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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001577-MR

JEFF ROACH

APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
INDICTMENT NO. 02-CR-00467

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; PAISLEY, SENIOR JUDGE.¹

PAISLEY, SENIOR JUDGE: Jeff Roach appeals from a judgment of the Graves Circuit Court, sentencing him to serve ten years for one count of first degree trafficking in a controlled substance. Roach argues that the trial judge improperly assisted the

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

prosecution by facilitating the recall of a key witness for the Commonwealth.

Roach was indicted on two counts of first-degree trafficking in a controlled substance. Each count stemmed from a separate transaction. The first occurred on March 27, 2002, when Larry Wilson, a police informant wearing a recording device, went into Roach's girlfriend's house, where he allegedly bought cocaine from Roach. The second incident occurred on March 29, 2002, when Wilson returned to the same house, again wearing the recording device. On that occasion, Roach came out of the house, walked up to Wilson's car window and sold him some cocaine. Kentucky State Police detectives John Saylor and Tony Dunker were able to observe this second transaction from across the road, where they were pretending to look at a boat for sale.

At trial, the Commonwealth called detectives Saylor and Dunker to testify that they had set up the two "controlled buys," and had personally observed the March 29, 2002, transaction. Beverly Wagner, a drug chemist at the Kentucky State Police Crime Laboratory, testified that Detective Saylor had mailed two separate substances to her and that after testing, she had determined that both of them were cocaine.

Wilson, the confidential informant, was the Commonwealth's final witness. The prosecutor began his direct examination by stating that he wanted to ask Wilson about two

dates, March 27 and March 29. He then proceeded to question Wilson about what had happened on March 27. He concluded his direct examination of Wilson without having asked any specific questions about the March 29 episode. On cross-examination, Roach's defense counsel asked no specific questions about either day, focusing instead on impeaching Wilson with questions regarding his personal background and credibility.

On redirect, the Commonwealth sought to ask Wilson about the March 29 transaction. Counsel for the defense objected. At the ensuing bench conference, defense counsel argued that such questions lay outside the scope of the direct examination and cross examination. The court agreed.

Following this bench conference, the witness Wilson asked the judge if he could continue his testimony. The judge replied, "No sir." The Commonwealth's attorney announced to the judge that he was through with the witness.

The judge then asked the Commonwealth's attorney whether the witness was subject to recall. The Commonwealth's attorney replied that he was not. The judge then asked again, "He is not subject to recall?" The Commonwealth's attorney said, "Well, I guess I will keep him." The judge then called another bench conference at which he directed the prosecutor to "just say he [Wilson] is subject to recall." The Commonwealth's attorney reminded the court that he had talked about the March

29 incident; the judge agreed but pointed out that he had not asked Wilson about it before he released him for cross examination. The judge asked again whether Wilson was subject to recall, and the prosecutor said yes. The judge then announced that the witness could stand down and the next witness could be called. The judge asked the Commonwealth's attorney who the next witness was going to be, and he replied, "Him" indicating Wilson. The judge said, "I thought so" and told him to proceed.

The Commonwealth's attorney asked Wilson what had happened on March 29. Defense counsel renewed his objection. The judge overruled the objection but allowed another bench conference at the request of the defense. The Commonwealth's attorney spoke first and admitted that he should have gone further in his initial direct examination. The judge said "Yes, you should have." Defense counsel stated that they "needed to follow the rules." The judge responded, "Well, thank you, Mr. Irwin. I appreciate that. Are there any other reminders that you have for the Court?" The next statement by defense counsel is inaudible. The judge then said, "I did. He has called his next witness, and this is his next witness." The bench conference ended, and the Commonwealth proceeded to question Wilson about the March 29 incident.

The jury ultimately acquitted Roach of the trafficking count stemming from the March 27 incident, but found him guilty of the count associated with the March 29 incident, and he was sentenced to serve ten years.

On appeal, Roach contends that he is entitled to a new trial because the trial judge abandoned his role as "a dispassionate, fair and impartial governor" (Appellant's Brief at 9), by advising the Commonwealth how to prosecute its case, and in assisting the prosecution to remedy its mistake of failing to raise the March 29 incident on direct examination.

Roach acknowledges that many of the cases that address the issue of judicial impartiality present factual scenarios in which the trial judge's demeanor and actions overtly favor the prosecutor in a manner that might influence the jury. Roach concedes that the issue in this case is not the effect of the judge's actions on the jury, since the dispute over Wilson's recall was held at the bench and was not heard by the jury.

Roach relies instead on Terry v. Commonwealth, 153 S.W.3d 794 (Ky. 2005), in which the Kentucky Supreme Court addressed the propriety of a trial judge asking a witness in a murder trial over one hundred questions. The Supreme Court cited with approval an opinion of the Fifth Circuit Court of Appeals which states that:

A trial judge should never assume the role of prosecuting attorney and lend the weight of his great influence to the side of the Government. . . . In our system of administering justice the function of the trial judge and the prosecuting attorney are separate and distinct; they must not be confused. The trial judge has a duty to conduct the trial carefully, patiently, and impartially. He must be above even the appearance of being partial to the prosecution.

Terry, 153 S.W.3d at 803, citing United States v. Sheldon, 544 F.2d 213, 218 (5th Cir. 1976).

