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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000712-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM TRIMBLE CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 14-CR-00014

ROBERT L. BALDWIN — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

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

LAMBERT, D., JUDGE: The Commonwealth of Kentucky brings this appeal from an interlocutory order excluding expert testimony regarding DNA[1] evidence. The Commonwealth offered the evidence during Robert L. Baldwin's murder trial. After reviewing the record and observing that the Trimble Circuit Court did not

[1] Deoxyribonucleic acid.

conduct a *Daubert*[2] hearing regarding the analytical technology used to further test blood from the crime scene, we vacate the order and remand.

I. BACKGROUND

In the early morning of November 27, 2013, Baldwin called the police to report that he had discovered Angela Long's body. Baldwin had been with Long the night before in her trailer. A homicide investigation later ensued.

Among the evidence collected at the crime scene was a blood-soaked claw hammer. A forensic analysis of the hammer revealed that it contained DNA from two individuals, a major and a minor contributor. Analysts identified Angela as the major DNA contributor. They could not, however, conclusively determine whether Baldwin was the minor DNA contributor. Regardless, Baldwin was indicted for Angela's murder in early January 2014.

Two years later, in February 2016, the Commonwealth, Baldwin's counsel, and the Kentucky State Police Crime Lab shared a conference call. During that conference call, it was revealed that the results from the prior DNA test could be re-analyzed to determine whether Baldwin was the minor DNA contributor. The Crime Lab explained that several other states had employed a probabilistic software program called TrueAllele for that very purpose. The Crime Lab eventually ran a TrueAllele test, and according to the Commonwealth, the results identified Baldwin as the minor DNA contributor.

[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct 2786, 125 L.Ed.2d 469 (1993).

With the TrueAllele results now available, Baldwin petitioned the circuit court for their exclusion. In the alternative, Baldwin also requested that Cybergenetics, the developer of the TrueAllele software, be forced to disclose the source code for its computer program. The failure to disclose the source code, Baldwin argued, would violate his Sixth Amendment right to confront the witnesses against him.

During a hearing on the motion to exclude, which occurred on April 28, 2016, the Commonwealth highlighted the probative value of DNA evidence linking Baldwin to a potential murder weapon. The Commonwealth also addressed Baldwin's constitutional concerns by countering that TrueAllele was demonstrably reliable and that experts interpreting the results, rather than the computer program itself, would be testifying at trial. The Commonwealth presented an affidavit from Dr. Mark Perlin, TrueAllele's developer, which explained how those skilled in the art of forensic data analysis had tested TrueAllele and approved of its use in a number of peer-reviewed articles. The Commonwealth also bolstered Dr. Perlin's affidavit with documentation showing that several state and federal courts had admitted TrueAllele results into evidence, despite a *Daubert* or *Frye*[3] challenge. In response, Baldwin's counsel asserted that time concerns, rather than any issues regarding TrueAllele's reliability, would

[3] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

preclude the defense from meaningfully participating in a *Daubert* hearing before the June 15, 2016 trial date.[4]

Following the hearing on the motion to exclude, the circuit court sided with Baldwin. In its order, the circuit court wrote that it "[was] absolutely convinced that the Defense team cannot competently represent the Defendant were the Court to proceed with Commonwealth's plans to introduce the True Allele results." The circuit court evidently reached this conclusion after making the following findings: (1) no court in Kentucky had yet admitted TrueAllele data results; (2) a *Daubert* hearing would come at considerable financial expense for the defense; (3) a *Daubert* hearing would consume the time of both the court and the attorneys in the weeks leading up to trial; (4) the Commonwealth already had a fair amount of DNA evidence which tended to show Baldwin was the perpetrator; and (5) the defendant was entitled to his trial without a *Daubert* hearing. This appeal followed.[5]

II. STANDARD OF REVIEW

Appellate courts review a trial judge's decision to exclude evidence under the abuse of discretion standard. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). The familiar test for abuse of

[4] As Judge Conrad stated during the April 28, 2016 hearing: "[The defense is] not arguing the junk science today—that's *Daubert*. [The defense is] arguing unfair and . . . prejudicial impact of bringing this up four months before trial." V.R. 4/28/2016; 2:29:37-2:29:49.

