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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001558-MR
AND
NO. 2006-CA-001608-MR

COMMONWEALTH OF KENTUCKY — APPELLANT/ CROSS-APPELLEE

v.

APPEALS FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 02-CR-00370

DAVID NICHOLS — APPELLEE/ CROSS-APPELLANT

OPINION
AFFIRMING IN PART AND REVERSING IN PART

** ** ** ** **

BEFORE: LAMBERT, MOORE AND NICKELL, JUDGES

MOORE, JUDGE: The Commonwealth of Kentucky has filed an interlocutory appeal from an order entered on July 18, 2006, by the McCracken Circuit Court in which the trial court held that the Kentucky Rules of Criminal Procedures (RCr) 7.24(3)(A)(i) did not require the criminal defendant, David Nichols, to generate a written report regarding his expert witness's anticipated trial testimony in order to satisfy the rules of reciprocal

discovery. In that same order, the trial court ordered Nichols to provide the Commonwealth with his expert witness's name and address. On appeal, the Commonwealth argues that fundamental fairness requires that the identity of a criminal defendant's expert witness be discoverable and that either a report made by the expert witness or a summary of the expert's results be discoverable. Finding that the trial court did not abuse its discretion, we affirm in part.

David Nichols has filed a cross-appeal from that part of the trial court's July 18, 2006 order in which the trial court ordered him to provide the Commonwealth with the name and address of his expert. On cross-appeal, Nichols argues that RCr 7.24 does not require him to provide the Commonwealth with a list of defense witnesses. Upon careful review, we reverse in part and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2002, Nichols was dating Misty Kirk, the mother of three young boys. On August 7, 2002, Misty's youngest child, Gage, who was eleven months old at the time, suffered a spiral fracture of his left femur. Misty and Nichols took Gage to the emergency room at Lourdes Hospital where he was treated. *Id*. Gage's treating physician suspected that the child's injury had been caused by physical abuse so he alerted the proper authorities. The next day, Detective Rusty Banks of the McCracken County Sheriff's Department, and Rebecca Kinslow, a social worker, began investigating the situation. Banks and Kinslow interviewed Nichols, and he told them that on August 7 he had found Gage in the living room floor and had picked up the child. Nichols claimed

that when he did so, he heard a popping sound. Banks and Kinslow spoke with Misty as well. She told the investigators that she had left Gage in the living room with his two older brothers, Nichols, and a family friend. According to Misty, Gage had been leaning upon a coffee table and had fallen injuring himself. Sometime during the investigation, Dr. Betty Spivak reviewed Gage's medical records, the photographs of his injuries and all the investigative reports. As a result of Dr. Spivak's review, she opined that Gage's injuries were the result of physical abuse. On November 22, 2002, Nichols was indicted by a McCracken County Grand Jury and charged with one count of criminal abuse in the first degree, a Class C felony.

On December 15, 2004, Nichols proceeded to trial and was convicted of criminal abuse in the second degree. After a sentencing hearing, the trial court sentenced Nichols to serve five years in prison. Nichols filed an appeal from his judgment of conviction with this Court in March of 2004. In an opinion rendered on March 11, 2005, this Court vacated Nichols' judgment of conviction and remanded the case to the trial court for a new trial.

After the case was remanded for new trial, Nichols moved the trial court to clarify whether he was obligated, pursuant to RCr 7.24, to provide the identity of his expert witness to the Commonwealth and whether he was obligated to provide a report regarding his expert's anticipated trial testimony.

RCr 7.24 reads in pertinent part:

> (1) Upon written request by the defense, the attorney for the Commonwealth shall disclose . . . (b) results or reports of

> physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.
> . . .
> (3)(A)(i) If the defendant requests disclosure under Rule 7.24(1), upon compliance to such request by the Commonwealth, and upon written request of the Commonwealth, the defendant, subject to objection for cause, shall permit the Commonwealth to inspect, copy, or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody, or control of the defendant, which the defendant intends to introduce as evidence or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to the witness's testimony.

