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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001375-MR

BRIAN MUCHRISON

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 14-CR-00037

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** *

BEFORE: COMBS, D. LAMBERT, AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: Appellant, Brian Keith Muchrison, appeals from a verdict and judgment of conviction entered by the Mason Circuit Court following a jury trial. Having reviewed the record, we reverse.

I. FACTUAL AND PROCEDURAL HISTORY

Muchrison is currently serving a ten-year term of incarceration in state custody, following convictions in this matter for the offenses of first-degree trafficking in a controlled substance and being a first-degree persistent felony offender. His conviction stems from a purchase of a quantity of heroin by a confidential informant acting on behalf of law enforcement.

The confidential informant in question, Jennifer Suister, had a romantic history with Muchrison, but also, in her own words, had “about three or four boyfriends” at or near the time she made the purchase from Muchrison. One of those boyfriends was Christopher Trent.

Trent had been arrested for theft at the local Walmart, and was represented by the same counsel who would later come to represent Muchrison at trial. Unbeknownst to Trent’s counsel, Suister entered into an agreement with Gerald Muse of the Maysville Police Department to act as a confidential informant in exchange for favorable treatment for Trent on bond. Trent informed his attorney that he had “someone else” working toward getting a favorable bond recommendation from the Commonwealth, but when pressed, refused to divulge the identity and attempted to backtrack that statement. At Trent’s next court appearance, the Commonwealth did not oppose and the court granted counsel’s request for a surety bond, an atypically light condition for one with a criminal history similar to Trent’s. Trent subsequently violated the terms of his release and police arrested him. He eventually entered a guilty plea and was sentenced for the offense.

On January 4, 2014, Suister, under the supervision of law enforcement, made contact with Muchrison for the purpose of setting up a drug purchase. She was fitted with video and audio recording devices. Though the video was obscured, the audio picked up what seemed to be a drug transaction, and Suister returned to Muse bearing two foil-wrapped pieces of heroin.

Muchrison maintained his assertion of innocence, insisting that he met with Suister that night not to sell her drugs, but in an attempt to have sex with her. The matter proceeded to trial. However, on the day before trial, the Commonwealth provided certain discovery to Muchrison's attorney. This discovery consisted of notice that the confidential informant with whom Muchrison had conducted a transaction had originally acted with the intention of "helping Christopher Trent with his current charges," which were the same charges for which Muchrison's counsel was representing Trent. The notice also stated that the confidential informant had been compensated with three hundred dollars and an additional one hundred for each successful purchase she made.

Defense counsel immediately made a call to the Kentucky Bar Association's Ethics Hotline, and his contact advised him that he had a conflict, but it would be several days before a formal letter memorializing that opinion could be issued. Defense counsel also filed a motion to withdraw as Muchrison's attorney, citing the conflict. By this point, Trent had already been sentenced, but counsel noted that Trent wished to file post-conviction motions. The trial court

conducted a hearing on the motion and denied it, finding no conflict existed, but nonetheless ordered that defense counsel no longer represent Trent.

As the trial in this case proceeded, Muchrison presented an alternative perpetrator theory, arguing that Suister had motive, means, and opportunity, to successfully fabricate a drug transaction. With his ability to ask questions regarding Trent limited, trial counsel instead attempted to impeach Suister regarding her need for money to pay her living expenses as the primary motive for such fabrications.

The recordings created by the devices worn by Suister were played for the jury during the testimony of Muse. When asked by the Commonwealth what relevant evidence was contained in the video, Muse answered as follows:

Was her walking from uh, Limestone Street and going to 5th Street. So if I am sitting there looking at the intersection watching the video she is walking up to the vehicle, which Brian Muchrison drives, which I know he drives. Uh she walks up to the car gets in the passenger seat of the car and she begins to speak to him. Uh, I think one of the things that she said to him, 'Did you make it fat?' And at that point she says, 'What are you going to be doing later on tonight?' And then she goes, 'Here is your sixty.' And at that point as she is leaving she said, 'What are you going to be doing, what are you going to do?' And he says, 'Well, hopefully destroying you later on.' And at that point she exited the vehicle and she started walking down Fifth Street. At that point we waited until we felt comfortable that Mr. Muchrison had left the area. And then we went and picked the cooperating witness up and took her back to the police.

Muchrison's counsel did not object to this testimony. During deliberation, the jury asked to see the video recording three more times.

The jury voted to convict and Muchrison now appeals. He asserts four errors in his trial proceedings. First, he contends the trial court erred in denying his trial counsel's motion to withdraw. Second, he contends the trial court erred in failing to sanction the Commonwealth for its discovery violation. Third, he contends the trial court improperly allowed Muse to interpret the events depicted in the recordings, thereby tainting the jury's impartiality. Finally, he contends that these errors, if not individually reversible, had a cumulative effect of depriving him of a fair trial.

