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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001002-MR

HOWARD HILL ANDERSON

APPELLANT

v. APPEAL FROM MCLEAN CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 13-CR-00027

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; DIXON AND NICKELL, JUDGES.

NICKELL, JUDGE: Howard Hill Anderson entered a conditional guilty plea to manufacturing methamphetamine¹ and possession of drug paraphernalia,² reserving the right to appeal several unfavorable pretrial rulings. He brings this appeal to

¹ Kentucky Revised Statutes (KRS) 218A.1432, a Class B felony.

² KRS 218A.500, a Class A misdemeanor.

challenge those rulings. For the reasons set forth below, we affirm.

On July 1, 2013, Probation and Parole Officer Paul Newman received information indicating Anderson, a parolee under his supervision, was using methamphetamine and may have possessed a tank of anhydrous ammonia. Based on this information, Officer Newman decided to visit Anderson's residence in Calhoun, Kentucky. Officer Newman asked deputies from the McLean County Sheriff's Department and Pennyriple Narcotics Task Force Detective Troy Gibson to accompany him to Anderson's home.

When the officers arrived, they found Anderson in a detached garage by his house. Upon questioning, Anderson told the officers he had used methamphetamine, cooked methamphetamine, and helped other people cook methamphetamine at the home of an acquaintance, Joshua Drury. The officers conducted a search of Anderson's premises and discovered various items used in the manufacture of methamphetamine: coffee filters found in the trash, which field-tested positive for methamphetamine residue; starting fluid and coffee filters, found together in a toolbox; coffee filters soaked in alcohol, found in Anderson's kitchen refrigerator; empty pseudoephedrine packets; and a soda bottle with a hole drilled in the cap. A deputy took several photographs of the property and items seized during the search.

Anderson was subsequently tried and convicted of manufacturing methamphetamine, possession of drug paraphernalia and being a persistent felony

offender in the first degree (PFO I).³ The circuit court entered its final judgment on February 5, 2014, sentencing Anderson in conformity with the jury's recommendation to twenty years' imprisonment. Shortly thereafter, the Commonwealth tendered an *ex parte* order requesting permission to destroy the physical evidence in the case. The circuit court granted the order on February 10, 2014, and the McLean County Sheriff's Department destroyed the evidence six days later.

On direct appeal, the Supreme Court of Kentucky reversed and remanded for a new trial based upon a unanimous verdict violation. On remand, because the physical evidence had been destroyed the Commonwealth moved to allow photographs from Anderson's first trial to be admitted at his forthcoming second trial. Two days later, Anderson moved the court *in limine* to disallow the Commonwealth and its witnesses from mentioning the destroyed evidence or the photographs. After a series of hearings, the circuit court denied Anderson's motion and granted the Commonwealth's motion to allow use of the photographic evidence. The court held the Commonwealth had not acted in bad faith, but had inadvertently tendered the *ex parte* order "because of some unexplained confusion or neglect." The court further held the destroyed evidence would not have been exculpatory. Finally, the court faulted Anderson for failing to have the evidence tested before the first trial.

³ KRS 532.080.

Anderson then filed a motion requesting the court give a missing evidence instruction. The Commonwealth opposed the motion, arguing the trial court had found no proof of bad faith in destroying the evidence. The Commonwealth then averred a missing evidence instruction would permit the jury to infer evidence used in the first trial to convict Anderson would be favorable to him at a second trial. Based on the non-exculpatory nature of the destroyed evidence, the court denied the requested missing evidence instruction.

On June 1, 2016, Anderson filed another motion seeking recusal of the trial judge and the Commonwealth's Attorney because both would be "relevant and material witnesses in this case." At a hearing on the motion, Anderson pointed out, notwithstanding the court's denial of the request for a missing evidence instruction, the defense could introduce proof that evidence relevant to his case is now missing. The court denied the motion, stating counsel had not shown how the testimony of either the trial judge or the Commonwealth's attorney was "material or relevant to the issue the jury is to decide." Further, the court found injecting that issue into a trial "would only serve to mislead and confuse the jurors." It further noted, "[t]he jury is not being impaneled to determine whether evidence was wrongfully destroyed, but whether [Anderson] committed the crime of manufacturing methamphetamine." On June 13, 2016, Anderson entered his conditional guilty plea to manufacturing methamphetamine and possession of drug paraphernalia,⁴

⁴ The PFO I charge was dismissed pursuant to an agreement with the Commonwealth.

and the court sentenced him to serve eighteen years in prison in accordance with the plea agreement. This appeal followed.

Anderson contends the circuit court denied him due process when it denied his motion and ruled the Commonwealth, upon retrial, could introduce photographs of the destroyed evidence. Generally, the standard of appellate review for a circuit court's evidentiary rulings is abuse of discretion. *Woodward v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) (citation omitted). "A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair or unsupported by legal principles." *Williams v. Commonwealth*, 229 S.W.3d 49, 51 (Ky. 2007) (citation omitted).

The Commonwealth moved the trial court to permit photographs of the physical evidence from the first trial to be utilized at the second trial. In support of the motion, the Commonwealth argued it had tendered the *ex parte* order to destroy the evidence "through error and mistake." At a hearing on the motion, the Commonwealth argued there was no evidence of bad faith. In addition, the Commonwealth argued Anderson could not now allege "some sort of lab testing" was needed, because no request for such testing was forthcoming before the first trial.

