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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000224-MR

DEMETRIOUS MACK — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELLEN B. EWING, JUDGE
ACTION NO. 97-CR-0140

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: JOHNSON, MCANULTY AND MILLER, JUDGES.

JOHNSON, JUDGE: Demetrious Mack appeals from a judgment of the Jefferson Circuit Court entered on January 14, 1998, following his conditional guilty plea.[1] Mack attempted to preserve two issues for appellate review: (1) whether the trial court erred in refusing to grant Mack a separate trial from his co-defendants; and (2) whether the trial court erred in refusing to sanction the Commonwealth for an alleged discovery violation. Having

[1]Kentucky Rules of Criminal Procedure (RCr) 8.09.

concluded that Mack has failed to show that he would have been unduly prejudiced by a joint trial and that the discovery ruling was proper, we affirm.

Mack was indicted along with co-defendants Demetrius Stephenson and Sherwin Harrison for robbery in the first degree[2] and the attempted murder[3] of Jerimaine Williams.[4] Williams claimed that late in the evening of October 9, 1996, Mack and Harrison robbed him and shot him eight times. He claimed that Stephenson was driving the car that the co-defendants alighted from just prior to robbing him.

A joint trial of the three defendants began on January 6, 1998. On the second day of trial, all three defendants accepted the Commonwealth's offer and entered conditional guilty pleas. Mack entered a conditionally guilty plea to two counts of robbery in the first degree[5] and one count of attempted murder.[6]

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[2]In violation of Kentucky Revised Statutes (KRS) 515.020.

[3]In violation of KRS 506.010 and 507.020.

[4]Mack and Harrison were indicted on additional unrelated offenses which were severed for separate trial. Each co-defendant also has an appeal pending in this Court: Stephenson, 98-CA-0674-MR, and Harrison, 98-CA-0368-MR.

[5]Mack also pled guilty to robbing Deante Smith on July 4, 1996.

[6]Mack also pled guilty to possession of a firearm by a convicted felon and received a five-year sentence; operating a motor vehicle without an operator's license, with a 6-month sentence; giving a peace officer a false name or address, with a 90-day sentence; and operating a motor vehicle without insurance, with a 30-day sentence. The trial court also dismissed a charge of being a persistent felony offender in the second degree.

He was sentenced to prison for a term of fifteen years on each conviction, with the sentences to run concurrently with each other and the other current sentences, but consecutively with a sentence he was then serving. This appeal followed.

Mack argues that the trial court erred by not severing his case for a separate trial from his co-defendants. He claims this issue was preserved for appellate review by the written motions for separate trials by each defendant and by the entry of a conditional guilty plea. The Commonwealth has conceded that at trial it intended to call as a witness Stephenson's former girlfriend, Alicia Lynette Sanders. The Commonwealth intended to elicit from Sanders testimony that she had seen the three co-defendants together in a car the night of the robbery. Co-defendants, Mack and Harrison, each stated that it was his intention to impeach Sanders by asking her about her alleged bias against Stephenson.[7]

[7]It was Sanders who had filed a petition for an Emergency Protective Order (EPO) against Stephenson that had led to his arrest in the case sub judice. In the petition seeking the EPO, Sanders accused Stephenson of violent behavior toward her and serious violations of the law. She claimed that Stephenson also went to a her house with a gun and forced her to go to his mobile home where he beat her with the gun, disrobed her, locked her in a closet and had his friends come over to look at her. The EPO petition further alleged that on that same day Stephenson also beat a 14-year-old girl and threw her out of his home. The EPO petition also claimed that Stephenson had been violent with Sanders in the past, including one instance where he broke her arm, and that she was afraid of him. Separate criminal charges were filed against Stephenson in regard to the allegations made in the EPO petition.

Mack also contended that it was his intention at trial to exercise his Fifth Amendment right to remain silent. He argued that if his co-defendants testified against him at a joint trial, he would be forced to waive his right to remain silent in order to defend himself. He claimed that he would be prejudiced by these circumstances and that this prejudice could only be eliminated by a separate trial.

Kentucky RCr 9.16 provides in pertinent part:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires.

