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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000631-MR

NEFCHEVIOUS MATHEWS — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 95-CR-00749

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MOORE, JUDGES.

CLAYTON, JUDGE: This is an appeal of the trial court's denial of Appellant Nefchevious Mathews' Kentucky Rules of Civil Procedure (CR) 60.02 motion. Based upon the following, we affirm the decision of the trial court.

BACKGROUND SUMMARY

Mathews was convicted of intentional murder in Warren Circuit Court and was sentenced in January 1997 to life imprisonment. Mathews and Dalton Morrow were involved in an argument on October 25, 1995. The argument escalated and Mathews fired his gun, missing Morrow, but fatally wounding an innocent bystander. He filed a direct appeal with the Kentucky Supreme Court arguing, in part, that the trial court refused to suppress his statement to the arresting officer which precluded him from testifying at his trial. In dealing with this issue, the Kentucky Supreme Court found that:

> Clearly, claiming that another was responsible for the shooting does not constitute an incriminating statement so as to fall under the guise of [Kentucky Rules of Criminal Procedure] RCr 7.24(1). Further, although Appellant's statement could be considered exculpatory, he was aware that he, in fact, made such an assertion to Detective Lackey. Appellant's failing to reveal the statement to his counsel can only be viewed as a strategic decision.
>
> An additional consideration is the fact that defense counsel chose to reserve opening statement and Appellant ultimately did not testify. As such, although Appellant had alluded to a self-protection defense, we have no way of knowing what Appellant's testimony would have actually been.
>
> . . . .
>
> Kentucky has a procedure enabling a criminal defendant to testify by avowal in the event he believes it necessary to place his testimony into the record out of the presence of the jury. RCr 9.52. Appellant did not avail himself of this remedy. In the absence of anything in the record to indicate the substance of Appellant's testimony,

> had he chosen to testify, this Court is unable to review such testimony to determine whether it would have been consistent or inconsistent with the prior statement. Appellant simply has failed to demonstrate that the trial court's ruling precluded his testifying. A defendant does not have the right to present testimony free from the legitimate demands of the adversarial system.

Mathews v. Commonwealth, 997 S.W.2d 449, 451- 452 (Ky. 1999).

The Court upheld his conviction and on August 25, 2000, Mathews filed a motion to vacate his judgment pursuant to RCr 11.42 with the trial court, alleging ineffective assistance of counsel. The trial court denied his motion and a panel of this Court affirmed that denial on October 5, 2001. A belated motion for discretionary review was denied by the Kentucky Supreme Court on January 11, 2002.

On September 23, 2008, Mathews filed a motion to vacate pursuant to CR 60.02 in the Warren Circuit Court, contending that *Chestnut v. Commonwealth*, 250 S.W. 3d 288 (Ky. 2008), made the ruling in his case an error. The trial court denied Mathews' motion finding:

> The Kentucky Supreme Court's interpretation of RCr 7.24 has changed. The *Chestnut* interpretation is not "newly discovered evidence which by due diligence could not have been discovered in time for a new trial under Rule 59.02," "perjury or falsified evidence," or "fraud affecting the proceedings, other than perjury or falsified evidence" to invoke CR 60.02(b)(c) or (d). The *Chestnut* interpretation does not appear in any equitable way to possibly change the outcome of this case thereby invoking the power given in CR 60.02(e), that the judgment is no longer equitable, or CR 60.02(f), that it is a reason of an extraordinary nature justifying relief. The defendant was convicted of intentional murder. The

> defendant's statement that another was responsible for the shooting and his counsel's lack of knowledge of the statement is not of such significance that the change of the interpretation of the rule revealed in *Chestnut* demands that this case be reversed and vacated.
>
> Additionally, the Court notes from an equitable viewpoint that the defendant cannot persuasively argue that this evidence is of such extraordinary importance in value that equity and justice require vacating the prior judgment. Just because a rule's interpretation has changed does not change the outcome of the defendant's case. There is no extraordinary equitable justification for vacating the prior judgment.

Order entered March 11, 2010, at 4. The trial court did not hold an evidentiary hearing, finding that the record showed there was no basis for relief. Mathews now appeals that denial to this Court.

STANDARD OF REVIEW

We review the denial of a CR 60.02 motion under an abuse of discretion standard. *White v. Commonwealth*, 32 S.W.3d 83, 86 (Ky. App. 2000); *Brown v. Commonwealth*, 932 S.W.2d 359, 361 (Ky. 1996). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Therefore, we affirm the lower court's decision unless there is a showing of some "flagrant miscarriage of justice." *Gross v. Commonwealth,* 648 S.W.2d 853, 858 (Ky. 1983).

DISCUSSSION

Mathews argues: (1) that the trial court erred in failing to grant his motion filed pursuant to CR 60.02(b) "newly discovered evidence . . . ; (c) perjury or falsified evidence; [or] (d) fraud affecting the proceedings, . . . "; and (2) grant him a new trial in light of the Kentucky Supreme Court ruling in *Chestnut,* 250 S.W.3d 288. In *Chestnut* the Court found in relevant part, as follows:

> Appellant argues that the Commonwealth presented testimony which they were bound to disclose to him under RCr 7.24(1), and thus the trial court's admission of said testimony was error. We reluctantly agree.
>
> Detective Wright interviewed Appellant at the police station following his arrest. During that interview, Appellant admitted to Detective Wright that he waited outside as his wife burglarized homes. Appellant now asserts that certain testimony presented at trial by Wright concerning these previously undisclosed oral statements made by the Appellant was given in violation of RCr 7.24(1). RCr 7.24(1) states in pertinent part that
>
> > the attorney for the Commonwealth *shall* disclose the substance, including, time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, *and* to permit the defendant to inspect and copy or photograph any relevant (a) *written or recorded* statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth
>
> RCr 7.24(1) (emphasis added). Admittedly, this Court has previously held that the first part of RCr 7.24(1) applies only to written or recorded oral statements. [Citations omitted.] However, although we upheld these

previous decisions in *Mathews v. Commonwealth*, 997 S.W.2d 449, 451 (Ky. 1999), *overruled on other grounds by Hayes v. Commonwealth*, 58 S.W.3d 879, 882 (Ky. 2001), we were troubled by the result and began to question the soundness of the line of reasoning these prior opinions espoused.

