

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001625-MR

SAMUEL ADKINS

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE LEONARD L. KOPOWSKI, JUDGE
ACTION NO. 00-CR-00402

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Samuel Adkins has appealed from a judgment and sentence on plea of guilty entered by the Campbell Circuit Court on July 25, 2001, which sentenced him to a probated term of five years on a plea of guilty to arson in the third degree.¹ Having concluded that Adkins has not shown a constitutional violation by the Commonwealth for failure to disclose exculpatory information, and that the trial court did not abuse its discretion by denying his motion to withdraw his guilty plea, we affirm.

¹Kentucky Revised Statutes (KRS) 513.040.

On September 9, 2000, the police were notified of a burning pickup truck on Vine Street in Dayton, Kentucky. On October 17, 2000, Adkins was arrested on a warrant issued on a charge of arson in the second degree.² On December 28, 2000, a Campbell County grand jury indicted Adkins for arson in the second degree for "starting a fire with the intent to destroy or damage an automobile owned by Daniel Sparks." On April 17, 2001, Adkins entered a plea of guilty to the amended charge of arson in the third degree pursuant to a plea agreement with the Commonwealth, which recommended a sentence of five years to be probated for five years, with 90 days to serve, restitution, and a \$1,000.00 fine.

Adkins has alleged that on July 17, 2001, at his sentencing hearing that he learned for the first time that Daniel Sparks did not own the pickup truck that burned but that Sparks had been driving the truck with the consent of the owner. Adkins claims that at his sentencing hearing he orally moved the trial court to allow him to withdraw his guilty plea based on this new information concerning the ownership of the truck. The trial court denied the motion and sentenced Adkins in accordance with the plea agreement. This appeal followed.

Adkins claims the trial court abused its discretion by failing to allow him to withdraw his guilty plea at the sentencing hearing. He contends that his motion to withdraw his guilty plea should have been granted because the validity of his plea was compromised by the inaccurate information concerning the

²KRS 513.030.

legal owner of the pickup truck. Adkins asserts that the Commonwealth's failure to provide him with the identity of the actual legal title owner of the truck violated his right to due process under the Fourteenth Amendment to the United States Constitution as recognized in Brady v. Maryland.³ He maintains that the fact that Sparks did not own the truck but instead was merely borrowing it was material information because it damaged Spark's credibility as a potential witness and weakened the Commonwealth's case. Adkins alleges that during plea negotiations, the Commonwealth indicated that Sparks was the owner of the truck and that he had no reason to doubt the prosecutor's representations.⁴ He also asserts that because he was under the impression that Sparks was the victim of the offense, his guilty plea was not entered knowingly, intelligently, and voluntarily as required by Boykin v. Alabama.⁵

Generally, unless a trial court fails to follow the sentence recommended by the Commonwealth after accepting a guilty plea, the defendant does not have an absolute right to withdraw his guilty plea.⁶ Absent rejection of the recommended sentence, a trial court has discretion whether to allow a defendant to

³373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

⁴Adkins notes that the indictment named Daniel Sparks as the victim of the offense.

⁵395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

⁶See generally Haight v. Commonwealth, Ky., 938 S.W.2d 243 (1996); Kennedy v. Commonwealth, Ky.App., 962 S.W.2d 880 (1997); and Kentucky Rules of Criminal Procedure (RCr) 8.10.

withdraw his guilty plea prior to final judgment.⁷ While the ultimate decision on withdrawal is reviewed for abuse of discretion, the determination of whether evidence is material in the context of a Brady violation is a mixed question of law and fact subject to independent examination of the record by the reviewing court.⁸ The defendant bears the burden of proving materiality for a Brady challenge.⁹

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."¹⁰ The duty to disclose favorable or exculpatory evidence has been extended to include, in addition to evidence of guilt, evidence affecting a witness's credibility where the

⁷See supra note 6; Brock v. Commonwealth, Ky., 58 S.W.3d 482, 486 (2001); Couch v. Commonwealth, Ky., 528 S.W.2d 712 (1975); and Anderson v. Commonwealth, Ky., 507 S.W.2d 187 (1974).

⁸See United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995); Williams v. Coyle, 260 F.3d 684, 706 (6th Cir. 2001), cert. denied ___ U.S. ___, 122 S.Ct. 2635, 153 L.Ed.2d 816 (2002); and Trevino v. Johnson, 168 F.3d 173, 184 (5th Cir. 1999), cert. denied, 527 U.S. 1056, 120 S.Ct. 22, 144 L.Ed.2d 825 (1999).

⁹See Carter v. Bell, 218 F.3d 581 (6th Cir. 2000); Martin v. Cain, 246 F.3d 471, 476-77 (5th Cir. 2001), cert. denied, ___ U.S. ___, 122 S.Ct. 194, 151 L.Ed.2d 136 (2001); and Paradis v. Arave, 240 F.3d 1169, 1176 (9th Cir. 2001).

