

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky **FINAL**

2006-SC-000743-MR

DATE 9-11-08 EJA/Growth, P.C.
APPELLANT

JEREMY DESHANNON RICE

V. ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA GOODWINE, JUDGE
NO. 04-CR-001384

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jeremy Deshannon Rice, was convicted by a Fayette Circuit Court jury of wanton murder, first-degree robbery, and of being a second-degree persistent felony offender. For these crimes, Appellant was sentenced to fifty (50) years imprisonment. He now appeals as a matter of right pursuant to Ky. Const. § 110(2)(b).

On appeal, Appellant argues (1) that he was deprived of his right to confront and meaningfully cross-examine a witness and (2) that the trial court erred in admitting DNA evidence. For the reasons set forth herein, we affirm Appellant's convictions.

I. Facts

The convictions stem from the shooting death of Carl Gene McClung, a commercial truck driver, at a Lexington truck wash in 2003. On the evening of

August 19, 2003, Appellant, Jeremy Rice, was working a 2:00 p.m. to 12:00 a.m. shift at Scrub-A-Truck with fellow employees Chris Fletcher, Patrick Fee, and Billy Fee. Also present at the truck wash that evening was Pete Kyle, a friend of Fletcher. Near closing time, McClung arrived in his truck and went inside Scrub-A-Truck, where he asked that his truck be cleaned and was told there was a wait. He then purchased a drink and returned to his truck.

While waiting for his turn, McClung apparently fell asleep inside his truck, with the cab and running lights on. Fletcher and Appellant tried to awaken McClung by knocking on the truck, but there was no response. Appellant said something to the effect that McClung better wake up before he gets robbed (or that McClung better wake up before he robs him). Fletcher and Kyle took his statement as a joke. They abandoned any further attempt to wake McClung up and closed the truck wash for the night.

McClung was later found dead lying on the ground outside his truck by Thomas Collins, a fellow truck driver, in the early morning hours of August 20, 2003. He had been shot three times in the chest with a .22 caliber weapon. There was change in his pocket, and six blank checks and \$570 in cash in his wallet.

The murder went unsolved for several months until police received information from Arian Brown during a tape-recorded interview, in which he implicated Appellant and Marc Anthony Buchanan. In the interview, Brown said that Buchanan came to Brown's house just prior to the murder and asked for a weapon larger than his .22 caliber revolver. Brown, however, did not comply with Buchanan's request. Appellant showed up some time later, and during the

conversation Buchanan expressed a desire to commit a robbery whereupon Appellant indicated he knew of a potential victim. Buchanan and Appellant then left together. Brown talked to Appellant the next day about the robbery.

Appellant said that he and Buchanan had attempted to rob someone at Scrub-A-Truck. Appellant claimed that Buchanan shot the victim when he fought back.

This information was used by police to obtain a warrant for the purpose of obtaining biological evidence from Appellant in order to create a DNA profile. Two hairs found on a mattress and blanket in the truck matched the DNA of Appellant. Appellant and Buchanan were subsequently arrested and indicted for the murder and robbery of McClung.

In addition to DNA evidence placing Appellant at the murder scene, the jury heard Brown's tape recorded statement implicating Appellant in the robbery. After divulging information, Brown refused to cooperate further with the police, stating shortly before testifying that he had no knowledge of the Scrub-A-Truck crimes. Brown, who had previously been arrested for murder and multiple robberies, testified that he was questioned by police only about his own crimes. He denied making statements to the police and claimed that it must have been his twin brother on the tape. The tape was then played for the jury over Appellant's objection.

Thomas Carpenter testified he drove Appellant and Buchanan to Scrub-A-Truck on the night of the crime. When Carpenter parked the vehicle, Appellant and Buchanan got out and disappeared from his sight. Within a few minutes, Carpenter heard gunshots. When Appellant and Buchanan returned, Buchanan smiled when Carpenter asked him if he had done what he thought he had done.

The jury convicted Appellant of wanton murder, first-degree robbery, and of being a second-degree persistent felony offender. He was sentenced to thirty (30) years for the murder, and ten (10) years for the robbery, enhanced to twenty (20) years by the second-degree persistent felony offender charge. The sentences were run consecutively, for a total of fifty (50) years.

