

IN THE COURT OF APPEALS 5/16/95
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00144 COA

MALCOLM D. KINCAID APPELLANT

v.

STATE OF MISSISSIPPI APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JOSEPH H. LOPER, JR.

COURT FROM WHICH APPEALED: WINSTON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT: PEARSON LIDDELL, JR.

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: JEFFREY A. KLINGFUSS

NATURE OF THE CASE: CRIMINAL: GRAND LARCENY

TRIAL COURT DISPOSITION: FOUR (4) YEARS IN THE CUSTODY OF MISSISSIPPI
DEPARTMENT OF CORRECTIONS WITH ONE (1) YEAR SUSPENDED AND THREE (3)
YEARS TO SERVE, AND RESTITUTION OF \$540, PAYMENT OF COURT COSTS AND
ASSESSMENTS WITHIN ONE (1) YEAR OF RELEASE

BEFORE BRIDGES, P.J., MCMILLIN AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Malcolm D. Kincaid was convicted of grand larceny in the Circuit Court of Winston County. He

appeals raising one issue: the trial court should have granted a continuance because the prosecution gave notice only two days before trial of a third eyewitness to the crime. Kincaid's attorney did not talk to the witness until the morning of trial, and was unable to explore as thoroughly as he wished this new evidence. We find the denial of a continuance to have been within the trial court's discretion, and affirm.

STATEMENT OF FACTS

Kincaid was indicted for the late-night robbery of a grocery store in Louisville on December 31, 1992. The store clerk, Evelyn Goodin, identified Kincaid. She was two to three feet from him, exchanging remarks, at the time he paid her for a beer. During that transaction, Kincaid reached into the open cash register, quickly seizing about \$400 in cash and \$140 in food stamps. He then ran from the store.

The store clerk's husband, Alton Goodin, also identified Kincaid. Mr. Goodin was three to four feet away when the person he identified as Kincaid seized the money from the cash register. Kincaid had been in the store several minutes, and Goodin said he got a good look at him. He was certain of his identification. A third witness, Burnett McCully, was in the store. He also positively identified Kincaid. The testimony is unclear, but it appears he knew of Kincaid before the robbery. He gave Kincaid's name to the store clerk, Mrs. Goodin, immediately after the robbery occurred.

DISCUSSION

The one issue raised on appeal concerns discovery. Kincaid's attorney, Pearson Liddell, Jr., is the Public Defender in Winston County. On May 18, 1993, Liddell submitted a general discovery request on five cases to the district attorney. On Monday, November 8, 1993, the State provided the Kincaid discovery responses. Defense counsel said that he first learned through these responses about the third witness, Brent McCully. The State does not dispute that. Trial began Wednesday, November 10. At approximately 9:00 a.m. in chambers, the defense counsel requested that the trial be continued until he had a chance to interview McCully.

The trial court refused, saying that the case had been set for over a month. The court further pointed to the fact two days had elapsed since defense counsel first learned of the witness. Liddell responded by describing his heavy case load for the entire term. The district attorney interjected that Liddell had not had any trials the previous two days.

After a somewhat heated exchange involving the attorneys, the trial court told Liddell he could have ten minutes to interview the witness. Noting his objection, Liddell proceeded to interview McCully. After ten minutes, Liddell reported he was not ready. The court gave him an additional ten minutes, and said he would give more time -- apparently if Liddell could justify the need. As discussion continued, the court said he would allow twenty minutes. After twenty-five minutes, Liddell again requested more time. His interview of McCully had uncovered a fourth witness, McCully's girlfriend. Liddell did not know if she were an eyewitness, but said she had been in the store during the robbery. The State said it had not been aware of that witness. The court would not allow the proceedings to be suspended until the fourth witness could be interviewed. He stated "I am not going to grant any additional time. This thing could of been done," meaning Liddell could have been pursuing these witnesses at some time prior to the morning of trial. The trial commenced.

In this case, the court was informed on the morning of trial of the discovery issue. The defense said there had been a discovery violation, but the prosecutor argued below and the State argues on appeal that the problem was caused by Kincaid's attorney. The district attorney said he had been unaware of the discovery request until two days earlier. The reason was that the defense had joined five different hand-written case names and numbers in a form request. From these remarks it appears either the entire five case request, or just the one on Kincaid was overlooked until a few days before trial. The trial court at that stage had to determine whether there was a failure to make timely disclosure and, if so, what the effect of the violation should be.