¹⁰Brady, 373 U.S. at 87.

witness's reliability is likely to be "determinative of guilt."¹¹

In order to establish a Brady violation, a defendant has the burden of establishing that (1) the prosecutor suppressed evidence; (2) the evidence was favorable to the defendant as exculpatory or impeachment; and (3) the evidence was material.¹² "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."¹³ Suppression of evidence within the context of the Brady doctrine involves evidence in the possession of the prosecution or of which it is aware.¹⁴ "[T]here is no Brady violation if the defendant knew or should have known the essential facts permitting him to take advantage of the

¹¹Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Hodge v. Commonwealth, Ky., 17 S.W.3d 824, 844 (1999).

¹²Moore v. Illinois, 408 U.S. 786, 794-95, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972); Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999); Carter v. Bell, 218 F.3d 581, 601 (6th Cir. 2000).

¹³Bagley, 473 U.S. at 682. See also, Kyles v. Whitley, 514 U.S. 419, 433-38, 115 S.Ct. 1555, 1565-68, 131 L.Ed.2d 490 (1995); and Jamison v. Collins, 291 F.3d 380 (6th Cir. 2002). The Brady materiality standard parallels the prejudice standard of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See id. at 694; Byrd v. Collins, 209 F.3d 486, 549 (6th Cir. 2000).

¹⁴See Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); and Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 158 (2001).

information in question, or if the information was available to him from another source.”¹⁵

Although Brady and its progeny dealt with the right to disclosure in order to facilitate a fair trial and defined materiality in terms of the effect on a jury verdict, a number of courts have applied the Brady doctrine to guilty pleas.¹⁶ These courts have reformulated the materiality standard in line with the different characteristics of a guilty plea vis-a-vis a jury trial. In the context of an attack on a guilty plea, evidence is considered material where “there is a reasonable probability that but for the failure to produce such information the defendant would not have entered the plea but instead would have insisted on going to trial.”¹⁷ Determination of this issue is based on an objective analysis not what the particular defendant would do but what is the likely persuasiveness of the withheld

¹⁵Carter, supra at 601; United States v. Mullins, 22 F.3d 1365, 1371 (6th Cir. 1994); Sanborn v. Commonwealth, Ky., 892 S.W.2d 542 (1994), cert. denied, 516 U.S. 854, 116 S.Ct. 154, 133 L.Ed.2d 98 (1995); Taylor, supra. See also Collier v. Davis, 301 F.3d 843, 850 (7th Cir. 2002) (suppression involves government’s failure to disclose known evidence before it is too late for defendant to make use of it and lack of availability of the evidence through exercise of reasonable diligence).

¹⁶See, e.g., United States v. Avellino, 136 F.3d 249 (2d Cir. 1998); Campbell v. Marshall, 769 F.2d 314 (6th Cir. 1985); White v. United States, 858 F.2d 416 (8th Cir. 1988); Sanchez, supra; United States v. Walters, 269 F.3d 1207 (10th Cir. 2001).

¹⁷Avellino, supra at 256 (quoting Tate v. Wood, 963 F.2d 20, 24 (2d Cir. 1992)); Walters, supra at 1214; Sanchez, supra at 1454. Cf. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L. Ed.2d 203 (1985) (stating prejudice for ineffective assistance of counsel claim in guilty plea context is whether there is reasonable probability that but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial).

information.¹⁸ However, in Matthew v. Johnson,¹⁹ the Court held that the rationale of the Brady doctrine does not extend to the guilty plea situation. The Court stated that “[b]ecause a Brady violation is defined in terms of the potential effects of undisclosed information on a judge’s or jury’s assessment of guilt, it follows that the failure of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation.”²⁰

The recent case of United States v. Ruiz,²¹ calls into question the application of the Brady doctrine in the context of guilty pleas. In a unanimous decision, the United States Supreme Court held that the United States Constitution did not require the government to disclose impeachment evidence and evidence regarding an affirmative defense prior to entry of a guilty plea.²² Ruiz involved the validity of the federal government’s policy of requiring a defendant to waive the right to receive impeachment information and information supporting any affirmative defenses as a part of a plea agreement. In an analysis similar to that of the court in Matthew, the Supreme Court stated that the Brady doctrine was based on the right to a fair trial. It noted that a guilty plea constitutes a waiver of

¹⁸Avellino, supra at 256.

¹⁹201 F.3d 353 (5th Cir. 2000), cert. denied, 531 U.S. 830, 121 S.Ct. 291, 148 L.Ed.2d 44 (2000).

²⁰Id. at 362.

²¹___ U.S. ___, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002).

