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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002325-MR

TIMOTHY GOLDEY

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 04-CR-00050

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER AND McANULTY, JUDGES; POTTER, SENIOR JUDGE.¹

BARBER, JUDGE: Appellant, Timothy Goldey (Goldey), appeals the Montgomery Circuit Court judgment against him. We affirm the judgment of the circuit court.

On October 21, 2002, Goldey obtained thirty-day prescriptions for Diazepam and Hydrocodone from Dr. Hazeltine in

¹Senior Judge John W. Potter, sitting as Special Judge by assignment of the Chief Justice pursuant to Section (110)(5)(b) of the Kentucky Constitution and KRS 21.580.

Paintsville, Kentucky. On October 28, 2002, Goldey obtained thirty-day prescriptions for the same drugs from Dr. Ward, in Mt. Sterling, Kentucky. Dr. Ward worked at Medical Associates, a small medical clinic in Mt. Sterling. On July 8, 2003, Goldey got a thirty-day prescription for Diazepam from Dr. Ward in Mt. Sterling. On July 22, 2003, Goldey returned to Medical Associates, but was unable to see Dr. Ward. Instead, he saw Dr. Doyle, another doctor in the same small practice. Goldey got a thirty-day prescription for Diazepam from Dr. Doyle in Mt. Sterling. In September, 2003, a nurse at Medical Associates in Mt. Sterling, where Dr. Doyle and Dr. Ward worked, contacted the Mt. Sterling Police Department to obtain a report on Goldey's medications.

Goldey was charged with three counts of obtaining a prescription controlled substance by deception. The first two counts dealt with obtaining two prescriptions from Dr. Ward less than a month after similar prescriptions were obtained from Dr. Hazeltine. The third count was for obtaining a prescription from Dr. Doyle nine months after getting a similar prescription from Dr. Ward. Each prescription was for a one month supply of medication. After a jury trial Goldey was found guilty of the first two counts, not guilty as to the third count and sentenced to ten years' imprisonment. Goldey contends that the trial court made three erroneous rulings that prevented the jury from

accurately understanding Goldey's credibility and the credibility of the accusing doctors. He argues that these rulings so prejudiced his defense that he should be entitled to a new trial.

Goldey suffered repeated serious injuries to his shoulder in a work-related accident, and later in an automobile collision. He had multiple surgeries for his injury. Goldey was permanently impaired as a result of this injury. He testified that he continues to suffer pain as a result of the injury and impairment. Goldey takes prescription medication to cope with the pain. The record shows that he has participated in ongoing treatment of his injuries, including physical therapy.

Goldey's regular physician, Dr. Hazeltine, is located in Eastern Kentucky. While in central Kentucky Goldey sought medical treatment in Montgomery County from Dr. Robertson Ward. He testified that he informed Dr. Ward that he was under medical care, gave the doctor the name of his regular physician, and disclosed the medications he was taking at that time. Goldey received new prescriptions from Dr. Ward. Goldey saw Dr. Ward again a year later and received a new prescription from Dr. Ward. Several weeks later Goldey saw Dr. John Doyle who worked at the same medical clinic as Dr. Ward. Dr. Doyle gave Goldey additional medication. Goldey later returned to Dr. Ward, who

informed Goldey that he could no longer treat him, but gave him a ten-day course of pain medications.

After Goldey received his final prescriptions from Dr. Ward, a nurse at the medical clinic where Dr. Ward and Dr. Doyle worked requested a Kentucky All Schedule Prescription and Electronic Reporting system (KASPER) report on Goldey. The request was made on behalf of Dr. Ward. The report allegedly showed that Goldey had simultaneous prescriptions from Dr. Ward, Dr. Doyle and Dr. Hazeltine for pain medication. A police investigation then took place.

Dr. Ward signed pre-written forms titled affidavits, which contained "yes" and "no" blocks for checkmarks. The forms contained statements such that he (Dr. Ward) was unaware that Goldey was being treated by any other physician at the time he prescribed medication to him, and that he believed Goldey had withheld information regarding other treatment and other medications in order to obtain a prescription. Dr. Doyle signed a similar affidavit. The Mt. Sterling Police Department provided Dr. Ward with a pre-printed affidavit on which the physician could check "yes" or "no" as to whether the patient informed him that he was taking other medications, and whether the doctor would have prescribed medication had he known of other prescriptions. Dr. Ward checked "no," the patient did not inform him of other medications, and "no" that he would not have

prescribed the medication had he known. Dr. Doyle filled out the same pre-printed "affidavit" with blanks to check for "yes" or "no" regarding whether Goldey had informed him that he was taking other medication. Dr. Doyle checked "no." The form also had a blank for the doctor to check "yes" or "no" as to whether he would have provided the prescription had he known that Goldey was seeing another physician.

