

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001947-MR

CHARLES BRENT BEARD

APPELLANT

v.

APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE C. RENE' WILLIAMS, JUDGE
INDICTMENT NO. 05-CR-00053

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** *

BEFORE: DIXON AND LAMBERT, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Charles Brent Beard appeals his methamphetamine and marijuana trafficking convictions. For the reasons herein, we affirm both.

In this case, Beard was charged in a “sting” operation involving a confidential informant. Specifically, the confidential informant used cash provided by the police to purchase drugs from Beard, and then testified against Beard at trial. Finding the

¹Senior Judge Paul W. Rosenblum, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

informant's testimony credible, the jury convicted Beard of drug trafficking. On appeal, Beard contends (1) that his appointed, public defender failed to provide constitutionally adequate representation due to a conflict of interest; and (2) that all evidence obtained in this case as a result of the sting operation should be suppressed because the confidential informant did not have the consent of his probation officer to participate in the sting.

Conflict of Interest

Beard contends that he was denied effective assistance of counsel at trial because his lawyer had previously represented the Commonwealth's chief witness against him, the confidential informant, and therefore had divided loyalties. The law is well-settled that even an indigent defendant with a counsel appointed at public expense is entitled to conflict-free counsel. *See Von Moltke v. Giles*, 332 U.S. 708, 725-26, 68 S.Ct. 316, 92 L.Ed. 309 (1948). But, the law is equally well-settled that, to reverse a conviction for the absence of conflict-free counsel, “a defendant must show an actual conflict of interest adversely affected the performance of his lawyer.” *Kirkland v. Commonwealth*, 53 S.W.3d 71, 75 (Ky. 2001); *see also Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (showing of actual prejudice to defense required).

Here, the record indicates that, despite his prior, professional relationship with the informant, Beard's lawyer defended Beard by vigorously attacking the informant's credibility at trial and even filing a suppression motion seeking to exclude the informant's testimony altogether. Indeed, Beard failed to show in any way how the performance of his counsel was adversely affected by counsel's prior representation of the

Commonwealth's chief witness or that his defense was otherwise prejudiced. The unrealized possibility that Beard's lawyer might have gone easy on the informant is not grounds for reversal. *See Kirkland v. Commonwealth*, 53 S.W.3d 71, 75 (Ky. 2001). Consequently, we hold that Beard's convictions were not obtained in violation of his constitutional rights.

Suppression Motion

Beard also contends that the evidence obtained as a result of the confidential informant's participation in the sting operation should be suppressed because the informant's participation violated internal government policy. Specifically, Beard relies on government policies requiring a probation officer's consent before a probationer may serve as a confidential informant in a sting operation. However, the law is replete with precedent indicating that only violations of a defendant's constitutional rights constitute sufficient grounds for suppression of evidence. Mere violation of an internal government policy or regulation is not sufficient grounds to trigger the exclusionary rule. *See e.g., Bothman v. Commonwealth*, 941 S.W.2d 479, 480 (Ky.App. 1997) (holding that violation of internal police procedure not grounds for suppression). Consequently, we hold that, despite the absence of permission from his probation officer, the confidential informant's participation in the sting operation did not violate Beard's constitutional rights, and the trial court did not err in admitting incriminating evidence obtained by the Commonwealth as a result of the sting.

For the foregoing reasons, we affirm the judgment of the Crittenden Circuit Court.

DIXON, JUDGE, CONCURS.

ROSENBLUM, SENIOR JUDGE, DISSENTS IN PART AND CONCURS IN PART.

ROSENBLUM, SENIOR JUDGE, DISSENTING IN PART AND CONCURRING IN PART: I respectfully dissent from the majority opinion which concludes that the trial court did not err in denying appellant's pro se motion for substitute counsel. The requisite good cause was established herein by demonstrating that a conflict of interest existed, thus requiring that the trial court appoint substitute counsel. A significant portion of appellant's defense revolved around the credibility of the confidential informant, Jackie Davis. It was imperative that appellant's counsel vigorously attack Davis's credibility by attempting to impeach his claim that he did not know he was on probation. Counsel had also been appointed to represent Davis at a probation revocation hearing where Davis would argue that he was unaware that he was subject to probation. I concur with the result reached by the majority opinion pertaining to the suppression issue. Because of the evident conflict of interest, I would vacate the convictions and remand this case to the trial court for a new trial with directions that new counsel be appointed.

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