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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000705-MR

FRANCISCO BARROSO — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 99-CR-001976

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: BARBER, COMBS, and TACKETT, Judges.

COMBS, JUDGE: Francisco Barroso ("Barroso") appeals from a judgment of the Jefferson Circuit Court finding him guilty of first-degree rape and second-degree robbery. After reviewing the record on appeal, we vacate and remand for a new trial.

On August 12, 1999, Barroso was charged under a two-count indictment for the rape and robbery of Jennifer Hollenkamp, a former girlfriend. The incident which led to his indictment allegedly occurred on May 22, 1999, at a house in the Lyndon area of Jefferson County, where John Hall (an acquaintance of Barroso) lived with his brother. The house was apparently a "hang-out" for local teenagers without adult supervision.

Hollenkamp testified that on May 22, 1999, she received a telephone call from Barroso, stating that he needed to see her. She agreed to meet Barroso, and the two ultimately went to John Hall's house. After speaking briefly to others in the house, Barroso and Hollenkamp went to a bedroom and began to kiss. According to Hollenkamp, Barroso told her that they were going to have sex and tried to unfasten her shorts even as she told him "no." She further testified that Barroso lost his temper because she refused to have sex with him. He struck her on her jaw, cheekbone, and forehead with a closed fist. Hollenkamp then stated that she became dizzy and frightened and that she could only cry and tell Barroso to stop as he forcibly had sex with her.

Hollenkamp testified that after the rape, she immediately left the house and was followed by Barroso. She told Barroso that she wanted to go to the home of her friend, Angela Ormerod, but he told her "no." Hollenkamp then testified that after they had walked approximately one (1) block from the house, Barroso grabbed her purse from her shoulder, pulled out her wallet, took the money that was inside the wallet, and threw the wallet back at her. On the night of the incident in question, however, Hollenkamp told a police detective that Barroso had taken the money from her wallet before they left the bedroom. Hollenkamp further testified that Barroso walked back to Hall's house while she continued walking to Ormerod's home. Later that night, Angela's mother found out about the incident and notified the police.

Barroso's testimony was that he and Hollenkamp went to John Hall's house and began kissing in a bedroom. He further testfied, however, that Hollenkamp willingly had sex with him and that he did not strike her. Barroso also testified that he and Hollenkamp left the house together and that they decided to get something to eat. He recalled asking Hollenkamp if he could borrow some money. She responded by removing money from her wallet and counting it, explaining to Barroso that she needed it to buy a birthday present for a friend. Barroso admitted that he grabbed the money from her hand and refused to give it back. When Hollenkamp tried to take the money from him, he pushed her away with his elbow. Barroso testified that Hollenkamp then began screaming at him and chased after him before she finally decided to walk away. Barroso stated that he then returned to John Hall's house.

On May 24, 1999, Barroso was arrested and was charged with first-degree rape and second-degree robbery. On July 6, 1999, the charges against Barroso (who was a juvenile at the time of the incident) were transferred from the juvenile division of Jefferson District Court to the Jefferson Circuit Court. On January 13, 2000, a jury convicted Barroso on both the rape and robbery charges and recommended a sentence of ten (10) years for the rape conviction and a sentence of five (5) years for the robbery conviction with the sentences to run concurrently. On January 21, 2000, Barroso filed a motion for Judgment Notwithstanding the Verdict on both convictions. This motion was denied by the court, and on February 23, 2000, a Judgment of

Conviction and Sentence was entered in accordance with the jury's recommendations. This appeal followed.

Although Barroso raises several issues on appeal, we shall address only two (2) for purposes of our review. We first consider whether the trial court abused its discretion in not allowing Barroso to have access to certain mental health records of Hollenkamp. In particular, Barroso contends that the court erred in conducting an *in-camera* review of these records without the presence of his defense counsel.

On September 15, 1999, in compliance with a discovery request, the Commonwealth provided Barroso an investigative report which stated that Hollenkamp had previously been hospitalized "for depression ... because she had broken up with her boyfriend and her best friend had moved away." The Commonwealth also provided Barroso medical records from the night of the incident in question. Among these records was a statement made by Hollenkamp that she had been hospitalized for depression and that she was currently taking at least three (3) anti-depressant medications.

Based upon this information, counsel for Barroso filed a motion to compel the production of Hollenkamp's mental health records, arguing that these records could bear upon her credibility as a witness. On January 11, 2000, the trial court questioned Hollenkamp about her past hospitalization and then granted the motion for the records to be produced. The court received the records the next day and reviewed them during a lunch recess. The court then told both parties that he had

received and reviewed the records and that -- with the exception of one minor incident -- he had found nothing germane to the case therein. Accordingly, the court denied Barroso's motion to review the records. As part of a motion for a new trial, Barroso argued that Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1994), cert. denied, 516 U.S. 1154 (1996), required an in-camera review of the records in the presence of defense counsel and that the court erred in not allowing the defense to have access to the records.

"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." Id. at 701, citing Pennsylvania v. Ritchie, 480 U.S. 39, 55-56 (1987). "Information regarding the credibility of a prosecution witness has been recognized as the sort of exculpatory evidence which is subject to disclosure." Id. at 701-02, citing Ritchie, supra, at 56-57; and Rolli v. Commonwealth, Ky. App., 678 S.W.2d 800, 802 (1984). In Eldred, supra, the Kentucky Supreme Court stated that where a trial court is "'[confronted] with articulable evidence that raises a reasonable inquiry of a witness's mental health history, [the] court should permit a defendant to discover that history'" because of its potentially exculpatory nature. Id. at 702, quoting Illinois v. Dace, 449 N.E.2d 1031, 1035 (1983). However, the Eldred court qualified this assertion by stating that "the defendant is not entitled to unlimited access or use of the evidence sought." Id.