The forms contain no particulars relating to the circumstances in this case. In particular, the forms failed to note that the other medication prescribed to Goldey was prescribed by Dr. Doyle's associate, Dr. Ward, and that this information was or should have been in Goldey's file when he met with Dr. Ward. The doctors worked in the same practice, shared the same central office, the same filing system, and the same patient charts. Any information Dr. Ward had placed in Goldey's chart should have been available to Dr. Doyle when he used the same chart to meet with Goldey. It would have been impossible for the doctor to properly treat Goldey in the absence of his patient file.

Goldey was indicted on three counts of obtaining a prescription controlled substance by deception in violation of KRS 218A.140. The jury found Goldey guilty on two counts, both dealing with obtaining prescriptions by deception from Dr. Ward.

Goldey claims reversible error occurred because he was denied the opportunity to cross-examine witnesses regarding the charges against him and the criminal investigation. Goldey asserted during trial at a bench conference that he had reason to believe that the Medical Associates Clinic closed due to an ongoing criminal investigation against the physicians. Goldey showed the court that the physicians at Medical Associates were in practice together. The physicians shared patients, and each patient had only one chart. When Dr. Ward treated Goldey, he used the same chart, records and billing system as that used by Dr. Doyle. The court had judicial knowledge that the clinic closed because of bankruptcy. The court held that a suspected criminal investigation was not relevant to Goldey's defense. The Commonwealth argues that Goldey's questions were speculative, and that the trial court correctly sustained the Commonwealth's objection.

The Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution require that a criminal defendant be granted the right to confront the witnesses against him. A defendant must be afforded "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).

Goldey requested that he be allowed to question the witnesses regarding a possible existence of bias. Goldey contends that one or both of the physicians who provided evidence against him was facing criminal charges. Goldey intimates that these charges might have related to improper prescription of medication. At trial counsel for Goldey asked the nurse about the reason for the medical clinic closing. The Commonwealth made an objection which was sustained by the trial court. Goldey then asked Dr. Doyle if he was under investigation by a law enforcement authority. The Commonwealth objected, and the trial court sustained that objection. Goldey then asked Dr. Ward whether Dr. Doyle was prohibited from writing prescriptions for certain types of pain relief medication. Again, the court sustained the Commonwealth's objection. Goldey contends that he was attempting to show that the clinic and Dr. Doyle were under investigation for improperly prescribing medication, that Dr. Doyle was forced to leave the practice, and that the practice later closed down, in part, because of the investigation, and lastly, that one or both of the physicians had a motive to cooperate with the investigating authorities.

Goldey contends that he had the right to inform the jury about the criminal charges pending against one or both of the physicians, and to show the jury that the witness "thereby

possesses a motive to lie in order to curry favorable treatment from the prosecution." Williams v. Commonwealth, 569 S.W.2d 139, 145 (Ky. 1978). Defense counsel argued at trial that the evidence he was attempting to get in was relevant because "it gives [the doctor] a motive to sort of turn in some people so he doesn't get, doesn't become the focus of the investigation." The law requires that the defendant be permitted to present the jury with "a reasonably complete picture of the witness' veracity, bias and motivation." Bratcher v. Commonwealth, 151 S.W.3d 332, 336 (Ky. 2004). In cases where the witness may be influenced by a desire to seek favorable treatment or leniency, potential motives of the witness for testifying should be admitted. Bowling v. Commonwealth, 80 S.W.3d 405, 408 (Ky. 2002). The defendant must show a connection between the testimony offered against him, and the evidence he is seeking to have admitted. Id., 80 S.W.3d at 411.

Admissibility of evidence tending to prove the bias of a witness is a matter of relevancy. United States v. Abel, 469 U.S. 45, 50-52, 105 S.Ct. 465, 468-69, 83 L.Ed.2d 450 (1984). "Any proof that tends to expose a motivation to slant testimony one way or another satisfies the requirement of relevancy. The range of possibilities is unlimited...." Robert G. Lawson, The Kentucky Evidence Law Handbook § 4.15, at 183 (3d ed.1993).

