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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002988-MR

DALE GEE — APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 98-CR-00042

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Dale Gee has appealed as a matter of right from a judgment of the Lewis Circuit Court entered on September 24, 1999. Following a jury trial, Gee was found guilty on one count of complicity[1] to tamper with physical evidence,[2] and on one

[1]Kentucky Revised Statutes (KRS) 502.020.

[2]KRS 524.100.

count of perjury in the first degree.[3] Having found that all of Gee's claims of error are without merit, we affirm.

In 1994, Gee was employed as a conservation officer for the Kentucky Department of Fish and Wildlife. Gee was a friend of James Sinnott, a Trooper for the Kentucky State Police. Sinnott was involved in an extramarital affair with Kara Plummer, who became pregnant with his child. Sinnott, in an attempt to avoid paying child support and with Gee's assistance, formulated a plan to submit someone else's blood sample for his paternity test. Vanessa Harrison, a phlebotomist employed by Plummer's physician, assisted Sinnott by performing the test on the false blood sample. The falsified test, which was dated October 26, 1994, excluded Sinnott as a possible father of the child. Plummer then demanded a second test. The second test, which was dated January 10, 1995, and performed by a court ordered phlebotomist, revealed that Sinnott was indeed the father of Plummer's child.

Thereafter, Sinnott and Harrison were indicted by the Lewis County grand jury for tampering with physical evidence. Gee testified before the grand jury during the investigation of Sinnott and Harrison, and stated that he had no knowledge of Sinnott's plan to falsify the paternity test. In March of 1997, Sinnott and Harrison were convicted of tampering with physical evidence, and they each received two-year prison sentences. The

[3]KRS 523.020.

donor of the fraudulent blood sample remained unknown throughout the trial of Sinnott and Harrison.

In November of 1997, Anita Murphy, Gee's former wife, contacted the Attorney General's office. Murphy stated that she had overheard conversations between Gee and Sinnott, when the two had discussed the plan to falsify the paternity test. Murphy also said that Joseph Billman was the probable donor of the false blood sample. A subsequent blood test revealed that Billman was in fact the donor.[4]

On December 4, 1998, based upon Murphy's statements and the results of the blood test, Gee was indicted by the Lewis County grand jury on one count of complicity to tamper with physical evidence and on one count of perjury in the first degree. On September 24, 1999, a jury convicted Gee on both counts. The trial court sentenced Gee to prison for two years on the conviction for complicity to tamper with physical evidence, and five years on the perjury conviction. The trial court ordered the sentences to run consecutively for a total of seven years in prison. This appeal followed.

Gee makes the following eight claims of error: (1) Murphy's knowledge of the scheme to falsify the blood test came from confidential marital communications; thus, her testimony should not have been admitted; (2) a sufficient chain of custody

[4]Billman was not charged. It was established that Sinnot and Gee lied to him concerning the reason for the blood test. Presumably, Billman had no knowledge that his blood sample was to be used to falsify a paternity test, or to be used in any way as evidence in a court proceeding.

of the blood evidence was never established; thus, this evidence should not have been admitted; (3) there was insufficient evidence to support a conviction for complicity to tamper with physical evidence; (4) there was insufficient evidence to support a conviction for perjury; (5) Murphy's testimony regarding Sinnott's out-of-court statements should not have been admitted; (6) Gee's grand jury testimony should have been suppressed; (7) Gee should have been allowed to testify to out-of-court statements that Sinnott had made to him; and (8) the trial court erred in failing to grant Gee probation, alternative sentencing, or conditional discharge.

Gee first argues that Murphy's knowledge of his involvement with Sinnott's plan to falsify the paternity test came from confidential marital communications, and this evidence should not have been admitted. We disagree. The communication at issue was in the presence of Sinnott; to be afforded the spousal privilege, the communications must be made in confidence outside the presence of a third party.

In Slaven v. Commonwealth,[5] our Supreme Court discussed the scope of spousal privilege:

> The Kentucky Rules of Evidence changed the spousal privilege in two significant respects. First, the testimonial privilege was expanded to enable a party spouse to preclude a witness spouse from testifying against him. KRE 504(a). . . . Second, the marital communications privilege was narrowed by defining the term "confidential" to require not only that the communication was

[5]Ky., 962 S.W.2d 845, 852 (1997).

