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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000500-MR

FORTUNE WILLIAMS — APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE ROBERT B. CONLEY, JUDGE
ACTION NO. 02-CR-00029

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND WINE, JUDGES.

WINE, JUDGE: Dr. Fortune Williams, M.D., appeals from his conviction for unlawfully prescribing a controlled substance. On appeal, Williams alleges that he was entitled to a directed verdict due to a dearth of evidence that he lacked a "legitimate medical purpose" for prescribing the controlled substance. In the alternative, Williams argues that he is entitled to a retrial based upon *Brady* and

Crawford violations and because of improper expert testimony which was allowed at trial. Upon a review of the record, we affirm the Lewis Circuit Court.

History

In October of 2000, Dr. Williams began working at 1st Care, a pain management clinic in Garrison, Kentucky owned by Nancy Sadler and Mike Journey. Williams testified that he believed most patient reports of pain were true and that "most patients are undertreated" for pain. He further testified that probably four-fifths of the patients at 1st Care came there for pain medication. Most patients of 1st Care were uninsured and paid cash for their services. The fee was typically sixty to seventy dollars.

Sadler and Journey typically decided how many patients Williams would see per day at 1st Care. They paid Williams a salary for his work, as well as food and transportation costs for his work in nutritional medicine. By the time Williams left his employee at first care, he was making roughly $10,000 a week. A nurse's aide, Peggy Figley, testified that Williams saw up to an estimated 200 patients a day at 1st Care and that he worked approximately two and one-half days per week. Journey also testified that Williams saw around 200 patients per day. Williams disputed this figure, testifying that it would be "physically impossible" to see that many patients in a day. Williams did admit, however, that he would sometimes work until 9:00 p.m. to see everyone that had been scheduled for that day.

In 2001, an investigation of the 1st Care clinic was launched after the Lewis County Sheriff's Office began receiving complaints about high volumes of traffic at the clinic as well as the improper prescribing of controlled substances. The Lewis County Sherriff's Office contacted the Kentucky Attorney General's office which in turn contacted the Office of Drug Control with the Cabinet for Health and Family Services. Ron Burgess of the Attorney General's Office and Bob Kelly of the Office of Drug Control were directed to undertake a joint investigation of the clinic.

After conducting surveillance of the clinic, Burgess and Kelly began working with several confidential informants who agreed to pose as patients and attempt to obtain prescriptions for controlled substances from Williams. One such informant was Phyllis Brothers.[1] Brothers's visits to the clinic formed the basis for the Commonwealth's case.

Brothers first visited the clinic on May 2, 2001. After waiting in a crowded waiting room for several hours, Brothers was seen by a clinic assessor who took her pulse, temperature, and blood pressure. Brothers completed paperwork indicating that she was in pain, had difficulty sleeping, and had been in a motor vehicle accident a few years prior. She did not bring any medical records with her to this visit.

[1] Apparently, in the first trial of this case, the Commonwealth relied heavily upon evidence seized during a raid of the 1st Care Clinic which was later determined by the Supreme Court to be the product of a warrantless search in violation of the Fourth Amendment.

Unbeknownst to the employees of 1st Care, Brothers recorded the happenings of this first visit on an audio recording device supplied to her by the Commonwealth. The audio recording was played for the jury at trial. According to the audiotape, Williams spent only three minutes with Brothers on her first visit. Williams asked a few questions about the causes of her pain, whether she had an MRI film, whether she had seen any other physicians, and whether she was allergic to any medications. Brothers indicated that she had shooting pains in her back and legs. She testified that Williams did not perform a physical examination of her. Testimony indicated that Williams did touch Brothers's back, however, which caused her to flinch. At that first visit, Williams wrote Brothers a prescription for Vicodin, a Schedule III controlled substance, and Anaprox. He also ordered an MRI scan and blood work.

Brothers visited the clinic for a second time on July 9, 2001. On this particular visit, Brothers took fake medical records with her to the visit. These records contained an x-ray, but did not contain an MRI. Nothing in the records indicated that Brothers was hurt. Burgess prepared these medical records. At trial, he testified that the records were prepared with the idea that a person with medical training would realize that the records were fake.