The interest of a witness, either friendly or unfriendly, in the prosecution or in a party is not collateral and may always be proved to enable the jury to estimate credibility. It may be

proved by the witness' own testimony upon cross-examination or by independent evidence. Parsley v. Commonwealth, Ky., 306 S.W.2d 284, 285 (1957) (citations omitted).

Miller Ex. Rel. Monticello Baking Company v. Marymount Medical Center, 125 S.W.3d 274, 280 (Ky. 2004).

In delineating the boundaries of the trial court's discretion in limiting cross-examination, this Court has explained: "So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries." Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky.1997), citing United States v. Boylan, 898 F.2d 230, 254 (1st Cir.1990). The Court of Appeals has likewise observed: "In weighing the testimony the jury should be in possession of all facts calculated to exert influence on a witness." Spears v. Commonwealth, 558 S.W.2d 641, 642 (Ky.App. 1977).

The Kentucky Supreme Court held, in Caudill v. Commonwealth, 120 S.W.3d 635 (Ky. 2003), that:

"So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries." Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997) (quoting United States v. Boylan, 898 F.2d 230, 254 (1st Cir.1990)).

[A] connection must be established between the cross-examination proposed to be undertaken and the facts in evidence. A defendant is not at liberty to present unsupported theories in the

guise of cross-examination and invite the jury to speculate as to some cause other than one supported by the evidence. Maddox, at 721.

Id., 120 S.W.3d at 640, finding that permitting the defendant to establish that the witness was a convicted felon who was hoping for leniency from the parole board, and who had cooperated with the police in the past and received a benefit from that cooperation, was sufficient to protect the defendant's rights.

The Commonwealth argues that no error could have occurred in the exclusion of Goldey's line of questioning because Goldey was convicted of obtaining the prescriptions from Dr. Ward, not the prescriptions from Dr. Doyle, and it was Dr. Doyle whom Goldey was attempting to cross-examine regarding bias. A relevant issue may have existed regarding the potential for bias. As the Commonwealth points out, however, Goldey failed to preserve this error through avowal, or an offer of evidence supporting his contention that circumstances showing bias existed. KRE 103 requires preservation of error and presentation of enough evidence to allow this Court to review the claim of alleged error. Hart v. Commonwealth, 116 S.W.3d 481, 482 (Ky. 2003). This Court must have before it a record capable of review. Commonwealth v. Ferrell, 17 S.W.3d 520, 525 (Ky. 2000). Due to the lack of such a record, and recognizing the principle laid out in Commonwealth v. Maddox, 955 S.W.2d

718, 721 (Ky. 1997) that the trial court has broad discretion to control cross-examination, we find no reversible error in the limits imposed by the court.

The Commonwealth also asserts that a witness cannot be impeached by evidence of "particular wrongful acts," citing Barth v. Commonwealth, 80 S.W.3d 390, 401 (Ky. 2001). The Commonwealth, however, overlooks the fact that Goldey was not attempting to impeach the witness because he improperly prescribed medications, but rather to show that the witness had a motive for pointing the finger of blame at Goldey in order to cooperate with investigating authorities. This argument must fail.

Goldey claims reversible error occurred when the Commonwealth forced him to characterize Dr. Ward's testimony as a lie. The Commonwealth asked Goldey whether Dr. Ward had lied in testifying that Goldey did not inform him about his previous prescriptions for pain medication. Defense counsel objected, but that objection was overruled. Goldey contends that Kentucky law holds that a defendant should not be required to characterize the testimony of another witness as a lie. Howard v. Commonwealth, 12 S.W.2d 324, 329 (Ky. 1928).

The following discussion took place:

Prosecutor: When Dr. Ward testified that you had not told him about Dr. Hazeltine in Paintsville he was lying?

Defense counsel: Object. I think that's argumentative.

Judge: Overruled.

Goldey: I still don't understand. Could you restate it?

Prosecutor: When Dr. Ward on that stand, with you sitting in this chair, testified you did not tell him that you had a prescription from Dr. Hazeltine, is it your testimony that that is not correct, you did tell him? Yes or no.

