

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001978-MR

JEANA SPARKS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 01-CR-00688

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * *

BEFORE: EMBERTON, CHIEF JUDGE; KNOPF AND SCHRODER, JUDGES.

KNOPF, JUDGE: Following a bench trial in July 2002, the Fayette Circuit Court found Jeana Sparks guilty of ten felony counts of theft by failure to make required disposition.¹ By judgment entered September 11, 2002, the court sentenced Sparks to five years in prison and probated that sentence for five years. Sparks contends that the Commonwealth denied her an opportunity for a meaningful defense by failing to preserve potentially exculpatory evidence. She also challenges the admissibility of

¹ KRS 514.070.

certain bank records and the sufficiency of the Commonwealth's proof. Unpersuaded by these claims of error, we affirm.

Sparks was formerly employed for over twelve years as an insurance agent for the Allstate Insurance Company in Lexington. In August 1998, an audit indicated that Sparks had failed to transfer to the company more than \$60,000.00 of the premium payments she had received from her customers. Sparks's former supervisor testified that agents such as Sparks were required to report to the company via computer their daily receipts, both checks and cash, and promptly deposit the receipts in an assigned bank account. A few days later the company would attempt to have the reported amount transferred from the agent's account to a company account. If the funds in the agent's account were insufficient for the transfer, no transfer would occur. A day or two later the company would attempt to transfer that amount again. If again there were insufficient funds, the amount would be added to the agent's missing-funds account.

At the first appearance of missing funds, the agent's supervisor was to investigate. In Sparks's case, however, for reasons not developed at trial, several attempted transfers from her account failed but went undetected until the total amount missing exceeded \$60,000.00. The supervisor testified that when the discrepancy finally came to light he confronted Sparks with

his suspicion that she had been keeping her cash receipts and she admitted that she had. The company terminated her employment, the matter was referred to the Insurance Commission, and the present changes eventually ensued.

Sparks claims that at the time of her termination in August 1998 she had about 1,600 customers with about 2,000 policies. At her office in Lexington she maintained a file for each customer. Following her termination, another Allstate agent took possession of about one hundred fifty or two hundred of those files, but, notwithstanding the Insurance Commission's investigation, the rest were apparently discarded. Sparks contends that she may have left premium payments in some of these files and that some of the files may have contained records of deposits for which the bank did not give her credit. The destruction of the files thus deprived her, she maintains, of the opportunity to raise these grounds of defense.

Under the federal constitution, the government violates a defendant's right to due process when it destroys evidence whose exculpatory significance is apparent before destruction and the defendant remains unable to obtain comparable evidence by other reasonably available means.² If the exculpatory value of the evidence is not apparent and all that can be confirmed is that the evidence was potentially useful to

² California v. Trombetta, 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984).

the defense, then a defendant must show that the government acted in bad faith in destroying the evidence.³

We agree with the trial court that, even assuming that the Commonwealth was responsible for the destruction of the alleged files, the files' exculpatory value was not apparent. Sparks does not claim to have told either the company or the investigators that she had left money and deposit slips in her files, and otherwise those dealing with the files had no reason to think that they contained exculpatory evidence. Sparks has not shown that the Commonwealth proceeded in bad faith. The court did not err, therefore, by denying Sparks's motion for relief on the ground of lost evidence.

The trial court accepted into evidence bank statements for Sparks's agent account reflecting several instances where twice the automatic transfer of a particular amount was attempted but the transfer failed because both times the account contained insufficient funds. An Allstate official testified that the amounts attempted to be transferred corresponded to daily receipts reported by Sparks and that the total of the failed transfers when Sparks's account was finally closed was approximately \$64,000.00. For two reasons, Sparks contends that the trial court erred by admitting the bank records into evidence.

³ Arizona v. Youngblood, 488 U.S. 51, 102 L. Ed. 2d 281, 109 S. Ct. 333 (1988); Collins v. Commonwealth, Ky., 951 S.W.2d 569 (1997).

First, Sparks maintains that the records were not properly authenticated. Under KRE 902(11) business records may be deemed self authenticating only if their custodian certifies them; that is, makes a written declaration under oath that they are contemporaneous records made by someone with knowledge in the regular course of business. Sparks asserts that the purported certification in this case does not meet this standard. We agree. The certification letter proffered by the Commonwealth was not made under oath, as the rule requires. Nevertheless, we are persuaded that the trial court did not abuse its discretion when it admitted the bank statements.

The Commonwealth gave Sparks ample notice of its intention to introduce the bank statements and four days before trial moved for a ruling on their admissibility. The court declined to make a blanket ruling that the statements were admissible because another ground of objection might arise at trial, but it acknowledged that it and Sparks were on notice that the Commonwealth intended to rely on the certification letter and would not present an agent from the bank. When Sparks objected to the inadequate certification at trial, the court overruled the objection and admitted the records. We agree with the court that Sparks waived this ground of objection by failing to raise it at the pre-trial hearing. A party has a duty to raise objections in a timely manner, which generally

means at a point when the court retains the ability to provide appropriate relief.⁴ Appropriate relief here would have been additional evidence from the Commonwealth authenticating the statements. The trial court did not abuse its discretion by ruling, in effect, that by delaying her objection until such relief was no longer possible, Sparks had violated that duty to be timely.

Sparks also objects to the bank statements on the ground that the deposits recorded thereon are actually totals of numerous individual items deposited at one time. These totals, Sparks, maintains, should be deemed "summaries" of the separate items and thus must comply with KRE 1006. That rule provides that summaries of voluminous records may be introduced under certain conditions, and Sparks contends that here the conditions were not met. We agree with the trial court, however, that the summaries KRE 1006 contemplates are summaries prepared for trial and not business records, such as these bank statements, that comprise underlying data.⁵

Finally, the Commonwealth introduced only a portion of Sparks's account records, just those records indicating when the system found insufficient funds in her account to cover

⁴ RCr 9.22; Commonwealth v. Petrey, Ky., 945 S.W.2d 417 (1997); Salisbury v. Commonwealth, Ky. App., 556 S.W.2d 922 (1977).

⁵ *Cf. United States v. Catabran*, 836 F.2d 453 (9th Cir. 1988) (construing the similar federal rule); United States v. Draiman, 784 F. 2d 248 (7th Cir. 1986) (same).

particular receipts. Sparks maintains that she should have been acquitted because by itself this portion of her bank statement does not show that her account wound up with a deficit. A company auditor testified, however, that the amounts the statements showed to have been uncollected were never collected and that Sparks's account wound up far in arrears. This was sufficient evidence to support the finding of guilt.⁶

In sum, Sparks received a fair trial, tainted neither by the improper loss of exculpatory evidence nor by the improper admission of evidence, and the Commonwealth introduced sufficient evidence of her guilt to justify her conviction. Accordingly, we affirm the September 11, 2002, judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Errol Cooper
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Wm. Robert Long, Jr.
Assistant Attorney General
Frankfort, Kentucky

⁶ Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).