

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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

2001-SC-0919-MR

DATE 3-11-04 E.M.F. G+AN:HH, D.C.

BOYD BROCK

APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR.
CASE NO. 2001-CR-0058

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal comes before this Court as a matter of right following the judgment of the Bell Circuit Court convicting the appellant of multiple drug trafficking offenses.

For the reasons set forth in this opinion, we affirm.

The appellant, Boyd Brock, was investigated by the Kentucky State Police for trafficking in illegal prescription narcotics. Sgt. Mickey Hatmaker led the investigation and employed two individuals – Cecil Roark and Jessica Logan Roark – to assist in the investigation by participating in staged “buys” of prescription narcotics. On or about June 29, 2000, Sgt. Hatmaker directed both Cecil and Jessica Roark to purchase drugs from Brock. The Roarks went to Brock’s residence in Bell County and purchased five tablets of Oxycontin (Oxycodone). A second buy was conducted on or about June 30,

2000. Again, the Roarks acquired five tablets of Oxycontin, as well as three tablets of Xanax (Alprazolam).

On February 22, 2001, the Bell County Grand Jury indicted Brock with four counts each of Trafficking in a Controlled Substance, First Degree (KRS 218A.1412) and one count of Trafficking in a Controlled Substance, Third Degree (KRS 218A.1414).¹ On October 18, 2001, following a jury trial in the Bell Circuit Court, Brock was convicted on two counts of first-degree trafficking in a controlled substance. He received two consecutive ten-year sentences in the penitentiary. He was also convicted of third-degree trafficking in a controlled substance, for which he received a twelve-month sentence in the Bell County Jail, to run concurrently with the other sentences. Brock's term of imprisonment totals twenty years. Brock brings this appeal as a matter of right. Ky. Const. § 110(2)(b).

The first assignment of error presented to this Court concerns a statement made by Cecil Roark while being cross-examined by defense counsel, wherein Roark insinuated that Brock had previously killed someone. After participating in the undercover investigation of Brock, Roark testified that he shot himself in the leg with a handgun because he was afraid of Brock. While testifying regarding the shooting, Roark stated:

“[Brock] is a dangerous fellow. I thought he [Brock] was going to kill me, because of [sic] I think he had did it in the past.”

Defense counsel immediately objected and the trial court gave the jury the following admonition:

¹ Two of the first-degree trafficking counts relate to events that occurred in 1999, and are unrelated to the buys involving the Roarks. The trial judge severed those counts of the indictment, which are to be tried separately. As such, those counts are not at issue in this appeal.

“Jurors, you will disregard the allegation, or reference to past acts of [Brock]. You will disregard that.”

Brock contends that the above admonition was not sufficient. However, as Brock himself concedes, this issue was not preserved for our review. Nevertheless, Brock urges review of this issue under RCr 10.26. We decline to do so. The trial court promptly and properly admonished the jury. Defense counsel did not question the effectiveness or propriety of the trial court’s admonition. Further, defense counsel did not offer the court an alternative admonition or request other relief. Clearly, this is not an instance of palpable error affecting Brock’s substantial rights. Thus, we need address this issue no further.

The second assignment of error relates to the discovery of Cecil Roark’s psychiatric records. Defense counsel unsuccessfully moved the trial court for discovery of those records. Brock claims that the trial court’s failure to allow discovery of the records was erroneous because his right to confrontation under both the federal and state constitutions was compromised. We cannot agree.

Brock requested access to records pertaining to the psychiatric treatment of Roark and other witnesses. However, before Brock would be permitted to view any of Roark’s mental health records, the trial court would first have to conduct an in camera review of the records in order to ascertain if any material contained therein was subject to discovery. (We note that Brock never specifically requested that the trial court review Roark’s records in camera.) 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), this Court held that in order to discover a witness’s psychiatric records, the party seeking discovery carries the burden of producing “articulable evidence that raises a reasonable inquiry of a witness’s mental health history. . . .” Id. at 702 (quoting Illinois v. Dace, 449 N.E.2d

1031, 1035 (Ill. App. Ct. 1983)). However, in the recent case of Commonwealth v. Barroso, Ky., 122 S.W.3d 554 (2003), we departed from the above Eldred standard and held that an “in camera review of a witness's psychotherapy records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence.” Id. at 564.

Roark has a variety of problems, which could be attributed to his mental and emotional well-being. For instance, at trial, Roark testified that he shot himself in the leg, apparently out of fear of Brock. Additionally, on avowal, Roark testified that he had received psychiatric treatment for depression. Also, during a pretrial conference, Brock's defense counsel informed the trial court that he had received information indicating that Roark may have cut his wrists or attempted suicide while he was in jail.