Goldey: Actually, I had told Dr. Ward that I was seeing Dr. Hazeltine. That was my doctor, and if he needed medical records he could send for 'em, and the medication I was on was Norco and Valium for muscle relaxer and pain medication. As far as getting into the days, how much, how much medication I had taken yesterday or the day before, the doctor never asked me that. The doctor asked me, are you currently on any medication and are you currently taking medication, or that, that's what the doctor asked.

Prosecutor: Then it's your testimony that you told Dr. Ward you were currently taking Diazepam and Hydrocodone?

Goldey: Yes.

Prosecutor: So when Dr. Ward testified that you did not tell him that he was lying?

Defense counsel: Objection.

Goldey: I don't. You know, I'm, I'm, I can't call anybody a liar.

Prosecutor: Answer the question, yes or no.

Goldey: I, I, yes, I did tell Ward.

Prosecutor: Okay, that is what I needed you to say.

Goldey claims that the Commonwealth improperly forced him to characterize Dr. Ward as a liar. The law provides that "A witness's opinion about the truth of the testimony of another witness is not permitted. . . ." Moss v. Commonwealth, 949 S.W.2d 579, 583 (Ky. 1997). The Commonwealth contends that the prosecutor did not force Goldey to characterize Dr. Ward's testimony as a lie. This argument is refuted by the fact that the prosecutor asked repeatedly whether Goldey had told Dr. Ward about his prior medical treatment, and whether the doctor's denial of receipt of that information was a lie. Goldey did state that he had informed Dr. Ward about the treatment by Dr. Hazeltine, which led, using the argument posed by the prosecutor, to the conclusion that Goldey contended that Dr. Ward was lying. Semantics cannot confuse testimony of record. The prosecutor did force Goldey to argue that Dr. Ward was a liar.

The law does permit a prosecutor latitude in conducting a cross-examination. A prosecutor may characterize a defendant's arguments, and show the jury the difference between both versions of the facts provided. Soto v. Commonwealth, 139 S.W.3d 827, 836 (Ky. 2004). Having said this, we conclude that

the prosecutor's conduct did not rise to the level required for reversible error.

Goldey argues that the trial court ruled improperly when it prohibited him from showing that the number of pills he obtained was consistent with reasonable treatment of his injury and related pain. Goldey attempted to argue that he received an average of 3 pain pills per day for a twelve-month period, which was a reasonable number to have been prescribed. The Commonwealth objected and the trial court sustained the objection on the grounds that Goldey did not have the prescriptions to support his statement. Goldey contends that the trial court improperly determined the credibility of that evidence. A trial court is not permitted to review the credibility of evidence, or the weight it should be given. Gibbs v. Wickersham, 133 S.W.3d 494, 495 (Ky.App. 2004). Such a review is the province of the jury. Id. Goldey did not provide the court with any evidence supporting his contention that three pills a day was a reasonable amount or that he had no additional prescriptions which would have affected the total number of pills he had in a year. In the absence of such evidence, we cannot say there was reversible error in the trial court's ruling.

The trial court's rulings and the judgment are affirmed.

McANULTY, JUDGE, CONCURS.

POTTER, SENIOR JUDGE, CONCURS AND FILES SEPARATE
OPINION.

POTTER, SENIOR JUDGE, CONCURRING. I concur. However, I do so only because Goldey failed to properly preserve any potential error in restricting his cross-examination of the clinic's personnel. Evidence that the clinic or any doctor associated with it were under investigation would have been extremely relevant as to the doctors' motives for testifying as they did, and therefore, admissible. Unfortunately this Court does not know what the answers would have been. It is skeptical, in any event, that the answers would have helped Goldey because, if so, the Commonwealth would have been obligated to disclose such exculpatory evidence under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Of particular interest, although not at issue before us, is the fact that Goldey was charged with and convicted of two counts of Obtaining a Controlled Substance by Deception, one for the diazepam and one for the hydrocodone, both prescribed by Dr. Ward on October 28, 2002, for which he received consecutive five-year sentences. As a single transaction that occurred in the same time and place, this appears contrary to the analysis in Commonwealth v. Grubb, 862 S.W.2d 883, 884 (Ky. 1993), wherein the Kentucky Supreme Court concluded, in a prosecution

for trafficking in percodan and dilaudid, that "(a) single sales transaction between the same principals at the same time and place which violates a single statutory provision does not justify conviction or a sentence for separate crimes, even though more than one item of a controlled substance (of the same schedule) is involved."

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