

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002595-MR

NATHANIEL BARBOUR

APPELLANT

APPEAL FROM HARDIN COUNTY CIRCUIT COURT  
v. HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 01-CR-00259

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: KNOPF, TACKETT AND VANMETER, JUDGES.

VANMETER, JUDGE. Appellant Nathaniel Barbour brings this appeal from a judgment of the Hardin County Circuit Court convicting him of trafficking in a controlled substance in the first degree and being a persistent felony offender in the second degree.

The main issue for our review is whether the trial court erred in denying the appellant a continuance of his jury trial date.

For the reasons stated hereafter, we affirm.

The pertinent facts stem from a December 1998 sale of cocaine by appellant to buyer, Christopher Garten. Officer Billy Edwards, a drug enforcement officer with the Elizabethtown Police Department, arranged the recorded sale after Garten was found in possession of controlled substances. Officer Edwards told Garten that the Commonwealth Attorney's Office would be notified if he cooperated with future buys. As a result of this controlled cocaine sale to Garten, appellant was arrested. On September 20, 2002, a jury convicted appellant for trafficking in a controlled substance in the first degree and of being a persistent felony offender in the second degree.

Prior to trial and by order of the trial court, a hearing on appellant's discovery requests and all other matters was scheduled for August 30, 2002. However, appellant's counsel was unable to attend and neither side made efforts to reschedule.<sup>1</sup> The first day of trial was set for September 18, 2002, but appellant's counsel informed the trial judge that the discovery matters not previously heard needed to be resolved before counsel could proceed. In order to accommodate appellant's discovery requests, the trial judge granted

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<sup>1</sup> We do not condone the Commonwealth's conduct in failing to disclose Garten's name earlier and to resolve the discovery issues prior to the eve of trial. See Moore v. Commonwealth, Ky., 634 S.W.2d 426 (1982). Be that as it may, the issue for this appeal is whether the trial court abused its discretion in failing to grant the appellant a continuance of the trial.

appellant a one day continuance and conducted a hearing on September 18, 2002.

At the September 18 hearing, appellant sought specifically the disclosure of Garten's name, the two audiotapes from the cocaine purchase and any information showing that a deal existed between Garten and Officer Edwards. The trial judge ordered the Commonwealth to disclose Garten's identity based on the fact that Garten participated in the controlled cocaine purchase and thus, was a witness subject to disclosure. KRE 508; see Burks v. Commonwealth, Ky., 471 S.W.2d 298 (1971) (identity of undercover informant who participated in criminal transaction was required to be disclosed). The trial judge directed appellant's counsel to visit the Commonwealth Attorney's office to review the audiotapes of the drug transaction. At this September 18 hearing, the Commonwealth clarified that it never made a deal with Garten, and more importantly, Officer Edwards testified that Garten was involved in a cocaine transaction with appellant prior to the controlled purchase.

On September 19, 2002, the trial began. Officer Edwards testified that appellant was the individual who exited the apartment where the cocaine buy occurred, and the drug transaction audiotapes were introduced in evidence. On cross examination, Officer Edwards adamantly denied that he ever made

a deal with Garten. Garten admitted on cross-examination that he was caught with drugs prior to the controlled buy even though he was never charged. However, despite counsel's persistent questioning, Garten claimed that neither the Commonwealth nor Officer Edwards had promised him special treatment for cooperating in the cocaine buy from appellant.

Nevertheless, appellant argues that evidence of a deal made with Garten in exchange for his cooperation was exculpatory and material to his case. Appellant contends that, based on United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Commonwealth is required to disclose evidence which implies that a testifying witness received special treatment, as such evidence is material in nature. In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." 373 U.S. at 87, 83 S.Ct. at 1196; see also Bagley, 473 U.S. at 669, 105 S.Ct. at 3377. Defining "reasonable probability" as "probability sufficient to undermine confidence in the outcome," the Court in Bagley noted that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result

of the proceeding would have been different." 473 U.S. at 682, 105 S.Ct. at 3383.

Here, the Commonwealth disclosed Garten's name to appellant during the September 18 hearing and the two audiotapes were made accessible to him without a delay. Moreover, appellant was aware of Garten's cocaine purchase from appellant prior to the controlled buy, which minimized any surprise at trial. In addition, the jury had full benefit of this evidence by virtue of counsel's thorough cross-examination of Officer Edwards and Garten.<sup>2</sup> Therefore, the result of appellant's trial would not have been different if disclosure of this evidence had been made prior to the September 18 hearing. See Bagley, 473 U.S. at 682, 105 S.Ct. at 3383; Brady, 373 U.S. at 87, 83 S.Ct. at 1196.

Appellant argues that disclosure one day before trial was inadequate, and that he should have been granted a longer continuance. In Anderson v. Commonwealth, Ky., 63 S.W.3d 135 (2001), the Kentucky Supreme Court held that the trial court had committed reversible error by denying a motion for a continuance. The Court in Anderson applied a seven-factor test, which it had previously set forth in Eldred v. Commonwealth,

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<sup>2</sup> In Bagley, 473 U.S. at 667, 105 S.Ct. at 3376, the defendant moved to vacate his sentence because the existence of a deal was not revealed until trial although the deal was pertinent for impeachment purposes. The Supreme Court agreed with the district court's denial of the motion because disclosure would not have affected the outcome of the case.

Ky., 906 S.W.2d 694, 699 (1994), for consideration by a trial court in exercising its discretion as to granting a continuance: (1) the length of the delay; (2) whether there were any previous continuances; (3) the inconvenience to the litigants, witnesses, counsel, and the court; (4) whether the delay is purposeful or caused by the accused; (5) the availability of competent counsel, if at issue; (6) the complexity of the case; and (7) whether denying the continuance would lead to any identifiable prejudice.

The matter now before us is distinguishable from both Anderson and Eldred.<sup>3</sup> Here, unlike the newly revealed information in Anderson, 63 S.W.3d at 138, the audiotapes were brief and revealed little new information other than the drug lingo used in the drug transaction and the name of the buyer. Additionally, since Garten had no prior felony record, it is unlikely that a longer continuance would have provided appellant with additional impeachment evidence. Essentially, appellant was given a one day continuance because the discovery matters were not complex.

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<sup>3</sup> In Anderson, the complex medical records on the rape victim, revealing sexual activity with a person other than the defendant, were not disclosed until a few days prior to trial, and the trial court never granted a continuance. 63 S.W.3d at 138. In Eldred, the discovery matters were very complex given that it was a death penalty case. 906 S.W.2d at 699.

We conclude that the trial court did not abuse its discretion by denying appellant's motion for a continuance of his trial date.<sup>4</sup>

The court's order is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT  
OF APPELLANT:

Ramon McGee  
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT  
FOR APPELLEE:

Albert B. Chandler III  
Attorney General

Perry T. Ryan  
Assistant Attorney General  
Frankfort, Kentucky

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<sup>4</sup> An abuse of discretion standard applies to a trial court's denial of a motion for a continuance. See Abbott v. Commonwealth, Ky., 822 S.W.2d 417, 418 (1992).