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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001520-MR

MIKEL CRUMES — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 11-CR-00648-001

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON, JUDGES.

COMBS, JUDGE: This is a criminal appeal filed by the Kentucky Innocence Project, a division of the Department of Public Advocacy (DPA), on behalf of Mikel Crumes, the Appellant. Crumes appeals an order of the Kenton Circuit Court that denied his motions for post-conviction relief filed pursuant to Kentucky

Rules of Criminal Procedure (RCr) 11.42 and Kentucky Rules of Civil Procedure (CR) 60.02. The judge who presided over the trial also presided over the post-conviction collateral proceedings initiated by Crumes. After our review of this troubling matter, we vacate the judgment of the trial court and remand for a new trial.

In August 2012, when he was seventeen years of age, Crumes was tried as a youthful offender for robbery, first degree; complicity to murder of Dre'Shawn Hammond; and tampering with physical evidence. After the trial court dismissed the tampering charge, the jury convicted him of robbery and complicity to murder. Tromonte Rice, Crumes's co-defendant, entered a guilty plea and testified against Crumes at trial.

In November of 2012, the trial court sentenced Crumes to thirty-years' imprisonment for the murder charge and twenty-years' imprisonment for the robbery, to run concurrently. Pursuant to the provisions of Kentucky Revised Statute(s) (KRS) 640.030(2), Crumes remained in the custody of the Department of Juvenile Justice until he reached eighteen years of age. At that point, he was re-sentenced. Following a re-sentencing hearing, the trial court considered whether Crumes's sentence should be probated, whether he should be conditionally discharged, or whether he should be incarcerated in an adult prison to serve his sentence. After considering the testimony, Crumes's record, the state of his

rehabilitation, and his alternate sentencing plan, the trial court determined in June 2013 that public safety required that Crumes be delivered to the custody of the Department of Corrections to serve his sentence in an adult prison.

The Supreme Court of Kentucky affirmed Crumes's conviction in an opinion rendered in December 2013. In its opinion, the Supreme Court recounted the eyewitness testimony of Tromonte Rice that implicated both boys in the crime and discussed video surveillance footage from a convenience store as well as cell phone records that tended to corroborate Rice's testimony. The "totality of [Crumes's] proof was that he could not have committed the murder and robbery because he was not present when the crime occurred." *Crumes v. Commonwealth*, 2012-SC-000774-MR, 2013 WL 6730044, at *2 (Ky. Dec. 19, 2013). Crumes has **never deviated** from his assertion that he was not present at the site of the murder.

In December 2014, Crumes filed motions pursuant to the provisions of both CR 60.02 and RCr 11.42. He contended that his conviction should be set aside because his co-defendant, Rice, had recanted his trial testimony. In the alternative, he claimed that he was entitled to relief because his trial counsel had been ineffective for failure to obtain an expert on cell tower technology to testify on behalf of the defense.

In May 2015, the trial court held an evidentiary hearing to determine the voluntariness of Rice's recantation of his prior testimony. Rice asserted his

rights under the provision of the Fifth Amendment to the United States Constitution and did not answer the questions put to him by Crumes's counsel. Subsequently, Rice executed an affidavit in which he indicated that Crumes had **not been at the scene** and that Crumes had had nothing to do with the crimes. Rice implicated another man in the crimes, "Little E." He testified that he had previously been afraid for his life to identify "Little E" as the real perpetrator of the crimes, but by now "Little E" himself had been murdered in Cincinnati. Rice claimed that he essentially felt driven to clear Crumes of his wrongful convictions in order "to clear his conscience."

In February 2017, the trial court held another evidentiary hearing at which Rice testified. He repudiated his prior testimony that Crumes had shot and killed the victim, and he testified that Crumes **had never been present** at the crime scene and asserted again that Little E had been the shooter. The court learned at this hearing that Little E had been shot and killed in July 2014 -- just months before Crumes procured Rice's affidavit recanting his prior testimony. Following the hearing, the trial court issued its lengthy opinion and order concluding that Rice's renunciation of his trial testimony had been inconsistent, that it lacked the detail of earlier statements, and that it implicated a dead man, an "easy scapegoat." Consequently, the trial court denied Crumes's motion to set aside his conviction. The court also rejected the assertion that Crumes's trial counsel failed to provide

effective assistance by not requesting a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), as to the admissibility of the cell phone evidence introduced against him. The court observed that the disputed testimony of the telephone representative was "based on his specialized knowledge in the field but not on the type of scientific evidence generally requiring a *Daubert* hearing." Furthermore, it concluded that the admissibility of the disputed evidence was an issue that was properly addressed to the Supreme Court on Crumes's direct appeal. In an order entered on August 21, 2017, the trial court denied both motions, and this appeal followed.