Although the factual situation in Roach's case is different from that in Terry, these principles of judicial impartiality are undeniably applicable. The question is whether the trial judge violated these principles in assisting the Commonwealth's attorney and allowing the recall of a witness to testify about matters that had not been raised on direct examination.

Kentucky Rules of Evidence (KRE) 611 governs the mode and order of interrogation and presentation of witnesses, stating in relevant part that

[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth[.]

"[T]he trial judge has . . . broad discretion to control interrogation of witnesses and production of evidence and decisions made in the exercise of this discretion have not been disturbed without a clear showing of abuse and prejudice." Metcalf v. Commonwealth, 158 S.W.3d 740, 748-49 (Ky. 2005) (citation omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

Our review of the record indicates that before the dispute over Wilson's testimony, the March 29 transaction had already been raised before the jury in the prosecutor's opening remarks, and in the testimony of the two detectives who set up the controlled buys. The prosecutor also briefly alluded to the date of March 29 before beginning his direct examination of Wilson. As the Commonwealth has argued, there was no element of surprise or lack of notice when Wilson was permitted to testify about the events of that day. Furthermore, because the interchange over the admissibility of his testimony took place at the bench, any appearance of favoritism on the part of the judge towards the Commonwealth could not have influenced the jury.

We are also persuaded by the reasoning in Montgomery v. Commonwealth, 262 S.W.2d 475 (Ky. 1953), where Kentucky's

highest court held that a trial court did not abuse its discretion in permitting the case to be reopened, at the conclusion of evidence for the Commonwealth, for introduction of evidence as to the defendant's age, an essential element of the prosecution's proof. (The prosecution was for criminally knowing, with her consent, a female child under the age of eighteen years and over the age of twelve years.)

The Montgomery court quoted with approval an earlier Kentucky case in which it was stated that

[t]he trial court has a discretion, exercised fairly and reasonably, to admit testimony out of the regular order, when the events of the trial, as they arise from hour to hour, would otherwise result in a miscarriage of justice. In general, such discretionary variations should be liberally dealt with; for nothing can be more irrational or unjust than to apply the judicial lash of a new trial to errors of trivial importance.

Id. at 477, citing Bennet v. Commonwealth, 150 S.W.806, 808 (Ky. 1912).

The court also cited with approval another Kentucky case in which

appellant insisted he was prejudiced because, after the Commonwealth had closed and appellant had moved for a directed verdict, the Commonwealth was permitted to recall a prosecuting witness who was allowed to give a material fact in a robbery case that the property had been taken against his will and consent. It was held that the trial court might for the "extraction of the truth as it may be" exercise a sound discretion, and the court refused to reverse

the judgment on the ground that such action of the trial court was an abuse of discretion.

Id. at 477-78, citing White v. Commonwealth, 191 S.W.2d 244 (Ky. 1945).

Roach has argued that Montgomery and the cases cited therein are distinguishable because the recalled witnesses testified to only a single key fact, and more importantly, the Commonwealth in those cases took the initiative in asking the court to permit the witness to be recalled. By contrast, in Roach's case, the judge "coached" the Commonwealth's attorney to recall Wilson and then Wilson was allowed to testify fully regarding the events that occurred on March 29.

As to the judge's "coaching" of the Commonwealth, there was no impression given to the jury that the judge favored the prosecution. We are also unable to detect a significant difference between the effect of Wilson's full testimony as to the events of March 29, and that of the witnesses described in Montgomery who testified only to a key fact. The testimony in all of these cases appeared to be equally prejudicial to the various defendants.

Roach nonetheless argues that allowing the prosecution to proceed out of the regular order of trial gave the Commonwealth a significant advantage in that Wilson was able to rebuild his credibility by testifying about a different

transaction. He contends that because Wilson had already been cross-examined, he was able to structure his subsequent testimony "in a fashion that could affect the jury's perception of his credibility." (Appellant's Reply Brief at 4.) He contends that because Roach's defense was based solely on impeaching Wilson's credibility, there can be no doubt that the error was prejudicial.

This argument is not persuasive. There is no indication that Wilson's further testimony as to the March 29 transaction in any way "rehabilitated" him as a witness, nor has Roach pointed to any specific parts of Wilson's testimony that would indicate that he had "structured" his responses in any way that could affect the jury's perception of his credibility. Roach has cited for support the fact that he was acquitted of the first (March 27) charge of trafficking, and found guilty only of the second (March 29) charge, in connection with which Wilson had the opportunity to be "rehabilitated." This is not sufficient evidence, however, to support what is a purely speculative contention.

Roach finally argues that the judge's response to defense counsel's comment that they needed "to follow the rules" lacked the dispassionate, patient tenor required of the governor of a criminal trial. Although we agree that "the trial judge was not a textbook example of judicial patience," we also find

"no violation of [Appellant's] rights." Stopher v. Commonwealth, 57 S.W.3d 787, 795 (Ky. 2001) citing Bussell v. Commonwealth, 882 S.W.2d 111 (1994).

For the foregoing reasons, the judgment and sentence of the Graves Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Samuel N. Potter
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
ATTORNEY GENERAL OF KENTUCKY

George G. Seelig
ASSISTANT ATTORNEY GENERAL
Frankfort, Kentucky