NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MALIK STAFFORD EVANS	:	
Appellant	:	No. 350 MDA 2023

Appeal from the Judgment of Sentence Entered February 8, 2023
In the Court of Common Pleas of Dauphin County Criminal Division at
No(s): CP-22-CR-0004723-2020

BEFORE: BOWES, J., LAZARUS, J., and STEVENS, P.J.E.*

MEMORANDUM BY BOWES, J.: **FILED: JANUARY 22, 2024**

Malik Stafford Evans appeals from the judgment of sentence of six to thirteen years of imprisonment, followed by two years of probation, imposed after a jury convicted him of, *inter alia*, possession with intent to deliver ("PWID") and flight to avoid apprehension. We affirm.

On the evening of October 20, 2020, eighteen-year-old Kellice Bair called Appellant, who was her mother's paramour, for a ride home. Appellant picked Ms. Bair up in a third-party's Ford Focus. After stopping at a gas station, Appellant allowed Ms. Bair to drive while he sat in the front passenger seat. Ms. Bair, who had recently obtained her driver's license, forgot to turn on the headlights although it was dark outside. When he observed police

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* Former Justice specially assigned to the Superior Court.

officers activate their lights and attempt to initiate a traffic stop, Appellant told Ms. Bair that she could not halt for the police. She pulled over as if she were going to stop, then merged back into traffic and sped away. While police engaged in pursuit, Appellant threw a small sack out the window, leaving behind a "cloud of loose marijuana." N.T. Trial, 11/2-3/22, at 36. He eventually told Ms. Bair to stop near an alleyway, which she did, and police observed him exit the front passenger door and run down the alley. Although multiple officers pursued, Appellant was not captured.

Ms. Bair was taken into custody, initially indicating the person who had been with her in the vehicle was someone she had just met called "Jay." During subsequent questioning, however, she identified Appellant as the passenger. Police located a baggie of fentanyl, containers with marijuana residue, and a cell phone in the Focus, as well as various forms of marijuana in the sack that was discarded from the car. Ultimately, Appellant was arrested and charged with flight and drug possession offenses.

Prior to Appellant's arrest, and before Ms. Bair ultimately agreed to plead guilty to fleeing and eluding and to testify against him, she was held in the Dauphin County Prison ("DCP"). While there, she had approximately eight hours of telephone conversations, all initiated by Ms. Bair, to various family members. In one call to her mother, a man, later identified by Ms. Bair as Appellant, stated that he wished that he had never picked her up that day, but that she was viewed as a "superstar" and "champ" in the neighborhood.

See Appellant's brief at 11 (quoting Commonwealth's Exhibit 25). Appellant further indicated during the conversation:

> we talked to the lady uh the dude already and he told us you had them little minor traffic charges you [know I] mean nothing heavy. That's good though [be]cause we had uh last night double (inaudible) that shit that I threw, nah [sic] mean, I don't give a fuck, fuck them I don't care if they listening, fuck them, but I got that shit fuck them you aight I'm gonna get you out yo.

Id. at 10 (quoting Commonwealth's Exhibit 25). In a different call that Ms. Bair placed to her mother, Appellant acknowledged that the phone seized from the Focus was his, asked if the sack discarded during the flight had been recovered, and advised Ms. Bair that she would likely receive probation if she declined to talk. ***Id***. (citing Commonwealth's Exhibit 26). In another call to Ms. Bair's mother, Appellant again joined the conversation and informed Ms. Bair how well respected she was by a lot of people "for holding it down behind that wheel." ***Id***. (quoting Commonwealth's Exhibit 27).

Appellant proceeded to trial, with jury selection occurring on October 17, 2022, and trial scheduled to commence on November 2, 2022. Seven days before trial began, the Commonwealth informed Appellant's counsel that it intended to play portions of the above-referenced phone calls during its case in chief and made copies available. The Commonwealth provided digital files of the calls to the defense early the next morning. That afternoon, Appellant filed a motion to preclude the Commonwealth from introducing any of the calls. Therein, Appellant maintained that the Commonwealth had been aware of the calls since November 2020 and withheld them without reason, and that

the discovery violation "would severely prejudice" him. Motion to Exclude, 10/27/22, at ¶¶ 11-15.[1]

The Commonwealth filed a written response stating that "[i]t was only recently that the Commonwealth became aware of [Appellant]'s existence on the calls." Response to Motion to Exclude Evidence, 10/28/22, at ¶ 12. It maintained that "the calls were not associated with [Appellant] until Wednesday, October 26, 2022, when the Commonwealth became aware that [Appellant] was speaking with [Ms.] Bair on the calls while she was incarcerated."[2] ***Id***. at ¶ 14. Therefore, the Commonwealth argued that the disclosure was not late, that Appellant had sufficient time to review the information before trial, and that, if any discovery sanction was warranted, it

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[1] Appellant attached to his motion a portion of what he described as a report of Sergeant David Milsteen, although there is elsewhere suggestion that it was authored by Officer Mick Snyder. The document states that the officer advised Assistant District Attorney Breese Lantzy on November 24, 2020, that he had received recorded conversations between Ms. Bair and Appellant, and that he made arrangements to have the recordings delivered to ADA Lantzy. ***See*** Motion to Exclude, 10/27/22, at Exhibit A. Appellant did not indicate in his motion whether he possessed this report prior receiving the calls from the Commonwealth on October 27, 2022. However, his appellate brief suggests that he obtained the document referencing the DCP recordings when he received the Commonwealth's "initial pre-trial disclosure of police reports." Appellant's brief at 22.

