RENDERED: JUNE 29, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000368-MR

JAMES HOLLAND A/K/A JAMES COLLINS — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, SPECIAL JUDGE
ACTION NO. 04-CR-00138

COMMONWEALTH OF KENTUCKY — APPELLEE

AND: NO. 2006-CA-000380-MR

STELLA SPRAGUE A/K/A JANE DOE — APPELLANT

v.

APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, SPECIAL JUDGE
ACTION NO. 04-CR-00137

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND TAYLOR, JUDGES; KNOPF,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: In these consolidated appeals, James Holland and Stella Sprague challenge their convictions following a joint jury trial for first-degree trafficking in a controlled substance. Both allege that the judgments entered against them should be reversed because the Commonwealth failed to provide an accurate address for a confidential informant and because the trial court erroneously permitted the Commonwealth to introduce into evidence an audiotape of the undercover drug transaction while allowing the jury to review a transcript of the transaction during closing arguments. They also contend generally that they were denied a fair and impartial jury and judge. We find no error and affirm both judgments.

On June 16, 2004, Detective Leah Worley of Operation Unite met with a confidential informant, Judy Minix, for the purpose of conducting an undercover drug transaction at the Appellants' residence in Falcon, Kentucky. Upon entering Holland's and Sprague's home, Worley and Minix encountered Sprague in the living room and Holland in the kitchen. After engaging in some conversation, Worley and Minix indicated to Holland their interest in purchasing Oxycontin pills. After stating that he had some available, Holland had Sprague join them in the kitchen where Worley and Minix watched Sprague retrieve a variety of pills wrapped in cellophane from under her shirt. Worley and Minix subsequently purchased two Oxycontin pills for $100.00, after which they left the house.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5) of the Kentucky Constitution and KRS 21.580.

As a result of the transaction, Holland and Sprague were indicted for first-degree trafficking in a controlled substance. Following a jury trial in the Magoffin Circuit Court held on December 19, 2005, each defendant was convicted of the charged offense and the jury set a penalty of ten years in prison for each offense. On January 19, 2006, the trial court sentenced both Holland and Sprague in accordance with the jury's verdict. This appeal followed.

Holland and Sprague first contend that the Commonwealth failed to provide them the correct address of the confidential informant, Minix. Kentucky Rule of Evidence (KRE) 508(a) provides in relevant part that the Commonwealth has a privilege to refuse to disclose the identity of a person who has furnished information relating to an investigation of a possible violation of law without implicating a defendant's constitutional right to confront his or her accusers. *Thompkins v. Commonwealth,* 54 S.W.3d 147 (Ky. 2001). However, disclosure may be required where the informant was, as Appellants allege in this case, a material witness to the crimes charged. *Taylor v. Commonwealth,* 987 S.W.2d 302 (Ky. 1998).

As the Commonwealth notes, the record indicates that the Appellants were provided with Minix's name in February 2005. Further, Detective Worley provided them Minix's name and address, believed to have been current as of August 2005, in late September or early October of that same year,[2] between two-and-a-half to three months prior to the date of trial. On the day of trial, Appellants' counsel stated that he was not

[2] Sprague and Holland contend that they received Minix's purported address for the first time on October 5, 2005.

prepared to proceed because the sheriff had been unable to locate Minix to serve her with a subpoena to testify. Citing the Commonwealth's inability to provide a valid address for Minix, he orally moved to continue the trial. Though he offered no explanation as to the expected nature of Minix's testimony or why he believed that it was necessary to the Appellants' defense, he asserted that Minix was a material witness and the trial could not proceed without her. We disagree.

According to Kentucky Rule of Criminal Procedure (RCr) 9.04,

> [a] motion by the defendant for a postponement [of a trial] on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it. If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true.

Further, "the granting of a continuance is in the sound discretion of the trial judge." *Id.* In the present matter, the Appellants did not comply with this standard in that no affidavit was tendered and nothing was offered describing the nature of Minix's expected testimony. In short, there is no basis for a finding that the trial court abused its discretion when it overruled the motion for a continuance. *Pennington v. Commonwealth,* 371 S.W.2d 478 (Ky. 1963); *McFarland v. Commonwealth,* 473 S.W.2d 121 (Ky. 1971).

