

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002284-MR

FRED JACKSON

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE JAMES R. DANIELS, JUDGE  
ACTION NO. 98-CR-00044

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING  
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BEFORE: BARBER, HUDDLESTON AND MILLER, JUDGES.

BARBER, JUDGE: This is an opinion reversing the conviction of Appellant Jackson below.

This case arises from a residential search in which illegal drugs and paraphernalia were found in the home of Jackson. The Paducah police department, acting on a tip, went to the home of Jackson while he was out. Eleven people in the home at that time were detained by the police. None of the people were residents of the home. The police officers saw evidence of illegal drug use through the open door and obtained a search warrant. During the ensuing search of the house, illegal drugs and paraphernalia were found. Jackson was charged with

trafficking in a controlled substance and possession of drug paraphernalia.

An initial trial was held on July 2, 1998. Immediately prior to the trial, Jackson notified the trial court that the Commonwealth had failed to timely provide him with the exculpatory statement of a witness. This statement was not turned over until the day before trial in violation of the trial court's discovery order and R.Cr. 7.24 and R.Cr. 7.26. The Commonwealth claimed that the statement had been "overlooked" by a secretary. Jackson declined to ask for a continuance on the basis of this untimely disclosure on the grounds that he had been waiting too long already for a trial, and sought dismissal of the charges.

During the first trial of the case, a mistrial was granted when a police officer testified before the jury about prior offenses for which Jackson had been arrested. The prosecution argues that because of the mistrial, no prejudice can be demonstrated by Jackson regarding the failure to timely disclose the witness statement. Because of the grant of mistrial, this Court finds that no prejudice occurred with regard to the failure of the Commonwealth to provide the witness statement.

Next, Jackson states that he was substantially prejudiced and denied due process of law when Detective Jackson, the investigating officer, testified at the first trial that he had questioned Jackson after his arrest and that Jackson had refused to give a statement. The record reflects that the police

detective was questioned by the prosecution and asked, "Did you at any point in time attempt to speak to the defendant?" The officer replied, "Yes, Sir, the day after he was arrested, Sir. He refused to speak to me." Jackson asserts that this was palpable error and subject to review by this Court on those grounds. See: Perkins v. Commonwealth, Ky. App., 694 S.W.2d 721, 722 (1985) holding that where manifest injustice results, reversal is required.

Kentucky law is clear in holding that the prosecution is barred from bringing up a criminal defendant's Fifth Amendment right to remain silent at trial. The Kentucky Supreme Court has stated:

It is clear that the prosecution is prohibited from using the defendant's silence in its case-in-chief. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). As previously mentioned, the fact of appellant's silence was twice brought to the attention of the jury.

To determine whether this error is harmless, we must consider the weight of the evidence and the degree of punishment fixed by the verdict.

. . .

This is, unquestionably, an error of fundamental constitutional magnitude. Over twenty-five years ago the United States Supreme Court in Miranda held that a defendant could not be penalized for exercising his or her Fifth Amendment right to remain silent. In Green we reaffirmed that principle, stating that "the right to remain silent does not truly exist if one may be penalized for its exercise. . . ." It is the obligation of this Court not to uphold a verdict that may reflect such a penalty.

Hall v. Commonwealth, Ky., 862 S.W.2d 321 (1993). In that case, the Supreme Court held that because only weak evidence linked the defendant to the crime charged, and because the jury awarded the most severe sentence possible in the case, the introduction of the defendant's silence was improper and constituted reversible error.

The Commonwealth points out that this improper testimony was given in Jackson's first trial, which resulted in a mistrial on separate grounds. For this reason, no prejudice can result from introduction of this testimony. Jackson was given a new trial, with a new jury, almost three weeks later. This Court agrees that no prejudice resulted from introduction of this improper testimony as a mistrial was granted.

During the second trial of this matter, witnesses for the Commonwealth also testified that the bag containing cocaine which was found in the house had been examined by the police and that no fingerprints were found on the bag. Jackson objected to introduction of this evidence, arguing that it had not timely been disclosed to him. Defense counsel stated that he had never received the fax containing this evidence allegedly sent by the prosecution two business days prior to trial. Various discovery materials were allegedly faxed to defense counsel by the Commonwealth, but were never received. The Commonwealth has failed to provide an explanation for this error in supplying properly discoverable material.