[2] The Commonwealth's response was submitted by ADA Lantzy, and did not address the representation in the report that Appellant attached to his motion that the police had specifically advised the ADA of the association with Appellant in November 2020.

would be a continuance of the trial, not exclusion of the evidence. ***Id***. at ¶ 15.

The trial court entertained the motion on November 2, 2022, when the parties appeared for trial. The court inquired how Appellant was prejudiced by the timing of the disclosure and production of the calls. Counsel indicated that he did not have sufficient time to sit with Appellant to review the calls, given the volume of material and counsel's involvement in another trial, and that "[i]t would [a]ffect our trial strategy." N.T. Trial, 11/2-3/22, at 6-7. While Appellant's counsel stated that he listened to "[a]s much as [he] could" of the recordings, he did not explain how the strategy would have been different had he received the material earlier, nor identify any information that was prejudicial. ***Id***. at 7. For its part, the Commonwealth stated that it provided pin-point references to the portions of the calls it intended to use, as well as transcripts of them. ***Id***. at 8. It also represented that, upon listening "to a good majority of the calls," it encountered no exculpatory evidence. ***Id***. After entertaining these arguments, the trial court ruled that it was allowing the evidence to be admitted.

Appellant's ensuing two-day trial resulted in guilty verdicts on all counts, and he was sentenced on December 14, 2022. Appellant filed a timely post sentence motion raising evidentiary and sentencing claims. Notably, he did not assert that he had discovered information within the late-produced prison call recordings that warranted the grant of a new trial. On February 8, 2023,

the trial court entered (1) an amended sentencing order that corrected a clerical order in the prior written order, and (2) an order denying Appellant's post-sentence motion.

This timely appeal followed. Appellant complied with the trial court's direction to file a Pa.R.A.P. 1925(b) statement, and the trial court filed an opinion addressing the issues raised by Appellant. On appeal, Appellant asks this Court to resolve only one question:

> Whether the trial court erred when it admitted prison phone calls that were known to the Commonwealth at the inception of the case, but not disclosed to the defense until the eve of trial when those calls were the sole supporting pieces of evidence to [Appellant]'s codefendant's testimony implicating him?

Appellant's brief at 7.

We begin with a review of the governing legal tenets. Initially, we observe:

> The admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. An abuse of discretion is not merely an error in judgment, but is rather the overriding or misapplication of the law, or the exercise of judgment that is manifestly unreasonable, or the result of bias, prejudice, ill-will or partiality, as shown by the evidence of record.

Commonwealth v. Ganjeh, 300 A.3d 1082, 1091 (Pa.Super. 2023) (cleaned up).

Appellant's evidentiary challenge is based upon an alleged discovery violation. Hence, Pa.R.Crim.P. 573 is implicated, providing as follows in pertinent part:

(B) Disclosure by the Commonwealth.

(1) *Mandatory*. In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.

(a) Any evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth;

(b) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made that is in the possession or control of the attorney for the Commonwealth;

(c) the defendant's prior criminal record;

(d) the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;

(e) any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant that are within the possession or control of the attorney for the Commonwealth;

(f) any tangible objects, including documents, photographs, fingerprints, or other tangible evidence; and

(g) the transcripts and recordings of any electronic surveillance, and the authority by which the said transcripts and recordings were obtained.

. . . .

(D) Continuing Duty to Disclose. If, prior to or during trial, either party discovers additional evidence or material previously requested or ordered to be disclosed by it, which is subject to discovery or inspection under this rule, or the identity of an

> additional witness or witnesses, such party shall promptly notify the opposing party or the court of the additional evidence, material, or witness.
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> **(E) Remedy.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such other order as it deems just under the circumstances.

Pa.R.Crim.P. 573.

This Court has observed as follows regarding the implementation of Rule 573(E) remedies:

> If a discovery violation occurs, the court may grant a trial continuance or prohibit the introduction of the evidence or may enter any order it deems just under the circumstances. The trial court has broad discretion in choosing the appropriate remedy for a discovery violation. Our scope of review is whether the court abused its discretion in not excluding evidence pursuant to Rule 573(E). A defendant seeking relief from a discovery violation must demonstrate prejudice. A violation of discovery does not automatically entitle appellant to a new trial. Rather, an appellant must demonstrate how a more timely disclosure would have affected his trial strategy or how he was otherwise prejudiced by the alleged late disclosure.

