

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001327-MR

BRADLEY EUGENE SMITH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EDWIN A. SCHROERING, JUDGE
ACTION NO. 97-CR-2228

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE: Bradley Eugene Smith (Smith) appeals a Judgment of Conviction and Sentence entered on May 19, 1998, in the Jefferson Circuit Court. Smith was found guilty of trafficking in a controlled substance I and possession of marijuana. After the jury verdict, Smith entered a guilty plea to an amended count of being a persistent felony offender (PFO) II. We affirm.

On September 16, 1997, Smith and Jacqueline Duke (Duke) were indicted by a Jefferson County Grand Jury for trafficking in a controlled substance I, possession of marijuana and PFO I. On the day of their arrest, June 2, 1997, both Smith and Duke gave untaped statements to the police regarding the circumstances of

the arrest. In January of 1998, Duke pled guilty and gave a taped statement to the police in exchange for the Commonwealth's offer of a probated sentence of five years.

Smith's jury trial on the charges was held on May 18, 1998. The day before the trial was set to begin, the Commonwealth provided Smith with a copy of Duke's January statement and notified Smith that Duke would testify against him at trial. On the day of the trial, Smith moved for a continuance arguing that he was not properly prepared due to this "surprise" development. The Commonwealth argued that Duke's testimony would be similar to the statement that she had given police on the day of her arrest and that Smith was aware that Duke had cooperated from the beginning. The trial court denied Smith's motion for a continuance.

Before the trial, Smith moved the trial court to dismiss the PFO I charge because one of his prior convictions was reversed on appeal. The trial court denied the motion. Smith then moved the court in limine to prevent Duke from testifying as to other uncharged crimes. The Commonwealth argued that Duke's testimony regarding other uncharged crimes in the six months prior to Smith's arrest went to prove the trafficking portion of the indictment. Smith argued that the testimony was unnecessary to prove trafficking and would duplicate other evidence. The trial court denied Smith's motion.

During voir dire, the trial court struck several jurors for cause relative to biased statements they had made. Further, during voir dire, the Commonwealth made a statement with regard

to "reasonable doubt". Smith objected and moved to strike the jury panel arguing that the Commonwealth had impermissibly attempted to define "reasonable doubt". The trial court overruled the objection. Thereafter, the trial went forward and the jury convicted Smith on charges of trafficking in a controlled substance and possession of marijuana. Smith waived sentencing by the jury and entered a guilty plea to the amended charge of PFO II in exchange for the Commonwealth's recommendation of fifteen years. The trial court followed the Commonwealth's recommendation and sentenced Smith to fifteen years. This appeal followed.

On appeal, Smith raises the following four issues:

1. Smith argues that the trial court erred when it denied his motion for a continuance;
2. Smith argues that the trial court erred when it allowed Duke to testify to other uncharged crimes;
3. Smith argues that the trial court erred when it refused to allow him to question a potential juror about his ability to be fair; and
4. Smith argues that the trial court erred when it refused to discharge the jury panel after the Commonwealth improperly defined reasonable doubt.

Smith first argues that he was entitled to a continuance because the Commonwealth did not notify him until the day of the trial that Duke had pled guilty and would testify against him. Smith argues that he needed time to change his trial strategy because he had believed he and Duke would be tried as co-defendants. Rule of Criminal Procedure (RCr) 9.04 states, "[t]he court, upon motion and sufficient cause shown by either

party, may grant a postponement of the hearing or trial...." "The decision whether or not to grant a continuance lies within the sound discretion of the trial court and, unless from a review of the record as a whole it appears that the trial judge has abused his discretion, we will not disturb his ruling." Stump v. Commonwealth, Ky., App., 747 S.W.2d 607, 609 (1987). See also Williams v. Commonwealth, Ky., 644 S.W.2d 335 (1982).

"Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case." Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579 (1991) (citations omitted). In the present case, Smith argues that he was surprised that Duke would testify against him and that he needed additional time to prepare a new defense. However, a thorough review of the record shows that Smith had actual knowledge that Duke had cut a deal with the Commonwealth and planned to testify against him some four months before the trial began.

On January 29, 1998, the Commonwealth filed a motion to review or alter Smith's conditional release. Paragraph five of the motion states:

The Co-Defendant in this case, Jacqueline Duke, has decided to cooperate in this matter and testify against Mr. Smith. She has already provided a taped statement indicating her and Mr. Bradley's [sic] involvement in this case. Ms. Duke notified the Commonwealth's Office on December 1, 1997, well before she decided to cooperate, that Mr. Smith had contacted her with threats of physical violence.

The Commonwealth argued to the trial court that the taped statement Duke gave to the Commonwealth corresponded with the

statement she had given the police on the day she was arrested. On appeal the Commonwealth notes that the statement Duke gave on the day of her arrest was contained in the Commonwealth's discovery, which was filed with the trial court on October 23, 1997. The trial court found that there was no element of surprise regarding Duke's taped statement and willingness to testify and, therefore, denied Smith's motion for a continuance.

