RENDERED: JULY 10, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000198-MR

MARK MCKENZIE — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE WILLIAM A. KITCHEN, III, JUDGE
ACTION NO. 18-CR-00320-002

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND
REMANDING

** ** ** ** **

BEFORE: COMBS AND JONES, JUDGES; BUCKINGHAM,[1] SPECIAL JUDGE.

[1] Retired Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution. Judge Buckingham concurred in this opinion prior to the expiration of his appointment.

COMBS, JUDGE: The Appellant, Mark McKenzie (McKenzie), was convicted of first-degree trafficking in a controlled substance and was sentenced to the maximum term of ten years. On appeal, he contends that his trial was tainted by a discovery violation. After our review, we vacate and remand for a new trial.

McKenzie was indicted by a McCracken County Grand Jury for first-degree trafficking in a controlled substance (>= 2 grams methamphetamine), 1st offense, and for possession of drug paraphernalia.

On April 20, 2018, the trial court entered an order on arraignment on a plea of not guilty and an order of discovery, which provided that:

> Further, it is **ORDERED** that the attorney for the Commonwealth is to do the following:
>
> 1. Disclose to the defendant and counsel the substance of any oral incriminating statements known by the attorney for the Commonwealth to have been made by the defendant to any witnesses. . . .

(Emphasis original.)

The language of the trial court's order mirrors the language of RCr[2] 7.24, which provides in relevant part as follows:

> (1) 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[.]

[2] Kentucky Rules of Criminal Procedure.

On May 10, 2018, the Commonwealth filed a Bill of Particulars, Compliance with Discovery Request, and Motion for Reciprocal Discovery, which provides as follows:

> The Commonwealth files the following Bill of Particulars and Compliance with all discovery requests as follows:
>
> 1. The defendants, Amy Curtain and Mark McKenzie, committed the offenses contained in the indictment on or about January 30, 2018, in McCracken County. On that date, the defendants, acting alone or in complicity with each other, possessed more than 2 grams of methamphetamine with the intent to sell it. The location for the sale was decided during a controlled call from a cooperating witness working with the Sheriff's Office. Defendants were on their way to the location when they were stopped by law enforcement and arrested on outstanding warrants. The defendants also were in possession of a glass pipe used for smoking methamphetamine. When stopped by law enforcement, Defendant Curtain concealed the methamphetamine in her vagina in an attempt to prevent law enforcement from finding it.
>
> 2. The Commonwealth has an open file policy with respect to discovery. Defense counsel may inspect and review the Commonwealth's file in the Commonwealth's possession at the office of the Commonwealth's Attorney located at 301 South 6th Street, Paducah, Kentucky.
>
> 3. The Commonwealth may call the following witnesses at the trial of this case:
>
> a. Det. Brock Martin, MCSD
> b. Dep. Steve Croft, MCSD
> c. Sgt. Jesse Riddle, MCSD

. . . .

> 8. The Commonwealth has reviewed the records in this case and finds no material which is exculpatory within the meaning of Brady v. Maryland, 373 U.S. 83, [83 S.Ct. 1194,] 10 L.Ed.2d 215 (1963), except that which is contained within the file of this case.

However, there is no mention of any incriminating oral statements in the Commonwealth's discovery compliance.

On August 7, 2018, the trial court entered an order setting trial for November 16, 2018, and further providing that any motions for suppression, *in limine*, 404(b) Notices, etc., "must be filed in the McCracken Circuit Court Clerk's Office no later than twelve (12) days prior to the trial date, so that a hearing can be set."

On November 14, 2018 -- two days before trial -- the Commonwealth filed a 404(b) notice of evidence that it intended to offer against McKenzie. KRE[3] 404 provides as follows:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> > (1) If offered for some other purpose, such as proof of motive, opportunity, intent,

[3] Kentucky Rules of Evidence.

> preparation, plan, knowledge, identity, or absence of mistake or accident; or
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.
>
> (c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

On November 14, 2018, the Commonwealth also filed an amended notice,[4] adding an additional paragraph as follows:

> 6. That following Defendant's arrest on the charges in this indictment, Defendant informed Captain Riddle that the methamphetamine had come from a man named James Bradley, and Defendant agreed to cooperate to help detectives catch Bradley. Defendant further admitted to obtaining methamphetamine from James Bradley on numerous occasions, and admitted that he had traveled with Bradley earlier in the day to Louisville in Bradley's vehicle. Defendant further stated that Bradley had purchased two pounds of methamphetamine in Louisville and brought it back to McCracken County to sell. Defendant also stated that he owed Bradley $1250 for the methamphetamine that had

[4] Copies of the notice and amended notice are attached to Appellant's Brief as Appendix "2" and "3," respectively.

> just been seized from him during his arrest. Defendant agreed to meet with Bradley and take him the owed drug debt, and detectives provided him with $1250 in pre-copied buy monies to pay Bradley back the owed drug debt.

