

RENDERED: OCTOBER 15, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001387-MR (APPEAL)
AND
NO. 2003-CA-001587-MR (CROSS-APPEAL)

COMMONWEALTH OF KENTUCKY

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 95-CR-00691

RICCARDO VETTRAINO

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * * *

BEFORE: SCHRODER AND TACKETT, JUDGES; AND EMBERTON, SENIOR
JUDGE.¹

TACKETT, JUDGE: The Commonwealth of Kentucky appeals from an
order of the Warren Circuit Court granting Riccardo Vettraino's
motion for post-conviction relief, filed under Kentucky Rule of
Criminal Procedure (RCr) 11.42. Vettraino cross-appeals that
portion of the trial court's order denying that he received

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of
the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution
and KRS 21.580.

ineffective assistance of counsel. We affirm because the trial court correctly found that the Commonwealth failed to disclose exculpatory evidence to the defense, as required by Brady v. Maryland, 373 U.S.83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963).

In 1996, Vettraino was convicted of the murder of Julie Speakman, and sentenced to life imprisonment, and of the attempted murder of her husband, John Speakman, for which he was sentenced to twenty years' concurrent imprisonment. His trial counsel pursued a self-defense theory during the jury trial. Vettraino testified that he went to the Speakman's home to confront John about an alleged sexual assault against Vettraino's girlfriend. He stated that he carried a concealed gun because he had heard that Speakman kept guns and had a quick temper. The confrontation occurred in the Speakmans' kitchen while John and Julie were sitting at their kitchen table. Vettraino stated that John kept one hand under the table during the discussion, causing him to fear that John had a gun under the table. When John removed his hand from under the table, Vettraino said that he was holding a silver gun. At that time, Vettraino closed his eyes and emptied his own gun believing that John was about to shoot him. John and Julie were shot multiple times; John survived, but Julie was killed. The jury convicted Vettraino of murder and attempted murder, and these convictions were upheld by the Kentucky Supreme Court.

During the post-conviction phase of Vettraino's case, the Department of Public Advocacy uncovered evidence that a silver handgun was found in the drawer of a nightstand beside the Speakmans' bed. The weapon was not collected as evidence or tested to see whether it had been recently been fired, and at no point before the trial was its existence disclosed to the defense. In fact, the detective who found the gun sat silently at the Commonwealth's table while the Commonwealth's Attorney stated during closing argument that Vettraino's claim of self-defense was unbelievable because no silver handgun had been found at the crime scene. Vettraino filed his motion to vacate the judgment against him based on the Commonwealth's failure to disclose this exculpatory evidence as well as numerous alleged instances of ineffective assistance by his trial counsel. After holding three evidentiary hearings, the trial court granted Vettraino's RCr 11.42 motion as to the exculpatory evidence, but found that his trial counsel had not provided ineffective representation. The Commonwealth appealed from the order vacating Vettarino's convictions, and Vettraino cross-appealed as to the determination that his trial counsel was not ineffective.

The Commonwealth argues that the trial court erred in granting Vettraino's RCr 11.42 motion as the evidence which was

withheld was not material to his guilt. The trial court's findings of fact included the following:

1. While searching the Speakman residence soon after the shooting, KSP Detective Steve Fitts found a nickel-plated .45 caliber semi-automatic pistol in the drawer of the nightstand beside the bed in the Speakmans' bedroom. Detective Fitts, who is an experienced KSP detective, examined the pistol, smelled it, and decided that it had not recently been fired. He replaced it in the nightstand drawer. It was not impounded or further analyzed. Except for other unidentified KSP officers who might have been in the room when the gun was discovered, the existence of this gun was not disclosed to the Commonwealth's Attorney and certainly not to the defense until September 24, 2002, when Detective Fitts finally told a DPA interviewer about it.
2. Detective Fitts defended his decision not to collect this handgun as evidence prior to trial and not to mention its existence until some six years had elapsed after the trial to mention it to anyone. Fitts considered the gun "irrelevant." First, he said that it was found at what he considered to be a significant distance beyond the perimeter of the "crime scene," i.e., outside the blood-drenched kitchen area where Julie's body and all of the spent shell casings were found. Second, he concluded from his own inspection that the gun had not been recently fired. Third, he reasoned that it would be highly improbable that Speakman, after having been shot multiple times in the left shoulder, forearm and wrist, could have made it to the bedroom nightstand before Trooper Smith, the first-responder, arrived. Fourth, Detective

Fitts was convinced that if Speakman had gone to the bedroom after the shooting, there would have been a blood trail on the carpet, walls, and/or furniture. No blood trail was found. In fact, Detective Fitts described the condition of the house outside the kitchen area as "immaculate" when he saw it after the shooting.