Considering the foregoing, it is arguable, under the standard set forth in Eldred, supra, that Brock met the requisite burden by showing that articulable evidence existed to seek discovery of Roark's psychiatric records. However, we must apply the new standard set forth in Barroso, supra. Under this standard, we conclude that Brock has failed to demonstrate that there existed enough evidence necessary to establish a reasonable belief that Roark's psychiatric records contained evidence of an exculpatory nature.

The strongest evidence presented by Brock in order to gain access to Roark's psychiatric records was information that Roark allegedly slit his wrists, or otherwise attempted to take his own life, while in jail. This information, however, was never substantiated. In our view, without regard to the veracity of the alleged suicide attempt, this evidence is based on nothing more than innuendo and surmise. In addition, we observe that the evidence of Roark's self-inflicted gunshot wound was put before the

jury. Moreover, Brock's defense counsel conducted a meticulous cross-examination of Roark. As such, we cannot say that Brock was denied his constitutional right to confrontation.

Applying the Barroso standard, we hold that the evidence produced by Brock was insufficient to support an in camera review of Roark's mental health history. Under the circumstances, we find no abuse of discretion on the part of the trial judge. Accordingly, we find no error warranting a reversal on this issue.

For his third point of error, Brock contends that the trial court erred when it failed to grant his motion for a continuance. The granting of a continuance is within the trial court's sound discretion. RCr 9.04; Williams v. Commonwealth, Ky., 644 S.W.2d 335, 336 (1982). Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579 (1991), overruled on other grounds, Lawson v. Commonwealth, Ky., 53 S.W.3d 534 (2001), provides a list of factors a trial court should consider in ruling on a motion for a continuance. These factors include (1) the length of delay; (2) whether there have been prior continuances; (3) the inconvenience to the litigants, witnesses, counsel and the court; (4) whether the delay is purposeful or caused by the accused; (5) the availability of competent counsel, if at issue; (6) the complexity of the case; and (7) whether denying the continuance would lead to any identifiable prejudice. Id. at 581. This Court will not disturb the trial court's findings unless, after a review of the record in its entirety, it is apparent the trial court has abused its discretion. Williams, supra at 336-337.

Brock argues that a need for a continuance arose out of defense counsel's desire to further investigate the discovery information provided by the Commonwealth. The trial court denied the motion for a continuance and stated that defense counsel was seeking public information not within the exclusive control of the Commonwealth. The

Commonwealth claimed that it had given the defense all the information it had regarding criminal convictions and that there had been no failure to disclose.

Following a consideration of the circumstances and facts particular to this case, we are unable to say that the trial court abused its discretion in denying Brock's motion for a continuance. The discovery information, which Brock's defense counsel sought to further examine, i.e., the criminal backgrounds of witnesses Cecil Roark and Jessica Logan Roark, was put to the jury and thoroughly explored during the respective cross-examinations of the Roarks. Consequently, we find no error.

Brock also seeks dismissal of the severed 1999 trafficking counts on speedy trial grounds. However, this appeal concerns only the counts for which Brock was tried and convicted, not the other counts. Therefore, we do not consider this argument because it is not properly before us.

Finally, Brock contends that he was denied due process when the trial judge, Hon. James L. Bowling, Jr., failed to sua sponte remove himself from this case pursuant to KRS 26A.015. Brock claims that Judge Bowling is or was a member of the "Bell County Drug Coalition," a group that supports the eradication of drugs within Bell County. Since this is a trafficking case, Brock argues that Judge Bowling's membership in such a group makes his impartiality in this action questionable. In Rush v. Denhardt, 138 Ky. 238, 127 S.W. 785 (1910), our predecessor court stated "[t]he fact that a judge is strongly opposed to the sale of liquor in any form is not of itself sufficient reason why he should not preside in the trial of cases involving infractions of the liquor laws of the state." Id. at 786. Likewise, any disdain or opposition Judge Bowling may have regarding illegal narcotics is not sufficient reason for him to not preside over the instant action. As such, we find no error.

We note here that Appellant filed a pro-se brief, in addition to the arguments presented by counsel. We have carefully reviewed the arguments presented therein, and found that while phrased differently, in essence they mirror counsel's arguments with the exception of the attacks on the behavior of the prosecutor. We have examined this allegation and found it to be meritless. We do not address his complaints about the trial counsel's actions because the trial court had no opportunity to address the issue first.

For the above reasons, we affirm the judgment of the Bell Circuit Court.

All concur.

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