"[W]e review the denial of a CR 60.02 motion for an abuse of discretion." *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010). "The test for abuse of discretion is whether the trial court's decision was 'arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Id.* (quoting *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). "CR 60.02 relief is discretionary. The rule provides that the court '*may*, upon such terms as are just, relieve a party from its final judgment. . . .'" *Gross v. Commonwealth*, 648 S.W.2d 853, 857 (Ky. 1983). Absent a "flagrant miscarriage of justice[,]" we will affirm the trial court. *Id.* at 858.

On appeal, Crumes contends first that the trial court erred by rejecting Rice's renunciation of his trial testimony. Crumes asserts that "the ability of a jury

to detect whether a witness is lying or telling the truth is measurably poor" and declares that a conviction "where the *only* evidence against a defendant is the sworn word of a witness" "invites injustice." He argues that our jurisprudence surrounding the repudiation of a witness's prior testimony is "too harsh." And he claims that the circumstances surrounding Rice's post-conviction renunciation weigh in favor of its credibility because his coming forth placed his own penal interest in jeopardy.

Recanted testimony has historically been viewed with skepticism by our courts: "[w]e affirm that it is not enough merely to show that a prosecuting witness has subsequently made contradictory statements or that he is willing to swear that his testimony upon the trial was false, for his later oath is no more binding than his former one." *Anderson v. Buchanan*, 292 Ky. 810, 168 S.W.2d 48, 53 (1943). Later, our Supreme Court explained not only the inherent perils of recanted testimony, but also the deference with which an appellate court should view the trial court's findings:

> [T]here are special rules for situations of recanted testimony. The general rules are that recanting testimony is viewed with suspicion; mere recantation of testimony does not alone require the granting of a new trial; only in extraordinary and unusual circumstances will a new trial be granted because of recanting statements; such statements will form the basis for a new trial only when the court is satisfied of their truth; the trial judge is in the best position to make the determination because he has observed the witnesses and can often discern and assay

> the incidents, the influences and the motive that prompted the recantation; and [the] rejection of the recanting testimony will not lightly be set aside by an appellate court.

Thacker v. Commonwealth, 453 S.W.2d 566, 568 (Ky. 1970).

Thacker indeed represents a stringent standard in analyzing recanted testimony. It approaches the issue with a jaundiced eye, announcing that recanted testimony must be "viewed with suspicion" and that it may serve as the basis for a new trial only under the most "extraordinary and unusual circumstances."

After our careful review of this record, including the extensive memorandum to its order filed by the trial court, we are persuaded that this case requires a new trial.

The Supreme Court summarized a dual basis for sustaining Crumes's conviction: the testimony of Tromonte Rice and the cell tower data indicating that Crumes was in the vicinity of the murder. Although it found that evidence to be sufficient, the court noted that it was the **only** evidence supporting his conviction.

As the appellant correctly notes, no DNA evidence linked him to the crime. There was no video surveillance of the crime scene, and the footprint evidence did not match Crumes's shoes. Gun-shot residue testing failed to establish a link. In the total absence of any other substantiating evidence in this case, the fact of Rice's recantation becomes much more significant and is entitled to greater consideration. We are also persuaded that the truthfulness of Rice's

recantation is bolstered by the fact that he faced significant risk of harm to his own self-interest – such as a possible charge of perjury resulting in more time to serve. Additionally, we note that Little E, of whom Rice had a mortal fear, had died and could not now retaliate against him for telling the truth.

In short, we are satisfied that the CR 60.02 motion of the appellant does indeed present newly discovered evidence in the form of recanted testimony sufficient to warrant a new trial. In *Anderson*, 168 S.W.2d. at 54, the court articulated the test that we are still bound to apply: whether there is a "probability that the conviction would not have resulted if the truth had been revealed." We are persuaded that absent the original testimony of Rice, a different verdict could have reasonably resulted.

We now address Crumes's claim of ineffective assistance of trial counsel based on his motion filed pursuant to RCr 11.42. Crumes argues that counsel was ineffective for failing to challenge the admissibility of testimony indicating that his cell phone "pinged" through a cell tower close to the crime scene near the time that the crime was committed. Crumes also contends that the trial court erred by refusing to order the discovery of raw data that he alleges existed at the time of trial and that was utilized by the Commonwealth's expert. Crumes argues that these data would be critical to the analysis of his post-conviction cell tower expert, Greg Chatten.

