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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000969-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 09-CR-000329

LLOYD W. HAMMOND

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, DIXON, AND JONES, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Jefferson Circuit Court's denial of the Commonwealth's renewed motion to introduce prior statements of a deceased witness under the forfeiture by wrongdoing exception to the hearsay rule set forth in Kentucky Rules of Evidence (KRE) 804 (b)(5). Based upon the

following, we reverse the decision of the trial court and remand this case with instructions to allow introduction of the statements.

BACKGROUND INFORMATION

In June 2006, intruders unlawfully entered the home of Troya Sheckles and murdered William Sawyers. A few hours later, Terrell Cherry was found shot and killed in a parked car. Two weeks later, Kerry Williams was shot and killed as he stood on his porch talking to visitors. Appellee, Lloyd Hammond, was arrested and charged with the murders of Sawyers and Cherry, as well as the other crimes that occurred during the burglary of Sheckles's home. Evidence was developed identifying Appellee as the gunman who killed Williams. There was also evidence indicating that shortly after the Sheckles burglary, Appellee murdered Cherry to keep him from testifying about both the Williams and Sawyers murders.

It was initially determined that the Williams murder case would be tried separately from the Sawyers–Cherry murders and the related charges connected with the Sheckles burglary. Before either case could be tried, however, the Commonwealth moved to dismiss all charges without prejudice. The charges relating to the Sawyers and Cherry murders were dismissed because Troya Sheckles, the only eye witness to the Sawyers murder, could not be located. The Williams murder case was dismissed when a key witness asserted his Fifth Amendment privilege not to testify. Sheckles was later found and Appellee was

reindicted. Before the case could be brought to trial, however, Sheckles was shot and killed as she sat in a park near her home.

Appellee was subsequently reindicted on all of the previously dismissed charges. The trial of Indictment 09–CR–000329 (Sawyers–Cherry murders and related crimes) ended in mistrial when a potential juror disrupted the proceedings. Over Appellee's objection, the case was rescheduled for trial and consolidated with the Williams murder, Indictment 09–CR–002661. A joint trial on all charges was held, resulting in Appellee's conviction on all counts.

The Appellee then appealed his conviction. In *Hammond v. Commonwealth*, 366 S.W.3d 425 (Ky. 2012), the Kentucky Supreme Court held that the joinder of the Williams murder with the Sawyers and Cherry murders and other crimes arising from the Sheckles burglary was improper and that the admission of Sheckles's out-of-court statement to police under the doctrine of forfeiture by wrongdoing was in error. As to the out-of-court statement, the Court opined as follows:

Upon retrial, the Commonwealth bears the burden of proving forfeiture by wrongdoing and we trust that if the issue arises upon remand, the Commonwealth will properly establish at a *Parker* hearing the authenticity and reliability of the documents upon which it relies, and that the evidentiary hearing will be conducted so as to provide an adequate record of the evidence for appellate review. If upon retrial, the forfeiture by wrongdoing standards as discussed herein are met, Sheckles's statement would be admissible in the Sawyers and Cherry proceeding.

Upon remand, indictments 09-CR-000329 and 09-CR-002661 were severed for trial. The Commonwealth moved the trial court to, once again, admit Sheckles's statements. The trial court conducted an evidentiary hearing on the issue and denied the Commonwealth's motion, holding as follows:

This Court originally ruled that the Decedent's statements were admissible at Defendant's trial under the doctrine of forfeiture by wrongdoing. (Citation omitted.) The Court found that because Defendant had procured Decedent's absence from trial by participating in the events that led to her murder, he waived his ability to confront her as a witness at trial.

This Court took great pains to research the law on the issue, analyze voluminous filings, seek input from counsel for the parties, and render a detailed, 16-page Opinion. (Citation omitted.) The decision to play the Decedent's statements at trial was not taken lightly, and only after many hearings in which substantial evidence was presented. Nonetheless, the Kentucky Supreme Court reversed this Court finding, in part, that this Court's findings were "not based upon substantial evidence," despite noting that the Court relied upon eighty-four pages of documents, including Decedent's two statements to police, transcripts of interviews of witnesses to the Decedent's murder, 911 transcripts, arrest reports, autopsy records, aerial photos of the shooting scene, and jail visitor logs.

