

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001893-MR

CARRIE GENTRY

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 99-CR-00021

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, EMBERTON, AND TACKETT, JUDGES.

TACKETT, JUDGE: Carrie Gentry appeals from a jury verdict finding her guilty of manslaughter in the second degree and driving under the influence first offense. The McCracken Circuit Court entered judgement sentencing her to five years' imprisonment. We affirm.

On the night of her arrest, Gentry had joined a few friends for drinks at Ginger and Pickles, a local bar in McCracken County. She had ridden to the bar with Anthony Robertson, a diabetic who did not normally drink, and who was to be the designated driver on the way home. At the bar, Robertson met another friend, Brian Pettit, and the two men began drinking

beers. Gentry also had some drinks although, according to her friends, she stopped drinking shortly after midnight and appeared to be sober.

When the bar closed, Pettit determined that he had had too much to drink and could not drive himself home. Gentry offered to let Pettit spend the night at her apartment and offered to drive the two of them in his car to her home. When they reached the apartment, Pettit asked whether he could keep listening to a new CD he had purchased. Gentry, not wanting to disturb her young daughter who was inside asleep with a babysitter, offered to drive around for a while.

While driving on US 62 West in Paducah, Gentry failed to negotiate a curve. The car crossed the center line, hit a bridge abutment and flipped through the air. Gentry and Pettit were both ejected from the vehicle. When Gentry regained consciousness, she flagged down a passing driver who called for an ambulance. Pettit was dead at the scene and Gentry suffered injuries to her back and neck. She made conflicting statements during the course of her treatment, both admitting and denying that she had been the driver of the wrecked car. At the hospital, she submitted to a blood test which revealed a blood alcohol level of 0.14. She was arrested shortly thereafter and charged with wanton murder. Her case was presented to the grand jury wherein she was indicted for manslaughter in the second degree and driving under the influence, and later convicted by a jury of those charges. This appeal followed.

Gentry's first argument concerns the video-conferencing system used by the McCracken Circuit Court which enables expert witnesses in other counties to testify via a closed circuit television connection. The camera at the remote site allowed onlookers in the courtroom a view of the witness' head and shoulders. Cameras were also located inside the courtroom at each counsel table and at the bench. The television screen in the courtroom displayed images from each of the four cameras simultaneously. At Gentry's trial, five of the Commonwealth's expert witnesses offered televised testimony including Dr. William Smock, a medical examiner and accident reconstruction expert, who testified that the victim's injuries were consistent with him being the passenger of the car. The other expert witnesses were Dr. Tracey Corey Handy, a medical examiner, Phil Wilson, who performed the blood alcohol test on Gentry's blood, Tracy Phillips, who examined material found in the passenger side door and testified that it was consistent with the victim's jeans, and Larry Ayers, who performed DNA tests on blood and tissue found on the passenger's side of the car and testified that they matched the victim's DNA profile and not Gentry's.

Prior to the first witness being called to testify via the closed circuit system, Gentry objected to its use on the grounds that it violated her constitutional right to confrontation. The trial court summarily overruled her objection and allowed each expert witness to testify from a remote location. On appeal, Gentry continues to argue that this decision violated her right to confront the witnesses against her

pursuant to the Sixth Amendment to the United States Constitution. This issue was addressed recently in Bolen v. Commonwealth, Ky., 31 S.W.3d 907 (2000), a case in which the Kentucky Supreme Court found this argument to be without merit.

Gentry next contends that she was denied the right to present a defense when the trial court refused to let her defense expert testify. Pursuant to an *ex parte* order, Gentry retained Anne Rummel Manley, a blood chemistry expert. The trial court had entered a discovery order, pursuant to Kentucky Rule of Criminal Procedure (RCr) 7.24, requiring Gentry to provide the Commonwealth with the results or reports of any scientific experiments or tests performed in connection with the case no later than five days prior to trial. On the third day of trial, the Commonwealth asked for the exclusion of Manley's testimony because Gentry had not turned over the expert's opinion. The Commonwealth had previously failed to comply with the order to preserve Gentry's blood sample for independent testing; therefore, Manley did not perform any scientific tests or prepare a written report. Consequently, Gentry argued that there was nothing to disclose and that she had not violated the discovery order. The trial court disagreed and granted the Commonwealth's motion to exclude Manley's testimony.