Brothers again recorded her visit to 1st Care, however, this second recording was obtained on videotape. The videotape of this visit was also played for the jury. The videotape showed that Williams spent less than two minutes with Brothers. During this two-minute time period, Williams asked Brothers if there

was "anything new," listened to her describe a sleep problem, and asked her about possible causes of the sleep problem. Williams did not physically examine Brothers, or otherwise touch her in any way, during this second visit. At the end of this second visit, Williams wrote prescriptions to Brothers for Vicodin, Anaprox, and Valium, a Schedule IV controlled substance.

Brothers's third visit to the clinic was on August 7, 2001. Brothers again captured the visit on videotape, and the tape was played for the jury at trial. This visit was shorter than the prior two, with Williams only spending about 90 seconds with Brothers. Williams asked Brothers whether she had gotten the MRI scan he ordered yet. Brothers responded that she did not know what an MRI scan was. Williams advised that they would "work with" the medication he was already prescribing until she had the testing done. Williams, again, did not touch or physically examine Brothers during this visit. Williams renewed the previous prescriptions and issued a new order for an MRI scan.

Brothers's fourth and final visit to the 1st Care clinic was on September 5, 2001. This visit was again captured on videotape and played for the jury. On this final visit, Williams spent less than thirty seconds with Brothers. The visit opened with Williams asking Brothers if anything was "new," to which Brothers responded that she felt "real good." Williams then renewed her prescriptions for Vicodin and Valium. Further facts will be developed below, as necessary.

Williams was charged with four counts of unlawfully prescribing a controlled substance in connection with the prescriptions he wrote for Brothers on August 7 and September 5, 2001. The jury acquitted him of three of the charges, but found him guilty of the charge for the prescription for Vicodin written on September 5, 2001. Williams was sentenced to five years' imprisonment, per the jury's recommendation. Williams now appeals.

Analysis

Williams claims on appeal (1) that there was insufficient proof that he lacked a legitimate medical purpose in writing the prescription for Brothers; (2) that he suffered *Brady* and *Crawford* violations when the trial judge failed to grant a mistrial after he was denied access to information about a witness's plea agreement; and (3) that he is entitled to a new trial on the grounds that the Commonwealth's expert based his opinion on suppressed evidence and used the wrong standard of care.

Sufficiency of the Verdict

We first address Williams's claim that there was insufficient evidence to support the verdict. When ruling on a motion for directed verdict, a trial court must assume that the Commonwealth's evidence is true and draw all fair and reasonable inferences in favor of the Commonwealth. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). In making its case, the Commonwealth must come forth with evidence of substance. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). The standard for evidence of substance is that such evidence must

be "more than a mere scintilla." *Id*. Upon review, we ask whether "under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty." *Id*.

Williams was initially charged in the indictment with four counts of violating Kentucky Revised Statute ("KRS") 218A.1404(3) which states that no person shall "dispense, prescribe, distribute, or administer any controlled substance except as authorized by law." KRS 218A.170(3) states that a practitioner may "(a) Administer, dispense, or prescribe a controlled substance only for a legitimate medical purpose and in the course of professional practice; or (b) Distribute a controlled substance to a person registered pursuant to the federal controlled substance laws. KRS 218A.180(3)(a) reiterates that in order for a prescription for a controlled substance to be valid, the prescription "shall be issued only for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice." Williams argues that the Commonwealth failed to produce more than a mere scintilla of evidence that he lacked a legitimate medical purpose to write the prescription for Brothers. We agree that there was no direct evidence that Williams's motivation in writing the prescription was for an illegitimate purpose, however "criminal intent" by its very nature is something that almost always must be shown by circumstantial evidence. *See, e.g., Reynolds v. Commonwealth*, 113 S.W.3d 647 (Ky. App. 2003); *Carver v. Commonwealth*, 303 S.W.3d 110, 119 (Ky. 2010). We find that there was sufficient circumstantial

evidence in this case to allow a jury to reasonably infer that Williams did not write the prescription for a legitimate medical purpose.