²²Id. 122 S.Ct. at 2457.

several constitutional rights that must be made knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequences.²³ The Supreme Court recognized that the Constitution does not require the prosecution to share all useful information with the defendant, and that constitutional rights may be waived knowingly, intelligently, and with sufficient awareness by a defendant with only a general knowledge of the circumstances, rather than specific detailed knowledge of the consequences.²⁴ It said that impeachment information and affirmative defense evidence were not so critical that a defendant's guilty plea would not be knowing, intelligent, and voluntary without disclosure prior to the plea. It opined that the due process considerations underlying the right to exculpatory and impeachment information militate against extending the right to disclosure in the guilty plea situation.²⁵

First, Adkins has not shown a Brady violation, since the information on the legal owner was not suppressed. Information on the legal owner of the truck was readily available to Adkins as a public record and through access to Sparks directly. Thus, Brady does not apply since the prosecution did not suppress this information and since Adkins could have known of the information by the exercise of reasonable diligence.

²³Id. 122 S.Ct. at 2455 (citing Brady, 397 U.S. at 748 and Boykin, supra).

²⁴Id.

²⁵Id. 122 S.Ct. at 2456-57. The due process considerations include: (1) the nature of the private interest at stake; (2) the value of the additional safeguard; and (3) the adverse impact of the requirement upon the government's interest.

Second, given the decision in Ruiz, it is questionable whether Adkins has a cognizable claim for any alleged Brady violation. Adkins asserts that the information that Sparks did not own the truck was material because it damaged Sparks's credibility and "given the fact that the vehicle was being borrowed, it is possible that Mr. Sparks could himself be a suspect." Clearly, Adkins's claim that his guilty plea was rendered invalid by the prosecution's failure to disclose impeachment information is precluded by the Ruiz decision. Additionally, to the extent that the information involved an affirmative defense, it was not required to be disclosed. In order to establish arson in the third degree, the Commonwealth must prove that the defendant "wantonly cause[d] destruction or damage to a building²⁶ of his own or of another by intentionally starting a fire or causing an explosion."²⁷ It is an affirmative defense to the offense if "no person other than the defendant had a possessory or proprietary interest in the building, or, if other persons had such an interest, all of them consented to defendant's conduct."²⁸ Thus, identity of the legal owner is not an element of the offense but only goes to the affirmative

²⁶For purposes of the arson statutes, "building" includes an automobile, truck, or other vehicle. See KRS 513.010.

²⁷KRS 513.040(1). Similarly, a person is guilty of arson in the second degree "when he starts a fire or causes an explosion with intent to destroy or damage a building: (a) Of another; or (b) Of his own or of another, to collect or facilitate the collection of insurance proceeds for such loss." KRS 514.030.

²⁸KRS 513.040(2). See also KRS 514.030(2).

defense, which is not subject to required disclosure under Ruiz.²⁹

The exact scope of the Ruiz decision, however, is not entirely clear. While the Supreme Court explicitly held that impeachment information and information supporting any affirmative defense need not be disclosed prior to a guilty plea, it did not discuss direct exculpatory evidence perhaps because under the plea offer involved, the government agreed to disclose any known information establishing the factual innocence of the defendant. Therefore, Ruiz arguably would not preclude Adkins's claim that the information was subject to disclosure as direct exculpatory evidence that Sparks committed the crime.

Nevertheless, even assuming direct exculpatory evidence of guilt falls within the Brady doctrine, Adkins's claim must fail because it was not material under the standard delineated by the cases prior to Ruiz. As discussed above, identity of the legal owner is not an element of arson in the third degree. Adkins fails to explain how the fact that Sparks had borrowed the truck and was not in fact the legal owner implicates him as a suspect in the arson. The record indicates that Sparks's father was the legal owner but that Sparks exercised primary use and control of the truck. Adkins has not demonstrated that the information concerning the true legal owner of the truck would

²⁹Adkins does not dispute the fact that the truck was owned by someone other than himself, or claim that the legal owner consented to the burning of the truck. The fact that Sparks was named as the victim in the indictment is inconsequential. See also Short v. Commonwealth, 291 Ky. 604, 165 S.W.2d 177 (1942) (finding variance as to ownership between indictment and true legal owner was not prejudicial).

have had a significant impact on the possible outcome of a trial.³⁰

Moreover, under the plea agreement, Adkins received a five-year probated sentence on the reduced offense of arson in the third degree while he faced a possible sentence of ten to 20 years on the original charge of arson in the second degree. Consequently, Adkins has not shown a reasonable probability that but for the Commonwealth's failure to produce the information identifying the legal owner of the truck, he would not have entered the guilty plea but instead would have insisted on going to trial.

In conclusion, Adkins has not established a Brady violation, so the trial court did not abuse its discretion by denying his motion to withdraw his guilty plea. For the foregoing reasons, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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³⁰Cf. United States v. Agurs, 427 U.S. 97, 109, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish 'materiality' in the constitutional sense.").