Nichols argued that RCr 7.24(3)(A)(i) only requires a criminal defendant to provide the Commonwealth with the existing written reports regarding physical or mental examinations or the results regarding scientific tests or experiments performed by a defendant's experts. Nichols asserted that his expert witness conducted no physical or mental examinations nor performed any scientific tests or experiments; accordingly, his expert has produced no written reports or results. Thus, Nichols reasoned that he was not obligated to provide his expert's identity, nor was he obligated to produce any discovery regarding his expert's anticipated trial testimony.

In response, the Commonwealth argued that the fact that Nichols' expert has not produced a report was inconsequential. According to the Commonwealth, if Nichols' expert witness testifies to opinions based on his or her review of medical reports,

then Nichols must provide the Commonwealth with a copy of the expert's opinion if the opinion addresses physical findings.

In an order entered on July 18, 2006, the trial court held that RCr 7.24 requires a criminal defendant to provide the Commonwealth with any tangible reports that have been generated by the defendant's expert witness, but the rule does not require the defendant's witness to generate such a report in order to satisfy the rules of reciprocal discovery. However, the trial court concluded that, if prior to trial, Nichols' expert generates a report, then Nichols would be obligated to produce it.

Regarding the identity of Nichols' expert, the trial court acknowledged that RCr 7.24 does not require a criminal defendant to provide the Commonwealth with the identity of his or her expert witness. Nevertheless, the trial court ordered Nichols to reveal to the Commonwealth the full name and address of his expert witness for two reasons: 1) because the trial court found that the spirit of RCr 7.24 required such disclosure and 2) because such a disclosure would give the Commonwealth the opportunity to request a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

As previously mentioned, the Commonwealth filed an interlocutory appeal from that portion of the trial court's order in which the trial court held that RCr 7.24 does not require Nichols to provide a report regarding his expert's anticipated testimony. In addition, Nichols filed a cross-appeal from that portion of the trial court's order in which the trial court ordered him to reveal the name and address of his expert witness.

II. STANDARD OF REVIEW

Regarding disputes concerning the discovery process, it has long been recognized that trial courts have broad discretion. *Sexton v. Bates,* 41 S.W.3d 452, 455 (Ky. App. 2001). However, this discretion is not unlimited, and we will reverse a trial court's decision regarding discovery if it has abused its discretion. *Id*. "The test for abuse of discretion is whether the trial [court's] decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

III. ANALYSIS

A. THE COMMONWEALTH'S INTERLOCUTORY APPEAL

According to the Commonwealth, fundamental fairness requires not only that the identity of a criminal defendant's expert witness be discoverable but also that any report generated by a defendant's expert witness or a summary of said expert's results be discoverable, including oral reports the expert makes to defense counsel. To support its theory, the Commonwealth relies upon *Barnett v. Commonwealth,* 763 S.W.2d 119 (Ky. 1988). In *Barnett*, the Commonwealth provided the report of its expert, a serologist, to the defendant. *Barnett,* 763 S.W.2d at 123. However, at trial, the serologist testified to an opinion that had not been included in his report. *Id*. According to the Commonwealth, the holding in *Barnett* stands for the proposition that an expert witness's opinion is important information that should be discoverable.

Citing *People v. Martinez,* 970 P.2d 469, 472 (Colo. 1998), the Commonwealth points out that, in general, reciprocal discovery is a good practice because it enhances the fairness of the adversarial system and it merely accelerates the timing of disclosures that would otherwise be made at trial. With these generalities in mind, the Commonwealth argues that requiring Nichols to disclose the substance of his expert's testimony would merely accelerate that disclosure from the trial stage to the pretrial stage. In addition, the Commonwealth insists that if Nichols does not produce information regarding the scope and nature of his expert's testimony, then the Commonwealth will not be able to effectively cross-examine Nichols' expert, thereby prejudicing the Commonwealth.