II. Analysis

A. Right to Confrontation and Cross-examination

Appellant argues he was denied his right to confront and cross-examine Arian Brown in two instances. The first instance concerns Brown's denial at trial that he discussed the Scrub-A-Truck crimes with police, which led to a tape of the interview being played for the jury, as evidence of prior inconsistent statements. Appellant complains that because Brown denied making such statements he was unable to effectively question about the substance of what was said to police, relying heavily on Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965):

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits ... being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 418-19, 85 S.Ct. at 1076-77 (quoting Mattox v. United States, 156 U.S. 237, 242-43, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895)).

The Confrontation Clause of the Sixth Amendment to the United States Constitution protects the right of cross-examination in criminal cases. Cross-

examination is the principal method to test the believability of witnesses and the truth of their testimony. Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). In this context, it is necessary to provide the defendant a generous opportunity to cross-examine witnesses as to bias, prejudice, and other conditions that might bear upon the credibility of their testimony. However, the Confrontation Clause guarantees only “an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” Kentucky v. Stincer, 482 U.S. 730, 739, 107 S.Ct. 2658, 2664, 96 L.Ed.2d 631 (1987) (quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.Ed.2d 15 (1985)).

Here, Brown was sworn and offered testimony on both direct and cross-examination. **Although Brown at various points in his testimony claimed no memory or outright denied making statements to police, he was nonetheless present and answered the questions posed to him on cross-examination.** See United States v. Owens, 484 U.S. 554, 559-60, 108 S.Ct. 838, 842-43, 98 L.Ed.2d 951 (1988) (Confrontation Clause was satisfied where the defendant had a full and fair opportunity to bring out the witness' bad memory and other facts tending to discredit his testimony).

It is immaterial to our analysis, on these facts, that Brown was uncooperative, leaving Appellant without the answers he had sought. **There is risk inherent whenever a witness is questioned, whether on direct or cross-examination, that he or she may forget or give evasive answers.** This does not mean that the witness must be declared “unavailable.” See KRE 804; Epperson v. Commonwealth, 197 S.W.3d 46 (Ky. 2006) (prior testimony of

accomplice was admissible in capital murder prosecution, as accomplice was “unavailable” to testify, given that he testified that he did not remember what happened and did not remember his prior testimony). Rather, in those situations, it is within the trial court’s discretion to strike portions, or even all, of the testimony. In finding no such abuse of discretion here, we stress that Brown was uncooperative *with both Appellant and the Commonwealth*, certainly casting doubt on the credibility of his accusatory taped statements to the police.

We further find from the record that Appellant was able to effectively question Brown. During cross-examination, Appellant elicited testimony that Brown received a very favorable plea offer in exchange for information he provided to police. Appellant additionally revealed on cross-examination that he has a twin brother, who could be the voice on the tape, further casting doubt on its credibility. These factors persuade us to conclude that Appellant was afforded his constitutionally-mandated opportunity for effective cross-examination.

We also find no error as to the playing of the tape for the jury. See KRE 801A(a)(1) (allowing the admission of prior inconsistent statements “if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613”). The Commonwealth laid a proper foundation for the admission of the tape by questioning Brown about the points contained therein. See KRE 613 (requiring that before the prior inconsistent statement of a declarant can be offered, “he [or she] must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them”). There was no Confrontation Clause violation because Brown testified and was cross-examined

by Appellant's trial counsel. See Crawford v. Washington, 541 U.S. 36, 59 n.9, 124 S.Ct. 1354, 1369 n.9, 158 L.Ed.2d 177 (2004) (“[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”).