Ineffective assistance of counsel is evaluated under the standard established in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), adopted by the Supreme Court of Kentucky in *Gall v. Commonwealth*, 702 S.W.2d 37 (Ky. 1985). *Strickland* first requires the appellant to "show that counsel's performance was deficient." 466 U.S. at 687, 104 S.Ct at 2064. He must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *id.*, or "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2064.

In applying the *Strickland* test, the Supreme Court noted that, "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." *Id.* at 689, 104 S.Ct. at 2065. Appellant is not guaranteed errorless counsel or counsel that can be judged ineffective only by hindsight, but rather counsel rendering reasonably effective assistance at the time of trial. *Id.; see also Haight v. Commonwealth*, 41 S.W.3d 436, 442 (Ky. 2001).

If he can demonstrate deficiency, the appellant then "must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial

whose result is reliable." *Strickland,* 466 U.S. at 687, 104 S.Ct at 2064. The appellant must show that there "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. A reviewing court must consider the totality of the evidence before the jury and assess the overall performance of counsel throughout the case to determine whether the acts or omissions at issue were prejudicial – in light of the presumption that counsel rendered reasonable, professional assistance. *Id.* at 695, 104 S.Ct. at 2069; *see also Foley v. Commonwealth,* 17 S.W.3d 878, 884 (Ky. 2000). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.

Testimony indicating that Crumes's cell phone "pinged" on a cell tower near the crime scene at the time of the crime is plainly relevant and highly probative. *See* Kentucky Rules of Evidence (KRE) 403. Nevertheless, Crumes contends that had his trial counsel "created a record as to the scientific reliability of the cell phone tower evidence," there is a "reasonable probability . . . that the result of the trial would have been different."

In *Holbrook v. Commonwealth*, 525 S.W.3d 73, 81–82 (Ky. 2017), the Supreme Court of Kentucky observed that where federal district courts have been called upon to decide whether to admit historical cell-site analysis, they have almost universally done so. (Citing *United States v. Hill*, 818 F.3d 289 (7th Cir. 2016)). The Supreme Court accepted that the "science is well understood" and that "the technique [of cell phone location analysis] has been subjected to publication and peer criticism, if not peer review." *Id.* (citing *Hill* at 298).

At Crumes's trial, the Commonwealth's expert carefully laid out the limitations of the technique, indicated the nature and cause of the imprecision with which that evidence might pinpoint a person's location at a given time, and explained specifically why he was unable to identify Crumes's exact location at the time that his cell phone was in use. In a triangulation of cell towers, a ping may emanate from either the strongest or the closest of the three. With these limitations established, the expert testimony permitted the jury to infer that Crumes was near the scene of the crime around the time that the crime was committed. This testimony was relevant and probative. However, Crumes contends that its admission could have been successfully challenged or made more conclusive if the raw data had been examined by his own expert. Crumes contends as follows:

> DNA, however, is simply one type of scientific testimony. There are others, such as the use of cell phone towers to determine a person's location. Just as DNA, in the right case and with the right set of facts, can provide

> an **absolute answer** as to someone's guilt or innocence, **so can cell phone tower location data**. Take for example, a rape case: where DNA might show that the person accused of rape did not commit the offense because the semen in the victim is not his, cell phone tower location data might prove that a person was not guilty because his cell phone places him, with an appropriate degree of certainty, far from the site of the crime at the time the crime was committed.
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> ***
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> In order for the defense expert to test the veracity of the Commonwealth's expert's testing, he would need **access to the raw data**. The position of the Kenton Circuit Court and of the Commonwealth is that such exploration for the truth is forbidden in post-conviction proceedings . . . .

Appellant's Brief at p. 21. (Emphases added).

Again, under the unique circumstances of this case, we are persuaded that Crumes is entitled to access to the raw cell phone data from Cincinnati Bell in order for his expert to present testimony at his new trial. *Bowling* and *Osborne* notwithstanding, we note that exculpatory evidence sought in a post-conviction proceeding can prove to be a boomerang in that it may surprisingly be inculpatory instead. A convicted party seeks irrefutable evidence at his own risk. We believe that our system of justice should be committed to elucidating the truth rather than adhering to a procedure that would tend to suppress it – and, in the process to ensure the untenable and inhumane result of perpetuating the incarceration of an innocent person.

Therefore, we vacate the judgment of the Kenton Circuit Court and remand this matter for a new trial.

ALL CONCUR.

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