

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001597-MR

BRIAN EDWARD GRESHAM

APPELLANT

v. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
ACTION NO. 03-CR-00051

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND KNOPF, JUDGES.

BUCKINGHAM, JUDGE: Brian Edward Gresham appeals from a judgment of the Ballard Circuit Court convicting him of marijuana and firearm offenses and sentencing him to twelve years in prison. The sole issue in this case involves exculpatory evidence that Gresham's attorney claims he did not receive until the day before the trial. We affirm.

On June 26, 2003, the Ballard County Sheriff's Department received information that marijuana was being grown at Gresham's residence. Sheriff Todd Copper went to the

residence and was invited inside by Gresham's wife, Leslie Rollins Gresham. Marijuana plants and firearms were found and seized.

Following a trial by jury, Gresham was sentenced to twelve years in prison for the offenses of possession of firearms by a convicted felon, possession of a firearm/long gun by a convicted felon, cultivation of five or more plants of marijuana (2nd offense), and being a second-degree persistent felony offender. This appeal followed.

Several months after Gresham's arrest, Mrs. Gresham gave a taped statement to the Commonwealth's Attorney stating that the marijuana plants, the firearms, and the drug paraphernalia belonged to her and that Mr. Gresham knew nothing about them. Mrs. Gresham was thereafter likewise indicted on the charges, and she fled or her whereabouts otherwise became unknown.

On the morning of the first day of Gresham's trial, his attorney moved the court to allow him to introduce the taped statement of Mrs. Gresham into evidence. Alternatively, he moved the court to grant a continuance of the trial date for up to two months so that he could attempt to locate Mrs. Gresham. The court denied both motions.

On appeal, Gresham does not argue that the court erred in denying his motion to introduce Mrs. Gresham's taped

statement into evidence. Rather, he argues that the Commonwealth's failure to disclose the taped statement until the day before the trial constitutes reversible error and that the court erred in denying him a continuance.

On the morning of the trial, Gresham's attorney claimed that he did not learn of the taped statement until the day before the trial. He states in the brief that an investigator was sent to the prosecutor's office to determine whether there was a recorded statement from Mrs. Gresham that exculpated him. Counsel stated to the judge prior to trial that the statement was found in Mrs. Gresham's file. Claiming unfair surprise, counsel moved the court to allow him to introduce the taped statement into evidence or to grant a continuance.

The prosecutor stated that he had a policy of "open file discovery." While he did not confirm that the taped statement had always been in Gresham's file, he stated to the court that it was in the file when he looked into it on the day before the trial. Further, the prosecutor related to the court that there was a letter in the file from the prosecutor to the sheriff referencing Mrs. Gresham's taped statement and its contents. In denying the motion to continue, the court entered a written order referencing the letter and its availability to Gresham's attorney under the Commonwealth's open file policy.

In his brief, Gresham phrases the sole issue on appeal as "whether the Commonwealth's failure to disclose highly exculpable recorded material pursuant to RCr 7.24 and 7.26 constitutes reversible error." He also states that there is an issue whether the court erred "in condoning this cat and mouse game" in denying his motion for a continuance.

Gresham first relies on RCr¹ 7.24(1) that relates to written or recorded statements or confessions made by the defendant. That rule is not applicable to this case because the issue here involves a recorded statement made by a co-defendant/witness and not a statement made by the defendant.

Gresham's reliance on RCr 7.26(1) is likewise misplaced. RCr 7.26(1) states in relevant part that the prosecutor shall produce all witness statements in its possession "not later than forty-eight (48) hours prior to trial." The rule further states that "[s]uch statement shall be made available for examination and use by the defendant." Id. That rule has "the purpose of allowing defense counsel a reasonable opportunity to inspect any such previous statements, before the witness is called, to enable counsel an opportunity to fully cross-examine the witness concerning any contradictory statements made by him." Hicks v. Commonwealth, 805 S.W.2d 144, 148 (Ky.App. 1990). Had Gresham's attorney had the taped

¹ Kentucky Rules of Criminal Procedure.

statement of Mrs. Gresham more than 48 hours prior to trial as required by RCr 7.26(1), then he still would not have been able to use it for purposes of cross-examination since Mrs. Gresham did not appear as a witness to testify. Therefore, we find no reversible error in connection with RCr 7.24(1) or RCr 7.26(1).

Nevertheless, the taped statement of Mrs. Gresham was exculpatory evidence, and the prosecutor had a good faith duty to disclose it to Gresham's attorney. See Rolli v. Commonwealth, 678 S.W.2d 800, 802 (Ky.App. 1984). Although there is some question concerning whether the taped statement was in Gresham's file so as to satisfy the Commonwealth's compliance with its open file policy, there is no question that reference to the statement was in the file in the form of a copy of a letter from the prosecutor to the sheriff.

Failure to comply with discovery rules concerning the production of a witness statement does not require automatic and absolute reversal. See Hicks, 805 S.W.2d at 149. Unless there is prejudice, the error is harmless. RCr 9.24. This rule applies to the failure to comply with an open file discovery agreement. Hicks, supra.

Assuming the Commonwealth did not comply with its open file policy and did not either have the statement in Gresham's file or otherwise make Gresham's attorney aware of it, we conclude that Gresham did not suffer prejudice thereby. As we

have noted, there was no violation of RCr 7.24(1) or RCr 7.26(1). Gresham's attorney became aware of the exculpatory evidence no later than the day prior to trial. Due to the copy of the letter to the sheriff in the file, he was either aware of the statement or should have been aware of it prior to that time. Regardless, due to the inadmissibility of the statement as evidence and the inability of Gresham's counsel to use it at trial for cross-examination purposes, Gresham suffered no prejudice by becoming aware of it as late as the day before the trial.

As for the court's denial of Gresham's motion for a continuance, RCr 9.04 is applicable. The rule requires that a motion for a continuance based on the absence of a witness must be supported by an affidavit showing facts the affiant believes the witness will prove. Id. No such affidavit was filed in this case.

More importantly, "[a] reviewing court will not reverse a criminal conviction unless it is found that the trial court abused its discretion in the denial of a motion for a continuance." Abbott v. Commonwealth, 822 S.W.2d 417, 418 (Ky. 1992). We find no abuse of discretion in the court's denial of the continuance motion under the facts of this case.

The judgment of the Ballard Circuit Court is affirmed.

ALL CONCUR.

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