

RENDERED: JULY 14, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 2005-CA-000513-MR

JOSEPH "TINY" SMITH

APPELLANT

APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
INDICTMENT NO. 00-CR-00109

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; McANULTY,¹ JUDGE; POTTER, SENIOR
JUDGE.²

McANULTY, JUDGE: Joseph "Tiny" Smith appeals from an order of
the Adair Circuit Court reinstating his conviction for first-

¹ This opinion was completed and concurred in prior to Judge William E. McAnulty, Jr.'s resignation effective July 5, 2006, to accept appointment to the Kentucky Supreme Court. Release of the opinion was delayed by administrative handling.

² Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

degree trafficking in a controlled substance following a remand from this Court. He argues the Commonwealth improperly withheld evidence about a potentially exculpatory witness and therefore he is entitled to a new trial. Because the withheld evidence was neither clearly exculpatory nor material, we affirm.

The facts of this action are fully set forth in this Court's prior opinion. For purposes of this appeal, the following facts are relevant: On December 15, 1999, Detective George Atwood of the Kentucky State Police and Neil Blankenship, a paid confidential informant, allegedly purchased crack cocaine from Smith as part of an undercover investigation. Smith was not arrested until a later date, and he denied being present at the scene. Prior to trial, Smith requested that the Commonwealth provide any information it had regarding the identity of other witnesses to the transaction. The trial court denied the request. The Commonwealth could not locate Blankenship to testify at trial and only Detective Atwood testified concerning the transaction. At the conclusion of trial, the jury convicted Smith of first-degree trafficking in a controlled substance and sentenced him to ten-years' imprisonment.

On appeal, this Court vacated the conviction, holding that the Commonwealth has a duty to disclose to the defendant the identity of known witnesses to a crime. Citing Lowe v.

Commonwealth, 712 S.W.2d 944, 946 (Ky. 1986), and Burks v. Commonwealth, 471 S.W.2d 298, 301 (Ky. 1971). But while the Court vacated Smith's conviction, the Court could not

discern from the record whether or not exculpatory information existed in the form of identifiable witnesses to the alleged drug transaction. Although the Commonwealth asserts that it is highly unlikely that Atwood knew the identities of any witnesses, it does not deny that it is possible that Atwood had such information. Clearly, Brady [v. Maryland], 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] places a duty upon the Commonwealth "to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Taylor v. Commonwealth, Ky., 63 S.W.3d 151, 158 (2001) (quoting Strickler v. Greene, 527 U.S. 263, 280-281, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286, 301 (1999)).

Consequently, this Court remanded the matter to the trial court "to conduct evidentiary hearing to determine whether the Commonwealth possessed any exculpatory evidence regarding the identity of any witnesses present during the alleged drug transaction, which would entitle appellant to a new trial. In the event that no such evidence exists, the trial court may reinstate the judgment."

On remand, Detective Atwood testified that it was dark at the time of the alleged transaction, but he was able to observe and hear the exchange between Smith and Blankenship. He also testified that there were other people in the vicinity of the transaction, but he only recognized one person at the scene

- a man named "Hopsing" Miller. Detective Atwood was of the opinion, however, that Miller was not in a position to view the transaction. He specifically testified that Miller did not pass in front of the vehicle until several minutes after the transaction. However, Detective Atwood also admitted that he was not watching Miller during the time the transaction took place.

Based on this testimony, the trial court concluded that Miller was not an exculpatory witness, and that the Commonwealth's failure to disclose Miller's name did not deprive Smith of due process or a fair trial. Consequently, the trial court reinstated Smith's conviction. Smith now appeals from this order.

As recognized by the prior panel, the Commonwealth has a duty to disclose to the defendant the identity of known witnesses, exculpatory witnesses or persons observing or participating in the crime. Lowe v. Commonwealth, supra at 946. The Commonwealth's failure to do so may violate the defendant's right to a fair trial and due process. Commonwealth v. Key, 633 S.W.2d 55, 56 (Ky. 1982). But to be entitled to a new trial, Smith has the burden of showing that the evidence withheld is favorable to him and material to either guilt or punishment. Sanders v. Commonwealth, 89 S.W.3d 380, 385 (Ky. 2002). In other words, Smith has the burden of establishing that there is

a reasonable probability that the result of the trial would have been different if the withheld exculpatory evidence were disclosed to the defense. Id. at 386, citing Strickler v. Greene, 527 U.S. 263, 279, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999).

As Smith correctly notes, it is possible that Miller might have been able to provide some exculpatory evidence, either directly or by providing names of other people who were at the scene. But because the Commonwealth failed to disclose this information before trial, Smith probably cannot produce any evidence at this point in time showing that Miller or any other person at the scene could have identified the person involved in the drug transaction. For purposes of this appeal, however, the controlling question is whether the Commonwealth or its agents were aware of any exculpatory or material witnesses at the time of trial. At most, the evidence shows that Detective Atwood knew the identity of a person in the vicinity of the crime, but he had no reason to believe that Miller could provide any exculpatory or material evidence. Left with nothing more than mere speculation that some exculpatory evidence may exist, this Court is in no position to reverse in Smith's favor. Commonwealth v. Key, supra at 57.

Accordingly, the order of the Adair Circuit Court reinstating Smith's conviction is affirmed.

ALL CONCUR.

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