RENDERED: SEPTEMBER, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001219-MR
&
NO. 2006-CA-001442-MR

BRYCE BONNER — APPELLANT

v.

APPEALS FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NOS. 05-CR-001280 & 05-CR-003612

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, STUMBO, AND THOMPSON, JUDGES.

STUMBO, JUDGE: This appeal is brought from an Alford plea to charges of second-degree robbery and second-degree burglary. The agreement provided for a 10-year sentence and encompassed two cases, 2006-CA-001442-MR and 2006-CA-001219-MR. The two cases stem from the same transaction, but two separate sentencing hearings were held. Because two judgments were entered, there are two appeals, but the issues for both are the same and we resolve both in this opinion. Bryce Bonner, Appellant, argues that the circuit judge erred in not excluding the victim's, Ms. Wahl, photo-pack identification,

in denying a motion to review Ms. Wahl's psychotherapy records, and in not excluding all evidence provided by the government in a supplemental discovery response. We find that these rulings were proper and therefore affirm the trial court.

On December 3, 2002, a man, later identified as Appellant by Ms. Wahl, unlawfully entered her home. Ms. Wahl was not present at the time but soon returned. Upon her return, she was accosted by Appellant who was armed. Ms. Wahl was either forced or tricked to drive Appellant to her bank and withdraw $6,400. She refused to leave the bank with him and gave him her car keys with instructions to take the car back to her house. Appellant returned the car to the house and then left in his own vehicle.

Wahl told a bank employee that she had been robbed. Initially she did not want the police to be called, but they eventually were. The bank employee also called Dr. Tabler, Ms. Wahl's employer, who then came to the bank. Upon the arrival of the police, Wahl was uncooperative and upon being shown a photo from the bank's surveillance system denied that it was Appellant who had robbed her. The detective had doubts that Wahl had actually been robbed and discontinued his investigation.

On May 28, 2003, Wahl encountered Appellant at a hospital in which she worked. She contacted the police about Appellant, but it is unclear as to whether the police did anything at this time.

Wahl again contacted the police after seeing Appellant's picture in media coverage surrounding a series of rapes. Detective Sherrard met with Wahl on February 23, 2005, and presented her with six pictures in a photo-pack, one of which was that of

Appellant. The detective asked if she recognized any of the photos and she indicated that the photo of Appellant was the man who robbed her.

On April 20, 2005, and December 8, 2005, Appellant was indicted on charges stemming from this incident. Both indictments were consolidated on January 5, 2006. A conditional guilty plea was entered for one case on April 18, 2006, and for the other on May 2, 2006.

Appellant's first argument is that the trial court erred in not excluding Ms. Wahl's photo-pack identification from evidence because it was unreliable. Appellant argues that because Ms. Wahl had identified him on two prior occasions (at the hospital and through media coverage) the photo-pack identification was tainted. He contends that the only reason to show Ms. Wahl a photo-pack would be to allow the detective to testify that Ms. Wahl quickly identified him as her assailant. Appellant also discusses the unreliability of witness identifications. While we will not comment on the general issue of the reliability of eye witnesses, we can find no taint to the photo-pack identification. The fact that Wahl had identified Appellant on two prior occasions does not make the photo-pack identification suspect. There is nothing in the record that demonstrates the detective indicated which photo she should pick or in any way guided her decision. The photo-pack identification could have been excluded had it been mishandled by the police, either by showing Ms. Wahl a single photograph or by stating that there was other evidence against one of the people shown in the photos. *See Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L. Ed. 2d 401 (1972); *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct.

2243, 53 L. Ed. 2d. 140 (1977). A prior independent identification alone does not render a photo-pack identification inadmissible.