The determination of whether a separate trial should be granted to jointly indicted persons is a matter within the sound discretion of the trial court, and a conviction will be reversed only if the refusal of the trial court to grant the relief is a clear abuse of discretion and undue prejudice to the defendant is positively shown prior to trial.[8] A defendant must show that antagonism between his and his co-defendant's case would prevent a jury from being able to separate and treat distinctively evidence that is relevant to each defendant and that such

[8]Rachel v. Commonwealth, Ky., 523 S.W.2d 395 (1975); Humphrey v. Commonwealth, Ky., 836 S.W.2d 865, 868 (1992).

antagonism could mislead or confuse the jury.[9] However, the fact that the defenses of the co-defendants are antagonistic is only a factor for the trial court to consider in determining whether a defendant will be prejudiced by a joint trial.[10]

There are only a few cases in Kentucky where sufficient prejudice to the defendant was found so as to require the reversal of a conviction. Compton v. Commonwealth[11] embraces the proposition that severance is proper when evidence presented against one defendant would not have been admissible in a second trial of that single defendant.[12] Kentucky courts have also recognized that severance is proper when one defendant is on trial with co-defendants who are also charged with additional, separate crimes.[13]

The problem that we encounter in the case sub judice is that we must decide whether the trial court erred in making its determination that Mack was not unduly prejudiced by the joint trial when no trial actually took place. Mack is asking this Court to predict what would have happened had the case gone to trial. Since Mack has failed in his burden to demonstrate that

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[9]Wilson v. Commonwealth, Ky., 836 S.W.2d 872 (1992) cert. denied 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993).

[10]Id.; Rachel, supra at 400.

[11]Ky., 602 S.W.2d 150, 153 (1980).

[12]See also Commonwealth v. Rogers, Ky., 698 S.W.2d 839 (1985).

[13]See Harris v. Commonwealth, Ky., 869 S.W.2d 32 (1993); Jackson v. Commonwealth, Ky., 670 S.W.2d 828 (1984).

the trial court's denial of a severance was a clear abuse of discretion due to a positive showing of prejudice, we affirm.

The relief sought by Mack would require us to speculate as to what evidence would have been presented at trial and as to the significance of the prejudice caused by the co-defendants' testimony. This need for speculation highlights one of the policy reasons for the adoption of a rule of law that requires that any issue reserved for appeal through a conditional guilty plea be "case dispositive and [] capable of being reviewed by an appellate court without a full trial."[14]

> It has been held that, before accepting a conditional plea, the trial court and the prosecutor[15] must determine that the pretrial issues reserved for appeal are case dispositive and are capable of being reviewed by an appellate court without a full trial, which requires the trial court to make specific findings on the record of the issues to be resolved upon appeal,[16] and a further specific finding that those issues would effectively dispose of the indictment or suppress essential evidence which would substantially affect the prosecution's ability to prosecute the defendant as charged in the indictment . . . . However, it has also been held that the dispositiveness of

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[14]21 Am.Jur.2d Criminal Law §712 (1998).

[15]Fed.R.Crim.P. 11(a)(2) makes specific reference to "the consent of the government" to the entry of a conditional plea of guilty, while RCr 8.09 makes no reference to the prosecutor.

[16]The judgment in the case sub judice merely stated: "This is a conditional plea pursuant to RCr 8.09 reserving the right to appeal all pre-trial motions." Mack's motion to enter guilty plea made no reference to a conditional plea. The Commonwealth's offer on a plea of guilty merely noted: "This is [a] conditional plea pursuant to RCr 8.09 reserving right to appeal all pre-trial motions."

> the issue preserved for appeal is not a prerequisite to the acceptance of a conditional plea of no contest to a criminal charge [citations omitted].[17]

Two foreign cases that illustrate this dichotomy are cited in the above discussion. The first, State v. Hosea[18], is a West Virginia case involving West Virginia Rule of Criminal Procedure 11(a)(2)[19]. There, the defendant, a juvenile charged with first-degree murder, entered a Rule 11(a)(2) conditional guilty plea; but the State argued that the issues were not properly preserved for appellate review because they were not dispositive of the case. The Supreme Court of Appeals of West Virginia noted that several federal courts have consistently held that guilty pleas entered pursuant to Rule 11(a)(2) are proper only when the appellate court's decision will completely dispose of the case,[20] and ruled that the issue presented on appeal must

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[17]21 Am.Jur.2d Criminal Law §712 (1998).