The circuit court granted the Commonwealth's motion to use the photographs and denied Anderson's motion *in limine*, relying upon reasoning found in *Garland v. Commonwealth*:

[T]o make out a due process violation where evidence has been destroyed a defendant must show (1) the Commonwealth acted in bad faith in destroying the evidence; (2) the potential exculpatory value of the evidence was apparent before its destruction; and (3) the evidence destroyed was, at least somewhat, irreplaceable.

458 S.W.3d 781, 785-86 (Ky. 2015) (citing *McPherson v. Commonwealth*, 360 S.W.3d 207, 217 (Ky. 2012)). Following *Garland* and *McPherson*, the court held Anderson could not make out a due process violation because he could not show bad faith on the part of the Commonwealth, and the evidence had no apparent potential exculpatory value. The court also indicated the defense was partly responsible for not making any effort to set aside the destruction order.

As an appellate court, we defer to the trial court's findings of fact and will not disturb those findings unless clearly erroneous. CR⁵ 52.01. "A factual finding is not clearly erroneous if it is supported by substantial evidence." *Gullett v. Commonwealth*, 514 S.W.3d 518, 523 (Ky. 2017) (citation and internal quotation marks omitted). "Substantial evidence is [e]vidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence . . . has sufficient probative value to induce conviction in the minds of reasonable [people]." *Id.* (Citation and internal quotation marks omitted). The circuit court's determination, finding the *ex parte* order had been submitted inadvertently and the Commonwealth had not destroyed the evidentiary items in bad faith, was supported by substantial evidence. The

⁵ Kentucky Rules of Civil Procedure.

court found significance in how the *ex parte* order for Anderson's case was submitted along with *ex parte* destruction orders for two other cases, for which no appeals were pending. The court found this supported an inference of "confusion or neglect" in the Commonwealth's submission.

Moreover, despite Anderson's assertions to the contrary, we agree with the trial court's conclusion the destroyed evidence had no potential exculpatory value. Our statute criminalizing the manufacture of methamphetamine provides in relevant part as follows: "[a] person is guilty of manufacturing methamphetamine when he knowingly and unlawfully . . . [w]ith intent to manufacture methamphetamine possesses two (2) or more chemicals or *two (2) or more items of equipment for the manufacture of methamphetamine.*" KRS 218A.1432(1)(b) (emphasis added). As previously mentioned, police found a significant collection of items in Anderson's home commonly related to the manufacture of methamphetamine including coffee filters, starter fluid, empty pseudoephedrine packets, and a soda bottle with a hole drilled in the cap. The statute does not require the government to show the presence of methamphetamine or other chemical residue on these items to prove its case. Therefore, no laboratory test result would have led to Anderson's acquittal. All the destroyed evidence was, in fact, *inculpatory*. The circuit court did not err in denying Anderson's motion *in limine*, nor granting the Commonwealth's motion to use photographs of the destroyed evidence during a second trial.

Anderson next contends the circuit court erred when it did not recuse itself or the Commonwealth's Attorney, arguing both would have been relevant and material witnesses to support the fact that evidence relevant to his case was missing. Anderson combines this argument with a claim he would have been entitled to a missing evidence instruction. The circuit court denied the motion, stating counsel had not shown how the testimony of either the judge or prosecutor was material or relevant to the issue before the jury and would only cause confusion and mislead the jury.

Anderson mistakenly relies on *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), to support his argument in favor of a missing evidence instruction. *Sanborn* is factually distinguishable. It involved a prosecutor intentionally destroying recorded interviews prior to trial and without first giving the tapes to defense during discovery. Anderson was fully aware of the Commonwealth's proof—it was introduced against him at his first trial. It was mistakenly destroyed only after conviction.

In *Estep v. Commonwealth*, 64 S.W.3d 805 (Ky. 2002), the Supreme Court of Kentucky gave guidance on this issue.

First, the purpose of a “missing evidence” instruction is to cure any Due Process violation attributable to the loss or destruction of *exculpatory* evidence by a less onerous remedy than dismissal or the suppression of relevant evidence. . . . Second, the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed.

Id. at 810 (emphasis in original). As discussed above, Anderson has not established the now-unavailable evidence was exculpatory or intentionally destroyed. Therefore, the circuit court correctly found a missing evidence instruction would be inappropriate.

Finally, Anderson contends the trial judge and the Commonwealth's Attorney should have been recused, because they could potentially serve as witnesses and testify regarding the destruction of evidence. The court denied the motion, finding potential testimony the judge and prosecutor could offer would not be relevant to the question before the jury—whether Anderson manufactured methamphetamine. Additionally, the court noted any necessary proof regarding the destroyed evidence could be provided by testimony of police officers having personal knowledge of the matter.

“[A] decision to recuse is vested in the sole discretion of the judge. Mandating a rule of automatic recusal in instances where there has been no evidence of prejudice, bias, or impartiality would strip our judges of their discretion to consider each motion for recusal on a case-by-case basis.” *Minks v. Commonwealth*, 427 S.W.3d 802, 808 (Ky. 2014). Anderson has not shown how the trial judge had any bias or conflict preventing him from participating in retrial of this case. Similarly, there is no evidence of bias or conflict preventing the Commonwealth's Attorney from performing his role in prosecuting the case.

Therefore, we conclude the circuit court did not err in denying Anderson's motion to recuse.

For the foregoing reasons, the judgment of the McLean Circuit Court is AFFIRMED.

ALL CONCUR.

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