

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 21, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000205-MR

DATE 6/11/09 Kelly Klaber D.C.

CLARENCE TATE

APPELLANT

V. ON APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
NO. 07-CR-00035

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Clarence Tate, was convicted by a Hardin Circuit Court jury of three counts of first-degree rape, three counts of first-degree sodomy, six counts of incest, and first-degree sexual abuse. For these crimes, Appellant received a total sentence of seventy years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110. On appeal Appellant argues that the trial court committed reversible error by failing to dismiss the charges against him due to an alleged discovery violation committed by the Commonwealth. For the following reasons, we affirm Appellant's conviction and sentence.

Appellant's charges stem from allegations made by his two step-daughters, E.G. and D.F., that Appellant raped and sexually abused them. E.G. and D.F. made two video-recorded statements to the police regarding these allegations, one on July 31, 2006, and the other on September 11, 2006. On March 3, 2007, the trial court issued its Order for Discovery and Inspection ("Order"). The Order required that:

[p]ursuant to RCr 7.26, no later than sixty (60) days prior to trial, the Commonwealth shall provide the statement(s) of any witness who may be called as a witness for the Commonwealth, if the statement is in the form of a document or recording in its possession which relates to the subject matter of the witness' testimony.

The Order further required:

[p]ursuant to Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976), the Commonwealth and/or its agents shall provide to the defense any and all exculpatory evidence or information tending in any way to negate or mitigate the guilt of the Defendant.

Prior to the entry of the Order, on March 1, 2007, the Commonwealth turned over seventy-one pages of written discovery including notes from the July 2006 and September 2006 statements made by E.G. and D.F. However, the actual video-recorded statements were not provided.

On October 5, 2007, Appellant requested copies of the video-recorded statements from the Commonwealth. The Commonwealth complied on October 11, 2007. On the first day of trial, October 29, 2007, Appellant complained that the video copies provided by the Commonwealth were of poor audio quality and he requested new copies. The Commonwealth provided DVD versions of the statements on October 31, 2007. On November 1, 2007, after a jury was

impaneled, Appellant moved for the charges against him to be dismissed, arguing the Commonwealth violated the Order regarding discovery.

In support of his motion, Appellant argued that upon reviewing the DVDs provided by the Commonwealth he discovered, purportedly for the first time, the video recording of the victims' September 2006 statements. Appellant argued that the Commonwealth had failed to previously provide them, in direct violation of the Order. Appellant argued that the September 2006 statements contained exculpatory evidence and that he did not have enough time to properly review them before trial. Thus, Appellant believed the charges against him should, therefore, be dismissed. The Commonwealth responded by arguing that Appellant knew of the existence of the video-recorded September 2006 statements due to the written discovery turned over in March 2007. The Commonwealth further argued that it is not their protocol to make copies of video-recorded statements for the defendant until they are requested by the defense.

The trial judge denied Appellant's motion to dismiss the charges. The trial judge found there was insufficient evidence to prove that the September 2006 statements were not in the video recordings turned over by the Commonwealth on October 11, 2007. The trial judge told Appellant to review the video recordings previously provided by the Commonwealth to see if they contained the September 2006 statements. Appellant, however, never presented any additional evidence to prove the September 2006 statements were not provided earlier. The trial judge further believed that Appellant had

notice of the existence of the video-recorded September 2006 statements from the information contained in the Commonwealth's written discovery. The trial judge found that Appellant should have brought the missing video-recorded September 2006 statement to the court's attention earlier than the morning after the jury was impaneled. Finally, the trial judge held that Appellant had adequate time to review the potentially exculpatory evidence. It is important to note that Appellant did not request any continuance or delay of trial to review the September 2006 statements after the trial judge denied his motion.

On appeal, a trial court's ruling regarding a discovery violation is reviewed for an abuse of discretion. Penman v. Commonwealth, 194 S.W.3d 237, 249 (Ky. 2006). A reversal for a discovery violation is not automatic. The complaining party must show prejudice as a result of the error before reversal is required. Beatty v. Commonwealth, 125 S.W.3d 196, 202 (Ky. 2003) (quoting Gosser v. Commonwealth, 31 S.W.3d 897, 905 (Ky. 2002)).

In this matter, we cannot find that the trial judge abused her discretion by overruling Appellant's motion. It is clear from the record that the Commonwealth did violate the Order by not turning over the victims' video-recorded September 2006 statements prior to sixty days before trial. The Commonwealth did not produce the video recordings earlier because it was following its own internal office protocol which requires the defense to request any video recordings before they are provided. We disapprove of such a

protocol¹, to the extent it directly contradicts a trial judge's order. The Order plainly stated that the Commonwealth was to provide, at least sixty days before trial, any statement of a witness "if the statement is in the form of a document or recording in its possession which relates to the subject matter of the witness' testimony." The Commonwealth clearly did not comply and in the future should change its procedure to conform to the trial court's order.

However, while the Commonwealth did not comply with the discovery Order in a timely manner, we cannot find that the trial judge's ruling is an abuse of her discretion. Appellant failed to notify the trial court that the Commonwealth had violated the Order until after a jury had been impaneled. Appellant had notice of the existence of the video recording of the September 2006 statements due to the written discovery the Commonwealth provided in March 2007, and had copies of the recordings, albeit allegedly defective ones, two weeks prior to the trial. Thus, Appellant should have moved to force the Commonwealth to comply with the Order once it became clear the Commonwealth was in violation of the Order. Additionally, the evidence presented does not conclusively prove that the Commonwealth failed to include the September 2006 statements in the October 11, 2007 tapes. The trial judge provided Appellant the opportunity to review both tapes to prove that the Commonwealth did not turn over the September 2006 statements until right before trial, but Appellant never provided his findings. The proper and most

¹ After July 15, 2009, it would be a violation of the Kentucky Rules Of Professional Conduct (SCR 3.130 (3.8 (c))) for a prosecutor, on his/her own initiative to fail to make a timely disclosure of exculpatory evidence.

reasonable remedy in this situation would have been for Appellant to request a recess in the trial so that he could review the September 2006 statements. This was never requested. Thus, we cannot find that the trial judge abused her discretion in denying Appellant's motion. Penman, 194 S.W.3d at 249.

For the foregoing reasons, we affirm the conviction and sentence of the Hardin Circuit Court.

All sitting. All concur.

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