

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001730-MR

ELY WENDELL HEMBREE

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT  
HONORABLE JAMES L. BOWLING, JR., JUDGE  
ACTION NO. 04-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: BARBER, KNOPF, AND MINTON, JUDGES.

BARBER, JUDGE: Appellant, Ely Wendell Hembree (Hembree), files this direct appeal of his conviction for second degree trafficking in a controlled substance. Hembree argues that the trial court wrongfully denied his motion for mistrial and motion for directed verdict. We affirm the denial of those motions. Hembree also contends that the circuit court was in error in denying his motion for a missing evidence instruction. We

believe that Hembree was entitled to a missing evidence instruction, and reverse and remand for a new trial.

Hembree was charged with the sale of Hydrocodone to a paid police informant. He was indicted and convicted of second degree trafficking in a controlled substance. Hembree's defense was that he had consistently refused to sell drugs to the informant, and that none of the three voices on the audiotape played to the jury was him. Hembree was sentenced to serve five years on that conviction.

The paid informant testified at trial that he was using drugs at the time of the alleged "buy". He also testified that he was paid to be an informant, and that his pay for being an informant was one of his primary sources of income. The informant was paid \$50 each time he worked as an informant. The informant testified that he had made two prior attempts to purchase drugs from Hembree and that both those attempts were unsuccessful.

The investigating officer testified that the informant was searched prior to being sent to Hembree's home to try to conduct the transaction. The officer was stationed near Hembree's home at the time of the transaction, but could not see whether the informant actually met with Hembree or entered the home. The informant had a recording device on his person. The investigating officer testified that both earlier unsuccessful

attempts by the informant to purchase drugs from Hembree had been recorded. The officer stated that the informant had not bought drugs from Hembree on either prior occasion. He further stated that those earlier recordings had been taped over. The recordings were not available to play to the jury. Because of being recorded over those tapes could not be provided to the defense.

The Commonwealth argues that it had no duty to preserve the earlier tapes, and that destruction of the tapes was not made in bad faith. The Commonwealth contends that no due process violation can be claimed in the absence of bad faith. Collins v. Commonwealth, 951 S.W.2d 569 (Ky. 1997), citing Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988). Hembree has shown no bad faith in the destruction of the tapes.

A portion of the evidence, the final transaction between the informant and Hembree, was played for the jury. The other evidentiary audiotapes, the prior transactions, because of being recorded over, could not be played. Hembree contends that those tapes contained evidence relevant to his defense. As a general rule, where only a portion of taped evidence is played to the jury, any additional taped evidence relevant to the portion entered by the submitting party should be played as well. White v. Commonwealth, 166 S.W.2d 873, 877 (Ky. 1942).

The issue is whether "the meaning of the included portion is altered by the excluded portion." Commonwealth v. Collins, 933 S.W.2d 811, 814 (Ky. 1996). Hembree contended that it was, and the evidence had been destroyed by the Commonwealth so that this contention could not be refuted.

Hembree requested a mistrial due to the destruction of the earlier audiotapes. That motion was denied. On appeal, Hembree contends that he was entitled to a mistrial because of the intentional destruction of relevant evidence. No bad faith has been shown. In the absence of bad faith, we do not believe that a mistrial was warranted.

Hembree then asked for a missing evidence instruction with respect to the missing audiotapes. The trial court denied the motion. Denial of the motion for a missing evidence instruction was in error. A missing evidence instruction is appropriate when the Commonwealth has lost or destroyed evidence. Mills v. Commonwealth, 170 S.W.3d 310, 331 (Ky. 2005). Such an instruction is necessary where the lost or destroyed evidence was obviously potentially exculpatory, and the loss or destruction is intentional. Estep v. Commonwealth, 64 S.W.3d 805, 810 (Ky. 2002). Where the police have destroyed a tape containing potential evidence, not in bad faith, a missing evidence instruction is the appropriate remedy. Shegog v. Commonwealth, 142 S.W.3d 101, 105 (Ky. 2004).

The record shows that the destruction of the evidence by the police officer was deliberate and intentional. The officer stated that he determined that the tapes would not "benefit my case," and recorded over them. Hembree asserts that at a minimum, the tapes would show that he refused to sell drugs to the informant on two prior occasions. Hembree contends that the tapes may have contained further exculpatory evidence.

The officer testified that on the earlier tapes Hembree had informed the confidential informant that he was "out" of pills to sell. Hembree denied that contention. What the officer claims to have heard on the tapes which were not available for review by the jury is clearly inadmissible.

Castle v. Commonwealth, 44 S.W.3d 790, 793 (Ky.App. 2000). Introduction of evidence or claims of prior bad acts of the defendant is improper, particularly where, as here, the tapes were destroyed and were therefore unavailable. KRE 404(b).

At trial, Hembree denied making a sale of the pills to the informant on the date charged. Hembree testified that the tape admitted at trial was not a recording of his voice. No parties were identified by name on the tape. Three voices are present on the tape. The tape was played to the jury, but the jury did not have the earlier tapes available to it.

Hembree argues that the trial court erred in refusing his request for a directed verdict. At the conclusion of the

Commonwealth's case Hembree argued that the Commonwealth had failed to prove that the voice on the tape was Hembree's and that for this reason he was entitled to a directed verdict. The request was properly preserved for review, as required by Hill v. Commonwealth, 125 S.W.3d 221, 229-230 (Ky. 2004). Hembree argues that the muffled and indistinct nature of the voices on the tape made a conclusive finding of identity impossible. A direct verdict may be reversed on appeal only "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. . . ." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). The law holds that credibility and weight of the evidence is within the exclusive province of the jury. Commonwealth v. Smith, 5 S.W.3d 126, 129 (Ky. 1999). No error has been shown in the trial court's submission of the case to the jury for a verdict. We affirm the denial of the motion for directed verdict.

Because we believe the appellant was entitled to a missing evidence instruction, we reverse and remand his conviction for proceedings consistent with this opinion.

KNOPF, JUDGE, CONCURS.

MINTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION:

MINTON, JUDGE, DISSENTING: I concur with the majority's conclusion that the trial court did not err when it denied Hembree's motions for a directed verdict and mistrial.

But I respectfully dissent from the majority's conclusion that Hembree's conviction must be reversed because of the trial court's failure to give a missing evidence instruction. As I construe it, Estep v. Commonwealth requires a showing of bad faith before a defendant is entitled to a missing evidence instruction. The court in Estep explained that

[f]irst, the purpose of a "missing evidence" instruction is to cure any Due Process violation attributable to the loss or destruction of *exculpatory* evidence by a less onerous remedy than dismissal or the suppression of relevant evidence. . . . Second, the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed. None of the above precludes a defendant from exploring, commenting on, or arguing inferences from the Commonwealth's failure to collect or preserve *any* evidence. It just means that absent some degree of "bad faith," the defendant is not entitled to an instruction that the jury may draw an adverse inference from that failure.<sup>1</sup>

Since I agree with the majority's conclusion that Hembree has not demonstrated bad faith, I believe that he was not entitled to a missing evidence instruction.

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<sup>1</sup> 64 S.W.3d 805, 810 (Ky. 2002).

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