> made in private, but also that it was not intended for disclosure to any other person, i.e., there must have been a positive expectation of confidentiality. KRE 504(b) [footnotes omitted].
>
> On direct examination, Murphy testified as follows:
>
> Q- So it's about this time [summer of 1994] is when — It's about this time when Jim Sinnott, you [Murphy] and [Gee] have this conversation about [how Sinnott] can't afford to take that risk [of being named the father of Plummer's child]?
>
> A- That's right.
>
> Q- Now, was there another conversation that you heard between [Gee] and Jim Sinnott?
>
> A- Yes.
>
> Q- Okay. When?
>
> A- Different times over the course of the next -- from that point up through Mr. Sinnott's trial. They had different conversations at different times.
>
> Q- Tell the jurors what you heard in these conversations?
>
> A- It was decided that the blood sample would be provided by Mr. Joe Billman . . . .
>
> Q- How do you know he was the one decided to be the person?
>
> A- I heard them talking about it.
>
> Q- Who is "Them"?
>
> A- I heard [Gee] and [Sinnott] talking about [Billman] providing the blood sample.

The above testimony indicates that Murphy was apparently privy to conversations between Gee and Sinnott. Therefore, Murphy's knowledge of the plan to falsify the blood sample did not come

from confidential marital communications. Accordingly, the spousal privilege does not apply, and there was no error in permitting Murphy to testify concerning the conversation she overheard between Gee and Sinnott.

In claiming the conversation was privileged, Gee points to a confusing exchange on cross-examination, where Murphy seemed to contradict herself:

> Q- But, you never heard conversations of them planning to use Joe Billman as a blood donor, did you?
>
> A- I can't comment on how I had that information. It's not admissible.
>
> Q- But, you -- you never heard conversations between [Gee] -- and [Sinnott]?
>
> A- Right.
>
> Q- You never did, did you? That's a correct statement?
>
> A- As far as I can recall.

This testimony seems to indicate that Murphy had perhaps been told of the plan by Gee in private.[6] Under these circumstances, the spousal privilege requirements would be met and it would have been error to have allowed Murphy to testify concerning Gee's involvement in the scheme to falsify the blood sample. However, where a witness gives conflicting testimony, it is within the province of the jury to weigh the credibility of that testimony.

[6]The Commonwealth argues that Murphy was not being inconsistent, but merely unclear. The Commonwealth claims Murphy was confused by the question and was referring to another time period and another conversation with Gee. Regardless, this factual matter is for the jury to sort out.

In Nix v. Commonwealth,[7] the former Court of Appeals stated:

> The argument is made also that on cross-examination, Mable Nix admitted she was unable to hear anything that was said concerning plans for the theft. If this had been all that was said by Mable, we would be inclined to agree that the evidence was insufficient to connect the appellants with the crime. On direct examination, however, Mable testified that she heard the details of the planned theft. This conflict clearly affects her credibility as a witness, but it is the jury's province to determine the weight to be given her conflicting testimony. It may believe what was said on direct examination despite subsequent inconsistent statements. Durbin v. Banks, 314 Ky. 192, 234 S.W.2d 681; Cheatham v. Chabal, 301 Ky. 616, 192 S.W.2d 812.

Therefore, it was the jury's role to decide this possible conflict in the evidence and to determine whether to give more weight to Murphy's prior testimony where she recalled overhearing Gee and Sinnott's conversation, than to her subsequent statements to the contrary. Accordingly, the trial court did not err in admitting Murphy's testimony as evidence.

Gee next claims that evidence of Sinnott's falsified blood sample should not have been admitted, since a sufficient chain of custody was not established. This argument fails as well.

In Fugate v. Commonwealth,[8] the Supreme Court stated:

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[7]Ky., 299 S.W.2d 609, 610-11 (1957).

[8]Ky., 993 S.W.2d 931, 937-38 (1999).

> We hold that the DNA comparison analysis using the RFLP[9] and PCR methods is admissible without being the subject of a pretrial Daubert[10] hearing. However, the evidence in question is still subject to challenge at trial. The opposing party could question the handling of the samples, the chain of custody, the accuracy of the procedures, the quality of training of the particular person or persons who conducted the actual tests and whatever other challenge could be made to the credibility of the evidence. Such complaint would go to the weight of the evidence, not its admissibility.

In the case at bar, the blood sample evidence was derived from the same RFLP procedure that Fugate addressed. Gee's attack on the chain of custody is thus limited to the credibility of the evidence, not its admissibility. As stated above, a decision concerning the credibility of the evidence is for the jury. We have reviewed the record, and we believe there was sufficient evidence to establish a chain of custody to warrant the trial court's allowing the jury to consider the blood evidence. We provide the following chronology:

1. January 3, 1997. Darvin Sebastian, an investigator with the Kentucky Attorney General's Office, picked up Sinnott's falsified blood sample, packed in dry ice, from Genetic Design, Inc.