The Commonwealth is bound by the notice requirement contained in Kentucky Rule of Evidence (KRE) 404(c) which states:

Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subsection (b) of this rule [evidence of other crimes, wrongs or acts] as a part of its case in chief, it shall give reasonable notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

The Supreme Court of Kentucky has interpreted the notice requirement contained in KRE 404(c) as follows:

KRE 404(c) requires the Commonwealth to give notice to a defendant of its intent to introduce evidence of other crimes, wrongs or acts. However, that rule is of no benefit to Appellant in this case. "The intent of [KRE 404(c) is to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion in limine and to deal with reliability and prejudice problems at trial." Obviously, no prejudice occurred, because Appellant had actual notice of this evidence....KRE 404(c) permits the trial judge "for good cause shown" to excuse failure to give the required notice. No

error occurred with respect to the admission of this evidence.

Tamme v. Commonwealth, Ky., 973 S.W.2d 13, 31 (1998) (citations omitted). In the case sub judice, Smith had actual knowledge that Duke had given a taped statement to the Commonwealth and decided to testify against him some four months before the trial began. The trial court correctly ruled that there was no surprise regarding Duke's testimony in its order denying Smith's motion for a continuance. We see no abuse of discretion in that ruling.

Smith next argues that the trial court abused its discretion in allowing Duke to testify about Smith selling drugs from his apartment in the past. The Commonwealth argued that Duke's testimony was necessary to prove the trafficking element of Smith's indictment. Smith argued that the testimony given by Duke would duplicate other evidence and that the Commonwealth could prove trafficking by the amount of cocaine found in Smith's apartment alone. The trial court found that Duke's testimony was admissible under KRE 404(b) which states:

Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

- (1) if offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident;
- (2) if so inextricably intertwined with other evidence essential to the case that separation of the two could not be accomplished without

serious adverse effect on the offering party.

In Daniel v. Commonwealth, Ky., 905 S.W.2d 76 (1995), the Supreme Court held that the Commonwealth may introduce evidence of other uncharged crimes, wrongs or acts under 404(b) if it can show a proper basis for such evidence, including a need for such evidence, subject to the Drumm analysis. Under Drumm v. Commonwealth, Ky., 783 S.W.2d 380 (1990), the trial court must consider whether the evidence is relevant, probative and whether its probative value outweighs potential prejudice. "A ruling based on a proper balancing of prejudice against probative value will not be disturbed unless it is determined that at trial court has abused its discretion." Bell v. Commonwealth, Ky., S.W.2d 882, 890 (1994).

In the present case, the trial court held that Duke's testimony regarding other uncharged crimes went to intent, course of conduct, absence of mistake or accident, knowledge, preparation and plan and therefore was admissible pursuant to KRE 404(b). We agree. In addition, Smith attempts to play the "surprise card", arguing that he had no notice of the substance of Duke's testimony. Not only was there no surprise concerning the fact that Duke planned to testify against Smith, but there was no element of surprise regarding the substance of her testimony. Smith was aware of Duke's statement to police on the day of her arrest. The trial court did not abuse its discretion by allowing Duke to testify that Smith had previously sold drugs from his apartment.

Smith next argues that the trial court erred when it excused Juror No. 73 for cause without allowing him to question the potential juror during voir dire. However, "[t]he determination of whether to exclude a juror for cause lies within the sound discretion of the trial court....Unless the action of the trial court is clearly erroneous, we will not reverse it." Caldwell v. Commonwealth, Ky. App., 662 S.W.2d 405 (1982) (citations omitted). See also Holbrook v. Commonwealth, Ky. App., 662 S.W.2d 484 (1984). During voir dire, Juror No. 73 stated to the trial court that he could not be fair and impartial because he had formed opinions that made him tend to acquit because he worked in a law office (which performed criminal defense work) as a paralegal and he distrusted evidence in drug cases. The trial court dismissed this potential juror for cause without further questioning. The trial court did not clearly err in this decision. See Simmons v. Commonwealth, Ky., 746 S.W.2d 393 (1988).

Finally, Smith argues that the Commonwealth's attorney impermissibly defined reasonable doubt during voir dire when he stated that although he was not allowed to define reasonable doubt, "I can tell you what it's not. I can tell you, it's not beyond any doubt." This statement is not a violation of Callahan v. Commonwealth, Ky., 675 S.W.2d 391 (1984), which prohibits counsel from defining reasonable doubt at any point in the trial. In King v. Commonwealth, Ky. App., 875 S.W.2d 902 (1993), the court held reasonable doubt does not mean beyond "any doubt." Therefore, we do not believe it is error for counsel to so state.

Counsel merely explained to the jury panel that the standard was reasonable doubt and not something higher. This is permissible. Simpson v. Commonwealth, Ky., 759 S.W.2d 224 (1988).

For the foregoing reasons, the decision of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth Shaw
Richmond, KY

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky
Frankfort, KY

Todd D. Ferguson
Assistant Attorney General
Frankfort, KY