In response, Nichols argues that his expert has not prepared any reports that will be introduced at trial nor has he prepared any reports that relate to any opinion to which he will testify at trial. Therefore, he argues that RCr 7.24(3)(A)(i) simply does not require him to create a report regarding his expert's anticipated testimony solely for the purpose of reciprocal discovery.

In addition, Nichols relies heavily on *Vires v. Commonwealth,* 989 S.W.2d 946 (Ky. 1999). Nichols points out that in *Vires*, the Commonwealth's expert did not generate a report, and the opinions to which he testified at trial were based on evidence gathered during the course of his investigation. *Vires,* 989 S.W.2d at 948. The Commonwealth in *Vires* had provided this evidence to the defendant; therefore, the

expert's testimony was not based on any premise that had not been disclosed to the defendant. *Id*.

According to Nichols, his expert has not and will not interview or examine the alleged victim in the present case. Nichols claims that his expert will only review those reports, documents, and witnesses' statements that have been previously provided by the Commonwealth. So, according to Nichols, any opinion that his expert will express will be based on materials that the Commonwealth already possesses. Thus, Nichols concludes that the present case is like *Vires,* not *Barnett,* because: 1) his expert has not generated a report and 2) his expert will not rely on any undisclosed premises to form his opinions.

As previously mentioned, the Commonwealth relies heavily on *Barnett,* 763 S.W.2d 119. In *Barnett*, the defendant was accused of viciously stabbing his wife to death sometime before midnight on July 29, 1985, along a secondary road. *Id.* at 120. There were no eyewitnesses to the brutal slaying. *Id*. At trial, the Commonwealth called a serologist to the stand to testify as an expert witness. *Id*. at 123. Prior to trial, the Commonwealth provided a copy of the serologist's report to the defendant. *Id*. The serologist testified that faint traces of unidentifiable blood had been found on the defendant's hands and arms. *Id*. at 121. According to the serologist's trial testimony, he only found trace amounts of blood because the defendant had washed it away. *Id*. at 123. The serologist came to this conclusion because there was a large puddle of water near the victim's body. *Id*. At trial, the defendant objected to this testimony because it was not

included in the serologist's report. *Id*. at 121. Regarding the serologist's testimony, the Supreme Court of Kentucky held:

> The presence of a nearby puddle would support an inference, albeit weak, that there was at least an opportunity for the [defendant] to wash the blood off of his hands. This evidence was weak because the undisturbed condition of the puddle and of the [defendant] and of his clothing refuted the implication that washing had occurred. All things considered, we conclude that the serologist's conclusion was admissible as opinion evidence, but the [defendant] was entitled under RCr 7.24 to be confronted with the fact that this opinion would be presented against him before the trial started so that he had a reasonable opportunity to defend against the premise.

Id. at 123. Because the defendant was unduly surprised by the serologist's testimony based on an undisclosed premise, the Supreme Court reversed his conviction. *Id*.

Also, as previously noted, Nichols relies heavily on *Vires,* 989 S.W.2d 946. Like *Barnett*, the *Vires* case is very fact-intensive. In *Vires*, the defendant allegedly shot and killed the victim. Prior to the shooting, the defendant had been dating the victim's estranged wife. On the night of the shooting, the defendant, accompanied by the victim's wife, was driving his truck along a winding mountain road. The victim, driving a Jeep, pulled up behind the defendant's truck. According to the defendant, the victim then struck the defendant's truck in an attempt to push the defendant's vehicle off the road and over a mountainside. According to a passenger in the victim's Jeep, the victim came around a curve and found the defendant's truck stopped in the middle of the road. The passenger testified that the victim hit his brakes in an unsuccessful attempt to avoid a collision. Immediately after the collision, the defendant shot and killed the victim. At

trial, the Commonwealth called a Kentucky State Trooper to the stand to testify as an expert in accident reconstruction. *Id*. at 947. The state trooper testified regarding the angle of impact between the front of the victim's Jeep and the rear of the defendant's truck. The Commonwealth asked the trooper if he had formed an opinion as to whether or not the physical evidence was consistent with the victim having attempted to avoid a collision rather than initiate one. In response, the trooper stated he could not express an opinion on that question. Regarding the state trooper's expert testimony, the Supreme Court held:

