

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000226-MR

TERENCE EUGENE ALEXANDER

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 02-CR-00610

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** *

BEFORE: BUCKINGHAM, COMBS, and DYCHE, Judges.

COMBS, JUDGE. Terence Alexander was convicted in Fayette Circuit Court of trafficking in a controlled substance in the first degree and possession of drug paraphernalia. Based upon the jury's recommendation, he was sentenced to serve terms of nine (9) years and twelve (12) months, respectively. Alexander appeals. We vacate and remand for a new trial.

In the early morning hours of April 15, 2002, officers of the Lexington Police Department responded to a tip that drugs were being sold from a residence on East Loudon Avenue. Upon

their arrival, the officers requested and received permission from the homeowner to enter the residence, where they then observed various items of drug paraphernalia. Four men were present, including: the appellant; his brother, Frank Alexander; the homeowner, William Neal; and Jason Cross, a temporary resident in the home. All four were given warnings pursuant Miranda¹ and were placed under arrest.

After the scene was secured, the residence was thoroughly searched. Officers recovered items including crack cocaine pipes, plastic sandwich bags with missing corners, a heating spoon, a push rod, and plastic bags containing 43 pieces of crack cocaine. Terence Alexander had \$513.00 in cash on his person.

The appellant contends that he is entitled to a reversal of his conviction for two reasons. First, he contends that the trial court erred by permitting the Commonwealth to play before the jury the taped statements given to police by Jason Cross and Frank Alexander on the day of their arrests. We agree.

Following defense counsel's cross-examination of Jason Cross and Frank Alexander, the Commonwealth announced that it intended to ask Lieutenant Lawrence Weathers to identify the tape-recorded interviews of the two men. The Commonwealth then

¹ Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S.Ct. 1602 (1966).

sought permission to play the audiotapes before the jury. In its proffer, the Commonwealth argued that the evidence fell within the hearsay exception provisions of KRE² 801A by serving to rebut the suggestion of defense counsel that these two witnesses had implicated the appellant in order to curry the favor of the police and thereby to negotiate a more favorable plea agreement for themselves. The trial court agreed and overruled the defense's objection, permitting the jury to hear the tape-recorded statements.

Some prior consistent statements of a witness are not excluded by the hearsay rule and may be admitted "if offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive..." KRE 801A(a)(2). However, in order to be admissible, the timing is critical. The statements must have been made before the declarant formed or possessed a possible motive to falsify the statements. Smith v. Commonwealth, Ky., 920 S.W. 2d 514 (1996), citing Tome v. United States, 513 U.S. 150, 130 L.Ed.2d 574, 115 S.Ct. 696 (1995). It has long been the rule in Kentucky that:

A witness cannot be corroborated by proof that on previous occasions he has made the same statements as those made in his testimony. Where, however, a witness has been assailed on the ground that his story is a *recent* fabrication, or that he has some motive for testifying falsely, proof that he

² Kentucky Rules of Evidence.

gave a similar account of the matter when the motive did *not* exist, *before* the effect of such an account could be foreseen, or when motive or interest would have induced a different statement, is admissible. (Emphasis added).

Eubank v. Commonwealth, 210 Ky. 150, 275 S.W.630, 633 (1925).

The record supports the Commonwealth's contention that its purpose in offering the prior consistent statements was to bolster the credibility of witnesses who had been discredited by the defense. However, their alleged motives to manipulate the truth, (*i.e.*, to implicate the appellant in exchange for favorable treatment) very likely could have developed or come into being at the time of their arrests -- after which they gave the disputed statements.

In order to refute a charge of recent fabrication, a prior consistent statement must have been made "before the source of the bias, interest, influence or capacity originated." Tome, 115 S. Ct. at 700. A statement made after an improper motive exists does not fall within the scope of KRE 801A(a)(2). It is reasonable to believe that the witnesses in this case might have assumed that implicating Terence Alexander during their initial interviews with police detectives would enhance their standing so as to result in more lenient treatment by the police in exchange for their cooperation (*i.e.*, their statements). Since the witnesses' statements were made after

they allegedly possessed a motive to falsify, the statements cannot qualify as exceptions to the hearsay rule and thus are not admissible.

Kentucky Rule of Criminal Procedure (RCr) 9.24 provides that:

No error in either the admission or the exclusion of evidence . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice.

We agree that the appellant was substantially prejudiced as the result of the admission of the contested hearsay statements against him. Absent that error in admitting the tainted statements, there is a reasonable probability that the verdict would have been different. Therefore, we cannot conclude that the admission of the evidence merely constituted harmless error. See Hill v. Commonwealth, Ky. App., 779 S.W.2d 230 (1989). Consequently, we believe that the appellant is entitled to the relief he seeks.

Alexander next contends that the testimony of Lieutenant Weathers concerning the production, packaging, and sale of crack cocaine on the street was improperly admitted. He argues that the testimony was not relevant or, in the alternative, that if it was relevant, its probative value was

substantially outweighed by the danger of undue prejudice to him. We disagree.

Lieutenant Weathers testified with respect to activities characteristic of drug trafficking operations as opposed to the personal consumption of crack cocaine. His observations were relevant and helpful to the jury in evaluating whether Alexander was engaging in drug trafficking. While the testimony was most certainly detrimental to the defendant, the probative value nonetheless outweighed the prejudice. Similar testimony should be deemed admissible upon retrial.

The judgment of the Fayette Circuit Court is vacated, and this matter is remanded for new trial.

BUCKINGHAM, JUDGE, DISSENTS.

DYCHE, JUDGE, CONCURS.

BRIEF FOR APPELLANT:

John Rampulla
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

George G. Seelig
Assistant Attorney General
Frankfort, Kentucky