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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001603-MR

TERRY K. MULLIKEN — APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
INDICTMENT NO. 04-CR-00020

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

MINTON, JUDGE: Terence K. Mulliken appeals his convictions for promoting contraband in the first degree and conspiracy to traffic in a controlled substance. We affirm.

Mulliken was a lawyer practicing in Pikeville. Joanna Stanley, who was an inmate at the Pike County Detention Center, was his girlfriend. She complained to Mulliken that she was having difficulty sleeping. So he agreed to provide pills to

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

help her sleep. They devised a surreptitious way for Mulliken to get the pills into the jail for Stanley using Lenora Crank, Stanley's cellmate and Mulliken's client, as the courier. Crank was on the work release program, which allowed her to leave the jail to work at a Pikeville restaurant.

On December 30, 2003, Mulliken left some pills, which he contends were Benadryl, in a prearranged place in a restroom at the restaurant where Crank worked. Crank hid those pills in the waistband of her clothing and delivered them to Stanley inside the jail. On December 31, 2003, Mulliken left more pills in the restaurant restroom. This time, Crank concealed them in her vagina. When Crank reported back to the jail, she was asked to give a urine sample for a random drug test. Crank then produced the pills and revealed to the jail deputies the smuggling plan involving Mulliken and Stanley. The authorities enlisted Crank to catch Mulliken and Stanley.

In order to explain the disappearance of the confiscated pills, Crank told Stanley and Mulliken that she had flushed them down the toilet because she was going to be drug tested. On January 1, 2004, Crank called Mulliken; and they agreed to meet in a parking lot near the jail so Mulliken could give her more drugs for Stanley. At that meeting, Crank was wearing a hidden wire and video camera. After obtaining the pills from Mulliken, Crank gave them to the authorities.

Some of the pills retrieved from Crank were found to contain hyrdocodone.[2] In February 2004, Mulliken and Stanley were indicted for promoting contraband for their attempt to smuggle a controlled substance into the jail through Crank, and one count of conspiracy to traffic in a controlled substance for their foiled attempt to smuggle drugs into the jail.

In March 2004, the Commonwealth provided Mulliken's counsel with discovery, including a compact disc of telephone conversations between Mulliken and Stanley, as well as audiotapes of conversations between Stanley and Crank and Mulliken and Crank. On March 31, 2004, the trial court set May 26, 2004, as the trial date for Mulliken and Stanley.

On May 11, 2004, the Commonwealth moved to revoke Mulliken's bond, alleging that while appearing in court representing a client on an unrelated matter, Mulliken was under the influence of controlled substances. According to the Commonwealth's motion, Mulliken had, in fact, tested positive that day for opiates and benzodiazepine.[3] The trial court set a

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[2] Hydrocodone is "a semisynthetic product of codeine . . . having narcotic analgesic effects similar to but more active than those of codeine; used as an antitussive." DORLAND'S POCKET MEDICAL DICTIONARY 332 (23rd ed. 1982).

[3] Benzodiazepine is "any of a group of minor tranquilizers . . . having a common molecular structure and similar pharmacological activities, such as antianxiety, muscle relaxing, and sedative and hypnotic effects." *Id.* at 92.

hearing on that motion for May 21, 2004. On May 24, 2004, after the hearing, the trial court revoked Mulliken's bond.

On May 21, Mulliken's attorney filed a motion to suppress the audiotapes and compact disc furnished in discovery because they were allegedly unintelligible. On May 25, 2004, the day before the scheduled trial, the Commonwealth filed a notice of intent to introduce Kentucky Rules of Evidence (KRE) 404(b) material, specifically, Mulliken's alleged history of drug usage and commission of drug-related offenses.

Mulliken's attorney objected to the Commonwealth's last-minute KRE 404(b) notice. The Commonwealth responded by arguing that the timing of the notice was dictated by the fact that it did not know of the KRE 404(b) material until the May 21 bond revocation hearing. The trial court ultimately overruled Mulliken's objection. In addition, Mulliken's attorney sought to have the trial court conduct an in camera review of the allegedly unintelligible tapes.

Ultimately, Mulliken's attorney sought a continuance, ostensibly due to the late-filed KRE 404(b) notice and the allegedly unintelligible tapes furnished by the Commonwealth. The trial court denied both the continuance motion and the in camera review motion. The trial court remarked that Mulliken's attorney had had the tapes and compact disc for several weeks but had delayed until the eve of trial to object to them.

Curiously, the trial court granted Stanley a continuance because her attorney informed the court that he was unaware of the trial date and unprepared for the impending trial.

The pretrial hearings and the trial proceedings were peppered with heated exchanges between the trial judge and Mulliken's counsel. At least twice, Mulliken's counsel intimated to the judge that he would consider opposing the judge in the next election.