> Although RCr [7.24(1)(b)] requires the attorney for the Commonwealth upon written request by the defense to disclose "... results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth," the record here unmistakably discloses that the [trooper] neither had nor expressed any opinion concerning [the victim's] intent prior to or at the time of impact. Moreover, [the state trooper] testified that he did not perform an accident reconstruction. He prepared no written report. Photographs depicting the skidmarks and the remainder of the complete police investigation file were made available to [defendant's] counsel pursuant to his request. The Commonwealth notified the defense that [the trooper] would testify and his opinion was based upon the evidence gathered by him in the course of his investigation and which was provided to [defendant's] counsel. He did not rely upon any undisclosed premise as a basis for his conclusion. Accordingly, this case is easily distinguishable from the facts of *Barnett v. Commonwealth,* Ky., 763 S.W.2d 119 (1989). There, the Commonwealth's expert serologist testified that there were faint traces of blood on the accused's arm and expressed the opinion that these traces were attributable to a washing away of the blood that could have been expected from the victim's wounds. Before trial, the

> defendant had moved for discovery of reports of physical examinations of the evidence pursuant to RCr 7.24(1)(b). The Commonwealth provided the serologist's report but the report did not include his opinion as to what the physical findings indicated. In *Barnett*, this Court reversed the conviction based upon such testimony because the serologist's report omitted a significant piece of information, to-wit: The expert's opinion which was based not only upon the premise contained in the report but also upon an additional and necessary premise which was that Barnett may have washed away the victim's blood. This premise in turn was based upon the finding of light blood traces found on Barnett's hands and arms which included the necessary but undisclosed fact that Barnett had an opportunity to wash his hands. This Court noted that without prior knowledge of the expert's opinion, Barnett had no reason to develop proof that the puddle near the murder scene was undisturbed or that Barnett's hands, arms and clothing were not wet from washing so as to refute the expert's opinion.
>
> In the present case, [the state trooper] did not rely upon any undisclosed premise as the basis for his opinion and all facts and supporting materials relied upon by him were provided to defense counsel. There being no undisclosed premise against which the appellant claimed a need to defend himself, the trial court did not err in allowing [the state trooper] to testify as to his opinion based upon the results of his investigation. *Milburn v. Commonwealth,* Ky. 788 S.W.2d 253, 256 (1990). The appellant was not unfairly surprised by [the state trooper's] testimony.

Id. at 948. The Supreme Court of Kentucky affirmed the decision because the premise of the trooper's expert testimony was wholly based on evidence provided to defense counsel. Accordingly, all evidence forming the basis of the expert's opinion was readily available for defense counsel's review; thus, the defense could not claim undue surprise or prejudice.

In addition to *Barnett* and *Vires,* there are other cases addressing the application of RCr 7.24 to expert testimony. One such case is *Milburn v. Commonwealth,* 788 S.W.2d 253 (Ky. 1990), which was cited in *Vires*. In *Milburn*, the defendant allegedly shot the victim in the head, killing him. *Milburn,* 788 S.W.2d at 254. The Commonwealth intended to call a firearms examiner to the stand to testify as an expert witness. *Id*. at 255. The firearms examiner generated a brief report regarding his investigation, and the Commonwealth provided that report to the defendant. *Id*. In the report, the firearms examiner noted that lead residue was found on hair taken from the bullet wound located on the victim's head. *Id*. At trial, the firearms examiner testified that it would be consistent with his findings to assume that the weapon had been in close proximity to the victim's head when it had been fired. *Id*. Relying on *Barnett,* 763 S.W.2d 119*,* the defendant argued on appeal that he was entitled to advance notice of the firearms examiner's testimony regarding proximity of the weapon. *Id*. In resolving the appeal, the Supreme Court held:

