

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002712-MR

JOSEPH "TINY" SMITH

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 00-CR-00109

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: COMBS, McANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is an appeal from a judgment entered by the Adair Circuit Court after a jury convicted appellant of first degree trafficking in a controlled substance. Appellant argues that his constitutional rights were violated (1) by the court's refusal to grant his discovery request concerning the identity of witnesses who may have been present at the scene of the alleged crime, (2) by the court's admission of various hearsay statements, and (3) by the court's denial of his request

for a directed verdict. Appellant further argues that the cumulative effect of these errors amounted to a denial of his constitutional right to a fair trial. For the following reasons, we vacate and remand.

In December 1999, Neil Blankenship, a confidential informant, allegedly purchased crack cocaine from appellant as part of an undercover narcotics investigation. Detective Atwood accompanied Blankenship but remained in his vehicle where he could hear and observe the drug transaction as it occurred directly outside the vehicle. Appellant was subsequently arrested for first degree trafficking in a controlled substance.

Although appellant denied being present at the scene, the trial court refused to grant his request for any information that the Commonwealth had regarding the identity of other witnesses to the transaction. In addition, because the Commonwealth was unable to locate Blankenship for the purpose of having him testify at trial, the court allowed Detective Atwood to testify, over appellant's objections, about the transaction, including the conversation that he heard between appellant and Blankenship. The jury convicted appellant of first degree trafficking in a controlled substance, and he was sentenced to ten years in prison. The trial court denied appellant's motion requesting that the verdict be set aside, or in the alternative, that he be granted a new trial. This appeal followed.

Appellant's first argument is that the trial court's denial of his request for identification of witnesses who were allegedly present during the transaction violated his constitutional rights under the fifth and fourteenth amendments to the United States Constitution, as well as his rights under sections two, seven, and eleven of the Kentucky Constitution. Appellant claims that he was entitled to the identities of any witnesses pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) because such evidence was necessary to prove that he was not present at the time of the transaction.

Brady held that "the suppression by the prosecution 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." Brady, 373 U.S. at 87, 83 S. Ct. at 1196-1197, 10 L. Ed. 2d at 218. Basically, "Brady concerns those cases in which the government possesses information that the defense does not and the government's failure to disclose the information deprives the defendant of a fair trial." Bowling v. Commonwealth, Ky., 80 S.W.3d 405, 410 (2002).

Following the decision in Brady, RCr 7.24 and RCr 7.26 were enacted to establish the procedures to be followed in obtaining Brady materials. Although these rules do not

explicitly require that the Commonwealth produce information regarding the identities of persons present at the time of the crime, Lowe v. Commonwealth, Ky., 712 S.W.2d 944 (1986), notes that "there simply can be no valid principle under which the identity of a *known witness* may be concealed from adversary parties." Id. at 946 (quoting Burks v. Commonwealth, Ky., 471 S.W.2d 298, 301 (1971)). More specifically, the court in Lowe explained that although a defendant's request for information concerning "all persons present" at the time of the alleged act was categorically overbroad, a request for, "*known witnesses; exculpatory witnesses or persons observing or participating in the crime*" was permissible. Id. at 946. Further, while we recognize that appellant "has the burden of establishing that there is a reasonable probability that the result of the trial would have been different if the allegedly withheld exculpatory documents were disclosed to the defense," Sanders v. Commonwealth, Ky., 89 S.W.3d 380, 386 (2002) it is clear that "the duty on the state, mandated by the due process clause, to reveal exculpatory evidence is *always* applicable." Commonwealth v. Key, Ky., 633 S.W.2d 55, 56 (1982).

Unfortunately, we cannot discern from the record whether or not exculpatory information existed in the form of identifiable witnesses to the alleged drug transaction. Although the Commonwealth asserts that it is highly unlikely

that Atwood knew the identities of any witnesses, it does not deny that it is possible that Atwood had such information. Clearly, Brady places a duty upon the Commonwealth "to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 158 (2001) (quoting Strickler v. Greene, 527 U.S. 263, 280-281, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286, 301 (1999)). Finally, we are aware that the holding in Commonwealth v. Barber, Ky.App., 643 S.W.2d 592 (1982) is contrary to our decision, however, to the extent that Barber conflicts with Lowe, supra, it was impliedly overruled by the Kentucky Supreme Court's decision in that case.

Our conclusions to this point make it unnecessary to address appellant's remaining arguments, however, we feel that it is prudent to briefly discuss appellant's argument that the trial court improperly overruled his objection to Detective Atwood's testimony regarding statements that Blankenship made at the time of the alleged transaction. Although the Commonwealth asserts that these statements were admissible under KRE 801A(b)(2) as adoptive admissions, we feel that this characterization is incorrect. The statements by Blankenship fall outside of the realm of the hearsay rule because they were not offered for the truth of the matter asserted, but instead they constituted verbal acts used solely to give context to what

Detective Atwood observed. See Norton v. Commonwealth, Ky. App., 890 S.W.2d 632 (1994); ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK §8.05 (3d ed. 1993). Therefore, the trial court properly admitted them.

The judgment of the Adair Circuit Court is vacated and remanded, and the court is directed to conduct an evidentiary hearing to determine whether the Commonwealth or its agents possess any exculpatory evidence regarding the identity of any witnesses present during the alleged drug transaction, which would entitle appellant to a new trial. In the event that no such evidence exists, the trial court may reinstate the judgment.

ALL CONCUR.

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