2. January 6, 1997. Sebastian dropped off blood samples with Lucy A. Davis, the DNA section supervisor at the Kentucky State Police Lab in Frankfort. Davis placed the samples in the refrigerator.

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[9]Restriction Fragment Link Polymorphism. Scientific procedure used to extract DNA from blood for purposes of comparison.

[10]Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

3. March 17, 1997. Davis took the blood samples out of the refrigerator, and into Lewis Circuit Court for the trial of Sinnott and Harrison. The blood samples were refrigerated each night at the court reporter's home.

4. March 24, 1997. Sebastian picked up the blood samples from Lewis Circuit Court following the trial. The evening of March 24, 1997, was the only night the blood samples were unrefrigerated.

5. March 25, 1997. Sebastian dropped off the blood samples with Linda Winkle at the Kentucky State Police Lab. Winkle placed the blood samples in the refrigerator.

6. May 27, 1997. Blood samples remained in the refrigerator, but the blood samples were transferred from Winkle's log, to Davis' log.

7. February 19, 1998. Davis received Billman's blood sample for purposes of comparing it with Sinnott's falsified sample.

8. June 8, 1998. Davis opened Sinnott's falsified blood sample. Two tubes were broken, but Davis was nonetheless able to perform the tests. The tests later revealed that Billman was in fact the donor of Sinnott's false blood sample.

We believe the above evidence was sufficient to establish a chain of custody; and it was proper for the jury to consider the blood samples as evidence. Furthermore, Davis, a recognized expert in DNA analysis, testified that neither the broken tubes in Sinnott's false blood sample, nor the lack of refrigeration for one night would have impaired the integrity of the tests. Accordingly, the trial court did not err in allowing testimony concerning the falsified blood samples as evidence.

Gee next claims that there was insufficient evidence to support a conviction for complicity to tamper with physical evidence, and argues the trial court should have granted a directed verdict in his favor. We disagree.

In Commonwealth v. Benham,[11] the Supreme Court stated:

> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal [emphasis added].

Based upon the evidence presented at trial, we cannot say that it was unreasonable for the jury to find Gee guilty of complicity to tamper with physical evidence.

KRS 502.020 provides as follows:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so [emphasis added].

The evidence against Gee was substantial. First, Billman testified that Gee, by corroborating Sinnott's fabricated story, assisted Sinnott in convincing Billman to give a blood

[11]Ky., 816 S.W.2d 186, 187 (1991).

sample. Second, phone records revealed significant activity between Gee and Harrison at her work. Harrison, the phlebotomist who performed the first blood test, was employed by Dr. Lee, who was Plummer's obstetrician. Murphy testified that she was not a patient of Dr. Lee's, and she knew of no reason why Gee, her husband at the time, would be talking to Dr. Lee's office where Harrison worked. Third, Murphy testified that she heard Gee and Sinnott discuss their plan to get a false blood sample from Billman, and how Gee would "run interference," or make it appear as though Gee had given the blood sample. Finally, Brandy Gee, Gee's wife at the time of the trial, testified that Gee had told her of the plan to falsify the paternity test.

This evidence clearly was sufficient to support the jury's verdict convicting Gee guilty of complicity to tamper with physical evidence. Accordingly, the trial court did not err in refusing to direct a verdict in favor of Gee on that charge.

Gee similarly claims there was insufficient evidence to support his conviction for perjury, and that he should have been granted a directed verdict on that charge. However, we believe the evidence was sufficient to support the guilty verdict.

In Commonwealth v. Thurman,[12] the Supreme Court stated:

> "A person is guilty of perjury in the first degree when he makes a material false statement, which he does not believe, in any official proceeding under an oath required or authorized by law . . . ."
>
> . . .

[12]Ky., 691 S.W.2d 213, 215 (1985).

> It is not necessary that testimony, to be material, must relate to the principal issue in a case. It is sufficiently material if it has the potential to influence a tribunal or a jury [citation omitted].

In Day v. Commonwealth,[13] the former Court of Appeals stated:

> It has long been the rule of evidence in charges of perjury or false swearing that the charge must be supported by the evidence of two witnesses, or the evidence of one witness supported by strong corroborative evidence. Such support may be furnished by record, by writing, or by facts and circumstances testified to by one other than the accusing witness tending strongly to corroborate his statement [citation omitted].