At trial, counsel for Jackson failed to request any remedy for this discovery abuse. Jackson asserts that the

failure to ensure that he was provided with this evidence prior to trial constitutes an abuse of the rules of discovery. The Commonwealth asserts that because the jury did hear that there were no fingerprints on the bag, no prejudice resulted from the failure to ensure disclosure. This Court finds that although the Commonwealth was in error in failing to make sure that this evidence was received by defense counsel in a timely fashion, Jackson has demonstrated no prejudice, and thus the Commonwealth's carelessness must be found harmless error. Polk v. American Casualty Company of Reading, Pa., Ky., 816 S.W.2d 178 (1991).

A new trial was held on July 20, 1998. Prior to trial, it was again found that the Commonwealth had failed to timely provide a prior inconsistent statement by a witness. The first witness statement disclosed was taken on July 4, 1998. It was not provided in accordance with the Appellant's Bill of Particulars filed in April and was not received by Jackson until July 14, 1998. A second witness statement dated February 21, 1998 was allegedly faxed pursuant to a supplemental discovery request on July 16, only two business days prior to trial. Defense counsel denied receipt of any fax sent by the Commonwealth. Jackson did not find out about the existence of this earlier statement until he read the July 4 witness statement received on July 14th. The trial court found that the February witness statement was not provided until late on Friday, July 17, only one business day prior to trial. The substance of the witness statement concerned the linking of Appellant to the

illegal substances found in the house and Appellant's conduct during the time of the investigation.

Because of this late disclosure, Jackson requested that the trial court exclude the proffered witness testimony as a result of this delayed provision of evidence. He reminded the trial court that the Bill of Particulars was filed in April 1998 and required that all evidence be provided to the defendant fifteen or more days prior to the pre-trial conference in the action. The February 1998 statement of the witness was not provided pursuant to Jackson's initial discovery request or submitted in accordance with the Commonwealth's "open file" discovery policy.

Jackson's motion in limine was denied by the trial court. The trial court ruled:

"The police as an agent of the Commonwealth did fail to timely provide this information prior to the first trial which was mistried and that same is a violation of this Court's order on discovery and the Criminal Rules of Procedure, but that the relief requested by the Defendant of excluding the testimony of [the witness] at the second trial is not proper, therefore the motion is overruled on this ground."

The Commonwealth argues that the statements were turned over in accordance with R.Cr. 7.26, which only requires such evidence be provided forty-eight hours prior to trial. R.Cr. 7.24(1) requires the Commonwealth to comply with a discovery request made by a criminal defendant in a timely fashion. The discovery request filed by Jackson herein requested this information fifteen days prior to the pre-trial conference. The Commonwealth relies on R.Cr. 7.26(1), which states that witness

statements must be turned over forty-eight hours prior to trial as removing any duty of compliance with the Bill of Particulars or the trial court's discovery orders.

Jackson argued before the trial court that the witness statement at issue was not provided until Friday afternoon, and that the trial began early Monday morning. Even though this time period exceeds forty-eight hours, the fact that all but two of these hours were weekend hours invalidates the Commonwealth's reliance on R.Cr. 7.26(1). Not only does R.Cr. 7.24(1) require timely disclosure of information in response to a Bill of Particulars, but R.Cr. 1.10, "Time", which is not cited by the parties, states that:

Whenever these rules do not provide otherwise with respect to time, the following shall apply:

(a) In computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute . . . [w]hen the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

Id. (Emphasis supplied). This rule applies to any "act, event or default " and so is applicable to the provision of documentary evidence. Hence, as the forty-eight hour minimum period provided by R.Cr. 7.26(1) is less than seven days, weekends are not to be included in that computation. For this reason, the Commonwealth's disclosure was untimely and provided grounds supporting Jackson's request to exclude the witness testimony.

The law is clear in holding that the Commonwealth has a constitutional duty to provide an accused with both exculpatory

and impeachment evidence in the prosecutor's possession. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). This duty is enforced by the courts of this Commonwealth. Carter v. Commonwealth, Ky., 782 S.W.2d 597 (1990). An action should be reversed where there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, supra, 473 U.S. at 668. "[S]uppression by the prosecution of evidence favorable to an accused upon request violations due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Kentucky Courts do not require automatic reversal where a prosecutor has failed to comply with discovery orders. Prejudice must be shown by the defendant. McRay v. Commonwealth, Ky. App., 675 S.W.2d 397 (1984). The courts have held that a discovery abuse justifies setting aside a conviction only where there is a reasonable probability that had the evidence been disclosed, the result at trial would have been different. Weaver v. Commonwealth, Ky., 955 S.W.2d 722 (1997). However, we must take into consideration that in the present case the prosecutor had repeatedly failed to comply with the discovery orders and applicable rules of procedure despite the trial court's warning regarding this discovery abuse. This fact supports Jackson's contention that the case should be reversed. Additionally, Appellant has claimed that the witness statements, if timely