[5] We granted a stay of the trial scheduled for June 15, 2016, pending appeal.

discretion is whether the trial court made a decision that was "arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

III. DISCUSSION

On appeal, the Commonwealth argues that the circuit court abused its discretion by excluding the TrueAllele testimony. The Commonwealth elaborates on this argument by claiming that it presented enough information under the Kentucky Rules of Evidence (KRE) to compel the circuit court to hold a *Daubert* hearing. The Commonwealth also claims that the circuit court improperly weighed the evidence available to prosecutors prior to trial. Finally, the Commonwealth reasons that Baldwin's constitutional right to a speedy trial was not violated because the TrueAllele test results were made available in April for Baldwin to prepare an adequate defense.

On these points, Baldwin disagrees. He instead urges this Court to find that the hearing on the motion to exclude generated a sufficient record for the circuit court to exclude the TrueAllele results from evidence. For the following reasons, the circuit court abused its discretion.

When one side proffers expert testimony of a scientific nature under KRE 702, Kentucky law compels the trial court to determine "whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Goodyear Tire*, 11 S.W.3d at 578 (citing KRE 104; quoting *Daubert*, 509 U.S. at

592). If these two elements are met, then the proffered expert testimony is relevant, and the trial court must engage in an additional inquiry to determine if the testimony is also reliable. *Id.* This inquiry typically involves a *Daubert* hearing, unless the record is so complete a proper assessment of reliability can be made. *See Commonwealth v. Christie*, 98 S.W.3d 485, 488 (Ky. 2002).

Here, the Commonwealth provided the circuit court with ample information regarding the scientific nature of the TrueAllele software, the probative value of a DNA match, and TrueAllele's acceptance in other jurisdictions. But the circuit court evidently found that there was not sufficient time to pursue a *Daubert* hearing on TrueAllele's reliability, simply because the technology was new and had never been recognized by another Kentucky court and that preparation for such a hearing would be too time consuming for the attorneys and the court. The responsibility fell on the circuit court to fully assess whether TrueAllele evidence met the *Daubert* standard. In other words, the circuit court had to specifically determine whether TrueAllele's methods had been (1) tested, (2) subjected to peer review, (3) found susceptible to a known or uncontrolled rate of error, and (4) accepted within the relevant scientific community. *Goodyear Tire*, 11 S.W.3d at 578-79 (citing *Daubert*, 509 U.S. at 592-94).

Contrary to the circuit court's stated concerns about the judiciary's resources, the defendant's rights, and the evidence already available to the Commonwealth, a *Daubert* hearing was still necessary. First, considerations of

judicial economy and efficiency, while noble pursuits, are not valid reasons for a trial court to deny an evidentiary hearing on proffered scientific testimony shown to be relevant, reliable, and overall helpful for the trier of fact. *See* KRE 104, KRE 702. Second, Baldwin has not raised—and thus has not preserved—an argument regarding his Sixth Amendment right to a speedy trial.[6] Third, RCr[7] 7.24 did not authorize the circuit court to contravene KRE 104 and KRE 702 in this instance because there was no evidence that the Commonwealth could have made the TrueAllele results available any sooner. The circuit court also could not have reasonably determined that the prosecution was sandbagging in this particular instance because the pending evidentiary motions rendered the trial date tentative, at best. Fourth, and finally, Kentucky law forbids a trial court from weighing the evidence available to the prosecution, *ex ante*, to determine if the prosecution can prove all of the elements of the crime at trial. *See Commonwealth v. Hamilton*, 905 S.W.2d 83, 84 (Ky. App. 1995). Accordingly, the Trimble Circuit Court's order is vacated. We remand with instructions for the circuit court to conduct a *Daubert* hearing regarding the TrueAllele results and determine the admissibility of said results after said hearing.

COMBS, JUDGE, CONCURS.

[6] Therefore, we do not need to address this argument under the four-factor test explicated in *Smith v. Commonwealth*, 361 S.W.3d 908, 914 (Ky. 2012) (citing *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972)).

[7] Kentucky Rules of Criminal Procedure.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I dissent. The trial court acted well within its discretion when it decided to proceed with trial instead of delaying it to conduct a *Daubert* hearing.

The basis for the trial court's ruling cannot be fully understood without setting forth some of the procedural history of this case leading to its decision that the trial would proceed as scheduled. Baldwin was indicted on January 3, 2014. Although two court orders required that blood samples taken from Baldwin be preserved, the samples were destroyed, foreclosing Baldwin's chance to do further testing. In addition to the DNA testing already performed, the trial court permitted a second and final swab taken from the hammer, knowing it would be consumed. On December 17, 2015, the trial was moved from January 2016 to June 2016 to accommodate the Commonwealth after it learned that its pathologist would be unavailable for the January 2016 trial date.

