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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000398-MR
AND
NO. 2004-CA-000428-MR

RONNIE LEE COKER — APPELLANT

APPEALS FROM FRANKLIN CIRCUIT COURT
v. HONORABLE ROGER L. CRITTENDEN, JUDGE
INDICTMENT NOS. 03-CR-00142 & 03-CR-00157

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: For the past thirty years, Martin Twist, an entrepreneur, has owned and operated numerous businesses specializing in drilling for natural gas. Since Twist's businesses have historically been capital intensive, he has been required over the years to solicit large sums of money from numerous individuals. According to Twist, he has always kept investor information confidential. Twist has employed agents to call and solicit money from potential investors. Two

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

of Twist's solicitors were Ronnie Lee Coker and Forrest Hammond. In early 2003, Twist fired both employees.

After being fired, Hammond and Coker devised a scheme to extort money from Twist. Knowing Twist's concerns about investor confidentiality, Hammond, in June 2003, sent an anonymous letter to Twist demanding that Twist place a gym bag containing $150,000.00 at mile-marker 59 on Interstate Highway 64 in Franklin County. If Twist failed to comply, then letters would be sent to each of his investors revealing confidential information; moreover, each letter would include a list of regulatory agencies along with a recommendation urging investors to report Twist to those agencies.

After Twist received the extortion letter, he contacted the Kentucky State Police.[2] In an attempt to catch the unknown blackmailers, the KSP placed $301.00 in a gym bag and, in the early morning hours of June 20th, left it at mile-marker 59. Despite the fact that several state troopers were hidden nearby, Hammond and Coker managed to retrieve the money and escape unnoticed.

Having only received $301.00, Hammond and Coker sent three more anonymous letters to Twist demanding a total of $200,000.00. On July 19, 2003, the KSP placed another gym bag

[2] Twist gave the Kentucky State Police a list of the former employees that he felt may have been responsible for the extortion letter. Twist initially suspected Alexander White since White owed $125,000.00 in restitution.

containing an additional $301.00 at mile-marker 59. This time, however, several additional police officers were hidden at the scene. When Coker tried to retrieve the money, he and Hammond were arrested.

Once in custody, both confessed. Hammond admitted to participating in the extortion scheme and admitted that he had sent the letters to Twist. But he initially insisted that someone else had anonymously sent the letters to him along with instructions to forward them to Twist and to collect any blackmail money. According to Hammond, once he and Coker had retrieved the money, they were to await further instructions. In contrast, Coker admitted that he had actively participated in the extortion scheme, although he insisted that Hammond had written and sent the letters to Twist. Coker also acknowledged that he participated in the extortion scheme to gain revenge for being fired by Twist.

Both Coker and Hammond were charged in an indictment with two counts of theft by extortion over $300.00. In addition, Coker was charged with being a second-degree persistent felony offender. Hammond pled guilty and agreed to testify against his cohort, Coker. At Coker's trial, Hammond testified that he had written the letters and had sent them to Twist.

The statute defining theft by extortion, Kentucky Revised Statutes (KRS) 514.080, as it applies to Coker, provides that

> (1) A person is guilty of theft by extortion when he intentionally obtains property of another by threatening to:
>
> * * *
>
> (c) Expose any **secret** tending to subject any person to hatred, contempt, or ridicule, or **to impair his . . . business repute**[.][3]

At trial, Coker tried to cast doubt on the secrecy of the investor information by attempting to show that Twist's investors had ready access to the information. In addition, he attempted to cast doubt on Twist's business reputation. Coker referred to Twist's business activities as a "confidence game" and as a "pyramid scheme," and he strongly implied that Twist was a "con artist" who duped innocent people out of their life's savings. Thus, Coker reasoned that even if the investor information was secret, its exposure could not have impaired Twist's business reputation since Twist was, in his estimation, nothing more than a crook. Despite his efforts, Coker was convicted of one count of the theft by extortion over $300.00 and of being a persistent felony offender in the second degree.

[3] Emphasis supplied.