II. ANALYSIS

1. THE TRIAL COURT ERRED IN DENYING TRIAL COUNSEL'S MOTION TO WITHDRAW

Muchrison takes the position on appeal that the trial court's denial of his attorney's motion to withdraw deprived him of a fair trial. He adopts the position taken by his trial counsel in the motion to withdraw. Trial counsel's position was that his representation of Trent, and the ethical responsibilities inherent therein, precluded him from fully exploring exculpatory facts in his cross-examination of Suister, which prevented him from fully presenting Muchrison's defense.

An allegation that a violation of due process has occurred is a question of law. Questions of law are reviewed using a *de novo* standard. *Hamilton-Smith v. Commonwealth*, 285 S.W.3d 307, 308 (Ky.App. 2009).

The right to counsel is a fundamental right which governs our criminal jurisprudence, and is guaranteed by both the United States and Kentucky Constitutions. “The right to counsel includes ‘the right to effective assistance of counsel.’” *Steward v. Commonwealth*, 397 S.W.3d 881, 883 (Ky. 2012) (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). “Furthermore, effective assistance ‘includes the right to representation free from conflicts of interest.’” *Id.* (quoting *Rubin v. Gee*, 292 F.3d 396 (4th Cir. 2002)).

Also implicated here is the right to present a defense, of which the right to cross-examination is a crucial component. It is “more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps ‘assure the accuracy of truth-determining process.’” *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) (quoting *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 220, 71 L.Ed.2d 213 (1970)). In other words, a denial of cross-examination is a violation of an accused’s right to due process which “calls into question the ‘ultimate integrity of the fact-finding process.’” *Chambers* at 295.

Following a hearing, the trial court concluded that no conflict of interest existed. It reasoned that “[t]he information [of the confidential informant’s identity] comes from the Commonwealth, and only confirms a vague statement made by Mr. Trent.” The trial court declared the information “not detrimental to Mr. Trent,” presumably because the matter before the court concerning Trent was no longer pending by the time of Muchrison’s trial, though it gave “assurance” that

any information revealed by the cross-examination of Suister would not adversely affect the outcome of any post-conviction motions Trent might file. It further noted that the information was “not confidential in that it was known to and provided by the Commonwealth.”

Supreme Court Rule (“SCR”) 3.130(1.7) governs conflicts of interest to current clients. Subsection (a)(2) excludes an attorney from representing a client when “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” Further, paragraph 4 of the Supreme Court Commentary to the same rule provides that representation must be terminated if a conflict of interest arises after the attorney has undertaken representation of the client.

Clearly Muchrison’s trial counsel became aware of the potential conflict stemming from Trent after he had begun to represent Muchrison. Suister’s work as a confidential informant, in an effort to assist Trent, directly resulted in the charges against Muchrison. That his responsibilities to Trent would affect his cross-examination of Suister to Muchrison’s detriment is a reasonable belief by trial counsel in this situation, particularly in light of the fact that Trent still expected trial counsel to file post-conviction motions. A client’s reasonable belief or expectation that a lawyer will undertake representation is all that is necessary to create a current attorney-client relationship. *Lovell v. Winchester*, 941 S.W.2d 466

(Ky. 1997) (*overruled on other grounds by Marcum v. Scorsone*, 457 S.W.3d 710 (Ky. 2015)).

The trial court's ruling diminishes the fact that trial counsel's original source of information, which he would later need in order to effectively represent another client, was a confidential communication with his client. Further, the identity of the confidential informant was exactly that—confidential—until such time as the Commonwealth made it a matter of public record mere hours before trial. The trial court also clearly recognized the potential presence of a conflict of interest; otherwise the order for trial counsel to discontinue representation of Trent served as a completely moot gesture.

That Muchrison's trial counsel was able to find a different line of questioning to establish Suister's motive to fabricate a narcotics transaction is immaterial. The conflict manifested itself the instant trial counsel was forced by his obligations to Trent to search for such alternative line of questioning. The ethical dilemma placed on trial counsel by the trial court's ruling limited his ability to cross-examine a critical witness, and thus deprived him of the right to effective counsel.

This Court thus concludes that the trial committed reversible error in failing to permit Muchrison's trial counsel to withdraw.

**2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING
TO SANCTION THE COMMONWEALTH FOR LATE DISCOVERY
DISCLOSURES**

Rule of Criminal Procedure (“RCr”) 7.24 governs the discovery process in criminal cases in Kentucky. RCr 7.24(9) authorizes any sanctions as may be just in the circumstances for failure to abide by the discovery rules. This Court reviews the imposition or non-imposition of discovery sanctions for abuse of discretion. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky. 2006). A ruling is an abuse of discretion when it is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941 (Ky. 1999).