During the grand jury investigation of Sinnott and Harrison, Gee testified in part:

> Q. Uh, did [Sinnott] ever talk to you about tampering with the blood samples?
>
> A. Not that I recall, sir.
>
> Q. [D]o you have any knowledge whatsoever, either personal knowledge, or suspicion, or hearsay or anything at all that has a bearing on that first [falsified] blood sample?
>
> A. None that I recall, sir.
>
> Q. As -- So, your answer is no, you have no knowledge?
>
> A. I have no knowledge that I recall on anything.

It is evident from the above that Gee testified falsely before the grand jury. There was substantial evidence indicating that Gee did have knowledge of Sinnott's plan to falsify the paternity test. His false statements were also material, as they could

[13]Ky., 195 Ky. 790, 793, 243 S.W. 1051, 1052 (1922).

have influenced the decision of the grand jury on whether to indict Sinnott and/or Harrison. Accordingly, the jury was not unreasonable in finding Gee guilty of perjury, and the trial court did not err in refusing to direct a verdict in favor of Gee on the perjury charge.

Gee next argues that the trial court erred in allowing witnesses to testify as to out-of-court statements made by Sinnott. Gee claims these statements were inadmissable hearsay. Once again, we disagree.

In Perdue v. Commonwealth,[14] where the defendant was convicted of complicity to commit murder,[15] and complicity to arson in the first degree,[16] the Supreme Court stated:

> A more appropriate basis for admission of the Moore testimony in which she repeated statements made by appellant and Frank Eldred is the hearsay exception for statements of co-conspirators. By this exception, codified at KRE[17] 801A(b)(5), the hearsay rule does not require exclusion of out-of-court statements offered against a party which were made by a co-conspirator during the course and in furtherance of the conspiracy.

In the case sub judice, the statements made by Sinnott, which Murphy and others testified to, were statements Sinnott had made in furtherance of the conspiracy to falsify the paternity test. For example, Billman testified that in an effort to get

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[14]Ky., 916 S.W.2d 148, 158 (1996).

[15]KRS 507.020.

[16]KRS 513.020.

[17]Kentucky Rules of Evidence.

him to give his blood, Sinnott fabricated a story about needing a blood sample for a venereal disease test. Murphy testified that Sinnott and Gee had discussed how Gee would "run interference" in an effort to draw attention away from Billman. These statements were made in furtherance of Sinnott's plan to falsify the blood test and were properly admitted into evidence.

Gee next argues that since he was not advised of his Fifth Amendment right not to incriminate himself, his grand jury testimony should have been suppressed and it could not be used to support his conviction for perjury. This argument is also meritless.

In United States v. Wong,[18] the United States Supreme Court held that a failure to advise a witness testifying before a grand jury of his Fifth Amendment rights did not preclude that testimony from being used against that same witness who is later charged with perjury:

> As our holding in Mandujano[19] makes clear, and indeed as the Court of Appeals recognized, the Fifth Amendment privilege does not condone perjury. It grants a privilege to remain silent without risking contempt, but it "does not endow the person who testifies with a license to commit perjury." Glickstein v. United States, 222 U.S. 139, 142, 56 L.Ed. 128, 32 S.Ct. 71 (1911). The failure to provide a warning of the privilege, in addition to the oath to tell the truth, does not call for a different result. The contention is that warnings

[18]431 U.S. 174, 178 97 S.Ct. 1823, 52 L.Ed.2d 231, 235 (1977).

[19]United States v. Mandujano, 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976).

> inform the witness of the availability of the privilege and thus eliminate the claimed dilemma of self-incrimination or perjury. Cf. Garner v. United States, 424 U.S. 648, 657-658, 47 L.Ed.2d 370, 96 S.Ct. 1178 (1976). However, in United States v. Knox, 396 U.S. 77, 24 L.Ed.2d 275, 90 S.Ct. 363 (1969), the Court held that even the predicament of being forced to choose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury.

Thus, Gee's false statements before the grand jury that he had no knowledge of Sinnott's plan could be used against him, even without him being advised of his Fifth Amendment rights. The trial court did not err in refusing to suppress his grand jury testimony.