> [W]e found in *Barnett* that the report provided by the Commonwealth to Barnett omitted a significant piece of information. Similarly, in the case at bar, the firearms examiner's report omitted the expert's opinion as to what the physical findings indicated.
>
> Unlike the instant case, however, the expert's conclusion in *Barnett* was based not only on the premise contained in the report, but also on an additional and necessary premise. To reach the conclusion that Barnett may have washed away the victim's blood, the serologist relied on the light blood traces he found on Barnett's hands and arms. But in order to be relevant and admissible, the expert's opinion also had to be based on evidence that Barnett had an opportunity to wash his hands.

> Yet without prior knowledge of the expert's opinion, Barnett had no reason to develop proof that the puddle near the murder scene was undisturbed or that Barnett's person or clothing was not damp or splashed from washing, so as to refute the expert's opinion.
>
> In contrast, the firearms examiner's opinion in the case *sub judice* was drawn directly from the premise that a light reaction to lead residue was found in hair taken from the wound to the victim's head. The report stated that one of the purposes of the examination was to determine whether lead residue was present on the victim's hair sample. This information serves the commonly recognized purpose of determining the proximity between the gun muzzle and the victim. The expert relied on no additional premise against which appellant claims a need to defend himself.

Id. at 256. Because the examiner's testimony was not based on an undisclosed premise, the defendant in *Milburn* was not unduly surprised by the disputed testimony. Thus, the Supreme Court affirmed the defendant's conviction. *Id*. at 259.

Yet another case addressing the application of RCr 7.24 to expert testimony is *Collins v. Commonwealth,* 951 S.W.2d 569 (Ky. 1997). In *Collins*, the Commonwealth alleged that the defendant had repeatedly raped the victim, the defendant's minor stepdaughter. *Collins,* 951 S.W.2d at 571. At trial, the victim's treating physician testified as an expert regarding the physical aspects of child sexual abuse cases. *Id*. Prior to trial, the Commonwealth provided a copy of the physician's report to the defendant. *Id*. at 573. At trial, the physician testified regarding the conclusions found in her report. The physician concluded that the victim had been sexually abused despite the fact that her hymen was intact. *Id*. at 574. According to the physician's testimony, approximately fifty percent of the sexually active women she examined retained a hymen. *Id*. The

physician testified that this opinion was based on her experience as a physician and on extensive medical research that she had conducted. *Id*. On appeal, the defendant argued that he was unduly surprised by this testimony. *Id*. The Supreme Court held:

> [W]e cannot accept [the defendant's] contention that he was unduly surprised by [the physician's] testimony. Her report clearly stated that [the victim] had a hymen. Further, [the physician] concluded that the physical examination, in conjunction with the history [the victim] provided, was indicative of sexual abuse. Reading the report in its entirety, [defendant] could only have concluded that [the physician] was of the opinion that a female could engage in sexual intercourse and still have a visible hymen. It is further evident that [the defendant] was cognizant of [the physician's] testimony in that he presented an expert to rebut her opinion.

Id. Because the defendant had not been unduly surprised by the physician's testimony, the high court affirmed his conviction. *Id*. at 576.

The common thread that runs through all of these cases is the analysis performed by the Supreme Court. In each case, the Supreme Court did in-depth and fact-intensive evaluations regarding the substance of the expert's disputed testimony to determine whether the expert expressed an opinion that was based on a premise that had not been disclosed to the opposing party prior to trial. In cases where the Supreme Court determined that an expert had testified to an opinion that was based on an undisclosed premise, as in *Barnett*, the Court concluded that the opposing party was unduly surprised and had lost the opportunity to defend against that premise; thus, the Court reversed. On the other hand, in those cases where the Court decided that an expert's opinion was not based on an undisclosed premise, as in *Vires*, *Milburn*, and *Collins*, the Court reasoned

that the opposing party was not unduly surprised by the expert's testimony; therefore, the Court affirmed.

