred when the trial court improperly curtailed Anderson's right to wide open cross-examination of Singleton, the confidential informant and chief witness against Anderson, in violation of her constitutional rights. The Commonwealth disagrees and argues that the trial court did not abuse its discretion when it declined to allow Anderson to ask questions based on sheer speculation given that Anderson developed a reasonably complete picture of Singleton's veracity, motivation, and bias. With these arguments in mind we now turn to the applicable law.

At the outset we note that the scope and duration of cross-examination rests in the sound discretion of the trial judge. *Commonwealth v. Maddox*, 955 S.W.2d 718, 720-21 (Ky. 1997). Accordingly, we review rulings by the trial court limiting cross-examination for abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or

[6] The Commonwealth suggested that Anderson call the caseworker to the stand to establish if the diversion officer would recommend revocation of diversion if Singleton failed to give favorable testimony. Anderson declined to call the witness.

unsupported by sound legal principles. *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d Appellate Review § 695 (1995)).

Anderson is correct that Kentucky has long been an adherent to the "wide open" rule of cross-examination. *Derossett v. Commonwealth*, 867 S.W.2d 195, 198 (Ky. 1993). Pursuant to KRE 611 a witness may be cross-examined on any matter relevant to any issue in the case, including credibility, and that in the interest of justice the trial court may limit cross-examination with respect to matters not testified to on direct examination. *See* KRE 611(b) and *Derossett* at 198. Moreover, a defendant has a constitutional right to put in evidence any fact which might show bias on the part of a witness who has testified against him. This would include the fact that the witness is under indictment or that the witness was on probation. *Adcock v. Commonwealth*, 702 S.W.2d 440, 441 (Ky. 1986); *Spears v. Commonwealth,* Ky.App., 558 S.W.2d 641 (1977*); Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). However, this does not give the defendant license to unlimited cross-examination. *Delaware v. Van Arsdall*, 475 U.S. 673, 680, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986); *Davenport v. Commonwealth,* 177 S.W.3d 763, 768 (Ky. 2005). "Defendants cannot run rough-shod, doing precisely as they please, simply because cross-examination is underway. So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky.

1997) citing *United States v. Boylan,* 898 F.2d 230, 254 (1st Cir.1990); *see also Davenport* at 768.

The evidence sought should have some proclivity to demonstrate impropriety or partiality beyond abject speculation. When it does not, the trial court is well within its purview in limiting evidence that does not support such an inference of bias. *Holt v. Commonwealth*, 250 S.W.3d 647, 653-54 (Ky. 2008) citing *Bowling v. Commonwealth*, 80 S.W.3d 405, 411 (Ky. 2002) and *Davenport* at 769 ("The trial court does not err in limiting evidence of potential bias when there is a lack of credible evidence supporting the inference.").

We agree with the Commonwealth that Anderson presented a complete picture of Singleton's veracity, bias, and motivation to provide favorable testimony for the Commonwealth given the evidence presented to the jury. The jury was informed that Singleton was on felony diversion in Kenton County and that if she cooperated in the case *sub judice* by testifying against Anderson the charges dismissed in Campbell County would not be brought again. The jury was informed that Singleton would "do anything" to avoid going to jail and they were fully informed on her agreement with the Campbell County authorities. We agree with the trial court that without further evidence to support the assertion that Singleton's diversion officer in a *different* county would recommend revocation if Singleton recanted her testimony was simply sheer speculation which the trial court properly curtailed.[7] The testimony offered by Singleton on avowal did not

[7] *See Davenport* at 769:
In *Bowling v. Commonwealth*, a factually analogous case, we concluded that the mere fact of a witness's pending indictments in an adjacent county were insufficient to infer that the witness

provide anything more substantial than conjecture. Thus, the trial court set appropriate boundaries on cross-examination, did not violate Anderson's constitutional rights, and did not abuse its discretion. Accordingly, we find no error.

In light of the foregoing, we hereby affirm Carol Anderson's conviction and sentence in the Campbell County Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. Brandon Pigg
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James C. Shackleford
Assistant Attorney General
Frankfort, Kentucky

was motivated to testify in an effort to curry favor with the Commonwealth's Attorney. 80 S.W.3d 405, 411 (Ky.2002). The Court in *Bowling* was persuaded by the fact that the prosecuting attorney, in reality, had no jurisdiction to grant any leniency to the witness with respect to charges in another county. "Since there was no connection between [the prosecuting attorney] and the case against [the witness] in Fayette County, the pending Fayette County indictments were not admissible." *Id.* The Court also took note that Bowling offered no evidence that supported his claim that the witness had been offered leniency to testify.