Moreover, the record does not demonstrate that counsel for Sprague and Holland exercised "due diligence" in attempting to locate Minix. Though he was provided with Minix's name and address over two months prior to the trial date, he waited until the week before trial to attempt service of a subpoena upon her. By that time, Minix

could not be located. When questioned by the trial court, counsel stated that the only other effort made to locate Minix was to "check with people [he] thought might know her." In *Cornwell v. Commonwealth,* 523 S.W.2d 224 (Ky. 1975), our Supreme Court addressed similar circumstances. On the date of trial in *Cornwell,* the defendant moved for a continuance based on the unavailability of a witness he had subpoenaed. In affirming the McCracken Circuit Court's denial of the motion, the Supreme Court stated:

> [O]n the day of trial appellant and his counsel first learned that the witness had not been served with the subpoena and would not be available to testify. The responsibility of a person charged with the commission of a criminal offense and that of his counsel does not stop merely with having issued a subpoena. There is no showing that any effort was made by appellant or his counsel to learn whether his witness would be available. As a matter of fact, there is no statement made that the witness actually was in Phoenix, Arizona, or if he could be located, or if he would be available to testify at a future date. Had appellant made diligent effort to locate this witness prior to the issuance of the subpoena, or even at the time of the issuance, and learned of his absence, his present whereabouts may have been ascertained and his presence secured.

Id. at 227. Based upon the record in the present matter, we, like the Supreme Court in *Cornwell,* simply do not believe that Appellants' counsel, by delivering a subpoena to the sheriff just a few days before trial, exercised the "due diligence" required by RCr 9.04 in attempting to locate Minix. As a result, we again find no abuse of discretion in the trial court's decision to deny the motion for continuance.

Appellants further contend that the trial court erred in allowing the Commonwealth to play a tape recording made by Detective Worley during her

undercover drug transaction with them while, at the same time, allowing the jury to view a transcript. In support of their position, Appellants rely on *Sanborn v. Commonwealth,* 754 S.W.2d 534 (Ky. 1988), in which the Kentucky Supreme Court held that it was error for a trial court to admit into evidence a written transcript of the defendant's tape-recorded statement that was prepared by the prosecutor and included his interpretation of several inaudible portions of the tape. Appellants' reliance, however, is misplaced.

Sanborn does not dictate that it is automatically error for a trial court to admit a tape recording that contains inaudible portions. In *Johnson v. Commonwealth,* 90 S.W.3d 39, 45 (Ky. 2003), the Supreme Court held that it is not an abuse of discretion for a trial court to admit recordings if they are "sufficiently audible to be probative." This is not a rigorous standard, and a trial court will not be held to have abused its discretion even if many parts of the recording are inaudible so long as some parts are "sufficiently audible to be probative." *Id.* Moreover, this Court has previously ruled that in circumstances differing from those in *Sanborn,* allowing a jury to review a prosecutor's transcript of a recording is not error. In *Norton v. Commonwealth,* 890 S.W.2d 632 (Ky. App. 1994), we found that a trial court's decision to allow a jury to review a transcript did not violate *Sanborn* because, unlike the circumstances in *Sanborn*, in *Norton* the prosecutor accurately reflected on the transcript those portions of the recording that were inaudible without attempting to offer his own interpretation. Further, while the trial court did allow the jury to review the transcript when listening to the tape, unlike *Sanborn,* the

transcript was not admitted into evidence and was not sent into the jury room during deliberations.

Applying these principles herein, we find nothing to support the Appellants' claim that the trial court abused its discretion. On the date of trial, the record reveals that Appellants' counsel objected to the tape and the transcript on the ground that the prosecutor had altered the recording. However, when questioned by the trial court, counsel's concern centered on a portion of the tape *after* the transaction in question that contained recordings unrelated to the present matter. When informed by both the trial judge and the prosecutor that this portion of the tape did not relate to his clients' case and was therefore not included in the transcript, he did not press his objection any further and simply stated "OK." Though Appellants again argue in their briefs herein that "[c]hanges had been made," they do not state what, if any, those alterations are and offer nothing else to support their allegation. Moreover, the record does not support Appellants' allegation that the transcript was used in closing arguments or given to the jury during deliberations. We find no abuse of discretion in the trial court's decision to admit the tape into evidence and to allow the jury to review a transcript thereof while listening to it during the course of the trial.

Finally, Appellants argue that they were denied a fair trial and an impartial jury by "the conduct of the Trial Judge," making it "impossible for the Appellants[] and his attorney to object . . . ." Appellants do not, however, state precisely how the trial judge rendered their trial unfair other than by overruling their objections on the matters

pertaining to the confidential informant and the tape recording. Having concluded those matters were properly handled by the trial judge, we need not address this issue any further.

For the foregoing reasons, the January 19, 2006 judgments in the Appellants' respective cases are affirmed.

ALL CONCUR.

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