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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001007-MR

MICHAEL STONE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
INDICTMENT NO. 04-CR-002315

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: HENRY,[1] JUDGE; HUDDLESTON AND KNOPF, SENIOR JUDGES.[2]

HUDDLESTON, SENIOR JUDGE: Michael Stone appeals from a Jefferson Circuit Court judgment convicting him of manslaughter in the first degree and tampering with physical evidence. On appeal, Stone argues that his Sixth Amendment rights to

[1] Judge Michael L. Henry concurred in this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

[2] Senior Judges Joseph R. Huddleston and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

confrontation were violated when a redacted statement made by a non-testifying codefendant was introduced against him.

On the night of July 8, 2004, Michael Stone and his companions, Mathew Deck, Richard Holbeck, Edwin Ursry and Jeremy Ursry engaged in a physical confrontation with Lamartez Griffin and three of his companions. The confrontation began when Edwin Ursry attempted to attack George Gray, one of Griffin's companions. Gray repeatedly struck Edwin Ursry knocking him down several times. While Gray appeared to be victorious, he and Griffin's other companions quickly fled the scene leaving Griffin alone with Stone and his cohorts. As the confrontation continued, Griffin picked up a large beer bottle and used it to strike Jeremy Ursry on the side of the head, knocking Ursry down and shattering the bottle. At this time, Stone was standing close behind Jeremy Ursry and, after Griffin hit Ursry, Stone pulled a knife and confronted Griffin. According to Stone, Griffin was armed with the jagged remnants of the shattered beer bottle, specifically the bottle's neck. Although Stone told Griffin to back off, Griffin advanced on him. Stone claims that he then stabbed Griffin in self-defense. Immediately after the stabbing, Griffin attempted to flee but repeatedly fell down. Stone and his companions fled. The police and emergency personnel soon arrived and transported Griffin to a local

hospital where he died from the single stab wound inflicted by Stone.

After a brief investigation, the Louisville Police located Stone and his associates who were transported to a local police substation for questioning. Edwin Ursry refused to give a statement, but Stone, Holbeck, Deck and Jeremy Ursry each gave voluntary recorded statements to the investigating detectives.

Stone insisted that after witnessing Griffin's attack upon Jeremy Ursry he became frightened, pulled his knife and stabbed Griffin in self-defense. Later, during the statement, Stone said that, after Griffin hit Jeremy Ursry, Griffin advanced on Stone. Because Griffin was armed with the sharp remains of the beer bottle, Stone pulled his knife, held it in front of him and warned Griffin to back off. But, according to Stone, Griffin continued to advance. Stone then told Detective Duncan, who was investigating the stabbing, that he believed that he did not actually stab Griffin but that Griffin had impaled himself on Stone's outstretched knife.

After the statements were taken, the five men, including Stone, were arrested. Each was subsequently charged in an indictment with murder. In addition, Stone and Holbeck were charged with tampering with physical evidence.

Despite objections from Stone and his codefendants, the five men were tried jointly. Mathew Deck, Edwin Ursry and

Jeremy Ursry were acquitted, and Holbeck was acquitted of murder but convicted of tampering with physical evidence. Stone, however, was convicted of manslaughter in the first degree and tampering with physical evidence and was later sentenced to eighteen years' imprisonment.

Before we examine Stone's allegations of error, we must first delve deeper into the facts of this case. The Commonwealth sought to try Stone and his codefendants together. Anticipating that none would testify at trial, the Commonwealth sought to introduce redacted versions of each defendant's recorded statement. Stone and his codefendants objected to the use of their statements, but the circuit court determined that the Commonwealth could introduce redacted versions of each of the codefendants' statements.

Stone moved for a separate trial and argued that if he was tried jointly with his codefendants, then his confrontation rights under the Sixth Amendment to the Constitution of the United States would be violated since his codefendants could choose not to testify, and, if they did not testify, the Commonwealth would introduce their redacted statements. If his codefendants' redacted statements were introduced, Stone argued, he would not have the opportunity to cross-examine them. Stone

grounded his argument on *Crawford v. Washington*[3] in which the United States Supreme Court held that in order to introduce a testimonial statement the Sixth Amendment requires (1) the non-availability of the witness and (2) a prior opportunity for cross-examination. Stone also objected to the introduction of a redacted version of his own statement because, he claimed, it materially misrepresented what he actually said. Stone's motion for a separate trial was denied, and his objections to the introduction of the redacted statements of his codefendants and to his redacted statements were overruled.

At trial, the Commonwealth introduced the redacted versions of Stone's statement, and, most importantly to this appeal, also introduced the redacted statement of Stone's codefendant, Richard Holbeck. In Holbeck's redacted statement, the Commonwealth had removed any reference to the fight between Edwin Ursry and George Gray, removed any reference to Griffin's assault upon Jeremy Ursry and removed any reference to the stabbing. However, when Detective Duncan, the officer who had interviewed Stone and Holbeck, testified, the Commonwealth elicited the following testimony about Holbeck's statement:

> **Commonwealth's Attorney**: I'm referring you to the page of [Holbeck's] statement; talking about the beer bottle shattered and all that, that series of questions with [Holbeck's trial counsel]?