Truly, we are heedful of the doctrine of *stare decisis*. "*[S]tare decisis* [is] the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." *Vasquez v. Hillery*, 474 U.S. 254, 265–265, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986). Thus, it is with anything but a cavalier attitude that we broach the subject of changing the ebb and flow of settled law. However, we do not feel that the doctrine compels us to unquestioningly follow prior decisions when this Court finds itself otherwise compelled. "The doctrine of stare decisis, like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason." *Payne v. City of Covington*, 276 Ky. 380, 123 S.W.2d 1045, 1050–1051 (1938). While the doctrine does guide us to decide every case with a respect for precedent, it does not demand that this Court be precluded from change.

Looking at the plain language of RCr 7.24(1) stating that, "the Commonwealth shall disclose . . . any oral incriminating statement . . . made by a defendant," we find that it is apparent from a reading of the language of the rule, that RCr 7.24(1) was intended to apply to both oral and written statements, which were incriminating at the time they were made. Consequently, to the extent that *Berry,* and its progeny *Partin* and *Mathews* hold that RCr 7.24(1) does not apply to a defendant's oral incriminating statements, they are overruled. We simply cannot in good faith square such a counterintuitive reading of the rule's manifest intention. The Commonwealth's ability to withhold an incriminating oral statement through oversight, or otherwise, should not permit a surprise attack on an

unsuspecting defense counsel's entire defense strategy. Such a result would run afoul of the clear intent of RCr 7.24(1).

Accordingly, we now conclude that nondisclosure of a defendant's incriminating oral statement by the Commonwealth during discovery constitutes a violation of the discovery rules under RCr 7.24(1), since it was plainly incriminating at the time it was made. (Footnote omitted).

As such, we find this Court's reasoning in the dissent in *Mathews* to be persuasive.

There are two clear parts to RCr 7.24(1)(a). The first requires that the Commonwealth "disclose the substance of any oral incriminating statement . . . made by a defendant to any witness." The second mandates that the Commonwealth give the defendant access to "any relevant written or recorded statements." The reason that it is clear there are two separate parts to RCr 7.24(1)(a) is that the conjunction "and" is employed in the middle of the rule. Accordingly, there are two separate burdens imposed by RCr 7.24(1)(a).

RCr 7.24(1)(a) demands disclosure of "any incriminating statement." This is not a vague or complex concept. Basically anything that the defendant has said to a witness which in any way incriminates himself or herself must be disclosed to the defense. This part of the rule does not require that the statement even be recorded, simply that the Commonwealth know of the statement. *Mathews,* 997 S.W.2d at 454 (Stephens, J., dissenting). In *Mathews,* the dissent notes that when the appellant did not learn that the Commonwealth was in possession of his incriminating statements until trial, his rights were impermissibly violated. *Id.* at 454 (Stephens, J., dissenting). Justice Stephens reasons therein, that such impermissible violation of one's rights constitutes reversible error in his estimation. *Id.* at 453–454. Today, we are inclined to agree.

> Having concluded that such action constitutes a violation of the discovery rules in that the statements were incriminating, we next turn to whether the trial court erred in allowing the introduction of Appellant's statements, and whether such error mandates reversal. The United States Supreme Court has held that a discovery violation serves as sufficient justification for setting aside a conviction when there is a reasonable probability that if the evidence were disclosed the result would have been different. [Citations omitted].
>
> Here, Appellant asserts that had the incriminating statement been disclosed prior to trial, there was a reasonable probability that the result would have been different. Specifically, he argues that the Commonwealth's failure to turn over the statement served to fatally undermine his whole defense by permitting the Commonwealth to introduce a surprise confession in an otherwise circumstantial case, which directly refuted testimony proffered by both Appellant and Shakita. Appellant contends that the failure to disclose the statement induced him to rely on a defense strategy he may not have otherwise asserted and denied his right to due process of law.

Chestnut, 250 S.W.3d at 295-97. Mathews contends that based on this holding, his conviction should be overturned.

To begin, CR 60.02 does not provide a method of relief for changes in interpretations of law. Even if it did, however, Mathews appealed this issue and the Kentucky Supreme Court held that he was not entitled to his judgment's being vacated. Thus, this issue is now res judicata. One of the bases for res judicata is that there is an eventual end to the litigation of an issue. *Barnett v. Commonwealth*, 348 S.W.2d 834 (Ky. 1961). "Collateral estoppel, or issue preclusion, is part of the concept of res judicata and serves to prevent parties from

relitigating issues necessarily determined in a prior proceeding." *Gregory v. Commonwealth*, 610 S.W.2d 598, 600 (Ky. 1980) (citations omitted). Also, retroactive application of new rules is generally not given in cases involving collateral review. *Griffith v. Kentucky,* 479 U.S. 314, 328, 107 S. Ct. 708, 716, 93 L. Ed. 2d 649 (1989); *Teague v. Lane*, 489 US 288, 310, 109 S. Ct. 1060, 1075, 103 L. Ed. 2d 334 (1989).

Mathews appealed his conviction on this specific issue to the Kentucky Supreme Court. That Court held that his conviction was valid and it is, therefore, res judicata. We affirm the decision of the trial court.

ALL CONCUR.

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