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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000965-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BARRY WILLETT, JUDGE
ACTION NO. 13-CR-001323

RICHARD L. FELDHOFF;
CHRISTOPHER YOPP; AND
NICHOLAS YOPP — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, KRAMER, AND VANMETER, JUDGES.

KRAMER, JUDGE: The Commonwealth of Kentucky appeals the Jefferson Circuit Court's order dismissing the indictment against Richard L. Feldhoff, Christopher Yopp, and Nicholas Yopp with prejudice. After a careful review of

the record, we reverse because the circuit court abused its discretion in dismissing the indictment with prejudice, and we remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Richard L. Feldhoff, Christopher Yopp, and Nicholas Yopp (collectively, the "Appellees,") were indicted on one count of receiving stolen property valued over $500.00 but less than $10,000.00, after they allegedly stole jewelry. The uniform citations that were issued against the Appellees provided that police were called after $2,000.00 of the victim's jewelry went missing from her room while the Appellees were cleaning her carpet; that Christopher, who was in charge at the time, went to the truck and retrieved the jewelry; and that all property was returned to the victim.

The circuit court entered an order setting jury trial and, regarding the topic of pretrial hearings the order stated, *inter alia*, as follows: "The court has intentionally not scheduled a pretrial conference in this case. The Commonwealth shall produce discovery no later than thirty (30) days after arraignment." However, the order also stated, in regard to discovery, that "[d]iscovery shall be conducted pursuant to JRP[1] 803 and will be strictly enforced."[2]

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[1] Jefferson County Rules of Practice and Procedure.

[2] JRP 803 provides, in pertinent part:

> A. The Commonwealth may provide discovery to the Defendant on the day of arraignment, but shall provide no later than ten (10) days prior to the first pretrial conference, the following:
> 1. Written or recorded statements or confessions made by the Defendant(s), or copies thereof, that are known by the attorney for the Commonwealth or its agents [RCr 7.24(1)].
>
> * * * *

One document filed in the circuit court was the Commonwealth's Response to the Court's Order of Discovery. In that response, the Commonwealth acknowledged it was "aware of a 911 recording," as well as photographs and an in-car video, which it stated would "be provided upon receipt by the Commonwealth."

On July 18, 2013, Christopher Yopp moved to compel discovery. Specifically, he requested the disclosure of "further exculpatory or discoverable evidence." In that motion, Christopher's defense counsel also alleged: "As of this date, the undersigned has knowledge, based on the Commonwealth's Response to the Court's Order of Discovery, that the Commonwealth is aware of a 911 recording, photographs, and an in-car video. This evidence has not yet been disclosed to the defendant as of this date."[3] On July 24, 2013, the Commonwealth responded to the motion to compel discovery, stating that

> [t]here is no in[-]car video, 911 recording or photographs. [In t]he Initial Discovery in this case [that] was filed with this Court on June 19th, 2013, the Commonwealth indicated additional discovery may be forthcoming based on the citation written by Officer Shannon Reccius which placed checkmarks in the box on the citation for in[-]car video, fingerprints and

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> 4. The statements(s) of any witness who may be called as a witness for the Commonwealth, if the statement is in the form of a document or recording in its possession which relates to the subject matter of the witness' testimony and which (i) has been signed or initialed by him/her, or (ii) is or purports to be a substantially verbatim statement made by him/her [RCr 7.26].

[3] In addition to the Commonwealth's Response to the Court's Order of Discovery stating this evidence existed, there is also a uniform citation against Appellee Feldhoff which states that there are photographs and an in-car video.

> photographs. At the time Discovery was filed, Officer Shannon Reccius was unable to be reached. Since the initial filing of Discovery the Commonwealth was able to get in contact with Officer Shannon Reccius to verify whether or not such evidence existed. Officer Shannon Reccius indicated that no such evidence existed.

Also on July 18, 2013, Christopher filed a separate motion for exculpatory evidence requesting, *inter alia*, that the Commonwealth "[s]tate whether any evidence or materials have been destroyed in this case." On July 24, 2013, the Commonwealth responded to that request, stating "[n]o evidence has been destroyed in this case to the knowledge of the Commonwealth."

Christopher thereafter moved to dismiss the indictment due to prosecutorial misconduct. In his motion, Christopher contended that although the Commonwealth responded to his motion to compel discovery by stating that there was no 911 recording in this case, an investigator in the Public Defender's office was able to obtain a copy of the 911 recording from the Louisville Metro Police Department. The investigator also sought to obtain any in-car videos from the Louisville Metro Police Department, but the investigator was advised that there was no in-car video.