If a prosecution witness raises an issue involving a privacy interest such as the physician-patient privilege,

> an in-camera hearing shall be conducted by the trial court in the presence of the prosecutor and defense counsel to determine which information would be both relevant and material to the witness's credibility.

Id. (Emphasis added.) Any privacy interest raised by a prosecution witness may be overcome "where the critical nature of the evidence sought by the defendant outweighs the potential for harm caused by the resulting invasion of the victim's privacy[.]" Id. at 701. The language allowing presence of defense counsel is mandatory rather than permissive, leaving little room for a court's exercise of discretion.

In this case, we hold that the trial court abused its discretion in denying the discovery sought by Barroso. By ordering the production of Hollenkamp's mental health records for review, the trial court agreed that Barroso had presented the requisite amount of "articulable evidence" needed to meet the threshold requirement of Eldred, supra. At that point -- in accordance with the unequivocal language of Eldred, supra -- the trial court was required to conduct an *in-camera* hearing "in the presence of the prosecutor and defense counsel" to determine which information in those records -- if any -- might bear on Hollenkamp's credibility. In unilaterally reviewing the records to determine their relevance and materiality, the trial court failed to follow the explicit instructions of Eldred, supra.

The Commonwealth cites Hodge v. Commonwealth, Ky., 17 S.W.3d 824 (2000), as supportive of its position that in a case

such as this, a trial court is not required to conduct an in-camera hearing in the presence of counsel. We disagree. Hodge, supra, reveals only that the trial judge in that case "pursuant to Eldred v. Commonwealth ... reviewed the records in camera and determined that they did not contain information sufficiently relevant to overcome the psychotherapist-patient privileges...." Id. at 843. (Citation omitted.) In and of itself, this language does not disclose or indicate whether counsel was present at the hearing. Moreover, this language alone does not intimate that the Supreme Court intended to abandon the requirements of Eldred, supra.

We restrict our holding solely to the error of the trial court in denying the discovery of Hollenkamp's mental health records without venturing an opinion as to whether those records might contain information sufficiently relevant to overcome a claim of privilege. That determination is yet to be made by the trial court. However, this is a case in which the primary evidence necessarily involves conflicting testimony by an alleged victim and a defendant; therefore, the credibility of those witnesses assumes an enhanced significance. Barroso has met his burden to support his discovery requests and is entitled to an *in-camera* hearing conducted in the presence of his counsel. Accordingly, we vacate Barroso's convictions and remand for a new trial. See Eldred, supra, at 703.

Barroso also contends that the court erred in allowing the Commonwealth to impeach his testimony with a prior juvenile adjudication pursuant to Kentucky Revised Statutes ("KRS")

610.320(4). At trial, counsel for Barroso requested that the Commonwealth be prevented from eliciting testimony that Barraso had pled guilty to receiving stolen property in juvenile court in March 1997. Defense counsel argued that KRS 610.320(4) was inapplicable to Barroso's guilty plea because it became effective in July 1997 and, accordingly, could not be applied retroactively. The trial court disagreed and allowed the juvenile adjudication to be admitted for impeachment purposes.

On cross-examination by the Commonwealth, Barroso testified that he had pled guilty to receiving over $300 dollars in stolen property in juvenile court in March 1997. He also testified that receiving over $300 dollars in stolen property was considered a felony offense.

KRS 610.320(4) provides that:

> Subject to the Kentucky Rules of Evidence, juvenile court records of adjudications of guilt of a child for an offense which would be a felony if committed by an adult shall be admissible in court at any time the child is tried as an adult, or after the child becomes an adult, at any subsequent criminal trial relating to that same person. Juvenile court records made available pursuant to this section may be used for impeachment purposes during a criminal trial, and may be used during the sentencing phase of a criminal trial. However, the fact that a juvenile has been adjudicated delinquent of an offense which would be a felony if the child had been an adult shall not be used in finding the child to be a persistent felony offender based upon that adjudication.

The Commonwealth concedes that KRS 610.320(4) was applied retroactively to Barroso's juvenile court adjudication.

KRS 446.080(3) provides: "No statute shall be construed to be retroactive, unless expressly so declared." "This is a

principle fundamental to statutory construction in Kentucky." Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company, Ky., 983 S.W.2d 493, 499 (1998). "The courts have consistently upheld this admonition and have declared that there is a strong presumption that statutes operate prospectively and that retroactive application of statutes will be approved only if it is absolutely certain the legislature intended such a result." Commonwealth Dept. Of Agriculture v. Vinson, Ky., 30 S.W.3d 162, 169 (2000). (Emphasis added.) We have discovered no evidence of a clear legislative intent that KRS 610.320(4) was to be applied retroactively. Therefore, we hold that the trial court erred in allowing the Commonwealth to impeach Barroso's testimony with his guilty plea from a prior juvenile adjudication.

Having concluded that Barroso is entitled to a new trial, we need not address the additional issues which he has raised. Accordingly, the judgment of the Jefferson Circuit Court is vacated, and the case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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