

RENDERED: March 5, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-000853-MR

ROB WHITE

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE  
ACTION NO. 98-CR-003228

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING  
AND  
REMANDING

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BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND VANMETER, JUDGES.

BUCKINGHAM, JUDGE: Rob White appeals from an order of the Jefferson Circuit Court denying his motion for a new trial. We reverse and remand.

After a jury trial with his twin brother and co-defendant, Bob White, Rob White was convicted of complicity to first-degree robbery and two counts of complicity to first-degree assault. The charges against the two involved the

robbery of B-Line grocery store at the corner of 7<sup>th</sup> and Hill in Louisville, Kentucky, on July 14, 1998. Both the clerk and the security guard at the store were shot and seriously wounded. As a result of his convictions for the crimes, White was sentenced to eighteen years in prison.<sup>1</sup>

White filed a direct appeal to this court, raising several issues. One issue was whether the trial court erred in ruling that KRS<sup>2</sup> 610.320(4) was constitutional. Another issue involved whether the trial court erred in refusing to allow White's attorney to examine the mental health records of the store clerk.<sup>3</sup>

In an opinion rendered on January 25, 2002, this court rejected White's argument that KRS 610.320(4) was unconstitutional. However, this court concluded that the trial court had erred in refusing to allow White's attorney to review the mental health records of the clerk. We held that White was entitled to review the records and develop evidence which might cast doubt on the clerk's eyewitness identification. Thus, we remanded the case so that White could have a full review of the clerk's mental health records and the opportunity to present

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<sup>1</sup> The jury was unable to reach a verdict on the charges against Bob White, and he ultimately accepted a plea agreement, pled guilty to amended charges, and was sentenced to five years in prison.

<sup>2</sup> Kentucky Revised Statutes.

<sup>3</sup> The Commonwealth's case was built on the eyewitness testimony of the store clerk. The security guard could not identify the robber or robbers.

evidence based on the records relevant to the clerk's credibility which would warrant a new trial.

As directed by this court, the trial court conducted a hearing. Dr. Michael Nash, a clinical psychologist and professor from the University of Tennessee, testified on White's behalf. Following the hearing the trial court entered an order denying White's motion for a new trial. This appeal followed.

White raises two issues in this appeal. First, he argues that the trial court erred in denying his motion for new trial based on the evidence he presented at the hearing. Second, White argues that the Kentucky Supreme Court's decision in Manns v. Commonwealth, Ky., 80 S.W.3d 439 (2002), requires that he be granted a new trial. We agree with his second argument.

Prior to trial, White moved the court to declare KRS 610.320(4) unconstitutional. That statute states in relevant part as follows:

Subject to the Kentucky Rules of Evidence, juvenile court records of adjudications of guilt of a child for an offense which would be a felony if committed by an adult shall be admissible in court at any time the child is tried as an adult, or after the child becomes an adult, at any subsequent criminal trial relating to that same person. Juvenile court records made available pursuant to this section may be used for impeachment purposes during a criminal trial, and may be used during the sentencing phase of a criminal trial.

Id. The trial court denied the motion, and White testified during the trial that he had pled guilty in juvenile court to the felony offense of tampering with physical evidence. This fact was used by the Commonwealth to impeach White's credibility.

As we have noted, in our first opinion we upheld the trial court's denial of White's motion to declare the statute unconstitutional. Following the rendering of our first opinion, but before the hearing before the trial court concerning the mental health records of the clerk, the Kentucky Supreme Court rendered its opinion in the Manns case. Therein, it held that KRS 532.055(2)(a)6 was unconstitutional as a violation of the separation of powers doctrine. The court therein noted that KRS 532.055(2)(a)6 contained identical language to KRS 610.320(4), the statute involved in this case. 80 S.W.2d at 441. Although the court granted comity to the portion of the statute that permits the introduction of a defendant's juvenile court records during the penalty phase of a trial, it declined to do so with the portion of the statute that permits use of a prior juvenile adjudication for impeachment purposes. Id. at 444-45.

White now argues in this appeal that we should reverse the trial court and order that he be granted a new trial based on the holding in the Manns case. In response to this argument,

the Commonwealth argues that the holding in Manns should be applied prospectively but not retroactively.<sup>4</sup> In support of its argument, the Commonwealth cites United States v. Johnson, 457 U.S. 537, 102 S. Ct. 4579, 73 L. Ed. 2d 202 (1982), and Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). Referencing those two cases, the Commonwealth argues that “[a]pplying the ‘clear break’ threshold test of Johnson and the three-prong test of Stovall, the requirement to apply Manns non-retroactively becomes apparent.”

In relying on the Johnson and Stovall cases, the Commonwealth has overlooked the fact that the U.S. Supreme Court has since reexamined those cases and the issue of retroactivity in the case of Griffith v. Kentucky, 479 U.S. 314 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Therein, the Supreme Court stated that “[w]e therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” 479 U.S. at 328.

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<sup>4</sup> The Commonwealth does not contend that White is precluded from raising this issue in his second appeal based on the law of the case doctrine and our ruling adversely to White in his first appeal. Thus, we will not address that potential issue and offer no opinion on it. Also, the Commonwealth apparently concedes that the Manns case applies to KRS 610.320(4) and renders it likewise unconstitutional due to the identical language in the two statutes. Further, the Commonwealth apparently concedes that White preserved any error concerning his testimony that he had been adjudicated guilty of a felony offense in juvenile court.

Furthermore, the Griffith case has been recognized by the Kentucky Supreme Court. See Justice v. Commonwealth, Ky. 987 S.W.2d 306, 311 (1998).

The Kentucky Supreme Court held in the Manns case that KRS 532.055(2)(a)6 is unconstitutional. By implication, we conclude the same wording in KRS 610.320(4) to be unconstitutional. Because White's case was still on direct appeal when the Manns opinion was rendered, the principles set forth in that case apply retroactively to this case pursuant to Griffith v. Kentucky. Therefore, as with the defendant in the Manns case, White was entitled to a new trial.

The order of the Jefferson Circuit Court denying White's motion for a new trial is reversed, and this case is remanded for a new trial.<sup>5</sup>

ALL CONCUR.

BRIEFS FOR APPELLANT:

Bruce P. Hackett  
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BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

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<sup>5</sup> Because White has now had an opportunity to review the mental health records of the clerk and to produce expert testimony to support his theory, we deem the other issue moot. We offer no opinion concerning the admissibility of the testimony of Dr. Nash at a new trial.