B. Plea Negotiations

Appellant additionally contends it was error to exclude evidence of a threat a prosecutor made during Brown's plea negotiations, that he may be subject to additional prosecutions should he fail to testify. Specifically, Appellant alleges that the prosecutor's audio taped statements were probative of Brown's state of mind. See Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (internal citations omitted):

A[n] ... attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

We review the trial court's decision for abuse of discretion. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

The facts relevant to this issue are as follows. Brown had been charged with murder and multiple robberies in an unrelated case. Appellant was in possession of a tape of the plea negotiations, which included a discussion of the terms of the prosecutor's offer. Pursuant to the deal, Brown pled guilty in exchange for two counts of conspiracy to commit robbery, for which he received two concurrent ten year sentences. Brown further promised to testify against

Appellant. Brown was apparently suspected of committing other offenses, for which he had not yet been charged. The prosecutor told Brown that he would not be charged or tried on the other offenses, unless he backed out of testifying. Appellant sought to play the portion of the tape containing the prosecutor's threat to show its effect on Brown, thus impeaching his credibility. At the time of trial, the prosecutor who made the threat was out of the country and unavailable to testify. The trial court refused to allow the jury to hear the tape, due to the risk of undue prejudice, but allowed Appellant to present the tape by an avowal. See KRE 403.

It is generally true that there is a need to provide defendants with generous opportunities to attack the credibility of witnesses, requiring disclosure of the terms of plea agreements. However, the right to probe for bias is not unlimited. See Robert G. Lawson, The Kentucky Evidence Law Handbook § 4.10[4], at 283-84 (4th ed. 2003) ("Needless to say, Davis and Van Arsdall do not give defendants an unfettered right to cross-examine witnesses about possible bias, interest, or corruption."). One such limit is a trial court's discretion to exclude relevant evidence that is unduly prejudicial pursuant to the KRE 403 balancing test.

The record reflects that, despite the limitations imposed by the trial court, Appellant was able to successfully show Brown's motivation to speak to police. The jury heard Brown testify that he had entered into a plea agreement with the Commonwealth in exchange for his statement and testimony. Because Brown had received a favorable plea agreement, the jury could reasonably infer that there would be repercussions had he refused to follow through with the deal.

Allowing the jury to hear the prosecutor's threat out of context and without letting the Commonwealth to fully go into the details of the plea deal would have been unduly prejudicial, given the prosecutor's unavailability. As such, we conclude that there was no abuse of discretion in excluding the tape.

C. Appellant's Motion to Suppress DNA Evidence

Appellant's next argument concerns the admission of certain DNA evidence. Based on information provided by Brown, police obtained a warrant for the purpose of obtaining biological evidence from Appellant in order to create a DNA profile. Two hairs found in the truck matched Appellant's DNA, leading to his arrest and indictment.

Appellant moved to suppress biological evidence seized pursuant to the warrant, alleging it was issued without probable cause. A suppression hearing was held, where the trial court denied the motion after concluding that the affidavit provided probable cause. The affidavit in support of the warrant stated:

Affiant has been an officer in the aforementioned agency for a period of 6.5 years, and the information and observations contained herein were received and made in his capacity as an officer thereof.

On the 20th day of August, 2003, at approximately 0410 am/pm, affiant received information from/observed:

Officers from the Bureau of Patrol responded to Scrub-A-Truck, 960 Nandino Boulevard, in reference to an unresponsive male subject. The victim, Carl Gene McClung was located deceased at the scene.

Mr. McClung, who worked as a commercial truck driver, had parked his cattle truck at Scrub-A-Truck where he was sleeping in the cab. Investigation at the scene showed that Mr. McClung's assailants entered the cab of his truck and assaulted him in an apparent robbery attempt.

Forensic examination of the crime scene discovered hair samples that were consistent with Negroid characteristics

and not-consistent with Mr. McClung. Unidentified palm and finger prints were recovered from the crime scene.

A pocketknife recovered from the scene had an amount of blood. A swab of blood from the knife was tested to show that there is a contributor in addition to Mr. McClung.

An autopsy determined Mr. McClung's death to be the result of gun shot wounds. No casings were recovered from the scene and the projectiles recovered from the deceased at the autopsy were determined to be .22 caliber projectiles.

Acting on the information received, affiant conducted the following independent investigation.