The Commonwealth then learned of the TrueAllele software program in February 2016 during a routine conference call with the Kentucky State Police Crime lab and decided that the probabilistic software program could be used to determine whether Baldwin was the minor DNA contributor on the hammer. Baldwin objected to the additional DNA analysis and demanded that the developer of TrueAllele reveal its source code for its computer program.

On April 28, 2016, the trial court held a lengthy hearing on Baldwin's motion to exclude the TrueAllele results and, alternatively, that the developer of the TrueAllele software be required to disclose the source code for its computer program. At that time, Baldwin argued that even if the test results were admissible after a *Daubert* hearing, the Commonwealth should not be permitted to introduce the test results when it waited until four months prior to trial to seek their admission. The delay created by this last-minute attempt to introduce this evidence, not the TrueAllele results scientific reliability, was the basis for the trial court's ruling.

As the trial court observed, TrueAllele has not been approved by a Kentucky court and because of its newness and scientific complexity, would require a lengthy *Daubert* hearing with testimony from DNA experts. Consequently, it was obvious that the defense team could not prepare to defend against the test results in the short time before trial. The trial court excluded the test results "based upon the timing of the request for additional testing of a complicated scientific nature, as yet unapproved by any court in this state." The trial court detailed its reasoning as follows:

> The hearings involving [the test results] admissibility involve retention of experts on both sides at considerable expense ($100,000 for Defense experts alone per Defense Attorney Elizabeth Curtin), and consumption of extensive Court and attorney time within the few weeks prior to trial, when most attorneys are doing their final preparation based upon the evidence which has been available.

> Perhaps most noteworthy is that the Commonwealth has previously indicated it was ready for trial based upon the evidence it had been collecting since January 2014. These circumstances lead this court to rule it is too late to go down this path. This Case needs to be concluded, the Defendant is entitled to his trial now, and the Commonwealth needs to put its case on. There is no material prejudice to the Commonwealth, as it was ready to go forward before and nothing has changed with regard to the evidence it has available to it. It is the Defendant who will suffer unfair prejudice due to disruption and distraction to his counsel to adequately prepare for scientifically complex new evidence and a *Daubert* hearing.

As can be discerned from the trial court's lengthy explanation for its ruling, this case is not about when a trial court must conduct a *Daubert* hearing. It is about the trial court's "broad discretion in controlling the disposition of the cases on its docket and in determining whether to grant a continuance." *Smith v. Commonwealth*, 481 S.W.3d 510, 514 (Ky.App. 2016). As the trial court found, Baldwin could not prepare for a *Daubert* hearing and a trial by the June 2016 date. Essentially, the defense was being forced to request a continuance of the trial date.

In *Parker v. Commonwealth*, 482 S.W.3d 394, 404 (Ky. 2016), the Court held that the trial court did not abuse its discretion in denying a trial continuance to a defendant who, "on-the-verge-of-trial," made a request for a continuance to reassess the Commonwealth's DNA testing. The Court held "[t]he trial court was well within its discretion at that point to decide against further delay, delay occasioned for the most part by [the defendant's] own lack of diligence, and delay certainly inconvenient and possibly prejudicial to the

Commonwealth." *Id*. That same reasoning applies even more so when the constitutional rights of a defendant to a speedy and fair trial are involved.

The Commonwealth argues it acted with diligence because it did not learn of TrueAllele until February 2016 during a routine conference call. However, the time when the Commonwealth learned of TrueAllele is not determinative of whether it acted diligently to learn of its potential use. As early as 2009, five years prior to 2014 when Baldwin was charged, TrueAllele was available and used to analyze DNA. *See Commonwealth v. Foley*, 2012 PA Super 31, 38 A.3d 882 (2012). By 2011, it was being used by various police departments across the country. *See State v. Wakefield*, 47 Misc. 3d 850, 855, 9 N.Y.S.3d 540, 544 (N.Y. Sup. Ct. 2015) (In "2011 the New York State Commission on Forensic Science DNA Subcommittee unanimously approved Cybergenetics TrueAllele Casework for use by the New York State Police for their forensic casework."). The Commonwealth's ignorance of TrueAllele does not excuse its lack of diligence in proceeding with the TrueAllele analysis and warrant a delay of Baldwin's trial.

It was within the trial court's discretion to grant a lengthy continuance for a *Daubert* hearing or proceed with the trial as scheduled. As noted by the trial court, the Commonwealth announced it was ready for trial prior to receiving the test results and, therefore, the TrueAllele results would be cumulative evidence.

I would affirm the trial court's decision to administer its docket and proceed to trial.

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