

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000185-MR

JAMES A. SLAUGHTER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JOHN W. POTTER, JUDGE  
INDICTMENT NO. 97-CR-002198

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, DYCHE, AND GUIDUGLI, JUDGES.

DYCHE, JUDGE: James A. Slaughter appeals from the judgment of the Jefferson Circuit Court sentencing him to fifteen years' imprisonment, pursuant to a jury verdict of guilty of trafficking in cocaine.

In September 1997, Slaughter was indicted by the Jefferson County Grand Jury for first-degree trafficking in a controlled substance, cocaine (Kentucky Revised Statute (KRS) 218A.1412), and/or complicity therein (KRS 502.020), and first-degree persistent felony offender (KRS 532.080). Michael A. Bates and Timothy D. Miller were also named in the indictment.

The indictments stemmed from an incident which occurred on the night of May 19, 1997, in Louisville. According to the Commonwealth, Louisville Police Detective Robert O'Neil, in conjunction with a tip from a confidential informant provided to Detective Damon Green, was observing a Floyd Street Shell station through binoculars in anticipation of observing Slaughter engage in a drug deal. O'Neil first observed Bates, who appeared to be nervous and waiting for someone. Eventually, a van pulled into the station lot, Slaughter got out of the van, Slaughter and Bates approached each other, and Slaughter passed something to Bates. O'Neil believed he had witnessed a cocaine transaction. The police moved in, and Slaughter, Bates, and van driver Miller were arrested. Bates was searched, and a bag containing approximately two ounces of powder cocaine was found on his person.

According to Slaughter, on the night of May 19 Bates stole the cocaine from a street cocaine dealer. Bates was fleeing the area when he passed by Slaughter's home at the same time Slaughter and Miller happened to be leaving to go to the Shell station to buy lottery tickets. Bates asked for a ride, and the three drove to the Shell station. Slaughter exited the van and approached the Shell station night window to purchase his tickets. Slaughter then realized that he needed to call someone to obtain lottery numbers and asked Bates to bring him his cell phone from the van. Bates exited the van and handed Slaughter the cell phone. Moments later, the police apprehended Slaughter,

Bates, and Miller, found the cocaine on Bates, and arrested them all for trafficking in cocaine.

A joint trial was held with co-defendant Bates in February 1998, following which Slaughter was found guilty of cocaine trafficking and sentenced to seven years, enhanced to fifteen years under the persistent felony offender charge. This appeal followed.

First, Slaughter contends that the trial court erred by failing to declare a mistrial after it was discovered, on the third day of trial just before closing arguments, that a juror was the mother-in-law of an Assistant Commonwealth's Attorney who worked in the same office as the prosecutor trying the case. Though Slaughter's motion for a mistrial was denied, as a remedy, the juror was deliberately selected as the alternate juror. Slaughter agreed to this procedure so long as his agreement was not deemed a waiver of his objection.

The right to a completely impartial jury is protected by Section Eleven of the Kentucky Constitution as well as the Sixth and Fourteenth Amendments to the U.S. Constitution. Paenitz v. Commonwealth, Ky., 820 S.W.2d 480 (1991). A juror should be disqualified when the juror has a close relationship with a victim, a party or an attorney, even if the juror claims to be free from any bias. Butts v. Commonwealth, Ky., 953 S.W.2d 943 (1997). . . . Composition of the jury is always vital to the defendant in a criminal prosecution and doubt about unfairness is to be resolved in his favor.

Fugate v. Commonwealth, Ky., 993 S.W.2d 931, 939 (1999). "[T]he decision to grant a mistrial is within the trial judge's discretion, and his ruling will not be disturbed absent the showing of an abuse of that discretion." Belt v. Commonwealth,

Ky. App., 2 S.W.3d 790, 793 (1999) (citing Chapman v. Richardson, Ky., 740 S.W.2d 929 (1987), and Jones v. Commonwealth, Ky., 662 S.W.2d 483 (1983)).

