

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001209-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NOS. 13-CR-00973

KIONTAE SHARP

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: J. LAMBERT, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Commonwealth of Kentucky brings this interlocutory appeal from a June 24, 2014, Order of the Campbell Circuit Court granting Kiontae Sharp's motion in limine to exclude videotape recordings allegedly depicting him selling controlled substances to a confidential informant. We affirm.

Sharp was indicted by a Campbell County Grand Jury upon four counts of trafficking in a controlled substance and with being a persistent felony offender in the second degree. The indictment was the result of a series of alleged controlled drug buys between Sharp and a confidential informant (informant). The informant was wired with a videotape recorder when he allegedly purchased drugs from Sharp.

Shortly before the scheduled trial, the Commonwealth learned the informant intended to invoke his Fifth Amendment's privilege against self-incrimination when called to testify. As a result, the Commonwealth filed a motion requesting the circuit court to determine whether the informant would be permitted to invoke such privilege at trial. Sharp then filed a motion in limine to exclude the videotape recordings of the alleged controlled drug buys between Sharp and the informant. Sharp argued that his right to cross-examine the informant pursuant to the Sixth Amendment's Confrontation Clause would be violated if the videotape recordings were introduced into evidence but the informant was permitted to invoke his Fifth Amendment privilege and avoid testifying at trial.

By order entered June 24, 2014, the circuit court ruled that the informant was entitled to invoke his Fifth Amendment privilege against self-incrimination. The court also granted Sharp's motion to exclude the videotape recordings of the alleged controlled drug buys from introduction into evidence at trial. In its order, the court provided the following rationale:

Throughout this case, the Defendant has maintained his innocence. The Defendant argued that he did have contact with the confidential informant (CI) but he never sold the CI a controlled substance. When attempting to determine whether the CI had the right to invoke a Fifth Amendment privilege, the Court allowed the parties to ask the CI questions. The CI testified that during and after each alleged control buy he was not searched by a police officer. He testified that after each controlled buy, he did provide the officers with a controlled substance. The CI testified that he was under the influence of drugs during each alleged controlled buy and did not recall all that happened. However, when asked if he received controlled substance from the Defendant, the CI invoked his Fifth Amendment privilege. When asked if he gave the Defendant money for a controlled substance, he invoked his Fifth Amendment privilege. The attorney for the CI advised the Court if her client was forced to answer these questions, he could be implicated in a new crime. Through the CIs testimony, one could glean that the CI did not purchase a controlled substance from the Defendant, but some other type of criminal activity was taking place. If the video tape [sic] was allowed to be played to the jury, the Defendant would not have an opportunity to elicit testimony that the CI was not searched prior to, or after each alleged controlled buy. He would not be able to tell the jurors that the CI was under the influence of drugs and did not recall the events of the alleged control buys. He would not be able to present his theory of the case that the contact between the CI and him did not involve selling of a controlled substance. In order to explain the contact he had with the CI, the Defendant would be forced to give up his Constitutional right to remain silent.

The Defendant's right to cross examine police officers would be affected. As stated above, the CI claims he was under the influence of drugs and was not fully searched before or after the alleged controlled buys. The Defendant could question the officers about the search of the CI. The Commonwealth has argued that the CI was fully searched during and before each alleged controlled

buy. Without the CI's testimony the Defendant would have no way to show the Officers were mistaken.

June 24, 2014, Order. The Commonwealth then filed this interlocutory appeal.
KRS 22A.020.

The Commonwealth contends the circuit court erroneously granted Sharp's motion in limine to exclude the videotape recordings of the controlled drug buys. Specifically, the Commonwealth complains it was error to conclude that Sharp's right to confront a witness against him under the Confrontation Clause of the Sixth Amendment to the United States Constitution was violated by the informant's invocation of his privilege against self-incrimination pursuant to the Fifth Amendment. The Commonwealth believes the videotape recordings of the controlled drug buys were nontestimonial and, thus, not violative of the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment to the United States Constitution¹ provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]

The scope of the Confrontation Clause was addressed by the United States Supreme Court in its decision of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). In *Crawford*, the Court held that the Confrontation Clause prohibits admission into evidence of testimonial hearsay

¹ The Sixth Amendment applies to the states through the Fourteenth Amendment to the United States Constitution. See *Baker v. Com.*, 234 S.W.3d 389 (Ky. App. 2007) (citations omitted).

unless the witness is “unavailable to testify, and the defendant [has] had a prior opportunity for cross-examination.” *Crawford*, 541 U.S. 36, 54. In Kentucky, hearsay is defined by Kentucky Rules of Evidence (KRE) 801 (c) as a statement “offered in evidence to prove the truth of the matter asserted.” Simply stated, the Confrontation Clause prohibits admission of statements offered to prove the truth of the matter asserted provided the witness is not available to testify at trial and the defendant has not had an opportunity to cross-examine him. *Crawford*, 541 U.S. 36.

The Kentucky Supreme Court has directly addressed this issue and applied the *Crawford* precedent to the recording of a drug transaction by a confidential informant who was unavailable to testify at trial and had not been cross-examined by the defendant. In *Turner v. Commonwealth*, 248 S.W.3d 543 (Ky. 2008), the Court held that where the informant’s recorded statements provide context for the defendant’s statements, such statements serve a valid nonhearsay purpose. *Turner*, 248 S.W.3d 543. In other words, where statements are offered merely to provide context for defendant’s statements, and are not offered for the truth of the matter asserted, the statements do not implicate the Confrontation Clause or *Crawford*. *Turner v. Com.*, 248 S.W.3d 543. However, before concluding that *Turner* is controlling in this case, the exact content of the statements must be analyzed to determine whether the informant’s statements were hearsay or were merely providing context for the defendant’s statements.

As is evident from the court's holdings in *Crawford* and *Turner*, the exact content of the statements is essential to determining whether the recorded statements should be admitted or excluded from evidence under the Confrontation Clause. *Id.* And, to preserve a ruling upon the exclusion of evidence for appellate review, the evidence should be placed into the record either by proffer or avowal. KRE 103(a)(2). Without such proffer or avowal, an appellate court is generally prevented from engaging in any meaningful review of the trial court's ruling excluding the evidence. *Bayless v. Boyer*, 180 S.W.3d 439 (Ky. 2005).

In this case, we have searched the record and have been unable to locate the videotape recordings of the alleged controlled drug buys. After having reviewed the record and the tape of the hearing conducted on May 21, 2014, it appears the Commonwealth failed to place the videotape recordings into the record either by proffer or avowal. And, it was the Commonwealth's burden to provide a complete record before this Court. *Chestnut v. Com.*, 250 S.W.3d 288 (Ky. 2008). Here, the Commonwealth simply failed to provide an adequate record for appellate review. Without such a record, we are prevented from reviewing the statements contained on the videotape recordings. Moreover, the facts of this case are unique. The informant in this case refused to answer whether he received a controlled substance from Sharp or provided a controlled substance to Sharp. Rather, the informant invoked his Fifth Amendment privilege when asked both questions. Considering the legal precedent outlined in *Crawford* and the lack of an adequate record for appellate review, we are unable to conclude that the circuit court erred by

excluding the videotape recordings of the alleged drug buys as violative of the Confrontation Clause set forth in the Sixth Amendment to the United States Constitution.

For the foregoing reasons, the Order of the Campbell Circuit Court is affirmed.

J. LAMBERT, JUDGE, CONCURS.

MAZE, JUDGE, CONCURS IN RESULT ONLY.

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