Coker was sentenced to imprisonment for a total of seven years. He appeals to this Court seeking relief from his conviction.[4]

BATSON VIOLATION

During *voir dire*, Coker asked the members of the venire if they could name some of the rights found in the Bill of Rights, and a potential juror named Hanley, one of two African-American veniremen, answered, "Due process." Later, Coker's attorneys asked what verdict must the jury return if the Commonwealth failed to prove beyond a reasonable doubt every element of the offense. Hanley answered again and said, "Not guilty." The Commonwealth then used one of its peremptory challenges to strike Hanley.[5]

After Hanley was struck, Coker challenged the strike pursuant to Batson v. Kentucky.[6] As grounds for the Batson challenge, Coker's attorneys alleged that the prosecutor admitted that he had struck both black veniremen, alleged that Hanley did not give a response that justified his being struck, and they pointed out that the prosecutor had a history of Batson

[4] Coker was charged in indictment number 03-CR-00142-001 with two counts of felony theft by extortion and was charged in indictment number 03-CR-00157 with being a persistent felony offender in the second degree. While there were two indictments, there was only one Judgment and Sentence on a Plea of Not Guilty. But Coker filed two notices of appeal for each indictment which resulted in two separate appeals, 2004-CA-000428-MR and 2004-CA-000398-MR, from the same judgment. This Court has consolidated the two appeals.

[5] Previously, the Commonwealth had struck the only other African-American member of the venire for cause.

[6] 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

violations. The prosecutor argued that he struck Hanley because he had answered Coker's constitutional questions, and claimed that he struck three other members of the venire for the same reason. The prosecutor also insisted that since Hanley had voluntarily answered the defense's questions, he had clearly aligned himself with the defense.

Coker points out that when a criminal defendant alleges that a prosecutor has struck a member of the venire solely on the basis of race, he needs to establish a *prima facie* case of discrimination.[7] Coker insists that he did. Once a *prima facie* case for discrimination has been established, the prosecutor must then provide a race-neutral explanation for the strike.[8] Coker insists that the prosecutor's explanation was not satisfactorily race-neutral. Finally, Coker argues that the trial court must inquire into the prosecutor's intent and assess his credibility.[9] According to Coker, since the trial court never questioned the prosecutor, it neither determined his intent nor assessed his credibility. So, Coker reasons, his due process rights were violated.

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[7] Commonwealth v. Snodgrass, 831 S.W.2d 176, 179 (Ky. 1992).

[8] Washington v. Commonwealth, 34 S.W.3d 376 (Ky. 2000).

[9] Purkett v. Elem, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), and U.S. v Hill, 146 F.3d 337, 342 (6th Cir. 1998).

In Batson v. Kentucky,[10] the United States Supreme Court held that a prosecutor cannot use peremptory challenges to strike members of the venire from serving on a jury solely on the basis of race. To evaluate Batson challenges, the Supreme Court set forth a three-step process:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.[11]

On appellate review, a trial court's denial of a Batson challenge will not be reversed unless clearly erroneous.[12] As the United States Supreme Court noted in Hernandez v. New York, when dealing with a Batson challenge, the decisive question is whether the prosecutor's race-neutral explanation is believable.[13] And, as the United States Court of Appeals for the Sixth Circuit has said, "[t]he issue of whether the prosecutor met his . . . burden [of providing a race-neutral explanation]

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[10] 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[11] Commonwealth v. Snodgrass, supra, note 7, at 178 (citations omitted).

[12] Hernandez v. New York, 500 U.S. 352, 369, 11 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

[13] Id at 365.

needs an articulated explanation by the [trial] court."[14] That Court went further and stated that a trial court has the responsibility to assess a prosecutor's credibility under the totality of the circumstances.[15] In United States v. Hill, the Court lamented that the record gave no indication nor insight into the trial court's thought process regarding the prosecutor's credibility.[16] Due to this, the Hill court held that it could not meaningfully review the trial court's decision; thus, the Court reversed and remanded.[17]

In this case, as in Hill, the record gives no insight into the trial court's thought process since the trial court did not ask the prosecutor any questions nor assess the prosecutor's credibility. Neither did it explain why it found the Commonwealth's explanation sufficiently race-neutral. Furthermore, the record does not support the prosecutor's explanation. The record reveals that Hanley answered only two of the many questions posed by defense counsel. In fact, Hanley only spoke a total of four words during *voir dire*, and he did so quietly and with apparent reluctance. The prosecutor's explanation, that Hanley's answers clearly showed that he, like

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[14] United States v. Hill, 146 F.3d 337, 342 (6th Cir. 1998).

[15] Id.

[16] Id.