The Kentucky Supreme Court addressed this question in Barnett v. Commonwealth, Ky., 763 S.W.2d 119, (1988). That case involved a serologist whose written report was turned over to defense counsel in compliance with a discovery order. When the case went to trial, the serologist testified that traces of blood

found on the defendant's hands and arms were consistent with him having washed off the blood after stabbing his wife to death. This opinion, however, was not contained anywhere in the written report. The Court reversed his conviction, concluding that Barnett "was entitled under RCr 7.24 to be confronted with the fact that this opinion would be presented against him before the trial started so that he had a reasonable opportunity to defend against the premise." Id. at 123.

Gentry contended at her trial that she had only had two alcoholic drinks on the night of the accident and that her blood alcohol level should have been under the legal limit of 0.10. Manley testified on avowal that blood alcohol level refers to the level of alcohol in whole blood. When blood is reduced to serum, it still contains all of the alcohol; therefore, blood serum tests yield a higher blood alcohol content than tests performed on whole blood. Manley stated that, in order to equate the two, it is necessary to multiply a reading taken from serum by 0.85. According to the lab reports, the blood alcohol reading in this case was actually obtained from Gentry's blood serum. However, the Commonwealth pointed out that using Manley's calculation would still result in a blood alcohol reading content of 0.119 which is over Kentucky's legal limit for driving.

Gentry argues that the jury should have been permitted to hear Manley's testimony under the standard set forth in Vires v. Commonwealth, Ky., 989 S.W.2d 946, (1999). In Vires, a detective with the Kentucky State Police who was as an accident reconstruction expert was allowed to testify without providing

his opinions to defense counsel prior to trial despite the fact that a discovery order had been entered. The detective introduced photographs which he had taken of the accident scene including both vehicles involved, the surface of the roadway, and skidmarks which he attributed to one of the vehicles. The Commonwealth had notified the defense of the existence of this witness and provided counsel with all of the evidence on which his opinion would be based. Significantly, although he was recognized as an expert witness, the detective testified that he did not perform an accident reconstruction and he declined to state an opinion as to whether the evidence was consistent with the testimony given by the passenger in the victim's car. The distinction between the case sub judice and the situation presented in Vires is that the detective in that case "did not rely upon any undisclosed premise as the basis for his opinion and all facts and supporting materials relied upon by him were provided to defense counsel." Id. at 948. In contrast, Gentry sought to introduce expert testimony which would tend to dispute her blood alcohol level without notifying the Commonwealth of Manley's premise, i.e., that a blood serum test produces a higher blood alcohol content than a whole blood test.

Finally, Gentry claims that the Commonwealth improperly commented on her pretrial assertion of the right to remain silent. Green v. Commonwealth, Ky., 815 S.W.2d 398 (1991). In closing argument, the prosecutor remarked that Gentry had originally maintained that she was not driving the car and had only changed her story after being confronted with expert

witnesses to the contrary. Several witnesses testified that, on the night of the accident which claimed Pettit's life, Gentry stated that she was not the driver of the car. Gentry's counsel argued during opening statements that the Commonwealth must prove that she had been the driver of the car. Throughout the case, defense counsel's strategy was to pursue the theory that Pettit had been the driver of the car, not Gentry. The Commonwealth introduced testimony from several experts which indicated that Pettit had been on the passenger's side of the car when the accident occurred. After the defense initially had announced closed, Gentry took the stand and admitted that she had been driving, but denied that she was under the influence. On cross-examination, the prosecutor asked Gentry whether it was true that she had changed her story mid-trial, from not being the driver to not being drunk, after all of the experts had testified that she was driving the car. Her counsel did not object to that question.

The trial court found the prosecutor's statement to be fair commentary on the evidence. Attorneys are to be given broad latitude in making their closing arguments, and any inquiry into prosecutorial misconduct must focus on the overall fairness of the trial. Dean v. Commonwealth, Ky., 844 S.W.2d 417, 421, (1992). We agree with the trial court that the prosecutor's comment on Gentry's changing story was fair in light of the evidence presented at trial.

For the forgoing reasons, the judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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