Appellant also argues that the trial court erred in denying Appellant's motion for an *in camera* review of Ms. Wahl's psychiatric records to determine whether they contained exculpatory evidence. An *in camera* review of psychotherapy records is only authorized when there is evidence presented to establish a reasonable belief that the records contain exculpatory evidence. *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003). Such evidence can be admissible to attack a witness's ability to recall, comprehend, and accurately relate the subject matter of her testimony. *Id.*

The evidence presented to the trial court to justify an *in camera* review was: 1. Wahl was with Appellant for forty minutes; 2. Wahl gave Appellant her car keys after the robbery; 3. A witness reported that Wahl hugged Appellant; 4. Wahl did not want the police to be called; 5. Wahl was accompanied at the bank by her employer, Dr. Tabler, who was listed on the police report as her employer and psychologist; 6. Wahl was uncooperative with the police; 7. A bank teller told police she did not think Wahl was being robbed and that she might have mental problems; and 8. Wahl refused a polygraph examination. At the hearing held on the motion, the Commonwealth Attorney stated that he had spoken to Ms. Wahl and that she had no objection to the review of her psychiatric records because there were none. The judge denied the motion stating that the reasons set forth did not necessarily indicate a mental problem. We agree. The reasons propounded above have no bearing on Wahl's ability to recall or relate her testimony. Also, as the

trial judge stated, a robbery is a traumatic event which can lead to odd behavior. We do not think that the evidence presented was sufficient to justify a review of Wahl's psychotherapy records, if such records even existed.

Appellant's final argument is that the Circuit Court should have excluded evidence related to the documents filed in the Commonwealth's supplemental discovery response, filed 26 days before the trial date. On December 21, 2005, the Commonwealth filed a supplemental discovery response which consisted of additional interviews with Ms. Wahl and other potential witnesses. Since the trial date was set for January 17, 2006, defense counsel moved to exclude the evidence contained in the new discovery materials on the grounds that there was inadequate time to investigate the material. The Commonwealth Attorney responded that the materials were only recently provided to the defense because they had not been in the Commonwealth's possession, but in the possession of Ms. Wahl's private investigator. Once the Commonwealth acquired the documents, they were quickly turned over to the defense within a couple of days. The trial court ruled that excluding the evidence was a drastic measure and gave the defense a continuance instead. The new trial date was set for April 18, 2006.

Appellant argues that this is not good enough. He claims that the government has an affirmative duty to investigate and to acquire all evidence in a timely fashion. He also claims that it was reasonable for the Commonwealth to assume Ms. Wahl's investigator had relevant evidence and that this supplemental discovery should have been discovered by the Commonwealth in a more timely fashion. There is no

evidence in the record that the Commonwealth Attorney mishandled the case or was not diligent in its investigation. As soon as the materials came into the government's possession, they were turned over to the defense.

Appellant also cites Jefferson Circuit Court Rule 803(G) which states:

> All responses by any party shall be in writing acknowledging or denying existence of such items with copies of the responses and evidence being served upon the opposite party and filed with the Court. If, subsequent to the discovery deadline and prior to, or during trial, any party discovers additional material previously requested which is subject to discovery or inspection, counsel shall promptly notify the other party or attorney, or the Court, of its existence. This continuing obligation also applies to the Bill of Particulars and the disclosure of exculpatory evidence. Any items not divulged according to the discovery deadlines may result in the Court granting a request for a continuance, mistrial or dismissal of the action. The evidence may be suppressed unless good cause is shown or, in the alternative, the Court may enter such other Order as may be just under the circumstances.

Appellant argues that this rule requires exclusion of the evidence. We disagree. Nothing in this rule pertaining to the suppression of evidence is mandatory. The rule states that evidence "may" be suppressed unless good cause is shown. The rule does not state it "shall" be suppressed. The rule appropriately gives the judge wide discretion in deciding what to do with subsequent discovery. As the rule states, the granting of a continuance is a valid option. We find that giving a three-month continuance was a sound decision and no prejudice was shown to Appellant.

For the foregoing reasons, we affirm the trial court's rulings on all the above matters.

ALL CONCUR.

BRIEFS FOR APPELLANT:

J. David Niehaus
Louisville, Kentucky

BRIEFS FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Michael A. Nickles
Assistant Attorney General
Frankfort, Kentucky