

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

Supreme Court of Kentucky

FINAL

2002-SC-0497-MR

DATE 10-9-03 EIA COURT D.C.

JASON W. McCREERY

APPELLANT

V.

APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE T. STEVEN BLAND, JUDGE  
INDICTMENT NO. 01-CR-00004

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

The sole question presented in this appeal is whether the trial court erred in denying Appellant's motion for a mistrial. We affirm.

On January 19, 2001, Appellant, Jason W. McCreery, was indicted by the Hardin County grand jury on two counts of Class A felony first-degree sodomy charges. Count I alleged Appellant committed the offense of first-degree sodomy by engaging in deviate sexual intercourse with C.H., his minor stepson. Count II alleged that Appellant committed the same against W.W., his minor stepdaughter.

Appellant's jury trial commenced approximately one year later on January 14, 2002. On the second day of trial, Appellant's defense counsel discovered the existence of records from the Cabinet for Families and Children ("CFC records"). Apparently, the CFC records had been in the possession of the defense attorney who was representing

Appellant on a fourth-degree assault charge, which was pending before the Hardin District Court.

In light of the CFC records, defense counsel moved the trial court for a continuance of twenty-four hours in order to review them. The trial court granted the motion. During the next day of trial, defense counsel informed the court that he was essentially no longer prepared to continue with the case because he did not have an adequate amount of time to properly review and investigate the CFC records. However, instead of moving the trial court to grant another continuance, defense counsel moved for a mistrial. This motion was denied by the trial court.

Subsequent to the trial court's denial of the motion for mistrial, Appellant elected to forego the remainder of the jury trial by accepting an offer from the Commonwealth.

The terms of the agreement provided that Count I of the indictment would be amended from a Class A to a Class B felony. The Commonwealth recommended that Appellant serve ten years on the amended Class B felony charge and twenty years on the Class A felony, to run consecutively for thirty years. Additionally, the plea was conditioned on Appellant's right to appeal the trial court's denial of the aforesaid motion.

Appellant then entered a conditional plea of guilty to two counts of first-degree sodomy. The trial court sentenced Appellant in accordance with the terms of the plea agreement. This appeal followed.

Before we begin our discussion of the question presented, i.e., whether the trial court erred in denying Appellant's motion for a mistrial, we note Appellant's contention that, even though defense counsel moved for a mistrial, defense counsel was effectively asking the trial court to grant another continuance. We observe that the trial court, in an order dated February 20, 2002, referred to Appellant's mistrial motion as a request for a

second continuance. However, it is quite manifest from the record that defense counsel specifically moved the trial court for a mistrial, and not an additional continuance.

An abuse of discretion standard applies to a trial court's denial of a motion for a mistrial. See Wiley v. Commonwealth, Ky. App., 575 S.W.2d 166, 169 (1978).

Likewise, this Court will not reverse a trial court's denial of a motion for a continuance unless the trial court has abused its discretion. See Abbott v. Commonwealth, Ky., 822 S.W.2d 417, 418 (1992). Therefore, it is immaterial whether the motion on appeal herein is treated as a motion for a mistrial or as a motion for a continuance, as a reversal will not issue unless we determine the trial court abused its discretion in the denial of such.

The single assignment of error presented by Appellant in this appeal concerns the propriety of the trial court's denial of his motion for a mistrial. Appellant complains that forcing his defense counsel to go to trial without having fully examined the information contained in the CFC records would have prejudiced him, and requests that this Court reverse his conviction and sentence, and remand the cause for a new trial.

Appellant directs this Court to our opinion in Anderson v. Commonwealth, Ky., 63 S.W.3d 135 (2001), where we determined that the trial court committed reversible error in denying the appellant's motion for a continuance after applying the seven factors set forth in Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1994), cert. denied 516 U.S. 1154, 116 S. Ct. 1034, 134 L. Ed. 2d 111 (1996). Anderson and the present case are similar in that both involve requests from defense counsel for additional time to examine newly discovered records. However, that is where the similarity ends.

In Anderson, the newly discovered records received by defense counsel revealed that the victim had informed a nurse that she had sexual intercourse with a person other

than the defendant. Id. at 138. Here, Appellant cites to no information of this magnitude, nor does he point to any information within the CFC records which tend to exculpate him. The trial court in Anderson never granted a continuance. Id. Here Appellant's defense counsel had already received one continuance. Furthermore, this is not a matter that is of great complexity. In Anderson, we found that the case was complex due to suspect discovery practices. Id. There is no evidence of misconduct concerning the production of the CFC records on the part of the Commonwealth. Appellant has conceded such. Consequently, any reliance Appellant extends to Anderson in order to support a reversal of the trial court's decision is clearly misplaced.

Finally, we must consider the fact that the information was in the hands of Appellant's counsel for other unrelated charges and that the discovery received by defense counsel here repeatedly referred to CFC's ongoing investigation of various complaints and allegations of sexual abuse made by Appellant's step-children. Yet no effort to obtain the records was made during the eleven months that passed between receipt of the first discovery material referring to the CFC investigation and the date of trial.

Regardless of whether Appellant's motion is treated as a request for a mistrial or a continuance, we are simply unable to conclude that the trial court's denial of such motion was an abuse of discretion. Accordingly, under the circumstances, and from a consideration of the entire record, we cannot say the trial judge committed reversible error.

The judgment of the Hardin Circuit Court is affirmed.

All concur.

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