3. KSP investigators knew, soon after Vettraino's arrest, that Vettraino was claiming that Speakman had pulled a gun on him. A statement to the effect appears in the report of Trooper Davis that was furnished as part of the pre-trial discovery.
4. The gun that Vettraino described in his trial testimony—a semiautomatic pistol, silver in color—was similar the description of the gun Detective Fitts found in the nightstand after the shooting. Detective Fitts sat with the Commonwealth's Attorney as the designated representative for the Commonwealth throughout the entire trial. He heard Vettraino's testimony and participated in role-playing during the Commonwealth's cross-examination of Vettraino. There is nothing in the evidence to suggest that the Commonwealth knew of the similarity between Vettraino's description of the gun in Speakman's hand and the nightstand gun before Vettraino testified in his own defense at trial. Likewise, Vettraino did not know the description of the nightstand gun until over six years after he testified.
5. Vettraino retained Gary Logsdon, an experienced criminal trial attorney, who represented him at trial.
6. The existence of the handgun from the nightstand was never disclosed to the

defense, despite counsel's requests for such discovery materials. Logsdon testified that had he known of the nightstand gun, his trial preparation and strategy would have been different. For instance, he would have insisted on testing of the carpet in the hallway leading to the bedroom for the possibility of a blood trail left by Speakman. The existence of two long guns was disclosed as having been located in the basement of the Speakman residence. Logsdon said those guns were of no concern to him during trial preparation, but their disclosure further belies the Commonwealth's argument that disclosure of any weapon outside the Speakman kitchen/dining area was unnecessary and "irrelevant."

7. When asked if he ever disclosed the existence of the nightstand gun to the Commonwealth's Attorney, Detective Fitts responded that he could not recall. At trial, the Commonwealth's Attorney belittled Vettraino's self-protection defense before the jury, taking full advantage of the fact that Vettraino had no tangible evidence of a Speakman gun. Regardless of the nightstand gun's potential exculpatory value, one thing is certain: the Commonwealth's Attorney could not have gone unchallenged at trial when he emphasized to the jury the non-existence-anywhere on the scene-of a silver colored semi-automatic handgun if its existence in the bedroom had been disclosed to the defense.
8. Shortly before the trial began, the KSP lab generated a report of the handgun residue test performed on Speakman's right hand soon after the shooting. Apparently, the local KSP detectives did not request a copy of the report, so it remained in the file in the

Frankfort lab. The existence of the report and its contents were unknown to prosecution and defense at the time of trial. Both sides were under the impression that the test had been lost. The report's findings are actually inconclusive, stating that the possibility could not be confirmed nor eliminated that Speakman had handled or discharged a weapon before the shooting. Nevertheless, the report could have been of some evidentiary value to the defense of self-protection, although Attorney Logsdon discounted its potential value at trial. Attorney Logsdon testified that he asked about the lab results as part of discovery.

The trial court concluded that the evidence of the handgun was material to Vettraino's defense under Brady because there was "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985). We note that Vettraino was not required to prove with certainty that the outcome would have been different, but rather that the existence of undisclosed exculpatory evidence undermined confidence in the verdict. Kyles v. Whitley, 514 U.S. 419, 131 L.Ed.2d 490, 115 S.Ct. 1555 (1995). Further, the trial court correctly points out that the undisclosed evidence was in the government's hands even though the Commonwealth's Attorney did not possess knowledge of the handgun's existence. Consequently, the trial court's

conclusions that Brady had been violated and that Vettraino was entitled to a new trial were not erroneous as claimed by the Commonwealth.

We turn now to Vettraino's cross-appeal involving various allegations of ineffective assistance of counsel. The trial court found that Vettraino's retained trial counsel had not provided ineffective assistance. In light of our decision affirming Vettraino's right to a new trial due to the Brady violation, the question of whether his prior counsel was ineffective is moot, and we decline to review the trial court's determination with regard to those allegations.

For the foregoing reasons, the judgment of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

Albert B. Chandler, III
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Brian Thomas Ruff
LaGrange, Kentucky