The previously-mentioned recorded conversations were played for the jury, over Mulliken's objection. After hearing all the evidence, including Mulliken's testimony on his own behalf, the jury found Mulliken guilty of promoting contraband and of engaging in a conspiracy to traffic in a controlled substance. In accordance with the jury's recommendation, the trial court sentenced Mulliken to the maximum possible penalty of five years' imprisonment for each charge, to run consecutively. After the trial court denied his motion for a new trial, Mulliken brought this appeal.

Mulliken raises two issues before us. First, he contends that the trial court erred by not granting his motion for a continuance. Second, he contends that the trial court erred by permitting the taped conversations he had with Stanley to be played for the jury.

The decision on whether to grant a continuance is within the trial court's discretion, and we may not disturb the trial court's decision unless the trial court abused its discretion.[4] In order to constitute an abuse of discretion, a trial court's ruling must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[5]

When ruling on a motion for continuance, a court should consider the following seven factors:

1) The length of delay;

2) Whether there have been any previous continuances;

3) The inconvenience to the litigants, witnesses, counsel, and the court;

4) Whether the delay is purposeful or caused by the accused;

5) The availability of competent counsel, if at issue;

6) The complexity of the case; and

7) Whether denying the continuance would lead to any identifiable prejudice.[6]

We will discuss each factor separately herein.

First, Mulliken's counsel did not specify the length of continuance he was seeking. Thus, the length of delay has no bearing on our decision.

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[4] Williams v. Commonwealth, 644 S.W.2d 335, 336-337 (Ky. 1982).

[5] Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

[6] Anderson v. Commonwealth, 63 S.W.3d 135, 138 (Ky. 2001).

Second, the Commonwealth concedes that Mulliken had not sought a prior continuance. Thus, this factor militates in favor of granting Mulliken a continuance.

The third factor to consider is the inconvenience to the court, counsel, litigants, and witnesses. Obviously, a continuance will, by its very nature, create some degree of inconvenience for everyone involved with a case.[7] "Thus, in order to become a factor for consideration there must be some significant or substantial inconvenience, which should be demonstrated on the record."[8]

In the case at hand, the Commonwealth contends that granting Mulliken's motion for a continuance would have caused a great inconvenience because some of the witnesses had already traveled to Pike County for the trial. But this argument is unpersuasive because the trial court granted Stanley's motion for a continuance, meaning that, presumably, the same witnesses were already going to have to return to Pike County at a later date for Stanley's trial. And we see nothing in the record that demonstrates that postponing Mulliken's trial would have engendered any more inconvenience or hardship than that which is unavoidably engendered by any continuance. So this factor weighs toward granting Mulliken's motion.

[7] Eldred v. Commonwealth, 906 S.W.2d 694, 700 (Ky. 1994) *overruled on other grounds by* Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003).

[8] *Id.*

As to the fourth factor, the parties disagree about whether Mulliken acted purposefully or was responsible for the proposed delay. Based on our analysis, we find that Mulliken did not seek the delay for purely dilatory reasons. The general thrust of Mulliken's brief, and the subject of much argument before the trial court, is Mulliken's contention that the Commonwealth's last-minute notice of intent to use KRE 404(b) evidence spurred the request for a continuance. It cannot be said that the Commonwealth's tardiness in filing its notice was directly attributable to any purposeful gamesmanship by Mulliken's counsel. Thus, this factor weighs in favor of granting a continuance.

The fifth factor, the availability of competent counsel, is not at issue as Mulliken was represented by counsel during the entirety of the proceedings.

Next, we must determine if the complexity of the case merited a continuance. Mulliken contends that the case was complex because it involved an alleged conspiracy with statements of an erstwhile co-conspirator. But we believe that this case was not so complex that it necessitated a continuance because the conspirators were few, the time frame of the conspiracy was limited, and the evidence was not voluminous. So this factor weighs against granting a continuance.

Finally, we must examine the heart of this inquiry: whether the trial court's denial of a continuance caused Mulliken to suffer any identifiable prejudice. Mulliken again relies upon the Commonwealth's late-filed 404(b) notice, arguing that the tardy notice meant that his attorney "had not investigated or prepared for this new evidence." We share Mulliken's concern regarding the late filing of the Commonwealth's 404(b) notice. KRE 404(c) does not specify when the Commonwealth is obligated to file its 404(b) notice. Instead, KRE 404(c) only requires the Commonwealth to give "reasonable pretrial notice to the defendant of its intention to offer such [404(b)] evidence."

