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# Supreme Court of Kentucky

2013-SC-000805-MR

ORAN BRUMLEY

APPELLANT

V.

ON APPEAL FROM CLAY CIRCUIT COURT  
HONORABLE OSCAR G. HOUSE, JUDGE  
NO. 12-CR-00039

COMMONWEALTH OF KENTUCKY

APPELLEE

## **MEMORANDUM OPINION OF THE COURT**

### **AFFIRMING**

Oran Brumley appeals his conviction for the 1969 murder of Clay County Sheriff James Sizemore. On appeal, Brumley argues the trial court abused its discretion when it failed to grant a continuance so he could locate a witness and obtain discovery; and the court erred when it denied his motions for a directed verdict and for a mistrial. Having reviewed the record and the arguments of the parties, we affirm.

### **I. BACKGROUND.**

On June 1, 1969, Sheriff Sizemore was shot and killed. Lonnie and Jimmy Ray Hensley, who were nearby and heard several gunshots, saw Sheriff Sizemore staggering/running along the road and waving his arms in the air. They investigated, found the sheriff lying in the road, and went to a nearby house to call the police. Kentucky State Police Detective Richard Cox conducted the initial investigation and found two spent cartridges, a branch

that had been broken by a bullet, and little else. Detective Cox and local police initially suspected that a local bootlegger, P. S.,<sup>1</sup> had shot the sheriff. However, when presented with the evidence available in the fall of 1969, a grand jury refused to indict him.

The case then lay dormant until 1985, when Kentucky State Police Detective Roland Huckabee received a call from an officer at a prison facility in Ohio. The officer advised Detective Huckabee that an inmate, Brumley, had information regarding Sheriff Sizemore's murder. Huckabee interviewed Brumley, who stated that a fellow inmate, Don Wheeler, had confessed to killing Sheriff Sizemore. Huckabee then interviewed Wheeler and concluded that Brumley knew more about the crime than Wheeler and that the two were "running a con job" in order to get transferred to a prison in Kentucky.

The case then lay dormant again until the early 1990s, when someone from the Kentucky highway department told then Clay County Sheriff Ed Jordan that department personnel had discovered a gun in a culvert near where Sheriff Sizemore had been shot. Sheriff Jordan testified that the gun could have been the one used to shoot the sheriff. However, it had deteriorated and provided no useful forensic evidence. The discovery of the gun prompted Sheriff Jordan to reopen the investigation, and, as part of his investigation, Sheriff Jordan interviewed Brumley. Brumley described what Sheriff Sizemore was wearing and how Sheriff Sizemore ran after being shot, facts Brumley said

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<sup>1</sup> We are using this man's initials because we believe he is still living, and his identity is not important to the resolution of this case.

he knew because he had driven the "get-away car." During the interview Brumley mentioned Wheeler and a Clay County man named Marcum, but Brumley did not identify who shot the sheriff. Sheriff Jordan attempted to contact Wheeler but discovered that Wheeler had been transferred to a prison in Tennessee, where he had died. After he found out that Wheeler had died, Sheriff Jordan slowed down and eventually stopped his investigation.

The case then lay dormant again until Kentucky State Police Detective Jeff Senters took up the investigation in late 2011.<sup>2</sup> During his review of the file, Detective Senters noted Brumley's name and that Sheriff Jordan had spoken with Brumley. Because Brumley was then incarcerated in Ohio, Detective Senters asked an officer from Ohio to talk to Brumley to see if it would be worthwhile to go to Ohio to re-interview Brumley. Based on the report he received from the Ohio officer, Detective Senters and Detective Mark Allen went to the Ohio prison to re-interview Brumley.

At the beginning of the interview, which was played for the jury, Brumley stated that he would not talk about Sheriff Sizemore until he got a guarantee that he would be transferred to a Kentucky prison. Detective Senters told Brumley that he could not make that guarantee but that he would do what he could. Brumley then confessed, in detail, to shooting Sheriff Sizemore. According to Brumley, P. S. paid him \$200 to shoot the sheriff and provided him with a gun. Brumley stated that he then got a female companion, Alice

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<sup>2</sup> Senters was not a detective at the time he began his investigation. He was promoted to detective approximately a year later and was serving as a detective at the time of Brumley's trial.