While the analysis performed by the Supreme Court in these cases is the proper one to resolve disputes regarding the application of RCr 7.24 to expert testimony, we are unable to conduct such an examination in this case because we do not know the substance of Nichols' expert witness's anticipated testimony. Nichols claims that his expert has not generated any reports regarding his anticipated testimony and insists that, at trial, his expert will only express opinions based on the material previously provided by the Commonwealth. Given this, the facts of the present case are most like the facts found in *Vires,* rather than the facts found in *Barnett*. However, we cannot apply the holding of either case to the case *sub judice* due to the dearth of information regarding the anticipated testimony of Nichols' expert. Therefore, we are left with analyzing the trial court's decision purely for an abuse of discretion.

To determine whether the trial court abused its discretion, we turn to the language found in RCr 7.24(3)(A)(i) and find that, upon written request by the Commonwealth, a criminal defendant must provide the Commonwealth with:

> any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody, or control of the defendant, which the defendant intends to introduce as evidence or which were prepared by a witness whom the defendant intends to call at trial when the results or reports relate to the witness's testimony.

The rule, as written, only requires a criminal defendant to produce expert reports that are "within the possession, custody, or control of the defendant[.]" Based on this language, the rule is, therefore, limited to the production of existing expert reports. We reject the Commonwealth's arguments that these reports encompass oral reports or opinions given by the expert to the party retaining the expert. From the patent language of the rule, it is evident that RCr 7.24(3)(A)(i) is directed toward tangible reports, documents, etc. Indeed, the rule allows the Commonwealth to "inspect, copy, or photograph any results or reports...." Mental impressions of experts cannot be inspected, copied or photographed. Clearly, the language of the rule entails tangible items capable of reproduction.

Applying the rule as written to the present case, we reach the same conclusion reached by the trial court: RCr 7.24(3)(A)(i) does not require a criminal defendant to generate either a report or a summary of an expert's testimony merely to satisfy reciprocal discovery. The trial court's decision was reasonable and supported by sound legal principles; thus, it did not abuse its discretion.

However, we also agree with the trial court that if Nichols' expert generates a report prior to trial, then Nichols is required to provide that report to the Commonwealth. Furthermore, we hasten to add that this opinion does not limit the Commonwealth's right to object to the testimony of Nichols' expert if his expert expresses an opinion based on a premise not found in the materials previously produced by the Commonwealth.

B. NICHOLS' CROSS-APPEAL

In his cross-appeal, Nichols insists that RCr 7.24(3)(A)(i) does not require him to provide the Commonwealth with his expert witness's name and address. Moreover, Nichols avers that the trial court acknowledged this fact in its order. Citing *King v. Venters,* 596 S.W.2d 721 (Ky. 1980), Nichols argues that the Supreme Court of Kentucky soundly rejected the notion that a defendant is required to provide the Commonwealth with a list of witnesses as a condition of reciprocal discovery. Furthermore, Nichols cites *Lowe v. Commonwealth,* 712 S.W.2d 944 (Ky. 1986) and points out that, in *Lowe*, the Supreme Court confirmed the holding found in *King*. According to the facts in *Lowe*, in response to defendant's discovery motion, the trial court ordered the Commonwealth to provide the defendant with the names of all persons who were present at the scene of the alleged crime at the time the crime was allegedly committed. *Lowe,* 712 S.W.2d at 945. The Commonwealth sought and obtained a writ of prohibition from this Court, and the Supreme Court affirmed the issuance of the writ. *Id*. Citing *King,* 596 S.W.2d 721, the Supreme Court held that, pursuant to RCr 7.24(2), the Commonwealth was not required to provide, nor was the defendant entitled to receive, a list of all individuals present at the time the crime allegedly occurred. *Id*. So Nichols reasons that the trial court erred when it ordered him to provide his expert's name and address to the Commonwealth arguing that such an order is contrary to the plain reading of RCr 7.24(3)(A)(i) and is contrary to the holdings in *King* and *Lowe*.

