

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001634-MR

PHILLIP BROOKS

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE ROBERT I. GALLENGSTEIN, JUDGE
INDICTMENT NO. 02-CR-00022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: EMBERTON, Chief Judge; McANULTY, Judge; and HUDDLESTON, Senior Judge.¹

HUDDLESTON, Senior Judge: Phillip Brooks was convicted of second-degree robbery and sentenced to five years' imprisonment. Following his conviction and sentencing, Phillip² moved for a new

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

² Because three of the Brooks brothers appear in this case, we will use their first names to avoid confusion.

trial on the basis of newly discovered evidence. He presented an affidavit from his brother, Kenny Brooks, stating that it was he (Kenny) who had been involved in the incident that gave rise to the robbery charge.

Chance Cole was riding bicycles with James Cobb on November 25, 2001. According to Cole, Phillip tried to stop him and speak with him at a Super America station, but Cole ignored the invitation. At a later point, Cole and Cobb rode out of an alley when a car blocked their path. Cole testified that Phillip got out of the car and yelled at him, saying that Cole had stolen the bike. Cole initially responded that he had purchased the bicycle, but relinquished it following a threat. Cole left with Cobb and reported the robbery to the police. A few days later, Cole and his mother saw a boy riding a bicycle that proved to be the one taken in the above incident. The boy riding the bicycle was Scott Brooks, the younger brother of Phillip Brooks. Scott Brooks gave conflicting versions of how he came to be in possession of the bicycle, and testified at trial that he had spoken with his brother Kenny about the case but had not spoken with Phillip or his counsel.

Phillip denies involvement in the taking of Cole's bicycle. He offered an alibi claiming that he was at work at a Ponderosa restaurant at the time of the alleged robbery. His alibi was corroborated by Erma Valentine, general manager of a

Ponderosa restaurant, who testified that Phillip was at work from 12:09 p.m. until 4:42 p.m. that day.

Following the trial, Phillip's counsel was contacted by Jovetta Brooks, the defendant's mother. Ms. Brooks informed counsel that it was Kenny Brooks, Phillip's brother, who had taken the bicycle. Kenny executed an affidavit to that effect, which states, in relevant part:

On or about November 24, 2001[,] I met Chance Cole on the street and asked him where he got his bike from because my niece's had been stolen. He ignored my questions at that time, so I got a car ride with some friends and followed Chance and another boy. When I caught up with them he denied having stole [sic] the bike. I told him I wanted to check the bike out to make sure it was not my niece's and he gave the bike to me. My brother, Phillip Brooks, was charged with Robbery, Second Degree as the result of my actions.

I did not inform defense counsel about this because I knew my brother was innocent and would not be found guilty of a crime he did not commit and I did not want to get into trouble. I am coming forward now due to my brother's conviction, which I did not believe would happen due to his innocence. There was

no way that defense counsel would have been able to obtain this information from any other source.

"The rule is that in order for newly discovered evidence to support a motion for new trial in a criminal case it must be of such decisive force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted."³ "[N]ewly discovered evidence which merely impeaches or is collateral is insufficient unless it impeaches the only material witness in the case."⁴ "Whether to grant a new trial on the basis of newly discovered evidence is largely within the discretion of the trial court, and the standard of review is whether there has been an abuse of that discretion."⁵

The Commonwealth challenges Kenny's affidavit as being insufficient in that it does not rise to the level of a confession to the crime of robbery. Indeed, the Commonwealth argues that if this affidavit is believed, then no one would be guilty of robbery. The problem with this reasoning is that it assumes for all purposes that a robbery must have occurred. It

³ Wheeler v. Commonwealth, Ky., 395 S.W.2d 569, 572 (1965), citing Kinmon v. Commonwealth, Ky., 383 S.W.2d 338 (1964).

⁴ Foley v. Commonwealth, Ky., 55 S.W.3d 809, 814 (2000) (citations omitted).

⁵ Id (citations omitted).

is possible that Chance Cole was mistaken with respect to the details of the event.⁶ Furthermore, whether or not Kenny would be found guilty of robbery is irrelevant for our present determination of whether or not the admission of testimony conforming to the affidavit in question is reasonably likely to change the result of Phillip's trial.

Viewing the totality of the evidence presented, it is reasonably likely that Kenny's affidavit would have an impact on the jury's determination. Phillip denied involvement in the alleged robbery, and presented a disinterested witness to verify that he was indeed working. It is unlikely a jury would disbelieve Phillip's alibi when presented with corroboration from a disinterested witness and a plausible explanation of how Cole lost his bicycle without Phillip's involvement. Furthermore, Scott Brooks' revelation that he had spoken with Kenny but not Phillip about the case lends additional credibility to the version of events involving Kenny, not Phillip.

If the Commonwealth believes Cole's version of events rather than that contained in Kenny's affidavit, it is free to

⁶ The parties agree that Cole is of limited intellectual capacity. However, witness recollection and identification are frequently of problematic reliability. See, e.g., Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

prosecute Kenny assuming it can convince a grand jury to return an indictment against Kenny. In that event, a different petit jury would be called on to resolve the discrepancy in events as recounted by Chance Cole and Kenny Brooks. However, as stated above, that determination is irrelevant to our resolution of Phillip's case.

Finally, the Commonwealth argues that the lack of affidavits from Phillip and his counsel averring their exercise of due diligence should preclude our review of the proffered new evidence.⁷ "On the question of newly discovered evidence it is necessary that the diligence of both be shown."⁸

Kenny Brooks testified that he had full knowledge of the proceedings against his brother and would not have revealed his involvement regardless of any action taken by Phillip. In this instance, it is irrelevant what precise steps Phillip and his counsel took in investigating and preparing his defense because all efforts would have been met with the same response by his brother. There is no indication that Phillip intentionally withheld the evidence of his brother's involvement in order to gain strategic advantage over the Commonwealth, thereby negating any claim of unfair prejudice toward the

⁷ See Wheeler v. Commonwealth, *supra*, n. 3, at 571, citing Bales v. Commonwealth, 313 Ky. 272, 231 S.W.2d 61 (1950).

⁸ Id.

Commonwealth.⁹ To ignore the merits of Phillip's appeal on the basis of his missing affidavit would be to elevate form over substance and result in injustice.¹⁰

For the foregoing reasons, the circuit court's denial of Phillip Brook's motion for new trial is reversed, the judgment is vacated and this case is remanded to Mason Circuit Court for a new trial consistent with this opinion.

EMBERTON, Chief Judge, CONCURS.

McANULTY, Judge, DISSENTS WITHOUT OPINION.

BRIEF FOR APPELLANT:

Lisa Clare
DEPARTMENT OF PUBLIC ADVOCACY
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
ATTORNEY GENERAL

William L. Daniel, II
ASSISTANT ATTORNEY GENERAL
Frankfort, Kentucky

⁹ See Ky. R. Crim. P. (RCr) 9.24: "The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial right of the parties."

¹⁰ This opinion should not be interpreted as diminishing or departing from the general rule requiring that a defendant produce affidavits demonstrating the exercise of due diligence by both the defendant and his counsel. Rather, our holding is limited to the unique facts of this case where it is reasonably certain that further investigation would have been futile.