Webb,<sup>3</sup> to call the sheriff in order to lure him to a spot on a rural road, where Brumley would lay in wait. When the sheriff arrived, he started getting out of his car, and Brumley began shooting, hitting the sheriff in the arm and head. According to Brumley, after being shot, the sheriff began running down the road waving his arms, and Brumley shot him several more times. Brumley then hid the gun, ran to his get-away car, which he had stolen, and left the area.

Brumley stated that he was not motivated to shoot the sheriff just because of the \$200. According to Brumley, the sheriff had wrongfully accused Brumley's father of burglary and put his father in jail, where he died. Brumley also indicated that others were involved; however, he did not provide any additional names or specify what their involvement might have been.

We note that Brumley stated several times that he was serving a life sentence, that he knew he was never going to get out of prison, and that he wanted to serve the remainder of his time in Kentucky. However, he also contradicted himself several times, saying that he did not mind remaining in Ohio.

In addition to interviewing Brumley, Detective Senters interviewed P. S. and, because Webb had died, he interviewed some of her relatives. Detective Senters testified that P. S. was essentially incoherent and provided no useful information, and that Webb's relatives confirmed she and Brumley would see

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<sup>3</sup> Ms. Webb died before the trial.

each other whenever Brumley was not incarcerated, but they had no other useful information.

Based on Detective Senters's investigation, the Clay County Commonwealth's attorney presented the case to the grand jury, which indicted Brumley on May 3, 2012. The court initially scheduled Brumley's trial for September 2013; however, shortly before that date, Brumley's counsel moved for a continuance. In support of her motion, Brumley's counsel stated that she had not adequately prepared for trial because Brumley had led her to believe he was going to plead guilty but had changed his mind. Therefore, the court continued the trial to mid-November.

The day trial was scheduled to begin, Brumley moved for another continuance. In support of this motion, counsel stated that she had hired an investigator and taken significant steps to prepare for trial. However, because the case was 44 years old, she was having difficulty finding witnesses and obtaining documentation. Counsel specifically noted that she had been unable to locate Lester Burns, the then Commonwealth's attorney, who she believed had information about the shooting. She also noted that she had unsuccessfully attempted to obtain documentation regarding a car that Brumley stole in 1969, which she believed would establish that Brumley was lying when he gave his statement to Detective Senters. The Commonwealth objected and the court denied Brumley's motion.

At trial, the Commonwealth presented testimony from Detective Cox, Sheriff Jordan, Detective Senters, Sheriff Sizemore's son (who accompanied

Detective Huckabee when he interviewed Wheeler), and Lonnie and Jimmy Ray Hensley. Their testimony was consistent with what we have set forth above.

In addition to what is set forth above, Detective Senters stated that he interviewed Burns and had a recording of that interview. Neither Brumley's counsel nor the Commonwealth's attorney had the recording and both were surprised to learn that the interview had taken place. At the beginning of the second day of trial, Brumley's counsel moved for a mistrial arguing that the Commonwealth's failure to provide a copy of the Burns interview was both a discovery and *Brady* violation. Furthermore, Brumley's counsel noted that she had been attempting to subpoena Burns to testify at trial but had been unable to locate him. The Commonwealth's attorney stated, based on what Detective Senters had told him, the recording did not contain any exculpatory evidence. The judge stated that, before ruling on the motion, he and the parties needed to hear the recording. After doing so, the judge stated that the recording contained no exculpatory evidence, and he denied Brumley's motion.

Brumley then presented his case in chief, which consisted of his testimony; testimony from his cousins, Barbara Kiniry and William Brumley; testimony from Detective Huckabee; and additional testimony from Detective Senters. Detectives Huckabee and Senters testified consistent with what we set forth above.