On November 16, 2018, the morning of trial, a conference was held in chambers. Defense counsel objected to the Commonwealth's notice on various grounds.[5] Defense counsel also objected to paragraph 6 of the amended notice on grounds that it violated KRE 408(2)[6] and that it was extremely prejudicial under KRE 403.[7] Defense counsel explained that he had just found out this information "yesterday"; he requested a hearing outside the presence of the jury to determine how the conversation had taken place. Defense counsel stated that "we don't have enough information here" and that he was concerned about his client's

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[5] The court sustained McKenzie's objection as to paragraph 2; *i.e.*, that Amy Curtain, McKenzie's co-defendant, "was aware that Defendant frequently sold methamphetamine during that 7-month period" before the indictment.

[6] KRE 408(2) provides in relevant part that:

> Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

[7] KRE 403 provides that "[a]though relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

constitutional rights. Defense counsel explained that from the discovery he had received, it was not clear what had occurred -- what Riddle said to McKenzie, whether Riddle or whether McKenzie had initiated the conversation, or whether *Miranda*[8] was read. The trial court asked defense counsel if he asked Captain Riddle about it. Counsel responded that he was in trial "yesterday" and had not had the time to do so. The court denied defense counsel's request for a hearing, stating that it was "not going to have a discovery hearing. Right now, you don't have a basis for a motion to suppress. . . ." The case proceeded to trial. The jury found McKenzie guilty of first-degree trafficking in a controlled substance and not guilty of possession of drug paraphernalia. Following the penalty phase, the jury recommended the maximum sentence of ten years, and the trial court sentenced McKenzie to ten years.

McKenzie first argues on appeal that he was denied his right to due process and a fair trial because:

> **First**, the amended notice was a late discovery disclosure of inculpatory statements; **second**, the Trial Court erred in failing to hold a required hearing; and **third**, the introduction of [McKenzie's] work as a confidential informant and the facts regarding Bradley's arrest were irrelevant to this case and highly prejudicial.

(Emphasis original.)

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[8] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

McKenzie contends that the late disclosure of the incriminating statement was a discovery violation under RCr 7.24(1), which he preserved by objecting to the amended 404(b) notice and by requesting a hearing. McKenzie also requests palpable error review in the event that parts of his argument are deemed unpreserved, citing RCr 10.26 and KRE 103. McKenzie argues that the Commonwealth's discovery violation precluded him from properly preparing a defense and denied his right to due process and a fair trial because in light of the new information, he only had one day to prepare a defense strategy.

The Commonwealth argues that the issue is not preserved because McKenzie did not raise RCr 7.24 during the conference in chambers. Furthermore, it contends that McKenzie never explicitly made a written request for non-exculpatory statements under RCr 7.24(1), that he failed to properly invoke the rule, and, thus, that he is not entitled to any relief. We disagree. McKenzie did not have to invoke the rule. The trial court's order of discovery incorporated the language of the rule. Arguably, the order of the court effectively superseded the rule and did so by using almost the exact wording of the rule.

The facts of this case are that: the oral incriminating statement was not disclosed until two days before trial by way of an untimely amended notice of 404(b) evidence; that objection was made to the 404(b) notices; and that defense

counsel requested a hearing, which was denied. We conclude, therefore, that the issue has been sufficiently preserved for our review.

The Commonwealth argues that McKenzie waived the issue by failing to request a continuance. We disagree. *Grant v. Commonwealth*, 244 S.W.3d 39, 44 (Ky. 2008), provides that a defendant's objection to the introduction of undisclosed evidence (which was overruled) eliminates the necessity to move for a continuance or to seek any additional relief.

The Commonwealth relies upon *Dixon v. Commonwealth*, 519 S.W.3d 396 (Ky. App. 2017), which is distinguishable on its facts. In *Dixon*, the trial court instructed the Commonwealth to furnish "all discovery required by law." *Id*. at 400. Dixon argued that the trial court erred in allowing the Commonwealth to use evidence it had turned over to defense counsel the day before trial. This Court noted the duty to disclose exculpatory evidence -- whether or not requested by the accused -- citing *Commonwealth v. Bussell*, 226 S.W.3d 96, 100 (Ky. 2007). *Dixon*, 519 S.W.3d at 400 n.4. However, it also noted that Dixon had not argued that the evidence he sought to exclude was exculpatory. This Court explained: "[D]iscovery is a vehicle driven by the defense." *Id.* at 400. Because no request was made under RCr 7.24, there was no ground for reversal.

By contrast, in the case before us, the trial court's order of discovery **specifically ordered** the attorney for the Commonwealth to "[d]isclose to the

defendant and counsel the substance of any oral incriminating statements known by the attorney for the Commonwealth to have been made by the defendant to any witnesses. . . ."