Muchrison contends that the trial court should have excluded the testimony of Suister. The prosecution has a continuing burden to discover and provide all information pertinent to the defense of an accused. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *U.S. v. Agurs*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Williams v. Commonwealth*, 569 S.W.2d 139 (Ky. 1978); *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). This includes all exculpatory evidence, including that tending to impeach the credibility of prosecution witnesses, whether or not the defense has formally requested it. *Commonwealth v. Bussell*, 226 S.W.3d 96, 100 (Ky. 2007).

When previously undisclosed evidence is disclosed during trial, no *Brady* violation occurs “unless the defendant has been prejudiced by the delay in disclosure.” *United States v. Garner*, 507 F.3d 399, 405 (6th Cir. 2007) (*quoting United States v. Word*, 806 F.2d 658, 665 (6th Cir. 1986)). Here, we find no *Brady* violation, as the Commonwealth provided information about Suister’s agreement before trial. Even were we to find a discovery violation, defense counsel cross-

examined both the detectives and the confidential informant regarding the disclosed material effectively during trial. Thus, no prejudice resulted from the late discovery. Moreover, RCr 7.24 gives the trial court several options for sanctioning a party for discovery violations. If necessary to make preparations using the newly discovered information, Muchrison appears likely to have been entitled to a continuance had he requested one for that purpose. This remedy would have been far more appropriate than precluding the Commonwealth's primary witness from testifying. Regardless, the trial court acted within its discretion by permitting Suister to testify.

3. THE TRIAL COURT ALLOWING THE OFFICER'S TESTIMONY

"INTERPRETING" THE VIDEO WAS NOT PALPABLE ERROR

Muchrison's next allegation of error concerns the testimony given by Muse regarding the video. Muchrison requests this Court review for palpable error pursuant to RCr 10.26, as this error was not properly preserved for review. Said rule defines an error as "palpable" when it "affects the substantial rights of a party...." RCr 10.26. For an error to rise to the level of palpable, it must be "easily perceptible, plain, obvious, and readily noticeable." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (quoting *Burns v. Level*, 957 S.W.2d 218 (Ky. 1997)). A palpable error is one which is "so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings." *Brewer* at 349.

During Muchrison's trial, Muse took the stand to testify. He offered the testimony quoted above before the recording was played for the jury.

Particularly telling in that quotation is this language: "And then we went and picked the cooperating witness up and took her back to the police." This quotation indicates that Muse was not physically present at the time and location of the transaction and conversation between Muchrison and Suister. His knowledge of the event is based on his perception of the recordings and Suister's own account.

While a witness may proffer narrative testimony, such testimony "must comport with the rules of evidence." *Cuzick v. Commonwealth*, 276 S.W.3d 260, 265 (Ky. 2009). Rules 602 and 701 of the Kentucky Rules of Evidence ("KRE") govern the admissibility of narrative testimony of the type Muse offered. Rule 602 requires that testimony be within a witness' personal knowledge, while Rule 701 limits lay witness testimony to matters, "a) rationally based on the perception of the witness," and "b) helpful to a clear understanding of the witness's own perception of which he had personal knowledge and that are helpful to the jury." *Id.*

It was error to allow Detective Muse to narrate the contents of the buy tape. Not only did Muse lack "personal knowledge of the matter" as required by KRE 602 and 701, but his testimony also amounted to hearsay. KRE 801; KRE 802. Undisputed evidence established that Muse was not present in the vehicle when the alleged transaction between Suister and Muchrison took place. Muse then repeated the out-of-court statements for their truth while on the witness stand.

Muse's testimony did not conform to the rules of evidence. The trial court allowed a witness to testify and narrate the contents of a recording when he lacked the requisite knowledge of the events depicted. This differs starkly from the facts in *Cuzick*, where the Kentucky Supreme Court held that an officer could offer such narration testimony where the recordings came from the dash camera of his own cruiser, and were offered for "the purpose of describing the images on the video *from his perspective* as they happened." *Cuzick* at 265 (emphasis added). The trial court erred in allowing this testimony.

However, although it was error for Muse to narrate the video recording, this Court cannot conclude that, without the improper testimony, a substantial possibility exists the result of the trial would have been different. The confidential informant eventually testified as to what occurred during the controlled buy based on her own recollection. Additionally, she was available to the defense for cross-examination as to her statements depicted in the recording. Moreover, the recording in this case included audio, allowing the jury to listen and interpret events independently from Muse's testimony.