Brumley testified that he lied to Detective Senters when he confessed to killing Sheriff Sizemore because he knows he will die in prison and wants to do so in Kentucky. He stated that he would confess to any number of murders to

get transferred to Kentucky; however, he also testified that he did not mind staying in Ohio because he "had it made." Brumley explained that he had gathered details about the shooting from speaking with others about it and used those details to weave his lies. He also explained that he and Wheeler devised their stories in the mid-1980s because Brumley believed he and Wheeler could escape if transferred to Kentucky.

Kiniry testified that Brumley was at his mother's house near Lexington on June 2, 1969, when he heard on the radio that Sheriff Sizemore had been murdered. She also testified that Brumley had stolen a car from her brother-in-law, but that occurred after the shooting.

William Brumley testified that he remembered Brumley stealing a car because he and another man retrieved it from Brumley. William believed that happened in the winter because it was snowing. He also remembered being with family when they heard about the shooting, but he could not say whether Brumley was there.

Based on the preceding evidence, the jury convicted Brumley, and the court sentenced him to life in prison. We set forth additional facts as necessary below.

## **II. STANDARD OF REVIEW.**

The issues raised by Brumley have different standards of review. Therefore, we set forth the appropriate standard as we analyze each issue.



### III. ANALYSIS.

#### A. **The Trial Court Did Not Abuse Its Discretion When It Denied Brumley's Motion to Continue.**

The court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial. A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it. If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true.

Kentucky Rule of Criminal Procedure (RCr) 9.04.

When ruling on a motion for a continuance the trial court must consider the facts of each case, especially the length of the delay; previous continuances; inconvenience to the litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; the complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

*Slone v. Commonwealth*, 382 S.W.3d 851, 855 (Ky. 2012). We review a trial court's decision to grant or deny a motion for continuance for abuse of discretion. *Id.* at 856.

As noted above, Brumley, who had been granted one continuance, moved for a second continuance the morning the trial began. In support of his motion, Brumley stated that he had not been able to obtain records related to a car theft charge that was "directly related to the case at bar." Furthermore, Brumley stated that he had been unable to locate or subpoena Burns or "law enforcement officers." Finally, Brumley stated that he had been unable to obtain "information from media sources." Thus, Brumley's motion was based on the absence of evidence (records regarding the car theft and information

from media sources) and the absence of witnesses (Burns and law enforcement officers). Therefore, Brumley was required to provide an affidavit setting forth how the car theft records and media information were material and what facts testimony from Burns and the law enforcement officers would prove. Brumley provided no such affidavit. And, although he set forth in his motion how the car theft records and media information might be material, he did not state what facts he believed Burns or the law enforcement officers would prove. Therefore, Brumley's motion was insufficient to meet the requirements of RCr 9.04, and the court did not abuse its discretion in denying it.

Furthermore, even if Brumley had complied with RCr 9.04, we discern no abuse of discretion by the trial court. Brumley, who had previously been granted a continuance, did not state how much additional time he needed; several of the Commonwealth's witnesses were retired and no longer living in the area; the delay was caused by Brumley, who, according to his attorney, had initially indicated he was going to plead guilty but changed his mind on the eve of the first trial date; and the case, which in essence boiled down to whether the jury believed Brumley's recorded statement or his testimony in court, was not particularly complex. We recognize that the passage of time between the crime and the trial created some difficulties for the defense - witnesses had died or were not easily located and documents were gone or in not easily accessible archives. However, those same difficulties existed for the Commonwealth. Furthermore, through his own testimony and the testimony of the investigating detectives, Brumley was able to put before the jury his theory

that others in the area had equally strong motives to kill Sheriff Sizemore. Therefore, even if Brumley had met the requirements of RCr 9.04, we would have discerned no abuse of discretion by the trial court.

**B. The Court Did Not Err When It Denied Brumley's Motion For A Directed Verdict.**

Brumley moved for a directed verdict at the conclusion of the Commonwealth's proof and at the conclusion of his proof. The trial court denied both motions. On appeal, Brumley argues that the trial court should have granted his motions because the only proof of his guilt was his confession, which he characterizes as a "false confession."

