

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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

2003-SC-566-MR

DATE 10-13-05 ELLAGROW: H.P.C.  
APPELLANT

BILLY RAY CARROLL

V. APPEAL FROM KENTON CIRCUIT COURT  
HONORABLE GREGORY M. BARTLETT, JUDGE  
2002-CR-00780-002

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

Appellant, Billy Ray Carroll, was convicted in the Kenton County Circuit Court of second-degree burglary and first-degree persistent felony offender. He was sentenced to 10 years on the second-degree burglary. Upon a finding of first-degree persistent felony offender, his sentence was enhanced to 20 years. He appeals as a matter of right. For the reasons set forth, we affirm the Appellant's convictions.

**FACTS**

On the morning of March 19, 2002, Rosalynd Coppage awoke to discover that her home had been burglarized. The Kenton County Police responded and discovered a basement window broken out and a footprint in a mulch area of the yard surrounding the residence. Ms. Coppage's purse was determined to have been taken, containing several credit cards, \$300 cash and her checkbook, as well as various tools.

Shortly after the burglary, Detective Brian Capps learned that one of Ms. Coppage's credit cards was used at a Wal-Mart in Indiana as well as an

attempted use at a Wal-Mart in Jefferson County, Kentucky. The card was declined and confiscated in Kentucky because it had been reported stolen. Wal-Mart's loss prevention officer, Theresa Phillips, followed the two males and one female who had attempted to use the card and she was able to provide Detective Capps with the license plate number of the vehicle the individuals used to leave Wal-Mart. The vehicle was registered to Gary Rothfuss, Appellant's co-defendant. Phillips was also able to identify both the Appellant and Rothfuss from photo line-ups.

Detective Capps, however, did not, at the time, have sufficient evidence to charge Rothfuss with burglary, thus the investigation stalled. Though he had no evidence of his involvement, Detective Capps did interview the victim's son, Donny Coppage, who had a "shady past," on a hunch that the burglary was an "inside job." During the interview, Donny strongly denied any involvement in the burglary and agreed to help in the investigation. Detective Capps noted that Donny appeared "extremely nervous" and he described Donny as having a "thick tongue and dry mouth." Donny commented to the detective that the person who burglarized his mother's home "may deserve a second chance."

Approximately one month later, Donny asked Detective Capps to meet him. During that meeting Donny gave Detective Capps the names of Peggy Lovitt and the Appellant. Detective Capps tracked down Ms. Lovitt, who then confessed to her involvement in the burglary, implicating the Appellant and her brother, Gary Rothfuss. Ultimately, Ms. Lovitt gave a statement and testified to the fact that the Appellant entered the victim's house, obtained the victim's purse

and credit cards, and that she, along with the Appellant and Rothfuss, used, or attempted to use, one of those stolen credit cards at a Wal-Mart in Indiana and a Wal-Mart in Jefferson County, Kentucky.

On November 22, 2002, the Kenton County Grand Jury indicted the Appellant for second-degree burglary. On March 7, 2003, a second indictment was returned charging the Appellant with being a first-degree persistent felony offender. At trial in June of 2003, the Appellant was convicted of second degree burglary and of being a first-degree persistent felony offender.

At trial, Detective Capps testified to his interview with Donny Coppage. Counsel for Appellant, however, had not known of the interview with Mr. Coppage and, therefore, moved for a mistrial arguing the Commonwealth violated RCr 7.26 and Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (failure to produce exculpatory evidence on demand of accused). The Commonwealth responded that the information was contained in Detective Capps' investigative notes which were not subject to RCr 7.26 and, further, was inculpatory, rather than exculpatory, and not subject to Brady. The trial court then denied the motion.

At trial, Detective Capps read from a page of his notes related to his interview of Coppage. These notes were not a part of Detective Capp's official, written investigative report, which was provided to the defendant. The Appellant argues that the failure to provide these notes to him prior to trial was a violation of RCr 7.26. RCr 7.26 states, in pertinent part:

- (1) Except for good cause shown, not later than forty-eight 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 (a) has been signed or initialed by the witness or (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.

The written notes at issue are those of a law enforcement officer tasked with investigating a crime. The content of the written notes, the detective's own thoughts and observations, relate to the officer's interview with an individual during the course of the investigation. Coppage was interviewed sometime after the police became aware of the identity of Gary Rothfuss, the owner of the car used in the attempted use of one of the stolen credit cards. The notes were not a statement by Coppage and Coppage was not called as a witness at trial.

RCr 7.26 does not require the Commonwealth to provide Detective Capps' investigative notes to the Appellant. Rather, the applicable rule in this case is RCr 7.24 which "authorizes pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant)."

Detective Capps' notes were not, in fact, part of his official report, but were, rather, notes of an interview of a preliminary suspect or prospective witness, indisputably that of someone other than the defendant. These were notes made by a police officer in connection with the investigation of the burglary of Rosalynd Coppage's home. This case embraces the very spirit and purpose

of RCr 7.24. Detective Capps generated an investigative report which was produced to the defendant by the Commonwealth. At trial, Detective Capp's refreshed his memory using a page containing hand-written notes made during the course of his investigation.

Though the defense would undoubtedly love to have access to every item of paper generated, officially or unofficially, by law enforcement officers connected with its case, the rules simply do not sustain such a requirement. Nor are we persuaded to find such a requirement to exist in this case.

The Appellant further argues that, along with RCr 7.26, the information should have been provided to him according to Brady, supra, 373 U.S. 83. In Brady, the United States Supreme Court held that "a prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant." Id. at 87. The court further held "that the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id.

It is fundamental, however, that the materiality of a failure to disclose favorable evidence 'must be evaluated in the context of the entire record.' United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). And the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome does not establish materiality in the constitutional sense. St. Clair v. Commonwealth, 140 S.W.3d 510, 541 (Ky.

2004).

The investigative notes complained of in this case did not tend to exculpate the Appellant; nor did they tend to implicate Coppage in the burglary of his mother's home. Even in light of Brady, Detective Capp's notes were not discoverable. Because we find that Detective Capp's notes are not Brady evidence, there is no resulting prejudicial effect constituting reversible error with respect to the entirety of this trial. For the reasons set forth herein, we affirm Appellant's convictions.

All concur.

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