disclosed, would have changed his trial strategy. Under such circumstances, sufficient prejudice has been shown to support a reversal of this action. It is a longstanding rule of law that the Commonwealth must disclose evidence to a defendant in sufficient time that he can investigate and prepare to use such evidence. Silverburg v. Commonwealth, Ky., 587 S.W.2d 241 (1979). The Commonwealth's repeated failure to do so in this case warrants reversal of the conviction below.

As a general rule, the trial court is to use its discretion in determining whether to permit introduction of evidence not timely supplied to the defendant in pre-trial discovery. R.Cr. 7.24(9). Sanctions for such negligence are to be imposed only where the trial court feels they are appropriate. Berry v. Commonwealth, Ky., 782 S.W.2d 625 (1990). In the present case the trial court found that the Commonwealth's late submission of the witness statement was in violation of its discovery order, but held that this action was not sufficient to require the suppression of the witness testimony. In light of the history of the proceedings in this action, we disagree and find that sanctions should have been imposed and the testimony of this witness should have been excluded.

Jackson alleges prejudice resulted from the discovery abuses. He asserts that no physical evidence, such as fingerprints, linked him to any of the controlled substances or paraphernalia found in the house. This contention is supported by the record on appeal. Further, the testimony of the investigating officer showed that the persons found in the

building at the time it was searched acted in a suspicious manner regarding the evidence. The detective stated at trial that none of the people arrested in the house would sit on or stand next to the chair in which the controlled substances were hidden. It is uncontroverted that Jackson was not in the house at the time it was searched and had not been there for several hours prior to the search. Lastly, Jackson shows this Court that he received the maximum sentence on both counts charged.

Jackson argues that these facts demonstrate the prejudicial effect of the Commonwealth's actions. Jackson claims that the repeated discovery abuses by the Commonwealth denied him his Constitutionally protected right to a fair trial. Timely objection was made by Jackson to each discovery abuse. The discovery abuses include failure to disclose an exculpatory witness statement until the day before trial, failure to notify Jackson of fingerprint analysis on the evidence, or the results of such testing, and failure to provide a prior inconsistent statement of a witness until immediately prior to trial.

Jackson claims that the cumulative effect of the complained of errors entitles him to reversal of the conviction below. Kentucky courts have held that a prosecutor's misconduct or failure to comply with discovery orders does not require automatic reversal unless some prejudice is found. McRay v. Commonwealth, Ky. App., 675 S.W.2d 397 (1984). However, where multiple failures have occurred, the cumulative effect of the prosecutor's actions must be taken into effect. Kyles, 115 S.Ct., at 1567. An accumulation of concurrent errors may

authorize a reversal where no one error taken alone would justify such a reversal. Jones v. Commonwealth, 191 Ky. 485, 231 S.W. 31, 35 (1921). See also: Funk v. Commonwealth, Ky., 842 S.W.2d 476, 483 (1992).

This Court takes notice that the volume of the discovery abuses in the present case shows a lack of compliance with the rules of procedure and the orders of the trial court by the prosecution in this action. Two of the four errors claimed by Jackson were cured by the grant of mistrial in Jackson's first trial. The third error, wherein the Commonwealth failed to timely disclose lack of physical evidence linking Jackson to the bag of cocaine, was harmless because the jury learned this fact through direct testimony, and Jackson had opportunity to cross-examine the witness on this point.

The final claimed error, that being the failure of the Commonwealth to provide witness statements in its possession for over six months until one business day prior to trial, constitutes prejudicial error supporting a claim for reversal. This is not a case where the evidence unexpectedly came into the Commonwealth's possession immediately prior to or during trial. Under those circumstances, allowing the witness to testify would have been permissible. Holbrook v. Knopf, Ky., 847 S.W.2d 52 (1992). Rather, the Commonwealth had the evidence in its possession for months, but failed to timely provide it to defense counsel upon request. For this reason, the action below is reversed and remanded.

ALL CONCUR.

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