The Court cannot conclude the error "was more likely than ordinary error to have affected the jury." *Boyd v. Commonwealth*, 439 S.W.3d 126, 129-30 (Ky. 2014). Therefore, we must hold that the trial court's error in permitting Detective Muse's testimony does not rise to the level of palpability.

4. CUMULATIVE ERROR ANALYSIS IS UNNECESSARY

While Muchrison calls on this Court to reverse the conviction based on the cumulative effect of the alleged errors of the trial court, such reliance is unnecessary. “If an error is sufficient on its own to warrant reversal, a Court need not rely on cumulative error to overturn the case” *Elery v. Commonwealth*, 368 S.W.3d 78, 100 (Ky. 2012). This Court having determined the trial court’s failure to allow Muchrison’s conflicted trial counsel to withdraw amounted to reversible error, we need go no further in the cumulative error analysis.

III. CONCLUSION

Based on the foregoing, this Court concludes that the trial court committed reversible error in the proceedings below. The Appellant’s conviction is hereby REVERSED.

COMBS, JUDGE, CONCURS AND FILES A SEPARATE
OPINION.

VANMETER, JUDGE, DISSENTS AND FILES A SEPARATE
OPINION.

COMBS, JUDGE: In addition to its error in failing to allow counsel to withdraw, I would hold that the trial court also committed reversible error in failing to sanction the Commonwealth for its highly dilatory conduct in disclosing (“mere hours” before trial) Suister’s involvement with Trent. Its conduct directly affected the issue of conflict of interest, which caused the reversal of a criminal conviction. Sanctions should have been imposed

VANMETER, JUDGE, DISSENTING: I respectfully dissent. The majority opinion omits a number of important facts concerning trial counsel's "conflict." His other client, Christopher Scott Trent, had been charged with Burglary, Second Degree, and Persistent Felony Offender, First Degree, as a result of an incident occurring at the Maysville Wal-Mart sometime prior to January 2013. Trent was apparently indicted by the Mason Grand Jury on February 28, 2014, and arraigned in the circuit court on March 14; bail was set at \$20,000 cash. CourtNet 2.0 does not clearly indicate when Trent filed a motion for bond reduction, but does indicate the Commonwealth filed a Response to Defendant's Motion for Bond Reduction on April 23. In any event, Trent pled guilty to the amended charge of Burglary, Third Degree, on April 25, 2014, with the PFO charge being dropped. Trent was sentenced on May 29, 2014 to three-years' imprisonment. **No motion for shock probation was filed**, and Trent was released by the Department of Corrections on May 1, 2015.¹

Muchrison's charges in the instant case were completely unrelated to Trent's charges. While Muchrison's incident involving the confidential informant

¹ The facts recited concerning Christopher Trent appear from CourtNet 2.0. *Commonwealth v. Trent*, Mason Circuit Court, Docket No. 2014-CR-00018 (<https://kcoj.kycourts.net/CourtNet/Search/Index>). Under Kentucky Rules of Evidence ("KRE"), we may take judicial notice of our court records at any stage of the proceeding. KRE 201; *Jackson v. Commonwealth*, 3 S.W.3d 718 (Ky. 1999). Further, CourtNet 2.0 discloses that Trent had previously been convicted of at least two separate felonies, receiving a ten year sentence for one, *Commonwealth v. Trent*, Boyd Circuit Court, Docket No. 01-CR-00196, and two years for the other, *Commonwealth v. Trent*, Mason Circuit Court, Docket No. 11-CR-00146, and had been committed to the Department of Corrections. In Trent's previous Mason County felony conviction, he filed a motion for shock probation, which the trial court denied. *Id.* As noted, *infra*, the likelihood of this same circuit judge granting shock probation to Trent for any other offense seems exceedingly remote.

occurred in January, he was not indicted until March 28 or arraigned in circuit court until April 2. Muchrison's trial was at the end of June. By that time, Trent had been remanded to the Department of Corrections on his third felony conviction. While KRS² 439.265 does not prohibit shock probation for someone who has committed multiple felony offenses, the likelihood of a circuit judge who is familiar with his jurisdiction and the criminal record of those multiple felony offenders granting shock probation in such a case seems exceeding remote.

The majority opinion holds that no discovery violation occurred because of the day-before-trial disclosure of Suister's working for the police in order to help get Trent out of the Mason County Detention Center. Muchrison and trial counsel were thereby informed of the witness's motives for fabrication. If that disclosure was not subject to sanction, I fail to perceive how Muchrison's or his trial counsel's preparation or conduct during trial was compromised by this information, or by trial counsel's illusory conflict due to his prior representation of Trent. I would affirm the Mason Circuit Court in all respects.

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² Kentucky Revised Statutes.