The jury found Williams guilty under the fourth count in the Indictment, which referred to the prescription for Vicodin Williams wrote for Brothers on September 5, 2001. As previously stated, when Williams saw Brothers on September 5th, he visited with her for less than thirty seconds. He asked her if anything was new and she responded that she "felt good." After apparently not even noticing or hearing Brothers's response, Williams simply renewed Brothers's prescriptions for Vicodin and Valium. Other testimony at trial indicated that Williams didn't write the prescriptions after seeing patients, but that they were pre-printed by the staff before Williams saw the patients. Although we agree with Williams that the jury could have interpreted Brothers's response to mean that the drugs were working "good," the jury could have also interpreted the response to mean that she felt "good" in general and did not need further pain medication. Notably, Williams did not inquire further to determine Brothers's intent. We recognize the jury acquitted on Count 3 which pertained to the prescription written on the same day for Valium, but we will not second-guess the jury where the verdict reached is not clearly unreasonable. Given the overwhelming evidence presented, it was not unreasonable for the jury to find that Williams wrote the prescription for Vicodin to Brothers for an illegitimate purpose on September 5, 2001.

The trial court was obligated to consider the evidence in a light most favorable to the Commonwealth and resolve any doubts in the Commonwealth's favor. *Commonwealth v. Benham, supra*. As stated, while it is certainly true that the jury *could have* reached a different conclusion based upon the evidence, it is not the case that no reasonable jury could have arrived at the conclusion that Williams had an improper purpose. Therefore, the trial court did not abuse its discretion in refusing to grant a directed verdict.

Brady and Crawford Challenges

We next address Williams's second argument, that a retrial is warranted based upon *Brady* and *Crawford* violations. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Williams's argument is based upon the admission of the testimony of Mike Journey, one of the owners of the 1st Care Clinic. Apparently, Williams's attorney learned in the middle of trial, on December 11, 2008, that Journey had pled guilty in connection with a federal prosecution which would allegedly affect his testimony against Williams. When the Commonwealth called Journey as a witness on December 12, 2008, the defense moved for a mistrial and objected to Journey testifying as a witness in the case on the ground that the Commonwealth was aware of the plea deal but had not disclosed this information to the defense. The Commonwealth's Attorney responded by stating that he was unaware of the plea deal, himself, until the

previous night. He further stated that he had never seen Journey's plea agreement from federal court and was under the impression that the agreement said nothing about Journey testifying in the present case. The Commonwealth's attorney stated as follows:

> As far as I know, there isn't any agreement with the federal government that there's any leniency. He's maybe hoping for that, but as far as I know that's not in the agreement. I've never seen the agreement, I've never spoken to the federal prosecutor about his case in federal court. He is hoping that he will be able to tell the federal judge that he gave us substantial assistance in this case, that is all . . . It's a matter of hope.

Journey confirmed that he did not agree to give testimony in any certain case as part of his plea deal.

The trial judge did not immediately make a ruling on the defense's motion, but waited until after a short recess, when he was faxed a copy of Journey's plea deal from federal court. Once back on the record, the court noted that the plea agreement did not mention Williams's case. The trial judge ruled that Journey could testify, stating as follows:

> In light of the fact the prosecution didn't even have this — and still doesn't, only the Court has it—that I don't think that I could exclude Michael Journey's testimony or rule him ineligible for the failure to comply with *Brady* because I don't think this comes up under the *Brady* sphere. Number one – the Commonwealth didn't have it so they couldn't disclose it. Number two—even if they did disclose it, it doesn't really apply, you know, because I don't think he's under any compulsion to give testimony in this case.

The court noted that the agreement was vague and stated only that Journey "may be offered an opportunity to provide assistance in the prosecution of other individuals in the Southern District of Ohio or elsewhere." The Commonwealth's Attorney stated that he was not privy to what the federal prosecutors were doing and was told by federal prosecutors that Journey's agreement did not hinge on him testifying in Williams's case. He noted that he had tried to obtain a copy of the agreement, but that he was told it was sealed and the federal prosecutors would not allow him to access the agreement. The court agreed saying, "what the [Commonwealth's Attorney] says is exactly the truth. I mean, they were real reluctant to even let me see it and I had to promise not to let anybody else see it . . ." The judge did seal a copy of the agreement and placed the sealed copy in the record for appellate review. As such, the defense was not allowed access to the agreement during trial for the purposes of cross-examination or otherwise.