[18]199 W.Va. 62, 483 S.E.2d 62 (1996).

[19]Both foreign rules discussed infra are practically identical to Kentucky RCr 8.09 which reads: "With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determinations of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal."

[20]See United States v. Doherty, 17 F.3d 1056, 1058 (7th Cir.1994); United States v. Bell, 966 F.2d 914, 915-16 (5th Cir.1992); United States v. Yasak, 884 F.2d 996, 999 (7th Cir.1989); United States v. Markling, 7 F.3d 1309, 1313 (7th Cir.1993)(holding that when a guilty plea is appealed, the issues to be resolved must "dispose of the case")(quoting United States v. Wong Ching Hing, 867 F.2d 754, 758 (2nd Cir.1989))(quoting Advisory Committee Note to 1983 Amendment to Fed.R.Crim.P 11)).

be case dispositive.

Conversely, in State v. Montoya,[21] the Supreme Court of Utah reversed the intermediate appellate court's ruling that the issue on appeal from a conditional guilty plea must be case dispositive.[22] The defendant entered a conditional guilty plea to incest, and attempted to reserve for appellate review the narrow legal issue of whether the State had correctly charged him. The Supreme Court disagreed with the State's argument that since the issue on appeal was not case dispositive, it was not subject to a conditional guilty plea. The Court noted that in State v. Sery,[23] the Court had not found a case dispositive requirement; that the conditional guilty plea rule itself was clear and unambiguous; and that the conditional plea itself reserved the right to appeal "the adverse determination of any specified pre-trial motion," not just dispositive ones.[24]

Thus, this Court could follow the reasoning of the West Virginia Court and hold that in order for an issue preserved by a conditional guilty plea to be subject to review that it must be dispositive. Using this approach, Mack's argument for severance would fail, since if this Court found prejudice from the denial of the severance, it would necessitate a full trial. However,

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[21]887 P.2d 857 (Utah 1994).

[22]The Utah Rule of Criminal Procedure 11(i)mirrors the language of West Virginia Rule 11(a)(2) and Kentucky RCr 8.09.

[23]758 P.2d 935 (Utah Ct.App. 1988).

[24]Montoya, supra at 860.

since the Commonwealth has not argued for the "case-dispositive" approach and since there is no Kentucky precedent for us to follow, we will refrain from going beyond the arguments in the briefs. Instead, we affirm because Mack has failed to show prejudice.

This Court considered a somewhat similar issue in Rushin v. Commonwealth.[25] There the defendant, in accordance with KRS 440.450 and 500.110, requested a speedy trial in writing. Six days before the 180-day time limit was up, the court set the trial for November 28, 1994. On November 22, after the defendant's newly-appointed counsel's motion to dismiss was denied, counsel claimed that he did not have adequate time to prepare for trial because the Commonwealth was "trying to race to trial" to avoid violation of KRS 440.450.[26] The Commonwealth responded, claiming that if defense counsel could not be ready by the trial date, then Rushin should be required to move for a continuance, thereby waiving the prescribed time restraints. Rushin then entered a RCr 8.09 conditional guilty plea, reserving the issue for appeal.

Rushin argued that the Commonwealth's insistence on the November 28 trial date forced him to choose between his right to a speedy trial and his right to effective assistance of counsel. This Court noted that to prove ineffective assistance of counsel

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[25]Ky.App., 931 S.W.2d 456 (1996).

[26]Id. at 458.

prejudice must be shown:

> [I]t is well-established that a finding of ineffective assistance of counsel must be based upon a showing of prejudice. . . Since Rushin entered a conditional guilty plea without proceeding to trial, we are unable to determine whether he would have been prejudiced by the allegedly short amount of preparation time [citations omitted].[27]

Since no trial was held, Rushin's conditional guilty plea precluded a determination of whether prejudice had occurred.