[3] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

> **Detective Duncan**: Yes.
>
> **C.A.**: All right. Immediately after Mr. Holbeck observed the bottle shattering he stated that the black male [Griffin] began to do something. What did the black male begin to do?
>
> **Duncan**: He started backing up.
>
> **C.A.**: The black male backed up after the bottle shattered?
>
> **Duncan**: Yes.
>
> **C.A.**: And, in fact, he said it later didn't he, that the black male backed up, did he not?
>
> **Duncan**: Yes.

At this point, the attorneys representing the defendants objected to the Commonwealth's line of questioning since the Commonwealth's Attorney was soliciting testimony regarding the redacted portions of Holbeck's statement. The Commonwealth's Attorney insisted that Holbeck's attorney had opened the door when he questioned Duncan regarding the shattering of the beer bottle and pointed out that when Duncan testified about Holbeck's statement, the Detective never mentioned any of Holbeck's codefendants. Because Duncan's testimony did not mention the name of any of the codefendants, the circuit court overruled the objection and ruled the testimony admissible. Then the Commonwealth's Attorney continued:

> **C.A.**: So Detective Duncan I'll ask you again, after he said that he backed up earlier in the statement, did he [Holbeck] again say that he [Griffin] was backing up after the beer bottle had been shattered?
>
> **Duncan**: He did.
>
> **C.A.**: The black male?
>
> **Duncan**: The black male was backing away from . . . .

Later, during his closing argument, the Commonwealth's Attorney insisted that Holbeck's statement that Griffin had backed up proved that Stone did not stab Griffin in self-defense.

Stone argues that *Crawford v. Washington*[4] "eclipsed" *Bruton v. United States*[5] and its progeny. Stone points out that the United States Supreme Court held in *Crawford* that testimonial statements are not admissible at trial unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant.[6] And, while the *Crawford* court did not define "testimonial statement," it did hold that statements obtained during police interrogation are testimonial in nature.[7] Stone insists that the holding in *Crawford* apples to the introduction of a redacted statement of a

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[4] *Supra,* note 2.

[5] 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

[6] *Crawford v. Washington, supra,* note 2, at 68.

[7] *Id.*

non-testifying codefendant like Richard Holbeck's statement that Griffin had backed up.

According to Stone, the Commonwealth violated his Sixth Amendment[8] right to confrontation as defined in *Crawford* because Holbeck's statement was a testimonial statement from a non-testifying codefendant that directly incriminated Stone and because Stone had not had a prior opportunity to cross-examine Holbeck. Stone insists that the statement directly incriminated him by undermining his claim of self-defense. Furthermore, because the statement directly implicated him, Stone argues, the introduction of the statement violated his Sixth Amendment rights pursuant to *Bruton*. Since the Commonwealth violated the dictates of both *Crawford* and *Bruton*, Stone argues that we must reverse the judgment of conviction and remand this case to the circuit court for a new trial.

While we acknowledge that Stone has correctly set forth the Supreme Court's holding in *Crawford*, we find it unnecessary to analyze the present case under that holding since an analysis pursuant to *Bruton* and its progeny is sufficient to resolve this appeal. In *Bruton*, the United States Supreme Court

[8] The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." And a similar provision which appears in Section 11 of the Kentucky Constitution provides, again in pertinent part, that "In all criminal prosecutions the accused has the right to . . . meet the witnesses face to face . . . ."

held that a state deprives a criminal defendant of his rights as guaranteed by the Confrontation Clause of the Sixth Amendment when the state introduces at a joint trial a non-testifying codefendant's statement which implicates the defendant, even if the trial court instructs the jury to only consider the statement against the codefendant who made it.[9] Nearly twenty years later, in *Richardson v. Marsh,*[10] the U.S. Supreme Court considered the question of whether the holding in *Bruton* prohibits the prosecution from introducing at a joint trial a redacted version of a non-testifying codefendant's statement. After considering the issue, the Supreme Court held that, "[T]he Confrontation Clause is not violated by the admission of a non-testifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his existence."[11]

In the present case, the Commonwealth sought to try Stone and his codefendants together, and it sought to introduce their recorded statements as well. And as mentioned previously, to comply with the mandates of *Bruton* and *Richardson*, the

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[9] *Supra,* note 4, *see also Richardson v. Marsh,* 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987).

[10] *Richardson v. Marsh, id.,* note 7.

[11] *Id.* at 211.

Commonwealth redacted their statements and introduced them during its case-in-chief.