Williams argues on appeal that allowing Journey to testify despite the failure to disclose the plea agreement was a *Brady* violation. Further, Williams argues that a *Crawford* violation occurred when the trial court refused to grant him access to the plea for the purposes of cross-examination.

We agree with the Commonwealth that no *Brady* or *Crawford* violations occurred here. In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. Undisclosed evidence is material where "there is

a 'reasonable probability' that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bowling v. Commonwealth*, 80 S.W.3d 405, 410 (Ky. 2002), *citing U.S. v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed. 481, 494 (1985). Reasonable probability is "probability sufficient to undermine the confidence in the outcome." *Id*.

Here, even if the Commonwealth had disclosed the existence of the plea agreement to defense counsel, the outcome of the case would not have been different. To begin, disclosure of this information would not have precluded Journey from testifying. Accordingly, Williams's arguments on appeal about the damaging nature of Journey's testimony are misplaced. Rather, such information would only be useful to the defense for the purposes of cross-examination. However, defense counsel learned of the plea before Journey testified, so there was no prejudice. Defense counsel was able to cross-examine Journey the following day at trial. If defense counsel required more time to adequately prepare for cross-examination, he certainly could have made such a request of the trial court.

More importantly, the Commonwealth cannot be expected to turn over information which it simply does not have. The plea agreement in question was not an agreement between the Commonwealth and Journey. Rather, it was an agreement between Journey and the federal government which was unknown to the Commonwealth. Both the Commonwealth and defense counsel learned of the existence of the agreement at approximately the same time. We agree with other jurisdictions that have held that there is no requirement that the prosecution seek

out exculpatory or impeaching information not in its possession or control. *U.S. v. Sepulveda*, 15 F.3d 1161, 1179 (1st Cir. 1993); *U.S. v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991). It is clear that the Commonwealth was not working with, or for, the federal prosecutors who were pursuing Journey's federal convictions.

Finally, we note that the information in question (the plea agreement) was arguably not even favorable to Williams as the agreement did not require Journey's testimony in Williams's trial. Indeed, the agreement did not mention Williams's trial or any cases pending in the Commonwealth. Rather, the agreement appears only to compel Journey's testimony in federal court at the behest of federal prosecution.

In addition, we find no *Crawford* violation here. In *Crawford v. Washington*, the United States Supreme Court held that the Sixth Amendment prohibits the use of testimonial hearsay statements against criminal defendants unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination. 541 U.S. at 68. However, the present case does not deal with the use of testimonial hearsay. Rather, the violation Williams appears to be complaining of is a Confrontation Clause violation on the grounds that he was unable to effectively cross-examine Journey regarding the plea agreement. However, even when taken as a Confrontation Clause argument, the argument must still fail.

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to cross-examine witnesses testifying against him.

See, e.g., Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). This right is not unlimited, however. *Delaware v. Van Arsdall*, 475 U.S. 673, 679-80, 106 S.Ct. 1431, 1435-36, 89 L.Ed.2d 674 (1986). Indeed, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id., quoting Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (*per curiam*).

In the present case, although Williams argues that he was prevented from fully and effectively cross-examining Journey because he did not have a copy of the actual plea agreement, the trial judge effectively *told* Williams what was in the agreement. Thus any failure to produce the actual document was harmless. *See, Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 24 A.L.R.3d 1065, 17 L.Ed.2d 705 (1967) (Even constitutional errors are subject to harmless error rule where such errors are harmless beyond a reasonable doubt). To the extent that Journey had any motivation to testify for the Commonwealth, that motive was revealed on cross-examination when defense counsel questioned Journey about the agreement.

Expert Testimony

We now address Williams's third and final argument, that a retrial is warranted due to the testimony of the Commonwealth's expert, Dr. Lowell Kennedy. Williams argues that it was error to allow Kennedy's testimony (1) because it was based upon suppressed evidence; and (2) because it relied upon an erroneous standard of care.