Gee further alleges that the trial court erred by not allowing him to testify regarding a conversation he had with Sinnott, following Sinnott's conviction for tampering with physical evidence. Gee claims that after the trial, he asked Sinnott to tell him who had given the false blood sample. Allegedly, when Gee asked Sinnott if Billman was the donor, Sinnott "smiled and shrugged." Gee claims this evidence would have shown his "state of mind." That is, Gee claims that his questioning of Sinnott and Sinnott's response were proof that Gee did not know who had given the blood sample. This testimony would supposedly help to exculpate Gee from involvement in Sinnott's plan. The trial court ruled that this testimony was inadmissible hearsay. We agree.

First, the testimony that Gee attempted to give is clearly distinguishable from the aforementioned testimony of

Murphy. Sinnott's alleged statements that Gee offered as testimony were made after Sinnott's conviction. The statements that Murphy testified about were made during the planning and execution of Sinnott's plan to falsify the paternity test. Therefore, Gee's testimony does not fall within the co-conspirator exception to the hearsay rule.

Second, the "state of mind" exception to the hearsay rule can only be used to clarify the state of mind of the declarant. Gee would have this Court to allow the admission of Sinnott's out-of-court statements to prove Gee's state of mind. Such a result is contrary to KRE 803(3).

In Moseley v. Commonwealth,[20] our Supreme Court stated:

> The Commonwealth posits that the statements fall within the state of mind exception to the hearsay rule. KRE 803(3). However, the statements were offered to prove Appellant's state of mind and KRE 803(3), by its very language, only applies to prove the state of mind of the declarant, i.e., the victim in this case [emphases original].

Hence, Sinnott's statements, if admissible at all, would only be permitted to prove Sinnott's state of mind, not Gee's. Accordingly, this proffered testimony by Gee was properly excluded by the trial court.

Finally, Gee claims the trial court erred in sentencing him by refusing to grant him probation, alternative sentencing, or conditional discharge. This argument is wholly without merit. KRS 533.010 reads in part:

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[20]Ky., 960 S.W.2d 460, 462 (1997).

> (1) Any person who has been convicted of a crime and who has not been sentenced to death may be sentenced to probation, probation with an alternative sentencing plan, or conditional discharge as provided in this chapter.
>
> (2) . . . [P]robation or conditional discharge shall be granted, unless the court is of the opinion that imprisonment is necessary for protection of the public because:
>
> . . .
>
> (c) A disposition under this chapter will unduly depreciate the seriousness of the defendant's crime.

Clearly, the trial court's determination that probation or conditional discharge would be inappropriate in Gee's case was not an abuse of discretion. Gee's being a former peace officer would certainly contribute to a finding that the granting of probation or conditional discharge would unduly depreciate the seriousness of his offense.

Furthermore, in Tarrance v. Commonwealth,[21] this Court stated, "Unless there exists some Constitutional or statutory limitation, the sentencing power is of course discretionary with the trial judge." In the case sub judice, the trial court clearly did not abuse its discretion as Gee's sentence is in compliance with the sentencing statutes. KRS 532.110(c) reads in part:

> The aggregate of consecutive indeterminate terms shall not exceed in maximum length the

[21]Ky. App., 548 S.W.2d 147, 149 (1977).

> longest extended term which would be authorized by KRS 532.080[22] for the highest class of crime for which any of the sentences is imposed.

Gee was convicted of complicity to tamper with physical evidence and perjury in the first degree, both Class D felonies. Under KRS 532.080, the longest extended term for Class D felonies is 20 years. Therefore, Gee's sentence of seven years fell well within the statutory limits. Accordingly, no sentencing errors were made by the trial court.

In summary, all of Gee's claims of error fail. The trial court did not improperly admit confidential marital communications as evidence. The jury could have reasonably found that Murphy obtained her knowledge of Sinnott's plan from three-party conversations, rendering the spousal privilege inapplicable. Sufficient evidence was presented to establish a credible chain of custody. The evidence supported finding Gee guilty of complicity to tamper with physical evidence and perjury. Further, the trial court properly allowed hearsay testimony from Murphy, as it was made by a co-conspirator in furtherance of a conspiracy. The trial court properly excluded the proffered hearsay testimony of Gee, as it did not meet a recognized exception to the hearsay rule. In addition, there was no basis to suppress Gee's grand jury testimony; the Fifth Amendment does not guarantee the right of a witness to lie under oath. Finally, the trial court committed no errors in sentencing

[22]Statute authorizing enhanced sentences for persistent felony offenders.

Gee to seven years in prison, without granting probation, alternative sentencing, or conditional discharge.

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

ALL CONCUR.

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