

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001329-MR

THERON HOLT

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 99-CR-000810

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: Theron Holt entered a conditional guilty plea to lesser offenses after being indicted with three co-defendants in connection with a robbery. Holt argues that the indictment against him should have been dismissed due to prosecutorial misconduct because the prosecutor entered into a plea agreement with one of the co-defendants that required the co-defendant to "not attempt to provide exculpatory evidence" in Holt's case. Although the choice of words used by the

Commonwealth in its plea agreement with the co-defendant was less than desirable, we conclude, having reviewed the record as a whole, that Holt's rights were not violated and that the prosecutor did not engage in prosecutorial misconduct. Thus, we affirm.

On March 13, 1999, Holt was a passenger, along with Quantez Wiley and Clifford Patterson, in a vehicle driven by Raymon Hopson. Patterson was seated in the passenger side of the frontseat, and Wiley and Holt were seated in the backseat. Holt was seated behind the driver, and Wiley was seated behind the passenger.

The vehicle pulled along side three teenage boys, and the boys were robbed at gunpoint of their jackets, shoes, and other items. A police officer in an unmarked car observed the incident and suspected that a drug transaction had taken place. After following the vehicle for a short time, the officer stopped it for a traffic violation. Two handguns were found in the car, and Hopson and Wiley were arrested and charged with the offense of carrying a concealed deadly weapon. Holt and Patterson were allowed to go free, and Patterson was permitted by the officer to take the clothing from the vehicle after requesting that he be allowed to do so.

When law enforcement authorities later learned of the robbery, the four occupants of the vehicle were charged with

first-degree robbery. Holt and Patterson were also charged with tampering with physical evidence, and Holt was additionally charged with being a persistent felony offender in the second degree.

Holt filed a motion for a separate trial, and the court granted it, noting that the Commonwealth would try him first. Prior to Holt's trial, Hopson and Wiley entered into plea agreements with the Commonwealth. Each pled guilty to three counts of first-degree robbery, and the court sentenced each to ten years in prison.

Hopson and Wiley were called by Holt as witnesses at his trial. Hopson testified that Holt did not know that a robbery was going to take place, did not participate in the robbery, was not armed, and simply sat in the backseat of the car while the robbery took place. The Commonwealth impeached Hopson with his signed plea agreement wherein he indicated that he, Wiley, Holt, and Patterson had acted in complicity with each other in robbing the victims. He was also impeached with his statement to a detective in which he stated that he could not say for sure whether Holt knew that a robbery would take place.

Wiley also testified that Holt did not participate in the robbery. The Commonwealth also impeached him with his statement in his plea agreement that he had committed the robbery in complicity with the other three. Wiley explained

that he assumed that complicity meant that Holt was with him in the car when the robbery was committed. Wiley was also impeached by his statement to the detective.

At the conclusion of the evidence in Holt's trial, the jury deliberated but was unable to reach a verdict. Thus, the court declared a mistrial. Prior to the scheduled retrial of Holt, the Commonwealth entered into a plea agreement with Patterson in which Patterson admitted guilt to three counts of first-degree robbery and one count of tampering with physical evidence. Pursuant to the agreement, Patterson was also sentenced to ten years in prison. Patterson thereafter related to Holt's attorney that he would refuse to testify at Holt's trial.¹ The terms of Patterson's plea agreement with the Commonwealth are the crux of this appeal.

Patterson's plea agreement stated the facts of the case as "Clifford N. Patterson, acting alone or in complicity with Theron Holt, Raymon Hopson, and Quantez Wiley while armed with a gun, they stole money and property from Wendell Ratliff, Adrian Brown, and Kenneth Griten." The agreement also provided that Patterson would "not attempt to provide exculpatory evidence in this case to [Holt]." Further, the agreement stated

¹ Whether Patterson could have established a valid basis for asserting his privilege against self-incrimination had he been called as a witness in Holt's trial is questionable.

that Patterson would testify truthfully as to Holt's involvement in the crime if he were called as a witness.

In light of the fact that Patterson's plea agreement required him not to attempt to provide exculpatory evidence concerning the prosecution of Holt, Holt filed a motion to dismiss the indictment against him on the ground of prosecutorial misconduct. After conducting a hearing on the motion, the circuit court denied it. Thereafter, Holt entered a conditional guilty plea to three counts of theft by unlawful taking of property over \$300, as amended from three counts of first-degree robbery, and to one count of tampering with physical evidence. Pursuant to the plea agreement, Holt was sentenced to two years in prison on each of the counts, and the sentences were ordered to run concurrently. Following the entry of a final judgment, this appeal by Holt followed.