On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purposes of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony. On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

*Commonwealth v. Benham*, 816 S.W.2d 186 at 187 (Ky. 1991).

As we understand it, Brumley is arguing that his confession was false and that no reasonable juror could have believed it because: (1) Brumley desperately wanted to return to Kentucky and would have confessed to anything to do so; (2) Detective Senters implicitly promised Brumley that he could return to Kentucky in exchange for confessing, thus coercing Brumley to

confess; and (3) Detective Senters, in his questioning, provided Brumley with crucial facts about the shooting. We disagree.

As to Brumley's first contention, he did state in his confession that he wanted to return to Kentucky, as he did during his testimony at trial. However, Brumley also stated in his confession and testified at trial that he did not have a particular problem staying in Ohio. Drawing all fair and reasonable inferences from Brumley's testimony in favor of the Commonwealth, the trial court did not err in finding the jury could conclude that returning to Kentucky was not a motivating factor in Brumley's confession.

As to the second contention, Detective Senters did indicate his understanding that Brumley wanted to return to Kentucky, and Brumley stated as much. However, almost immediately after telling Detective Senters that he would not discuss the case without a guarantee of a transfer, Brumley confessed. Again, drawing all reasonable inferences in favor of the Commonwealth, Brumley willingly confessed without any promise of a transfer. Therefore, it cannot reasonably be said that his confession was coerced or involuntary.

As to Brumley's third contention, Detective Senters did discuss details of the case with Brumley when he interviewed Brumley. Therefore, the jury could have inferred Brumley was simply reiterating facts he learned from Detective Senters. However, the jury could have as easily inferred that Brumley knew details about the shooting because he was the shooter. The latter inference,

which is the one most favorable to the Commonwealth, supports the trial court's denial of Brumley's motion for a directed verdict.

**C. The Trial Court Did Not Err When It Denied Brumley's Motion For A Mistrial.**

As noted above, Brumley made a motion for a mistrial after Detective Senters disclosed he had interviewed Burns. Brumley argues that the trial court erred when it denied his motion because the Commonwealth was required to disclose the existence of and to provide a copy of Detective Senters's interview of Burns. According to Brumley, the Commonwealth's failure to do so impeded his ability to adequately prepare and present a defense. We agree with Brumley that, pursuant to RCr 7.24(2), the Commonwealth should have provided him with a copy of the Burns recording as part of discovery. However, we disagree that the Commonwealth's failure to do so mandated a mistrial.

"It is well established that a discovery violation may form the basis for a mistrial." *Slone v. Commonwealth*, 382 S.W.3d 851, 858 (Ky. 2012). However, "[a] mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity." *Bray v. Commonwealth*, 68 S.W.3d 375, 383 (Ky. 2002). We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *Id.* However, we only reverse a conviction for a discovery violation if, absent the violation, there is a reasonable probability that the result would have been different. *Akers v. Commonwealth*, 172 S.W.3d 414, 417 (Ky. 2005).

Here, the trial court listened to the recording of the Burns interview and concluded that nothing in that recording "would have been of any more benefit

to [Brumley] than anything else [he] might have had." Having listened to the recording, which was placed in the record by avowal, we agree.

In the interview, Burns, who is difficult to understand, essentially states that he suspected P. S. was the shooter and that he had heard other names mentioned as possibly being involved. That evidence had been placed before the jury via testimony from Detective Cox, who tried to get an indictment against P. S., and the other investigating officers. Furthermore, the names mentioned by Burns as other possible suspects or witnesses were contained in the written investigative record. Brumley had a copy of that record and nothing in Burns's statement would have led Brumley to other sources of information or to other possible suspects. Finally, Brumley has not set forth with any specificity how anything in the Burns recording would have enabled him to present a different defense or would have altered the outcome. Therefore, we cannot say that the trial court abused its discretion by denying Brumley's motion for a mistrial.

#### **IV. CONCLUSION.**

For the foregoing reasons, we affirm.

All sitting. All concur.

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