[17] Id. at 343.

other jurors who answered similarly, favored the defense, is a *non sequitur*. Hanley's answers revealed nothing more than a basic knowledge of constitutional law. Since it is unknown whether the trial court considered the totality of the circumstances surrounding the alleged violation, we conclude that the court erred when it denied Coker's Batson challenge. Therefore, we reverse and remand for a new trial.

DISCOVERY VIOLATIONS

On appeal, Coker avers that although he had requested from the Commonwealth information regarding Twist's former employees, the Commonwealth failed to produce this information, and the trial court refused to compel its production. Coker argues that if the court had compelled discovery, this information may have revealed that other former employees were involved in the extortion plot. Thus, Coker says, he was denied the opportunity to present a full defense.

The Commonwealth's discovery obligations to a criminal defendant are set forth in Kentucky Rules of Criminal Procedure (RCr) 7.24. When a criminal defendant makes a written request, the Commonwealth is obligated to provide the defendant with any and all incriminating statements, known to the Commonwealth, which the defendant made orally to any witness.[18] Moreover, the Commonwealth is obligated to provide the defendant with any and

[18] Ky. R. Crim. Proc. (RCr) 7.24(1).

all written or recorded statements or confessions made by the defendant that are in the Commonwealth's possession.[19] And, upon court order, the Commonwealth must give the defendant access to books, papers, documents or any other tangible objects in the Commonwealth's possession so the defendant may inspect and copy such items if the defendant needs the items to prepare his defense, provided, of course, the defendant's request is reasonable.[20]

If the Commonwealth has violated a trial court's discovery order, then such a violation will justify setting aside a criminal conviction if there exists a reasonable probability that had the requested evidence been produced the result at trial would have been different.[21]

In this case, the trial court did not err when it refused to compel the Commonwealth to produce information regarding Twist's former employees. The Commonwealth was not obligated under RCr 7.24 to produce this information. First, the record does not reveal that the information was in the Commonwealth's possession. Second, the record suggests that such information would not have lead to exculpatory evidence. Coker contends that the information may possibly have revealed

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[19] Id.

[20] RCr 7.24(2).

[21] Weaver v. Commonwealth, 955 S.W.2d 722, 725 (Ky. 1997).

that other former employees were involved in the extortion scheme. However, the record refutes that contention since both Coker and Hammond confessed and implicated each other. If others were involved, then Coker would have been in a better position than the Commonwealth to know the identity of his un-indicted co-conspirators. And even if such individuals did exist without Coker's knowledge, their existence would not negate Coker's guilt since he confessed that he willingly participated in the extortion scheme to gain revenge for being fired by Twist.[22]

Coker also argues that the trial court abused its discretion by not compelling the Commonwealth to produce information regarding Twist's other businesses. According to Coker, this information may have helped him cast doubt on Twist's business reputation.

The Commonwealth should have produced this information once it had been ordered to do so if it possessed the information. However, the record does not indicate that the Commonwealth possessed any information regarding Twist's other businesses, and, given that this was a criminal case, there was no reason for the Commonwealth to have such information. Furthermore, the record reveals that Coker's defense attorneys

[22] Coker does not assert that the Commonwealth withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

had extensive information about Twist's other companies and used this information to skillfully attack both Twist's business reputation and his credibility. To put it simply, Coker has failed to show a reasonable probability that disclosure of such information would have lead to a different result at trial.

CONCLUSION

In view of our ruling on the Batson issue, we need not address the other issues Coker has raised on appeal.

The judgment is reversed and this case is remanded to Franklin Circuit Court with directions to grant Coker a new trial.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

GUIDUGLI, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I respectfully concur in part and dissent in part. I believe the Commonwealth Attorney provided a race-neutral basis for striking Mr. Hanley, an African-American juror. The Commonwealth stated that it had excused all prospective jurors who had responded to defense counsel's questions, believing they may be biased for the defense. In that the Commonwealth removed all jurors who verbally responded to defendant's *voir dire* questions, I believe the prosecutor articulated a race-neutral explanation for striking the juror in question. Thus, I would

affirm Coker's conviction. I should add that although the majority does not address all appellate issues raised by Coker (since it reversed on the Batson issue), I have reviewed those issues and perceive no reversible error in this matter. Therefore, I would affirm the Judgment and Sentence entered by the Franklin Circuit Court.

BRIEF FOR APPELLANT:

Shannon Dupree
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Wm. Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky