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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000568-MR

JOSHUA WRIGHT

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
ACTION NO. 04-CR-00426-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: ABRAMSON AND BARBER,¹ JUDGES, MILLER,² SPECIAL JUDGE.

ABRAMSON, JUDGE: Joshua Wright appeals from a March 2, 2005, trial order and judgment of the Kenton Circuit Court finding him guilty of first-degree assault, in violation of KRS 508.010, and sentencing him as a youthful offender to ten years'

imprisonment. Wright contends that the Commonwealth's discovery

¹ Judge David A. Barber dissented in this opinion and filed a separate opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

² Retired Judge John Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

violation compromised his ability to put on a defense and undermined the fairness of his trial. We agree that the Commonwealth's belated, mid-trial disclosure of a statement Wright made to the arresting officer and the use of that statement to impeach Wright's alibi defense was an unfair surprise and is reasonably likely to have affected the outcome of Wright's trial. Accordingly, we must reverse the trial court's judgment and remand for additional proceedings.

Wright and codefendant Michael Hurt were accused of the June 8, 2004, drive-by shooting of Clifford Heard in Covington. The Commonwealth alleged that Hurt and one Darryl Allen were engaged in a feud and that on the evening of June 8, Hurt and Wright drove to Covington to confront Allen. According to witnesses, Hurt found Allen at the corner of Robbins and Greenup, where he was standing with his friend Heard and several others. Hurt allegedly drove his car slowly around the corner, and as he did so his passenger fired three or four shots in Allen's direction. One of the shots struck Clifford Heard in the back.

At Hurt's and Wright's joint trial, the Commonwealth produced several witnesses to the shooting who identified Hurt and his car and who testified that the passenger fired the shots. Although Allen and Heard both testified that Wright was the shooter, neither of them, nor any of the other witnesses of

the shooting, was familiar with Wright. None of those witnesses could identify Hurt's passenger positively, and there was conflicting testimony concerning the passenger's race and appearance.

For his defense, Hurt did positively identify Wright as his passenger, asserted that the two had come to Covington only to fist-fight with Allen, and claimed that when he saw how many people were present he decided to postpone the fight. He was beginning to drive away, he claimed, when Wright produced a handgun and started shooting. He had been unaware of the presence of the gun, he claimed, and had thus never intended its use.

Wright presented an alibi defense premised on the fact that he was never in Covington on the night Heard was shot. He, his mother, and three of his friends all testified that Wright was near his home in Cincinnati playing basketball at the time of the shooting. Hurt was attempting to pin the crime on him, Wright maintained, because he was a juvenile and so was apt to be punished less severely than an adult.

A Cincinnati police officer, Officer Manson, arrested Wright at his home a few hours after the shooting. On cross-examination, the Commonwealth asked Wright if he had not admitted to Officer Manson that he had been in Covington that evening. Wright denied having said that to Officer Manson,

whereupon the Commonwealth, outside the presence of the jury, belatedly disclosed that Officer Manson had reported Wright's statement to the Commonwealth's detective who investigated the incident. According to Officer Manson's report, and then according to his testimony at what evolved into an impromptu suppression hearing, he had arrested Wright in Wright's bedroom; had advised him of his *Miranda* rights; and, when Wright had denied any involvement in the shooting, had counseled him to be truthful. Wright then, according to the Manson, said that he had been in Covington but had not participated in the shooting. Officer Manson verbally reported the arrest and Wright's statement to the Commonwealth's detective, who made a note of the report on his log sheet, but the substance of the report and the statement were inadvertently omitted from the detective's file and from the materials produced during discovery. Only during trial, and possibly not until Wright's defense was underway, had the detective recalled Officer Manson's report and discussed Wright's statement with the Commonwealth's attorney, who, as noted, used the alleged statement in his cross-examination of Wright without having advised either defendant of its existence.

Arguing that Officer Manson had elicited the alleged statement in violation of Wright's rights, pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694

(1966), and that the Commonwealth's failure to disclose the statement was a violation of RCr 7.24, the discovery rule, Wright moved to suppress any further reference to it. The trial court denied the motion, whereupon Hurt called Officer Manson as a rebuttal witness, and the officer testified concerning Wright's statement.

Soon thereafter the case was submitted to the jury. Apparently struggling with the conflicting evidence concerning Wright, the jury submitted a question to the court asking whether they could find Hurt guilty without convicting Wright. The court advised them that they could, but ultimately the jury found both defendants guilty: Wright of first-degree assault and Hurt of complicity to that crime. Wright contends that the trial court erred by refusing to suppress his statement. We agree.

As Wright notes and as the Commonwealth concedes, RCr 7.24(1) requires that the Commonwealth

disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness[.]

The Commonwealth's failure to produce Officer Manson's report in a timely manner during discovery violated this rule and was an omission of such magnitude that a new trial is warranted. While the Commonwealth seeks to dismiss Wright's statement that on the

night of the shooting he "was in Covington" as "innocuous, and clearly not incriminating", Wright's statement was in fact of substantial import in a trial where there was conflicting evidence about the race and identity of the passenger in Michael Hurt's car. The statement was flatly contradictory to Wright's trial strategy, his own testimony and that of the four witnesses he called to testify that he was in Cincinnati throughout the evening of the shooting. Moreover, the jury was clearly struggling with conflicting testimony regarding Wright's role, if any, in the events as evidenced by the question which they sent the judge during deliberations: "According to the instructions, does the jury have to convict Joshua Wright, in order to convict Michael Hurt?"

It is true, as the Commonwealth insists, that a discovery violation justifies setting aside a conviction only if there exists a reasonable probability that had the evidence been disclosed the result would have been different. *Weaver v. Commonwealth*, 955 S.W.2d 722 (Ky. 1997) (citing *Wood v. Bartholomew*, 516 U.S. 1, 116 S. Ct. 7, 133 L. Ed. 2d 1 (1995)). In *Akers v. Commonwealth*, 172 S.W.3d 414 (Ky. 2005), however, our Supreme Court held that this standard was met where the Commonwealth failed to turn over in discovery an incriminating police report which revealed that Akers' daughter had sustained an injury to her leg. Akers had intended to defend the assault,

stalking and unlawful imprisonment charges on the grounds that his estranged wife and daughter had simply fabricated the events they testified to and, in support of his defense, he had intended to emphasize that the only police report produced in discovery revealed no injuries to either victim. At trial, on cross-examination, a police officer testified to a second police report which was prepared the day of the incident and which detailed an injury, but which, for reasons unknown, had never been produced to Akers. This Court and the Supreme Court held that the mid-trial production of this document which wholly undermined Akers' defense required reversal. While this Court held that only the assault charge (which specifically required proof of a physical injury) should be reversed, Justice Johnstone, writing for a 6-1 majority of the Supreme Court, held that all of Akers' convictions should be reversed because his ability to defend against all of the charges had been "substantially impaired."

Here, too, the Commonwealth's failure to disclose Wright's statement misled defense counsel with respect to critical evidence and induced Wright to rely upon a defense he might not otherwise have asserted or asserted in the same way. It makes no difference that Wright's post-arrest statement was not introduced during the Commonwealth's case-in-chief, but as impeachment after Wright's testimony. The state's failure to

disclose impeachment evidence, like the failure to disclose direct evidence, can so undermine the fundamental fairness of the defendant's trial as to warrant relief on appeal. *State v. Allison*, 11 P.3d 141 (N.M. 2000); *United States v. Lewis*, 511 F.2d 798 (D.C.Cir. 1975); *United States v. Padrone*, 406 F.2d 560 (2nd Cir. 1969). The standard remains whether timely disclosure is reasonably likely to have affected the result. *State v. Allison, supra*. Much as the Supreme Court could not conclude that Akers would have proceeded in the same way or that the jury would have reached the same result without the second police report, we cannot conclude that Wright would have proceeded in the same way or that the jury would have convicted him without the admission of Officer Manson's belatedly produced report regarding Wright's alleged acknowledgment of his presence in Covington on the night of the shooting. Accordingly, we must reverse Wright's conviction and remand for a new trial.

This result largely moots Wright's other contentions. He contends that the trial court erroneously supplemented the jury instructions after the jury had begun deliberating, but because this is an alleged error not likely to recur on remand we need not address it. He also contends that his statement to Officer Manson was obtained in violation of his rights under *Miranda v. Arizona, supra*, and should have been suppressed for that reason as well as the discovery violation. We decline to

address this contention, however, for, now that Wright's statement has been disclosed, whether, at a retrial, it should be suppressed under *Miranda* is a question the trial court must address in the first instance after the parties have had a full opportunity to brief it.

In sum, the fairness of Wright's trial was undermined and its outcome thrown into reasonable doubt by the Commonwealth's failure to timely disclose Wright's potentially incriminating statement to his arresting officer. Accordingly, we reverse the March 2, 2005, judgment of the Kenton Circuit Court and remand for additional proceedings.

MILLER, SPECIAL JUDGE, CONCURS.

BARBER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BARBER, JUDGE, DISSENTING: I respectfully dissent.

While I agree that failure to timely disclose the statement was an error, I don't believe the defendant demonstrated that there is a substantial possibility that the result would have been any different if the error had not occurred. See *Abernathy v. Commonwealth*, 439 S.W.2d 949 (Ky. 1969).

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