Likewise, prejudice must be shown in a claim of improper denial of severance.[28] Since a trial was never held, prejudice cannot be shown. Mack based his conditional guilty plea on the mere possibility of prejudice. Since he cannot show that the trial court clearly abused its discretion in refusing to sever the cases for trial, we affirm.

Mack also claims that the trial court erred in refusing to sanction the Commonwealth for an alleged discovery violation. In his brief, Mack stated the issue as follows: "The failure of the court to enforce the discovery order to include the nursing notes of the alleged victim in the robbery was so prejudicial to appellant so as to deny him due process of law as guaranteed by the 14th Amendment to the United States Constitution, and Section 11 of the Kentucky Constitution."[29]

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[27]Id at 460 (citations omitted).

[28]See RCr 9.16, supra.

[29]Mack attempted to preserve this issue by two rather innocuous written motions. The first, a motion for continuance,

(continued...)

During a pre-trial hearing on November 4, 1997, Mack's counsel mentioned to the trial court that the hospital records of the victim did not contain so-called "nurse's notes". He informed the trial court that these notes were potentially exculpatory in nature, in that they could possibly include data on the victim's intoxication level, thus evidencing an impairment of his ability to clearly identify two of the defendants, Mack and Harrison, as his assailants.[30] The trial court found that the Commonwealth had complied with its discovery obligations by turning over to the defendants the records sent by the hospital. The trial court offered to enter an order allowing Mack's counsel to visit the hospital and examine any of William's records, including the nurse's notes. Mack's counsel agreed to this arrangement, stating that he would examine those records the following morning. However, the following morning the trial was continued for a month and counsel made no effort to examine the notes. The trial finally commenced on January 6, 1998, almost seven weeks after the November 17, 1997, order.

RCr 7.24(1)(b), provides in pertinent part:

> Upon written request by the defense, the attorney for the Commonwealth shall . . . permit the defendant to inspect and copy or photograph any relevant . . . results or

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(...continued)
states: "The basis for the motion is that vital evidence contained in the hospital records of the victim have not been released to the Commonwealth."

[30]Williams identified Stephenson about one month later from a photo-pak presentation at his home.

> reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case . . . that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

The general rule is that the prosecutor's obligation to disclose information in the possession of the state is not limited to only materials that are in the prosecutor's office, but also includes information held by the various police agencies and officers involved in the case.[31] In Moore v. Commonwealth,[32] our Supreme Court approved this general rule as it relates to Kentucky police being "an arm of the prosecution for this purpose." In Wagner v. Commonwealth,[33] the Supreme Court held that the only materials discoverable under the rule are those within the possession, custody and control of the Commonwealth, and found that the records of a private, charitable hospital were not encompassed within this obligation.

The situation in the case sub judice is very similar to Wagner, supra; and the action taken by the trial court in this situation was proper. The trial court compelled the discovery of the hospital records, which the Commonwealth provided to Mack. When the issue concerning the nurses' notes was raised, the trial court found that the Commonwealth could not control what records

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[31]23 Am.Jur.2d Depositions and Discovery §421 (1983).

[32]Ky., 569 S.W.2d 150, 154 (1978).

[33]Ky., 581 S.W.2d 352 (1979), overruled on other grounds to the extent of conflict, Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1984).

the hospital relinquished, and that it had complied with the discovery order in good faith. Nevertheless, the trial court issued an order allowing counsel to go to the hospital to examine any and all records concerning Williams, including any nurse's notes. Seven weeks later, when the trial commenced, none of the three defendant's counsel complained that these nurse's notes were still not available to them.

In summary, the Commonwealth is required by the discovery rule to provide only those items within its control, custody and possession; and the hospital was not an agent of the Commonwealth. The trial court entered a proper discovery order, and the Commonwealth properly complied with the order. Furthermore, the trial court provided the defendant with a clear opportunity to examine the records at the hospital. Defense counsel, who had seven weeks to examine those records, did not advise the trial court on the day of trial that the notes were still an issue. Thus, Mack cannot now claim that he was improperly denied access to those records. If it is Mack's position that this Court should require the Commonwealth to assist in conducting an investigation to support his defense, such an argument is not supported by the law.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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