Williams first argues that Lowell's testimony should have been excluded because his opinion was tainted by his prior review of materials for the first trial of this case which were held by the Supreme Court to be the fruit of an improper warrantless search in violation of the Fourth Amendment. *Williams v. Commonwealth*, 213 S.W.3d 671 (Ky. 2006). Apparently, in the first trial of this case, state investigators raided the 1st Care Clinic without a warrant, under the assumption that they had the authority to do so under the former KRS 311.605(2). Numerous patient files and other documents were taken from the clinic. At the first trial, Kennedy testified for the Commonwealth and based his opinions on patient files and other documents he reviewed from the raid.

We review a trial court's ruling on whether to admit expert testimony for abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "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). In the present case, Williams's counsel objected to Kennedy's testimony on the ground

that his testimony was based upon suppressed evidence and a hearing was held outside the jury's presence to determine whether Kennedy should be allowed to testify. During the Commonwealth's examination of Kennedy at the hearing, the prosecutor asked Kennedy if he could answer questions about the present case and separate those questions from his knowledge from having previously reviewed the suppressed files. Kennedy responded that he was present to answer questions and nothing else. When asked whether he could answer questions about the informants without referencing their files, Kennedy testified that he could not even remember what was in their files or whether he even reviewed them before the last trial. The trial judge, apparently not satisfied solely by the questions posed by counsel, also questioned Kennedy as follows:

> Court: Doctor, you testified in this case before, correct?
> Kennedy: Yes.
> Court: And you gave opinions that were based upon review of files that were later determined to be illegally obtained. You understand that?
> Kennedy: Yes.
> Court: Are you able to set aside that knowledge that you gained through those files and not refer to that knowledge, not base any opinion that you give here today on
>
> any information that was gained from those files.
> Kennedy: I am able to do that.

As such, it is clear that Kennedy stated he could testify without reference to the tainted files and could form an opinion without basing that opinion on those files.

However, Williams argues, based upon *Dickerson v. Commonwealth*, 174 S.W.3d 451, 466 (Ky. 2005), that it was impossible to "unring the bell" and that Kennedy could not "forget" the contents of the files he had already reviewed in the case.

However, Williams misunderstands the law on this point. Kennedy was an expert witness –not a member of the jury; therefore the same concerns do not apply. The trial court need only have found that the expert was qualified under Kentucky Rule of Evidence ("KRE") 702 and was able to answer the questions without basing his testimony upon the suppressed evidence. We find that the trial court did not abuse its discretion in allowing Kennedy to testify as Kennedy's responses to questions during the hearing indicated that he was able to testify without relying upon information in the suppressed files.

We next address Williams's other argument concerning Kennedy's testimony, namely, that his testimony was based upon an improper standard of care. Williams argues that it was error for Kennedy to rely on the Model Guidelines for the Use of Controlled Substances in Patient Treatment (as adopted by the Kentucky Board of Medical Licensure on March 22, 2001). Williams argues that the reliance on the Model Guidelines rendered Kennedy's testimony "irrelevant" and that the testimony was "more prejudicial than probative."

However, this argument is not well taken. To begin, the jury was instructed to find Williams guilty of prescribing a controlled substance if he had "no legitimate medical purpose" to write the prescriptions. KRS 218A.1404. Kennedy's testimony, which was based in part upon the Model Guidelines, tended

to "assist the trier of fact to understand the evidence or to determine a fact in issue," specifically whether Williams had a legitimate medical purpose. KRE 702. Indeed, the testimony was of the type that would tend to help the jury understand matters not within their "common knowledge," such as when, how, or why controlled substances are generally prescribed. *See, Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 680 (Ky. 2005). Moreover, there was no danger that the jury would assume that the Model Guidelines were the law as Kennedy clearly stated in his testimony that the Model Guidelines did not represent the law. Instead, Kennedy testified that the guidelines were not standards which had to be followed but were merely advisory.[2] Accordingly, we find that the trial court did not abuse its discretion in allowing Kennedy to testify based upon the Model Guidelines where the ultimate question before the jury was whether Williams had a legitimate medical purpose. KRS 218A.1404.

Accordingly, we affirm the judgment and sentence of the Lewis Circuit Court.

ALL CONCUR.

[2] Moreover, as Kennedy himself wrote the Model Guidelines in Kentucky, the Guidelines express his own views on the proper way to use controlled substances for pain management.

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