On 03-08-04, Detectives received information from an individual who advised that he knew information concerning the murder of Mr. McClung. During an interview with the individual, he advised that the evening prior to the murder, he had been approached by Mr. Buchanan. Mr. Buchanan asked the individual if Buchanan could borrow a larger firearm. Mr. Buchanan had a .22 caliber revolver but wanted a larger pistol. The individual did not give Mr. Buchanan a different pistol.

During this time, Mr. Jeremy Rice arrives at the location where Mr. Buchanan and the individual were speaking. Mr. Buchanan expressed his interest in committing a robbery and Mr. Rice explained that he knew of a potential victim. Mr. Buchanan and Mr. Rice then left.

The following morning, the cooperating individual encountered Mr. Rice. During their conversation, Mr. Rice told the individual that Rice and Buchanan attempted to rob a subject at the Scrub-A-Truck (where Mr. Rice was employed). Mr. Rice told the individual that during the attempted robbery, Rice and Buchanan entered the truck to rob the victim, the victim fought back, and Mr. Buchanan shot the victim.

Afterwards, the first time the cooperating individual saw Mr. Buchanan after the incident, Mr. Buchanan told him that the victim "tried to fight back."

Affiant has reasonable and probable cause to believe that grounds exist for the issuance of a Search Warrant based on the aforementioned facts, information and circumstances and prays that a Search Warrant be issued, that the property be seized, or

any part thereof, and brought before any court and/or retained subject to order of said court, such property being held against the peace and dignity of the Commonwealth of Kentucky.

/s/ Det. WM Brislin

Appellant once again contends that there was no probable cause to issue the warrant.

Our standard of review of the denial of a motion to suppress is two-fold. Cummings v. Commonwealth, 226 S.W.3d 62, 65 (Ky. 2007). The factual findings by the trial court are reviewed under a clearly erroneous standard, and the application of the law to those facts is reviewed de novo. Id.; RCr 9.78 (“If supported by substantial evidence the factual findings of the trial court shall be conclusive.”).

Appellant complains that the alleged probable cause was based nearly exclusively on an unidentified informant’s declaration that he had committed the offense. Although the informant, Arian Brown, was unidentified in the affidavit, he was known to the police. As explained by the detective at the suppression hearing, the name of the informant was not included in the affidavit due to safety concerns. In support of his argument that the affidavit did not establish probable cause, Appellant cites to an anonymous tip case, Kohler v. Englade, 470 F.3d 1104 (5th Cir. 2006) (addressing a challenge to probable cause for a DNA warrant in the context of a § 1983 action and concluding that uncorroborated anonymous tips and other circumstantial evidence were insufficient to justify a warrant for the suspect’s biological material).

Here, the affidavit provided probable cause as it contained very specific information of events and conversations occurring before and after the murder.

Specifically, the affidavit indicated that during an interview the informant related to the detective the details of a conversation in which Appellant expressed his interest in robbing the victim while he slept at Scrub-A-Truck. Moreover, the informant described a subsequent conversation in which Appellant described how the victim fought back and was shot during the attempted robbery at the truck wash.

In addition, the information was corroborated by independent police investigation. The informant's statement that the victim fought back during the attempted robbery was corroborated by forensic evidence taken from the crime scene, which revealed that McClung had likely been involved in a struggle, as hair samples not consistent with McClung were found inside the truck along with a pocketknife containing blood from a contributor other than McClung. Further, the informant related to the detective that Buchanan possessed a .22 caliber revolver on the night of the crime, which matched evidence found during McClung's autopsy that his death was the result of gunshot wounds from a .22 caliber weapon.

Given these circumstances, we conclude that the affidavit provided probable cause for the warrant. See Illinois v. Gates, 462 U.S. 213, 230-31, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983) (adopting a "totality of the circumstances" approach for determining whether an informant's tip establishes probable cause for issuance of a warrant); Beemer v. Commonwealth, 665 S.W.2d 912, 915 (Ky. 1984) (adopting the totality of the circumstances test in Gates). Therefore, the trial court properly denied Appellant's motion to suppress.

III. Conclusion

For the foregoing reasons, we affirm Appellant's convictions.

Minton, C.J., Abramson, Cunningham, Noble, Schroder and Scott, JJ.,
concur. Venters, J., not sitting.

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