We disagree with Slaughter's contention that the juror was culpable in failing to disclose her mother-in-law status in voir dire. Slaughter cites two questions that he claims elicited her son-in-law's relationship with the prosecutor. First, when the jurors were questioned regarding relatives in law enforcement and, second, when the jurors were asked to divulge any information that they would want to hear if they were the attorneys trying the case. Considering that the juror was a layperson, both of these questions were too indirect to compel the conclusion that the juror was dishonest in her failure to disclose. Further, the juror was removed as the alternate, and there is no evidence of prejudice as a result of the juror's not being excused for cause. Moreover, it is doubtful that the mere fact that the juror was the mother-in-law of a co-worker of the prosecutor would require her to be excused for cause. See Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 299 (1997). In summary, we are not persuaded that the trial court abused its discretion in denying a mistrial under these circumstances.

Next, Slaughter contends that he was denied a fair trial because of the Commonwealth's abuse of the discovery process. Specifically, Slaughter alleges that the Commonwealth improperly failed to inform him that (1) immediately after his arrest, Bates told Detective O'Neil, in sum and substance, "That's my dope. Why are you arresting Mr. Slaughter? He has

nothing to do with this"; and (2) Detective O'Neil used binoculars to observe the drug transaction. Slaughter first learned of the exculpatory statement shortly before a suppression hearing the morning of the trial; he learned of the binoculars at the suppression hearing.

"It is clear that the government must produce evidence that is favorable to the accused and material to the question of his guilt and punishment." Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 701 (1994) (citing Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, (1987)). The prosecution is under a duty to produce exculpatory evidence in time for due investigation. Silverburg v. Commonwealth, Ky., 587 S.W.2d 241 (1979). "[T]he withholding by the state of information which 'creates a reasonable doubt that would not otherwise exist' is a denial of due process, regardless of good faith on the part of the governmental authorities responsible for the suppression." Timmons v. Commonwealth, Ky., 555 S.W.2d 234, 239 (1977) (citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963)). "[A] prosecutor will not have violated his or her constitutional duty of disclosure unless his omission is of such a significance to result in the denial of the defendant's right to a fair trial." Wilson v. Commonwealth, Ky., 836 S.W.2d 872, 885 (1992), overruled on other grounds by St. Clair v. Roark, Ky., 10 S.W.3d 482, 487 (1999). In determining whether the delay in disclosure of a witness statement was error, the appellate court must look to see if the prosecution was given a more favorable opportunity to convict. Epperson v. Commonwealth, Ky.,

809 S.W.2d 835, 840-841 (1990). The question of whether there was a discovery violation and whether because of it a continuance or mistrial was necessary is addressed to the judgment and discretion of the trial court. Carter v. Commonwealth, Ky., 782 S.W.2d 597, 601 (1989).

Paragraph (8) of the September 19, 1997, discovery order provided that "[t]he Commonwealth shall disclose to the defendant, in writing, all evidence or information that tends to negate the guilt of the defendant . . . ." Bates's statement to the effect that the cocaine was his and that Slaughter had nothing to do with it was exculpatory evidence that should have been disclosed under the discovery order. However, we are not persuaded that Slaughter was denied a fair trial because the statement was not timely disclosed. Slaughter's trial counsel learned of the statement the day of the trial.<sup>1</sup> Further, upon questioning by the trial court as to how earlier knowledge of the statement would have altered his trial strategy, trial counsel was unable to specifically identify how it would have. The record discloses that the Commonwealth did not learn about the statement until the suppression hearing and that it did not intentionally violate the discovery order. Detective O'Neil heard the statement and Detective Green prepared the investigation report. At trial, the detectives blamed the

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<sup>1</sup>Trial counsel otherwise undertook a vigorous defense of Slaughter. It is unclear why trial counsel did not find out about this statement much earlier by interviewing co-defendant Bates and/or Bates's trial counsel.

omission of the statement from the investigation report on human error.

In summary, the statement was exculpatory and Slaughter was entitled to it under Brady, the discovery order, and RCr 7.24. However, the failure to disclose was not willful, Slaughter was not denied a fundamentally fair trial, and his substantial rights were not affected as a result of the untimely disclosure of the statement. The trial court did not abuse its discretion in denying a continuance or a mistrial in connection with the exculpatory statement.

