

RENDERED: DECEMBER 8, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-1892-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. MCNEILL, III, JUDGE
INDICTMENT NO. 03-CR-00079

LISA JANELLE STROHOFER

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER,¹ SPECIAL JUDGE.

MILLER, SPECIAL JUDGE: The Commonwealth brings this appeal from an order of the Mason Circuit Court entered August 15, 2005 dismissing the charges against Lisa Janelle Strohofer. For the reasons stated below, we affirm.

On January 3, 2003, Strohofer was arrested for the offense of drug trafficking after allegedly selling five pills of "Lortabs" to a confidential informant; to wit, one, Matt Burlew. Prior to purchasing the pills, officers of the Buffalo

¹ Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Trace Gateway Area Narcotics Task Force fitted Burlew with a "body transmitter" to record the transaction. Burlew completed the purchase from Strohofer and turned the evidence over to the officers. On August 15, 2003, a Mason Circuit Court grand jury indicted Strohofer for trafficking in a controlled substance in the second degree.²

Strohofer was represented by Tom Griffiths of the Maysville office of the Department of Public Advocacy. She initially entered a guilty plea on October 24, 2003, but later was permitted to withdraw same. The case was assigned for trial. On June 29, 2004, the day of trial, the Commonwealth argued that because Griffiths had previously represented Strohofer's brother, Michael Strohofer, on an unrelated charge in 2003, Griffiths should be prevented from representing her in the present case. The court agreed and excused Griffiths from the case. Rules of Criminal Procedure (R.Cr.) 8.30.

On January 28, 2005, Strohofer moved the court to reconsider its order. The Commonwealth requested additional time to respond to the motion. On February 11, 2005, Strohofer presented the court with signed waivers from herself and her brother. The waivers stated that each party understood the possible conflict and waived any objection to Griffiths serving as Strohofer's counsel. The court, after finding that the

² Kentucky Revised Statutes (KRS) 218A.1413.

waivers cured any conflict, granted the motion and reinstated Griffiths as counsel. The Commonwealth claims error in this regard, however, because we affirm the dismissal we need not consider same.

On April 5, 2005, Strohofer brought on a motion to dismiss the indictment. The motion was based on the conduct of Agent Tim Fegan, special agent for the Buffalo Trace Gateway Narcotics Task Force. The Commonwealth contended that Agent Fegan's actions were proper. At the hearing on the motion, the Commonwealth offered testimony that Michael Strohofer, while incarcerated upon unrelated charges, commented to the jailer that his sister wanted him to lie and say that he "did it all."

During the hearing, the brother testified that Agent Fegan came to the jail³ to ask him about the comment, but when asked if it was true, replied, "not really." Strohofer's brother testified that after the exchange, Agent Fegan remarked that he, Fegan, "would hate to see [him] get more time."

At the hearing, Strohofer also called one Michael Irwin. Irwin testified that he did not know Strohofer, but was "best friends" with Burlew, the Commonwealth's principal witness. Irwin testified that in June of 2004 (during the time-frame that Strohofer's trial was originally set), while he was incarcerated in the Mason County jail upon unrelated charges,

³ Agent Fegan went to the jail at the behest of Assistant Commonwealth Attorney Mike Clark.

Agent Fegan visited him to find out why he was going to testify in the Strohofer trial. Irwin stated he was going to be a "character witness against Burlew." Irwin testified that Agent Fegan told him that "if [he] did not watch what [he] was doing, [he] was going to end up getting charged himself" and that Strohofer's counsel was just "looking for someone else to lay [blame] on." Irwin testified that based on Agent Fegan's comments, he did not want to testify against Burlew at Strohofer's trial because he felt "intimidated" and "trapped."

In dismissing the indictment against Strohofer with prejudice, the court "found the testimony of Irwin very convincing," noting that he had "[no] incentive to lie." The court also noted that Agent Fegan was "widely known throughout drug circles" in the surrounding counties and was involved in every major drug arrest in the Buffalo Trace area. The court stated that "knowing Fegan's reputation for aggressive drug enforcement, Irwin's fear [was] entirely credible." The court found that "[Agent] Fegan's conduct at the jail on the evening before the trial went beyond investigation and crossed the line into intimidation of witnesses." Consequently, the court concluded that Strohofer's right to a fair trial was denied in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution. This appeal ensued.