Christopher alleged in his motion to dismiss that during the hearing on his motion to compel, the prosecutor again stated that the 911 tape and the other items listed in the motion to compel did not exist. Christopher asserted that the prosecutor

> represented to the Court that she had confirmed the non-existence of these items with the arresting officer, but

> that she was initially mistaken about their existence because she was unable to get in touch with the officer when discovery was originally filed. . . . [The prosecutor] further stated that the reason for her mistaken belief in the evidence's existence was that the citation indicated the evidence existed, but that once she was able to speak with the officer, she was able to confirm that it did not exist. . . . Significantly, in discussing her purported interaction with the officer, [the prosecutor] repeatedly referred to the officer as "him." It should be noted that the officer is, in fact, a female.

Christopher contended that after the prosecutor asserted in the hearing that the 911 tape did not exist, his defense counsel revealed that the defense had independently obtained a copy of the 911 tape that the prosecutor not only had represented was non-existent, but that the prosecutor had represented was confirmed to be non-existent by the officer. After defense counsel made this revelation at the hearing, Christopher alleged the prosecutor "changed her story" and said that something had occurred during training where all of her computer files and everything she had digitally about the case on her computer had been deleted. Defense counsel argued at the hearing that the alleged loss of files "raises serious questions as to what else could have been erased regarding this case, what other evidence may exist that we do not have knowledge of." The prosecutor responded, "[t]here is no more evidence out there. . . . [E]verything I had I turned over and any mistake in that was inadvertent." Christopher's defense counsel moved for a dismissal based on the prosecutor's failure to provide the 911 call to the defense, as well as the issue concerning potentially lost evidence. The attorneys for Richard Feldhoff and

Nicholas Yopp joined in the motion to dismiss. Christopher contended that the next day, the prosecutor filed the 911 recording as supplemental discovery.[4]

The Commonwealth opposed the motion to dismiss. By the time the Commonwealth's opposition to the motion to dismiss was filed, the original prosecutor on this case had resigned, and a new prosecutor was assigned to the case. Submitted with the Commonwealth's opposition to the motion to dismiss

[4] The Commonwealth provided a transcription of the 911 recording in the record. Upon reviewing it and comparing it to the audio recording of the 911 telephone call, we find it to be an accurate transcription. The transcription is as follows:

Operator: 911 Operator Davis, what's the location of the emergency?
Caller: Yes, sir. I . . . I want to report a theft.
Operator: Okay, you can do a theft report over the phone [inaudible] if you want to ma'am.
Caller: Okay, well what it is, is I had a cleaning cre . . . crew here . . .
Operator: Um-hum.
Caller: . . . uh, to clean up my house. And they stole, uh, the cleaning crew stole my . . . my jewelry.
Operator: Okay.
Caller: And they claim they don't have it, but they do, because I know what I . . . I know my jewelry. I know what I have.
Operator: Okay.
Caller: It's like I don't have anything, but I know what I've got.
Operator: Are they there now?
Caller: Yes, sir. I won't . . . I won't let them leave. And I've also . . . I already called the company . . . the . . . the head company. But they still say they don't have it, but where is it? Nobody's here but me and them.
Operator: Hold on just a moment, please.
Caller: Okay. Thank you.
Operator: Just stay on the line. What's your address?
Caller: [Redacted].
Operator: [Repeats address].
Caller: Yes, sir.
Operator: And your name, ma'am?
Caller: [Redacted].
Operator: What's your, uh, cell phone number?
Caller: [Not transcribed.]
Operator: Is that a house or an apartment, ma'am?
Caller: It's a house.
Operator: Okay, I'll have an officer come out there, okay?
Caller: Alright, thank you.
Operator: Alright, thank you. Bye-bye.

were two affidavits: One from a paralegal in the Commonwealth Attorney's Office; and one from a police officer with the Louisville Metro Police Department.

The paralegal's affidavit stated, in pertinent part, as follows:

> 3. That on or about March 22, 2013, I requested a copy of any 911 recording(s) related to this case. Around the same time, I also requested copies of any police photographs or in-car video(s) related to the case.
>
> 4. That I was subsequently provided with a copy of the 911 recording and CAD report. I was also advised by the Louisville Metro Police Department that no police photographs or in-car video existed.
> 5. That I placed the 911 recording in [the prosecutor's] electronic folder.
>
> 6. That around June 19, 2013, I was advised that because [the prosecutor's] electronic folder on the office network had been inadvertently . . . deleted, her copy of the 911 recording was gone.
>
> 7. That on June 20, 2013, I obtained a new copy of the 911 recording and CAD report and placed them in [the prosecutor's] electronic folder on the office network. I emailed that same day to notify her that I had done so.
>
> 8. At no time did I communicate to [the prosecutor] that no 911 call existed in this case.