The Commonwealth also contends that McKenzie did receive notice of at least one oral incriminating statement. An officer[9] testified at the February 22, 2018, preliminary hearing[10] that McKenzie had agreed to sell methamphetamine to a cooperating witness in the case. That officer also testified that McKenzie made a post-*Miranda* statement on tape and that "all of his [McKenzie's] statements are either audio and video from the Sheriff's office and then some of them are just audio. . . ." The Commonwealth concedes by way of footnote that the officer incorrectly stated that these statements were recorded, but it nonetheless asserts that his answer provided notice to counsel that his client's statements might be an issue in this case. We disagree. The Commonwealth did not disclose any oral incriminating statements until November 14, 2018, two days before trial and six months after it filed its discovery compliance.

In *Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008), our Supreme Court held in reasoning highly pertinent to the case before us as follows:

[9] Detective Brock Martin.

[10] This hearing occurred in *Commonwealth v. Mark McKenzie*, 18-F-00153, according to the Commonwealth's August 19, 2019, motion to supplement the record filed in this Court.

[N]ondisclosure 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.

. . . .

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. *Wood v. Bartholomew*, 516 U.S. 1, 5-6, 116 S.Ct. 7, 10, 133 L.Ed.2d 1 (1995) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433-444, 115 S.Ct. 1555, 1565-1566, 131 L.Ed.2d 490 (1995)); *see also Weaver v. Commonwealth*, 955 S.W.2d 722, 725-726 (Ky. 1997).

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. . . . 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.

However, before such a determination can be made, we must turn to the question of whether, despite the Commonwealth's violation in failing to turn over Appellant's oral statement, the trial court properly admitted such testimony in rebuttal.

. . . .

> The Commonwealth asserts that even if the failure to disclose the statements was a discovery violation, the statements could be used in rebuttal. However, the duty of discovery imposed by RCr 7.24(1) to disclose incriminating statements does not end at the close of the Commonwealth's case in chief. Rebuttal does not offer a protective umbrella, under which prosecutors may lay [*sic*] in wait. "A cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused cannot be countenanced." *James v. Commonwealth*, 482 S.W.2d 92, 94 (Ky. 1972).
>
> That the statements were Appellant's own is immaterial. The premise underlying RCr 7.24(1) is not only to inform the defendant that *he* has made these statements, as he should be clearly aware, but rather to inform the defendant (and to make sure his counsel knows) that the Commonwealth is aware that he has made these statements. This ensures that the defendant's counsel is capable of putting on an effective defense, as per the intent of the rule.

Id. at 296-97 (footnote omitted). In reversing the conviction, our Supreme Court concluded that the trial court abused its discretion by permitting evidence to be admitted on rebuttal which had been withheld from the defense in violation of the rules.

McKenzie also relies on *Grant v. Commonwealth*, *supra*. In *Grant*, the Commonwealth failed to provide in discovery a recorded telephone call that the appellant had made from jail. The Commonwealth learned about it during trial, but it did not inform the appellant until after he had concluded his case and had testified on his own behalf. On appeal, the appellant argued that allowing the

statement to be admitted into evidence and to be played to the jury violated his discovery rights under RCr 7.24. Our Supreme Court held that:

> RCr 7.24 . . . places the burden on other parties to disclose what is in their possession. Thus, we conclude that merely because Appellant made the statement does not excuse the Commonwealth from the requirement to produce it in discovery to the defense pursuant to RCr 7.24. Any other conclusion would invalidate the provisions of the Rule.

Grant, 244 S.W.3d at 43.

In *Grant*, the Court concluded the conviction must be reversed. "While we cannot say with certainty that the result at trial would have been different, we can say that Appellant's defense to the charges would have been different, and we cannot conclude that the jury would have reached the same result." *Id.* at 44.

More recently, in *Trigg v. Commonwealth*, 460 S.W.3d 322, 328 (Ky. 2015), our Supreme Court held as follows:

> Without the fair notice required under RCr 7.24(1), the accused individual who is suddenly confronted with the claim that he made incriminating remarks must cobble together a make-shift response or allow the testimony to go unchallenged. Either way, Appellant's counsel was unfairly hindered in his ability to prepare and present a proper defense and to effectively challenge the accuracy of the testimony through cross-examination.

In the case before us, we are persuaded that defense counsel was unfairly hindered by the Commonwealth's failure to disclose any oral

incriminating statement in its discovery compliance and its late filing of 404(b) notices two days before trial in clear disregard of the trial court's August 7, 2018, order that "404(b) Notices, etc., must be filed . . . no later than twelve (12) days prior to the trial date, so that a hearing can be set." We conclude that the trial court abused its discretion by denying the request for a hearing and in permitting evidence to be admitted which had been withheld from the defense in violation of its April 20, 2018, discovery order.

Because the discovery error is dispositive of the outcome of this appeal, we need not address the remaining issues raised by McKenzie.

We VACATE the judgment of the McCracken Circuit Court and REMAND this matter for a new trial.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Adam Meyer
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Daniel Cameron
Attorney General of Kentucky

Christopher Henry
Assistant Attorney General
Frankfort, Kentucky