The Commonwealth argues that the trial court erred by dismissing the indictment with prejudice instead of pursuing other remedies. Before dismissal, the trial judge offered the Commonwealth an opportunity to present remedies short of dismissal. The Commonwealth made no suggestion.

Nevertheless, on this appeal the Commonwealth now argues that the court should have considered remedies other than dismissal. The Commonwealth suggests that a directive to Agent Fegan to refrain from contacting Irwin would have been a cure. We note, however, that the trial court did make such a directive. However, we perceive this as not an adequate remedy.

Under the circumstances, we agree with dismissal of this action. The United States Supreme Court has stated:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony he has the right to present his own witnesses to establish a defense. **This right is a fundamental element of due process of law.**

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019, 1023 (1967)(Emphasis added). This right is found specifically in the Sixth Amendment right to compulsory process.

Id. The trial court found that the actions of Agent Fegan denied Strohofer this right.

The conduct of Agent Fegan, effectively threatening Irwin with prosecution if he testified for Strohofer, was completely unnecessary and intimidating. The pressure brought to bear upon Irwin, by Agent Fegan, interfered with the voluntariness of Irwin's choice to testify and infringed upon Strohofer's constitutional right to have freely given testimony in his defense. It was the influence of Agent Fegan, a symbol of the Government's power to prosecute offenders, that sought to drive Irwin from the witness stand. However well-intended Agent Fegan's actions may have been, coercion toward a witness for the defense is not to be condoned. To do so would deprive a defendant of rights afforded under the Sixth Amendment of the U.S. Constitution and Section 11 of the Kentucky Constitution, as well as due process under the Fourteenth Amendment. When these rights have been infringed we know of no other remedy than dismissal.

This is not a case involving an illegal arrest, illegal search, or coerced confession in which case the fruits of the wrong may be suppressed and the trial proceed. Rather, this is a case involving the fundamental right to produce evidence in defense of charges laid against a defendant. Our Supreme Court has shown the inclination to embed the Sixth

Amendment rights under the Federal Constitution within Section 11 of the Constitution of this Commonwealth. See Greene v. Commonwealth, 197 S.W.3d 76 (Ky. 2006)(confrontation clause); Dunaway v. Commonwealth, 60 S.W.3d 563 (Ky. 2001)(speedy trial). Agent Fegan's conduct substantially interfered with those rights.

We agree with the trial court's conclusion that the "population in general can have no faith in the promise of justice if witnesses who may be called to testify for a defendant are intimidated into changing their story or refusing to testify on account of threats" by the police.

Michael Irwin was to be called to assail the character of a prosecution witness. Such testimony was not at all insignificant. The state's case rested upon believability of the confidential informant. If his believability was to be impugned, the state's case would be greatly diminished. In such cases, the reliability of the witness' testimony is subject to close scrutiny.

Our Supreme Court has stated "that the credibility of every witness presented to testify in a legal proceeding is subject to attack and cross-examination, this being the primary means by which trial counsel can attempt to persuade jurors of the weight or significance to be attached to the testimony of the witnesses" Brown v. Commonwealth, 934

S.W.2d 242, 247 (Ky. 1996)(citing Edwards v. Commonwealth, Ky., 554 S.W.2d 380, 385 (1977)). Moreover, the attack on the credibility of a witness is not limited to cross-examination, but also includes calling an adverse witness to impeach his or her credibility. See KRE 404(a)(3) and 608. Thus, just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he also has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process. Washington, 388 U.S. at 19; see also Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (the right to confront and cross-examine witnesses and to call witnesses on one's own behalf have long been recognized as essential to due process). Agent Fegan's conduct effectively denied Strohofer that right.

It is not difficult to see that the testimony of Irwin was to be offered to support Strohofer's claim that the state's chief, and perhaps only, prosecuting witness, Burlew, was untrustworthy. Of course, a conviction upon such evidence is impermissible. The state can have no interest in convicting an accused upon the testimony of untrustworthy persons. Cf. Gordon v. United States, 344 U.S. 414, 419, 73 S.Ct. 369, 373, 97 L.Ed. 447 (1953)(quoting People v. Davis, 18 N.W. 362, 363 (Mich. 1884)).

Finally, it is not entirely clear as to why Fegan desired to interview Irwin. Irwin had no factual evidence to offer to aid in the prosecution. Moreover, any character evidence which he was likely to present is severely limited by the Kentucky Rules of Evidence.⁴

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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⁴ KRE 404(a)(3), 607, 608, and 609.