In *King,* the Commonwealth moved the trial court to order two criminal defendants, both named King, to provide the Commonwealth with a list of prospective defense witnesses. *King,* 596, S.W.2d at 721. The defendants petitioned this Court for a writ of prohibition seeking to protect the identities of their witnesses. *Id*. The Supreme Court held:

> The extent to which either party to a criminal proceeding may require information of the other is set forth in RCr 7.24. Paragraph (3) of that Rule specifies those things the trial judge may require a defendant to divulge as a condition to his being given a right of discovery against the Commonwealth. A list of witnesses is not among the items of information so specified. It is our opinion that there is no authority for requiring a defendant to furnish such a list to the Commonwealth, and we are not entirely convinced that it would be free of constitutional difficulty.

Id. As pointed out by Nichols, in *Lowe,* 712 S.W.2d 944, the Supreme Court cited *King,* and relied upon its holding when the high court held that RCr 7.24 does not require the Commonwealth to provide a criminal defendant with a list of all persons present at the crime scene when the crime was allegedly committed. *Lowe,* 712 S.W.2d at 945. Additionally, in *Hodge v. Commonwealth,* 17 S.W.3d 824, 849 (Ky. 2000), the Supreme Court cited the *Lowe* case and held that a trial court exceeds its authority when it enters a discovery order in which it requires the Commonwealth to provide a criminal defendant a list of the Commonwealth's witnesses. *See also, Barnett,* 763 S.W.2d at 123 ("RCr 7.24 does not require the Commonwealth to produce a list of witnesses in advance of trial[.]").

As previously analyzed, regarding discovery disputes, we review the trial court's decision for abuse of discretion. *Sexton,* 41 S.W.3d at 455. If the trial court's

decision was arbitrary, unfair, unreasonable, or unsupported by sound legal principles, then we are required to reverse. *English,* 993 S.W.2d at 945. In the present case, the trial court directed Nichols to disclose his expert's name and address. To support this decision, the trial court reasoned that such a disclosure was required by the spirit of RCr 7.24 and such a disclosure would give the Commonwealth the opportunity to determine and, if necessary, to request a *Daubert* hearing. The trial court's decision appears, on its face, to be reasonable given the fact that *Daubert* potentially applies to all expert testimony.[1] However, the holdings found in *King*, *Lowe*, *Hodge*, and *Barnett* make it clear that neither party in a criminal action is required to disclose a witness list. Furthermore, RCr 7.24 contains no language requiring a criminal defendant to provide the identity of his or her expert witness to the Commonwealth, a fact that the trial court acknowledged in its order. Consequently, the trial court's decision was contrary to the plain reading of the criminal rule, as well as the holdings found in *King* and its progeny. Therefore, we hold that when the trial court ordered Nichols to produce the name and address of his expert, it abused its discretion.

IV. CONCLUSION

The trial court did not abuse its discretion when it held that RCr 7.24(3)(A)(i) did not require Nichols to generate a report regarding his expert witness's testimony; therefore, that portion of the McCracken Circuit Court's Order is AFFIRMED. However, because the trial court abused its discretion when it ordered Nichols to provide

[1] We harbor serious doubts that mere disclosure of the expert's name and address would be sufficient for the Commonwealth to determine whether it should request a *Daubert* hearing given that the contents of the expert's anticipated testimony is completely unknown at this time.

the name and address of his expert to the Commonwealth, that portion of the trial court's order is REVERSED, and this matter is REMANDED for further proceedings consistent with this opinion.

ALL CONCUR.

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