The affidavit from Louisville Metro Police Department Officer Shannon Reccius provided, in pertinent part, as follows:

> 2. That on January 12, 2013, I was involved in the arrest of the defendants.
>
> 3. That there was [a] 911 call that led to my being dispatched in relation to this case.
>
> 4. That I have no independent recollection of having any specific conversation with [the prosecutor] regarding the

> existence of a 911 recording, in[-]car video, or photographs in this case prior to September 11, 2013. However, because there was a 911 recording, if she had asked I would have told her such recording existed. Because I am aware of no in[-]car video or photographs related to this case, if asked, I would have told her that those do not exist.
>
> 5. That on October 4, 2013, I met with [a new prosecutor on the case,] Assistant Commonwealth's Attorney Dorislee Gilbert for the purpose of determining whether there were any documents or other evidence that had not already been provided in discovery. Ms. Gilbert copied my typewritten "investigative report" from my file. I am not certain whether I provided a copy of this report to the Commonwealth Attorney's Office previously.
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> 6. That I also advised Ms. Gilbert that on January 12, 2013, Defendant Christopher Yopp, while I was investigating to discover what happened . . . told me that he did not take the jewelry, that he did not know who did, but that because he was the boss, he would take responsibility for it. I do not believe I had previously disclosed this statement to anyone at the Commonwealth Attorney's Office.

The circuit court dismissed the indictment against all the defendants with prejudice. The court reasoned:

> Throughout the course of this case, shifting explanations were being offered for the non-production of the requested evidence. First, it exists. Second, no such evidence existed. Third, if it existed, it was lost when the computer hard drive failed. [The original prosecutor] claimed she was informed by Officer Reccius that the evidence did not exist. Officer Reccius does not recall this conversation, but stated she would have told her such evidence existed if asked. Just as troubling is the fact that [the original prosecutor] knew these files were deleted in April, 2011, yet did nothing to bring this dilemma to the Court's attention until the September hearing. [The original prosecutor] revealed this

> information only after being confronted with the results of the independent investigation.
>
> [The original prosecutor] is in violation of RCr 7.24. Furthermore, there is a possibility that evidence pertinent to this case has been lost. Taken together, this outrageous conduct calls for the extreme remedy of dismissal.

The Commonwealth now appeals, contending that: (a) the circuit court lacked authority to dismiss the indictment absent a showing of prejudice; (b) dismissal was not warranted for violation of discovery rules; (c) dismissal was not warranted because of [the original prosecutor's] statements; and (d) even if dismissal was appropriate, dismissal with prejudice was improper.

II. STANDARD OF REVIEW

We review a circuit court's decision to dismiss an indictment for an abuse of discretion. *See Commonwealth v. Baker*, 11 S.W.3d 585, 590 (Ky. App. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

III. ANALYSIS

In its four claims brought on appeal, the Commonwealth essentially alleges that the circuit court abused its discretion in dismissing the indictment with prejudice.

> The Kentucky Supreme Court has stated that the Kentucky Constitution provides for the separation of powers:

> The power to define crimes and establish the range of penalties for each crime resides in the legislative branch. The power to charge persons with crimes and to prosecute those charges belongs to the executive department, and by statute, is exercised by the appropriate prosecuting attorney. The power to conduct criminal trials, to adjudicate guilt and to impose sentences within the penalty range prescribed by the legislature belongs to the judicial department.

Gibson v. Commonwealth, 291 S.W.3d 686, 689–90 (Ky. 2009). Further, "subject to rare exceptions usually related to a defendant's claim of a denial of the right to a speedy trial, the trial judge has no authority, absent consent of the Commonwealth's attorney, to dismiss, amend, or file away *before trial* a prosecution based on a good indictment." *Gibson*, 291 S.W.3d at 690 (internal quotation marks omitted) (emphasis added).

> There are a variety of situations which may result in a dismissal of a criminal case under circumstances which, against the wishes of the Commonwealth, preclude further adjudication and are, in effect, a dismissal "with prejudice." These include the violations of the right to a speedy trial and the mistrials that occur after jeopardy attaches. In *Commonwealth v. Baker*, [11 S.W.3d at 590], our Court of Appeals recognized that "outrageous government conduct could taint evidence irrevocably, or prejudice a defendant's case on the merits such that notions of due process and fundamental fairness would preclude reindictment."