While the Commonwealth redacted from Richard Holbeck's statement any reference to Stone and any reference to the stabbing, upon the re-direct examination of Detective Duncan, the Commonwealth solicited testimony that Holbeck had told the detective that after the beer bottle had been shattered, Griffin, the victim, had backed away. This statement directly contradicted and directly implicated Stone even though his name was not mentioned because, prior to soliciting this statement - a statement that the Commonwealth had previously redacted - the Commonwealth's Attorney had played for the jury Stone's redacted statement in which Stone stated that, immediately after Griffin shattered the beer bottle on Jeremy Ursry's head, Griffin advanced on Stone and Stone stabbed him. Knowing this, the Commonwealth solicited from Detective Duncan testimony about Holbeck's statement, not for the purpose of incriminating Holbeck but solely for the purpose of incriminating Stone, Holbeck's codefendant. In addition, by soliciting this testimony, the Commonwealth nullified the effect of redacting Holbeck's statement. Thus, the introduction of this statement during the joint trial was contrary to the holdings in *Burton*[12]

[12] *Supra,* note 2.

and in *Richardson*,[13] and thus violated Stone's rights to confrontation and cross-examination set forth in the Sixth Amendment and Section 11 of the Kentucky Constitution.

Alternatively, Stone contends that the Commonwealth violated his right to present a complete defense when it introduced his redacted statement instead of introducing his complete statement. Because the jury did not hear his complete statement, it only heard Stone admit to stabbing Griffin in self-defense, but it did not hear Stone's description of the fight between Edwin Ursry and George Gray, did not hear Stone's description of Griffin's assault upon Jeremy Ursry and did not hear Stone's explanation that he was afraid of Griffin.

We find it unnecessary to address this allegation of error since we reverse Stone's judgment of conviction based on his previous argument and because we do not anticipate that the Commonwealth will attempt to introduce Stone's redacted statement during retrial as he alone among the five codefendants will be on trial.

Finally, Stone cites *Gibson v. Commonwealth*,[14] and argues that, while the circuit court instructed the jury on self-defense, the instruction given was defective in that it lacked language that Stone had no duty to retreat, thus depriving him of his right to present a complete defense.

[13] *Supra,* note 7.
[14] 237 Ky. 33, 34 S.W.2d 936 (Ky. 1931).

Addressing the issue of whether a "no duty to retreat" instruction should be given, the Kentucky Supreme Court has said that

> Despite the defiant attitude toward retreat exhibited by the *Gibson* opinion, Kentucky decisions have generally not adhered to such an absolute interpretation of the "no duty to retreat rule," nor did our predecessor court require jury instructions describing the same. For example, in *Bush v. Commonwealth,* 335 S.W.2d 324 (Ky. 1960), the Court of Appeals found no error in the failure to give an instruction on retreat, particularly since the jury was otherwise fully instructed on self-defense. "[A]n instruction on self-defense should be in the usual form, leaving the question to be determined by the jury in the light of all the facts and circumstances of the case, rather than in the light of certain particular facts."[15]

In the present case, the circuit court properly instructed the jury when it gave the self-defense instruction found in *Commonwealth v. Hager.*[16] Nothing further was required.

The judgment is reversed and this case is remanded to Jefferson Circuit Court with directions to grant Stone a new trial.

HENRY, JUDGE CONCURS.

KNOPF, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

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[15] *Hilbert v. Commonwealth,* 162 S.W.3d 921, 926 (Ky. 2005) (citations omitted).

[16] 41 S.W.3d 828, 846 (Ky. 2001).

KNOPF, SENIOR JUDGE, DISSENTING: I respectfully dissent from the majority decision which is based, in my opinion, upon an erroneous interpretation of the holdings in *Bruton*[17] and *Richardson*.[18]

As the *Bruton* court made clear, it is a violation of the Confrontation Clause to admit unredacted statements which implicate a co-defendant unless a fair chance for cross-examination is afforded. *Richardson*, on the other hand, noted the existence of a crucial distinction between statements which are facially incriminating (as was the case in *Bruton*) and those which become incriminating only when linked with other evidence introduced at trial, for example, the defendant's own testimony:

> On the precise facts of *Bruton,* involving a facially incriminating confession, we found that accommodation [a limiting instruction] inadequate. As our discussion above shows, the calculus changes when confessions that do not name the defendant are at issue. While we continue to apply *Bruton* where we have found that its rationale validly applies, we decline to extend it further. We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.[19]

[17] 391 U.S. 123, 88 S. Ct.1620, 20 L. Ed. 2d 476 (1968).

[18] 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987).

[19] 481 U.S. at 211 (citation omitted).

Thus *Richardson* requires exclusion of the statement only when the identity and existence of the defendant are disclosed in the statement of the non-testifying co-defendant. Contrary to the majority's conclusion, that did not occur in this case.

Although Detective Duncan's testimony did make reference to the victim's action of backing away, it did not in any way implicate Stone. It simply provided a version of the events surrounding the stabbing which differed from those offered by Stone. As such, I am convinced that there was no violation of the Confrontation Clause as explained in *Richardson*. Accordingly, I would affirm the judgment below.

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