We are not persuaded that the Commonwealth's failure to disclose that Detective O'Neil used binoculars while observing the Shell station was a discovery violation. We have reviewed the discovery order and are unable to locate any specific provision therein which would require the disclosure of this information. The order directed the Commonwealth to permit Slaughter to inspect "tangible objects . . . material to the preparation of his defense"; however, the binoculars do not fall within this category. Slaughter has failed to cite us to any authority which would require the disclosure of the fact that Detective O'Neil used binoculars in his surveillance duties, and we are unable to locate supporting authority for his argument. Moreover, Slaughter has failed to show that his defense was prejudiced, and he did, in fact, learn about the binoculars at the pre-trial suppression hearing. While Slaughter does argue that disclosure would have permitted him to test the binoculars and evaluate its ability to define objects, such testing and

examination are of speculative benefit. Slaughter was not entitled to a continuance or a mistrial in connection with the binoculars.

Next, Slaughter contends that he was denied a fair trial when, over his objection, the trial court permitted the Commonwealth to introduce irrelevant evidence. In his brief, appellant identifies several examples of this, most of which involve evidence relating to testimony from Detective Green and Detective O'Neil concerning crack cocaine. Testimony relating to crack included the statement that Bates had the appearance of a crack user; that crack is sold in "bundles"; and that crack is smoked in pipes and mixed with marijuana. Other testimony appellant alleges was irrelevant includes testimony as to the fair market value of cocaine; how cocaine can be diluted with baking soda and manitol; the evils of free basing cocaine, including how this led to the severe injury to Richard Pryor; and how long it would take to smoke two ounces of cocaine.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. KRE 401. All relevant evidence is, except as otherwise provided, generally admissible, and evidence which is not relevant is not admissible. KRE 402.

Evidence relating to crack cocaine and other means of smoking cocaine was relevant in Slaughter's trial. The defense theory was that Bates possessed the cocaine for his personal use. Moreover, Bates did not snort powdered cocaine, he smoked cocaine



"twenty four - seven." In order to evaluate whether Bates's story was plausible, i.e., that he possessed the cocaine for his personal use, the jury needed to know something about smoking cocaine. To this end, Detectives Green and O'Neil testified as to the various means of smoking cocaine, viz., by converting it to crack form, by smoking it mixed in with marijuana, and by free basing it. As to whether Bates "had the appearance of a crack user," Bates admitted he was a crack user, and there was no prejudice. The testimony relating to the packaging of cocaine and the street value, again, was germane as to whether Bates possessed the cocaine for his personal use. When the Richard Pryor incident was brought up, the defense objected, and the issue was quickly dropped.

The balancing of the probative value of relevant evidence against the danger of undue prejudice is a task properly reserved for the sound discretion of the trial judge. The standard of review is whether there has been an abuse of that discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999) (internal citations omitted). Applying this test, we conclude that the trial judge did not abuse his discretion in admitting the various evidence identified by Slaughter in this argument.

Next, Slaughter contends that the prosecutor engaged in misconduct in her closing statement by violating the trial court's order in limine. In its pre-trial order, the trial court ruled that the Commonwealth could make no mention that Detective Green, who was staking out Slaughter's house the night of May 19,

had radioed Detective O'Neil that a drug deal was about to occur at the Shell station. However, during her closing argument, the prosecutor mentioned the radio call. Following Slaughter's objection, the trial court admonished the jury that it should rely on its memory to remember the evidence given from the witness stand.

"In any consideration of alleged prosecutorial misconduct, particularly, as here, when the conduct occurred during closing argument, we must determine whether the conduct was of such an 'egregious' nature as to deny the accused his constitutional right of due process of law." Slaughter v. Commonwealth, Ky., 744 S.W.2d 407, 411 (1987). At issue in this matter was merely one brief utterance during the course of closing arguments, after which the trial court properly admonished the jury. In considering the Commonwealth's conduct in context and in light of the trial as a whole, we see nothing in the prosecutor's statement which would warrant reversal. Brown v. Commonwealth, Ky., 934 S.W.2d 242, 248 (1996). Finally, Slaughter contends that he was denied a fair trial because of the cumulative effect of the preceding errors. Though each error may be individually insufficient to require a reversal, the cumulative effect of the errors may require reversal. Funk v. Commonwealth, Ky., 842 S.W.2d 476, 483 (1992). "Our review of the entire case reveals that [Slaughter] received a fundamentally fair trial, and that there is no cumulative effect or error that would mandate reversal." Bowling v. Commonwealth, 942 S.W.2d at 293.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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