Gibson, 291 S.W.3d at 690–91. If the Commonwealth has refused to comply with a discovery order entered in accord with RCr[5] 7.24(9), and the refusal resulted in severe prejudice, a circuit court may dismiss the criminal indictment. 8 Leslie W. Abramson, *Kentucky Practice—Criminal Practice and Procedure* § 21.73 (2011).

[5] Kentucky Rules of Criminal Procedure.

> Pursuant to RCr 7.24(9), the circuit court may sanction a party in any manner that is "just under the circumstances."
> The Supreme Court in *Gibson* concluded that, under the circumstances of that case, it was
>
> > not within the province of the judicial branch of our government to grant a request to designate the dismissal "with prejudice" where [the defendant] made no claim of denial of her right to a speedy trial, of prosecutorial misconduct so outrageous as to irrevocably taint the case against her, of double jeopardy, or of any other deprivation of rights which, under [statute] or under recognized principles of Constitutional law, forecloses a future attempt to prosecute her.
>
> *Gibson*, 291 S.W.3d at 691.

Commonwealth v. Grider, 390 S.W.3d 803, 817-18 (Ky. App. 2012).

> Kentucky Rules of Criminal Procedure 7.24(9) provides:
>
> > If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or an order issued pursuant thereto, the court may direct such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as may be just under the circumstances.
>
> As noted in *Grider*, "[i]f the Commonwealth has refused to comply with a discovery order entered in accord with RCr 7.24(9), and the refusal resulted in severe prejudice, a circuit court may dismiss the criminal indictment." *Grider*, 390 S.W.3d 803, 817-18 (citing 8 Leslie W. Abramson, *Kentucky Practice—Criminal Practice and Procedure* § 21.73 (2011)). According to RCr 7.24(9), the

circuit court may sanction a party in any manner that is "just under the circumstances."

The circuit court's order setting jury trial stated, *inter alia*, as follows: "The court has intentionally not scheduled a pretrial conference in this case. The Commonwealth shall produce discovery no later than thirty (30) days after arraignment." However, the order also stated, in regard to discovery, that "[d]iscovery shall be conducted pursuant to JRP 803 and will be strictly enforced." JRP 803 states, in pertinent part, that the Commonwealth must provide discovery to the defendant no later than ten days prior to the first pretrial conference. Due to the apparently conflicting deadlines to produce discovery, the Commonwealth should have asked the court to clarify its order. Nonetheless, the Commonwealth ultimately produced the 911 recording in September 2013, after defense counsel pointed out in court that the recording existed. This was one and a half months before trial. The Commonwealth argues that, contrary to Appellees' assertion, the disclosure of the 911 recording was not governed by RCr 7.24, but by RCr 7.26, which provides, in pertinent part, as follows:

> Except for good cause shown, not later than forty-eight (48) hours prior to trial, the attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which . . . (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.

RCr 7.26(1). We agree with the Commonwealth, and hold that pursuant to RCr 7.26(1), the Commonwealth had until forty-eight hours prior to trial to turn over the 911 recording. Therefore, the circuit court abused its discretion in dismissing the indictment when the Commonwealth did not turn over the 911 recording earlier.

Regarding Christopher's incriminating statement, it was required to be produced in discovery pursuant to RCr 7.24(1), which provides: "Upon written request by the defense, 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 . . . ." The Commonwealth turned Christopher's incriminating statement over in early October 2013, which was approximately one month prior to trial. Thus, the Appellees cannot prove that they were severely prejudiced by the delay in turning over the statement, particularly considering there remained one month before trial. Consequently, because there was no severe prejudice, the circuit court had no authority to dismiss the indictment on this basis, *see Grider*, 390 S.W.3d at 817-18 (citing 8 Leslie W. Abramson, *Kentucky Practice—Criminal Practice and Procedure* § 21.73 (2011)), and it abused its discretion in doing so.

We note that the trial court believed that the original prosecutor in this case was dishonest and not forthcoming with discovery. The prosecutor in question may, therefore, be subject to sanctions. However, dismissing the indictment with prejudice is not an appropriate sanction in this case. The trial

court made no reference to the Appellees' being prejudiced by the slight delay in the production of discovery and we discern none.

Accordingly, the order of the Jefferson Circuit Court is reversed and the case is remanded for further proceedings.

ALL CONCUR.

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