

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001447-MR

JAMES RYAN

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 00-CR-00372

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, McANULTY, AND MILLER, JUDGES.

MILLER, JUDGE: James Ryan brings this appeal from a judgment of the Christian Circuit Court entered June 1, 2001. We affirm.

James Ryan was indicted by the Christian County Grand Jury on one count of burglary in the third degree, Kentucky Revised Statutes (KRS) 511.040, and one count of criminal mischief in the second degree, KRS 512.030. A jury trial was set for March 27, 2001. The same day, Ryan filed a motion to dismiss the indictment. Ryan's motion asserted written statements of two accomplices were not provided to the defense until March 23, 2001 and videotaped statements of the accomplices were not provided until March 26, 2001. The motion further asserted that an

audiotape of an accomplice's confession had become unavailable because of mechanical problems. The circuit court granted a two day continuance, and Ryan's motion was denied. The trial commenced March 29, 2001. Ryan was found guilty on both counts. On June 1, 2001, he was sentenced to five years' imprisonment on the burglary charge, and twelve months on the charge of criminal mischief. This appeal follows.

Ryan maintains the circuit court erred in denying his motion to dismiss the indictment against him. Specifically, Ryan claims the Commonwealth's delay in providing the accomplices' statements "may have deprived the defense of an opportunity to locate a witness that might provide exculpatory evidence." Timing of discovery of witness statements is governed by Ky. R. Crim. P. (RCr) 7.26(1), which provides in pertinent part:

(1) Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which . . . is or purports to be a substantially verbatim statement made by the witness.

Concerning the . . . audiotape of which Ryan complains, we note it appears the tape was not available to either party. Ryan does not dispute that mechanical problems rendered the tapes unavailable. We thus think the Commonwealth demonstrated good cause under RCr 7.26(1) and that no error resulted from the unavailability of tapes.

Concerning the delay in discovery, it appears only the videotaped statements did not comply with RCr 7.26(1) when

initially provided. The circuit court granted a two-day continuance, effectively providing the forty-eight hours required by RCr 7.26(1). Thus, we are of the opinion the continuance corrected the deficiency and the discovery conformed to RCr 7.26(1).

Even if the two-day continuance did not cure the defect in discovery, we still think the circuit court correct in denying Ryan's motion. Absent prejudice, the failure to comply with RCr 7.26(1) does not require automatic and absolute reversal. Hicks v. Commonwealth, Ky. App., 805 S.W.2d 144 (1990). Ryan laments the delay in discovery kept him from locating a witness. He offered no details as to what the witness might have testified. Ryan also complains the delay kept him from requesting a store security tape that was subsequently erased by the store. Ryan's alleged presence in the store on a specific date at a specific time was known to him from the beginning of the case. A request for the tape could have been made much earlier in the case. We do not believe the foregoing demonstrated any delay that prejudiced Ryan.

In sum, we are of the opinion that the discovery of the accomplices' statements conformed with RCr 7.26(1); even if it did not, Ryan suffered no prejudice as a result. Thus, we are of the opinion the circuit court did not abuse its discretion in denying Ryan's motion to dismiss the indictment.

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

ALL CONCUR.

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