Holt argues on appeal that the Commonwealth deliberately suppressed exculpatory evidence contrary to law and thereby deprived him of various constitutional rights. In support of his argument, Holt cites Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). That case held that "the suppression by the prosecution of evidence favorable to an

accused upon request violates due process where the evidence is material either to guilt or to punishment."² 373 U.S. at 87.

Holt argues that Patterson's plea agreement was improper in that it "effectively drove Patterson from the witness stand." Holt contends that "[b]y preventing Mr. Patterson from providing exculpatory testimony, the prosecutor unfairly withheld evidence that the defense should have had access to." In support of this argument, he cites United States v. Vavages, 151 F.3d 1185 (9th Cir. 1998).

In the Vavages case the defendant, who was charged with drug offenses, filed a notice prior to trial of his intention to offer the defense of alibi and disclosed that his alibi witnesses would include his common-law wife. Thereafter, the prosecutor learned that the witness had herself been arrested earlier the same year in a marijuana transportation case and had pled guilty and agreed to cooperate fully with the government. Based on that knowledge, the prosecutor contacted the witness's attorney and informed him that he did not believe Vavages' alibi defense and that if the witness testified falsely, the government might bring perjury charges against her and withdraw from the plea agreement in her case. Id. at 1188.

² Exculpatory evidence is "[e]vidence tending to establish a criminal defendant's innocence." Black's Law Dictionary (7th ed. 1999).

In reversing Vavages' conviction and remanding the case for a new trial, the court concluded that the prosecutor had engaged in improper conduct by threatening the witness with perjury or to withdraw from her plea agreement if she testified on the defendant's behalf. Id. at 1192-93. The court stated that it was well established that "substantial government interference with a defense witness's free and unhampered choice to testify amounts to a violation of due process." Id. at 1188, quoting United States v. Little, 753 F.2d 1420, 1438 (9th Cir. 1984). Further, citing the seminal case of Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972), the court stated that "[u]necessarily strong admonitions against perjury aimed at discouraging defense witnesses from testifying have been held to deprive a criminal defendant of his Sixth Amendment right to compulsory process for obtaining witnesses in his favor." Vavages, 151 F.3d at 1188. However, the court noted that it was equally well established that "perjury warnings are not improper *per se*[" Id. at 1189.

The court also stated that "the Sixth Amendment is not implicated every time a prosecutor or trial court offers advice regarding the penalties of perjury." Id. at 1189, quoting United States v. Davis, 974 F.2d 182, 187 (D.C. Cir. 1992). The court held that "unusually strong admonitions against perjury are typically justified only where the prosecutor has a more

substantial basis in the record for believing the witness might lie - for instance, a direct conflict between the witness' proposed testimony and her own prior testimony." Id. at 1190, citing United States v. Smith, 997 F.2d 674, 680-81 (10th Cir. 1993).

The circumstances in this case are unlike those in Vavages. Here, the witness, Patterson, having acknowledged in his plea agreement that Holt was involved in the offense, had an understanding with the prosecutor that he would not be called as a prosecution witness to testify against Holt, his cousin. Recognizing that the agreement could not prevent Holt from calling Patterson as a witness, the prosecutor made it a condition of the agreement that Patterson, if called as a defense witness, would not testify in a manner contrary to the facts of the case as stated in the agreement.

We conclude that the actions of the prosecutor did not deprive Holt of his right to call Patterson as a witness, did not interfere with Patterson's free and unhampered choice to testify, and did not violate any of Holt's constitutional rights. The fact that Patterson declared that he would invoke his Fifth Amendment privilege against self-incrimination and not

testify in Holt's second trial does not mean that the prosecutor's actions coerced him in any manner.³

Patterson had already stated in his agreement that "they stole money and property" from the victims. Any testimony by Patterson that Holt had no involvement in the robbery would be contrary to statements he had made in his plea agreement and during his guilty plea proceeding. Allowing Patterson to relate the involvement of Holt when he pled guilty and then change his story if called by Holt to testify, if done without threat of nullifying the plea agreement or perjury prosecution, would allow Patterson to "have his cake and eat it, too." In short, there was no Webb violation by the Commonwealth because testimony that Holt had no involvement would differ from that previously given. See Smith, 997 F.2d at 680.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

³ Further, since Holt did not call Patterson as a witness at the hearing on his motion to dismiss the indictment, it is impossible for this court to determine whether Patterson would have attempted to invoke his Fifth Amendment right not to incriminate himself and whether the circuit court would have allowed him not to answer certain questions. In other words, there is a question in this case as to whether Holt properly preserved his claim that the Commonwealth violated his Sixth Amendment rights to have compulsory process for obtaining a witness in his favor.

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