We strongly believe that filing a 404(b) notice one day before trial does not, under most circumstances, constitute "reasonable pretrial notice." Simply put, defense counsel should not be confronted with new evidence the day before a two-count felony trial. Generally speaking, the introduction of such belatedly disclosed evidence would be inherently prejudicial to a defendant.[9] In the case at hand, however, Mulliken has not pointed to any specific point in the trial

[9] Gray v. Commonwealth, 843 S.W.2d 895, 897 (Ky. 1992) ("[e]ven in cases where evidence of prior uncharged criminal activity between the defendant and third persons is admissible, fundamental fairness dictates, and we hold, that the defendant is entitled to be informed of the names of the non-complaining witnesses and the nature of their allegations so far in advance of trial as to permit a reasonable time for investigation and preparation.").

where the Commonwealth actually sought to introduce any KRE 404(b) evidence against him.[10] Likewise, when we reviewed Mulliken's cross-examination, we did not see any mention of KRE 404(b) evidence. Thus, despite our concern with the Commonwealth's belated 404(b) notice, we are forced to conclude that the late notice was a harmless error since no 404(b) material was apparently used at trial.[11] Since Mulliken has not shown any identifiable prejudice, this factor weighs heavily in favor of affirming the trial court's decision to deny his motion for a continuance.

After considering all of the requisite factors, the facts of this case make the decision of whether to grant a continuance a close call. We might well have granted Mulliken's motion, especially in light of the fact that Stanley received a continuance for what appears to be a far less meritorious reason. But the decision of the trial judge, who was in direct contact with his docket and with the litigation, merits a high degree of insulation from appellate revision. And the record does contain evidence supporting the trial court's decision, especially in light of the fact that Mulliken has not shown any

[10] Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v), made applicable to criminal cases by Kentucky Rules of Criminal Procedure (RCr) 12.02, requires the argument section of an appellant's brief to contain "ample supportive references to the record[.]"

[11] *See* RCr 9.24 ("[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties").

readily identifiable prejudice stemming from the lack of a continuance. So we cannot say that the trial court's decision to deny Mulliken a continuance was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles."[12] Thus, we must affirm on this issue.

Several conversations between Stanley and Mulliken were played for the jury. Those conversations were initiated when Stanley placed collect calls to Mulliken from the jail; and the conversations occurred on either December 31, 2003, or January 1, 2004. On appeal, Mulliken contends that these conversations contained inadmissible hearsay and violated his right to confront the witnesses against him due to the fact that he could not cross-examine Stanley. Neither argument has merit.

Mulliken's hearsay argument runs directly contrary to the express language of KRE 801A(b)(5), which provides an exception to the hearsay rule for statements of coconspirators.[13] "In order to fall within this exception, the proponent of the statement must show (1) there was a conspiracy; (2) the defendant was a part of that conspiracy; and (3) the statement

[12] English, 993 S.W.2d at 945.

[13] KRE 801A(b)(5) provides that "[a] statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is . . . [a] statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

was made in furtherance of the conspiracy."[14] The exception embodied in KRE 801A(b)(5) is generally construed in favor of admissibility.[15]

In the case at hand, there is ample evidence that Mulliken and Stanley conspired to smuggle pills into the jail. Thus, it cannot be reasonably disputed that the first two elements of the KRE 801A(b)(5) test are met. Furthermore, the taped statements in question were made during the specific dates of the conspiracy; and the main topic of conversation contained in the statements is Mulliken's effort to smuggle pills into the jail for Stanley's benefit. Thus, the statements in question were made in furtherance of the conspiracy. Therefore, the statements fall squarely within the KRE 801A(b)(5) hearsay exception. Furthermore, our ruling on the KRE 801A exception dooms Mulliken's confrontation clause argument because any statement that satisfies KRE 801A(b)(5) also satisfies the confrontation clause.[16]

Finally, Mulliken argues in his reply brief that the trial court committed reversible error by letting the jury hear

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[14] Marshall v. Commonwealth, 60 S.W.3d 513, 520 (Ky. 2001).

[15] United States v. MacMurray, 34 F.3d 1405, 1412 (8th Cir. 1994).

[16] *See* Taylor v. Commonwealth, 821 S.W.2d 72, 76 (Ky. 1990) *overruled on other grounds by* St. Clair v. Roark, 10 S.W.3d 482 (Ky. 1999); Bourjaily v. United States, 483 U.S. 171, 183-84 (1987); United States v. Lacey, 856 F.Supp. 599, 601 (D. Kan. 1994); United States v. Garcia, 994 F.2d 1499, 1506 (10th Cir. 1993).

that Crank wore a wire to record conversations she had with Stanley. This specific argument was not raised in Mulliken's initial brief, meaning that we may not consider it.[17] But even if we were to consider this argument, in light of the fact that the trial court sustained Mulliken's objection to playing the conversations between Crank and Stanley to the jury, we do not believe that the mere fact that the jury was, apparently, informed in passing that Crank wore a wire to record her conversations with Stanley would necessitate reversing Mulliken's conviction.

For the foregoing reasons, the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Karen Shuff Maurer
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Ken W. Riggs
Assistant Attorney General
Frankfort, Kentucky

[17] *See, e.g.,* Milby v. Mears, 580 S.W.2d 724, 728 (Ky.App. 1979) ("[t]he reply brief is not a device for raising new issues which are essential to the success of the appeal.").