Commonwealth v. Causey, 833 A.2d 165, 171 (Pa.Super. 2003) (cleaned up).

Appellant asserts that the Commonwealth failed to act in good faith in complying with its duty to disclose the recordings. He contends that the Commonwealth engaged in an "ambush strategy" in declining to review the recordings until the eve of trial, although it knew for nearly two years both

that they existed and that some of them involved Appellant.[3] ***See*** Appellant's brief at 19. Appellant further argues that the eleventh-hour disclosure prejudiced him as follows:

> The phone calls would determine the credibility of Ms. Bair's testimony as to who was the passenger. They would establish [Appellant]'s own statements placing himself there, the context of those statements, and would have, had they been provided long before a jury trial commenced, impacted the defense's strategy.
>
> Whether [Appellant] was the speaker on the phone calls was a substantive issue for the jury, with their sole question regarding whether his name was uttered during the phone calls. If he was provided the phone calls earlier, knowing how they would relate to his hostile co-defendant, [Appellant]'s decision to go to trial would have been impacted. There would have been an opportunity to cross-examine Ms. Bair on all calls, rather than the curated set of calls proffered by the Commonwealth. But for the phone calls, Ms. Bair's testimony would have been subject to impeachment based on her own dealings with the Commonwealth. However, with the phone calls, [Appellant] now had to contend both with self-incriminating statements and lacked the ability to see what else he may have said, or most importantly, what Ms. Bair said her own involvement was. The opportunity to properly investigate the phone calls was lost with the Commonwealth's gamesmanship.

Id. at 23-25 (citation omitted).

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[3] We find no indication in the certified record that Appellant requested mandatory discovery, which is required by the rule to trigger the Commonwealth's duty to disclose. ***See Commonwealth v. Long***, 753 A.2d 272, 277 (Pa.Super. 2000) ("[I]n order for the Commonwealth's mandatory duty to disclose material evidence to be triggered there is a corresponding requirement that a request for disclosure of discoverable items must first have been made by the defendant to the Commonwealth."). However, all parties here proceed as if Appellant had made the request. Therefore, we assume for the purposes of our review that he did.

The Commonwealth contends that the calls were properly admitted, making the seemingly incongruent claims that "the Commonwealth ha[s] no reason to retrieve these calls until a defendant decides to list his case for trial," and that "the delay was inadvertent." Commonwealth's brief at 5. It further notes that that Appellant was aware of what he said to Ms. Bair in the calls, had been on notice that the calls were recorded, and could have obtained them himself. ***Id***. Alternatively, the Commonwealth asserts that any error was harmless, as it ultimately produced the evidence and identified the exact portions it intended to use, ***id***., and the trial court concluded that Appellant's "counsel had ample time to review the calls and prepare their case." Trial Court Opinion, 5/1/23, at 4.

At the outset, we reject the Commonwealth's suggestion that it had "no reason" to review prison recordings of its key witness until it was certain that Appellant would exercise his right to go to trial and the parties had selected his jury. While this policy of willful ignorance might not equate to deliberate withholding, it plainly does not manifest diligent observation of the prosecution's discovery obligations. Certainly, the parties' full awareness of such information could impact both sides' decisions about whether to continue to litigate the charges. Accordingly, we agree with Appellant that the Commonwealth committed a discovery violation in this case.

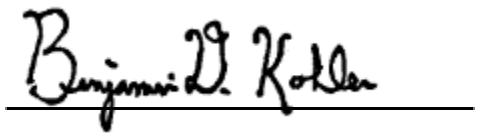
However, we are not convinced that the trial court abused its discretion in declining to sanction the Commonwealth for the Rule 573 violation. As the

trial court observed, Appellant had one week to decide how to incorporate the DCP recordings into his trial strategy. He has not identified how he would have dealt with the admissions he made in the phone calls differently had the Commonwealth disclosed earlier its intent to introduce them at trial. Furthermore, although he has now had more than ample time to review all the recordings, Appellant does not point to any information that he gleaned from them that he would have utilized in his defense had a continuance been granted.

In short, Appellant has identified no prejudice. ***Cf. Commonwealth v. Hanford***, 937 A.2d 1094, 1102-03 (Pa.Super. 2007) (ordering a new trial where a recording of a prison call was not disclosed to the defendant until the second day of trial when the Commonwealth indicated its intent to impeach a defense witness with it and "non-disclosure to [the defendant] of evidence in its possession [wa]s the very factor which enabled the prosecution to utilize the evidence so effectively"). Therefore, no relief is due.

Judgment of sentence affirmed.

Judgment Entered.



Benjamin D. Kohler, Esq.
Prothonotary

Date: 1/22/2024