At the April 29, 2013, hearing, the Commonwealth presented two witnesses, Detectives Roy Slalvey [sic] and Keith Roberts. Both merely read the exact same transcripts of witness interviews on which this Court previously relied. The Commonwealth also produced the same documents it had provided to the court; all 20 exhibits were largely confined to investigative letters from police summarizing interviews of other witnesses. None of those witnesses were called to the stand by the Commonwealth or offered any testimonial evidence. At the May 1, 2013, hearing,

Defendant attempted to introduce documents without testimonial evidence, which is precisely the procedure of which he complained on appeal.

In its brief in support of its motion, the Commonwealth argued that it only has to produce police detectives to authenticate some of the documents this Court has already reviewed in order to introduce Decedent's recorded testimony at trial. The Commonwealth claimed that if detectives simply read into the record a summary of an interview with another person, that interview becomes evidence reliable enough for the Court to consider. It contended that it is not required to produce live, eyewitnesses to the events surrounding Decedent's murder. It also stated that the witnesses interviewed by the detectives have demonstrated some credibility by coming forward in a case where a witness was allegedly killed because of her upcoming testimony.

In his opposition brief, Defendant responded that the admission of the Decedent's statement violates his constitutional right to cross-examine her. He complained that both detectives who testified at the April 29 hearing relied almost exclusively on the statements of others. This hearsay testimony persists in depriving Defendant of his ability to cross-examine a live witness, i.e., someone with actual first-hand knowledge of the events in question. Defendant emphasized that the witnesses interviewed by the detectives have serious credibility problems. Many of those witnesses are felons, and they possess self-interested motives to craft their testimony to achieve better deals from the Commonwealth on their own crimes. These witnesses for Commonwealth also have memory problems, in addition to their substantial credibility issues, and most of them have changed their testimony during the course of these proceedings. None of them provided information to the detectives until 2011, two years after the Decedent's murder and five years after the murders with which Defendant is charged. In light of the substantial amount of rumors about this case on the street, the Defendant said that witnesses interviewed by the

detectives may be merely relaying gossip versus providing factual information within their knowledge. The Defendant claimed it is his right to question the reliability of their purported statements, and he cannot do so unless they testify. Because the Commonwealth did not produce these witnesses, Defendant argues that it has not met its burden to allow the Decedent's testimony under the doctrine of forfeiture by wrongdoing.

Alternatively, Defendant requests this Court review the testimony in another case. *Commonwealth v. Steven Pettway*, 11CR3052, wherein that Defendant was recently convicted of murdering the Decedent. On May 21, 2013, the Commonwealth joined this request. Both parties acknowledged that a large portion of that trial would be irrelevant to the issue before this Court. Neither party delineated the portions of the trial it wished the Court to review, nor did either provide the Court any such testimony.

This Court is in the unfortunate position of having the same information it already possessed when it made its prior ruling. That information solidly supports allowing Decedent's testimony. As this Court stated clearly in its prior Opinion, Decedent was the only witness to one of the murders; Defendant knew Decedent's identity and that the Commonwealth could not proceed without her because it dismissed one of the cases earlier in the proceedings when she could not be located; Defendant knew Decedent would be killed and either actively participated in the murder or acquiesced to it for his own benefit; Defendant had a motive to murder; Defendant was connected to the shooter by his brother; and the Decedent's testimony was reliable. Nonetheless, that Opinion was reversed, and the Court cannot reissue it solely upon the same, substantial, credible, and well-founded evidence. The Kentucky Supreme Court surely did not send this case back for a new trial solely to allow two detectives to read to the Court the same interview summaries the Court had already read. Certainly, additional evidence was anticipated to make the evidence more reliable. The Commonwealth did not provide it. Alluding to testimony in another trial that did not involve

Defendant, and that was not provided by testimony at the evidentiary hearing, is insufficient. Accordingly, the Commonwealth's renewed motion will be denied.

After this decision by the trial court, the Commonwealth brought this appeal.

STANDARD OF REVIEW

In reviewing evidentiary issues before the trial court, we review for an abuse of discretion. *Springfield v. Commonwealth*, 410 S.W.3d 589, 592 (Ky. 2013).

We review issues of law *de novo*. *Fugett v. Commonwealth*, 250 S.W.3d 604, 616 (Ky. 2008). With these standards in mind we review the decision of the trial court and the Kentucky Supreme Court's directive on remand.

DISCUSSION

In this appeal, the Commonwealth argues that a proper evidentiary hearing was conducted by the trial court as required by the Kentucky Supreme Court and that there was substantial evidence warranting admission of Scheckles's statements under the forfeiture by wrongdoing exception. KRE 804(b)(5).

As set forth above, the Kentucky Supreme Court held that the trial court had erred in rendering an opinion on the issue of the admission of the testimony of Scheckles without first having some form of authentication of the evidence to support the finding that the statements should be introduced. The trial court conducted a hearing at which the Commonwealth presented two Louisville Metro Police Detectives who provided authentication for the documents submitted to the trial court and who participated in the interviews of witnesses whose testimony was used to establish the exception to the hearsay rule brought forth by the

Commonwealth. The Commonwealth also provided evidence in the form of self-authenticating certified court records and jail visitor logs which were not objected to by defense counsel. Defense counsel was given an opportunity to impeach the credibility of the witnesses through the self-authenticating material, as well.

KRE 804(b)(5) provides that “[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness” is “not excluded by the hearsay rule if the declarant is unavailable as a witness.” This includes unavailability due to death. KRE 804(a)(4). The reason behind this rule is that “a criminal defendant should not profit from ensuring that the declarant is unavailable to testify[.]. . . [O]ne who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.” *Parker v. Commonwealth*, 291 S.W.3d 647, 667-668 (Ky. 2009) (quoting *Davis v. Washington*, 547 U.S. 813, 833, 126 S.Ct. 2266, 2280, 165 L.Ed.2d 224 (2006)).

The trial court recounted the testimony by the detectives as simply a reading into evidence of the same interviews and evidence she had considered in making the decision which the Kentucky Supreme Court had regarded as lacking in foundation under *Parker*. The detectives, however, provided authentication for the reports which they had compiled and for interviews with witnesses in which they had participated. The hearing also allowed defense counsel the opportunity to cross-examine their statements so as to provide due process.

In this case, the Kentucky Supreme Court specifically set forth a directive to the trial court in its opinion reversing the original decision. The Court stated that the trial court had relied on information which had not been authenticated in ruling on the admission of the statements. The Court also provided that, upon remand, the trial court should conduct a *Parker* hearing wherein the documents upon which the decision was based could be put into evidence and authenticated by someone (a police officer) who had either created the documents or knew of the creation of the documents. The trial court had such a hearing and found that the evidence supported the decision that the statements could be admitted; however, it misinterpreted the Kentucky Supreme Court's directive and found that a document being read into the record was not sufficient to satisfy the Court's requirement of a hearing. We disagree with the trial court's decision on this issue. We also disagree with the Appellee that the Commonwealth is seeking an advisory opinion.

In *Parker*, it was required that a hearing be held where the defense could either impeach or rebut the authenticity of the evidence. The Kentucky Supreme Court instructed the trial court that such a hearing was necessary in order for the defendant to have due process in this matter. The Court also provided guidance as to what would be an acceptable hearing in order for the *Parker* requirements of authentication to be met. While the trial court held such a hearing and such requirements were met, it nonetheless did not determine that the statements provided authentication of the documents because it determined that such was not

what the Supreme Court had directed it to do. In fact, it was exactly what the Supreme Court explained was required by the holding in *Parker*.

Therefore, we reverse the trial court's decision finding that the Commonwealth had not provided authentication regarding the witness's unavailability and to not admit the testimony of Troya Sheckles. We also remand this case to the trial court so that the testimony may be admitted in future proceedings in this case.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dorilee Gilbert
Louisville, Kentucky

BRIEF FOR APPELLEE:

J. David Niehaus
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