The procedure to be followed when a discovery response is untimely and objection to evidence at trial is made on that basis, is set out in Uniform Criminal Rule of Circuit Court Practice 4.06. That procedure was first suggested in *Box v. State*, 437 So. 2d 19, 23-24 (Miss. 1983) (Robertson, J., concurring). The party surprised by a new witness must first object, and then should be given an opportunity to interview that witness. After the interview, the party may claim unfair surprise and seek a continuance or mistrial. The continuance should be granted unless the offending party agrees not to use the evidence.

It is true, as the State alleges, that no formal statement requesting a continuance appears in the record after Liddell interviewed McCully. Defense counsel made his objection evident, though, that he needed additional time before proceeding to trial. The court refused. A formal, explicit motion for a continuance is the only way to be certain an alleged error on a discovery violation will be considered on appeal. For present purposes, we treat Liddell's insistent demand as having preserved the issue. We must as an initial matter decide whether discovery was untimely. If it was, then we would need to determine if the procedures of Rule 4.06 were followed.

The *Box* opinion suggests that if evidence properly requested is not disclosed more than 48 hours prior to the beginning of trial, these guidelines should be employed. *Box*, 437 So. 2d at 24. Rule 4.06 itself is triggered when a party has "failed to comply with an applicable discovery rule, request, or an order. . . ." Unif. Crim. R. Cir. Ct. Prac. 4.06(I). Here, the disclosure was almost exactly 48 hours before trial.

Kincaid argues that providing him two days before trial with the name of the third witness did not give him sufficient time to prepare his defense. "Discovery, to be sufficient, must be made at a time far enough in advance of trial to give the defense a 'meaningful opportunity' to make use of it." *Inman v. State*, 515 So. 2d 1150, 1153 (Miss.1987) (quoting *Stewart v. State*, 512 So. 2d 889, 892 (Miss.1987)). The trial court determined that defense counsel had failed adequately to prepare his case, and now on the morning of trial wanted time to make up for this deficiency. He ruled, in effect, that the discovery was sufficiently timely to give the defense a "meaningful opportunity" to use the information, but that the defense did not use that opportunity.

A similar problem arose in *Traylor v. State*, 582 So. 2d 1003 (Miss. 1991). There the key prosecution witness, named Smith, the only eyewitness and a coindictor, was disclosed to the defense two days before trial. The witness was in Parchman until the day before trial and unavailable to the defense. The defense counsel was given an opportunity before trial to examine the new witness, but then stated he needed more time. The trial court refused. The supreme court said error occurred:

The next question is whether defense counsel had a reasonable opportunity to prepare to meet Smith's testimony. First, there is nothing in the record which informs us as to how long defense counsel took to interview Smith. Second, we must consider the nature of Smith's testimony. He was the only eyewitness to the crime, the only witness who could place Danny Traylor at the scene of the crime and in possession of the stolen property. We find that under these circumstances, the trial court erred in refusing defense counsel's request for additional time. That refusal amounts to reversible error in this case.

Id. at 1007.

The distinctions here are obvious. McCully was not the only witness, but one of three who identified Kincaid as the robber. The interview with McCully took approximately 25 minutes. McCully's testimony at trial duplicated what the two Goodins said. Finally, unlike the witness in *Traylor*, this witness was not incarcerated in Parchman until the day before trial. Kincaid's attorney had two days to talk to McCully, and did not take advantage of it.

We are sympathetic to the Public Defender's heavy caseload. To say that he was told of McCully's name two days before trial and that the attorney should have questioned McCully earlier than the morning of trial may seem impractical. Much of what district attorney offices and public defenders have to do with limited personnel and other resources is impractical. The length of time Kincaid's attorney had before trial, and whether that was a reasonable period to expect that a third eyewitness could be interviewed, were a matter for the trial court to weigh in determining whether the disclosure was provided sufficiently early to permit it to be used. Speculation about what a fourth person might have seen, particularly in light of defense counsel's failure to follow up with McCully sooner than the morning of trial, was something the trial court was entitled to discount when deciding whether to grant a continuance.

The Mississippi Supreme Court has continually balanced Rule 4.06 violations with the resulting prejudice to the defendant. *Alexander v. State*, 610 So. 2d 320, 331 (Miss. 1992). Kincaid's attorney had long been aware of Mr. and Mrs. Goodin. Both of them positively identified Kincaid. The third witness, McCully, had a similar story to tell. He too was at the store, was close to Kincaid when the robbery occurred, and positively identified him. The fourth possible witness, McCully's girlfriend, may not even have seen Kincaid. All McCully could say is she was in the store at the time of the robbery.

In the proper case, untimely providing of discovery will lead to reversal. Affirmance here is not a license to ignore Rule 4.06. The trial judge held that defense counsel had sufficient time to examine the witness after being notified two days before trial. We believe the trial court

appropriately exercised his discretion in determining whether the providing of McCully's name was

untimely. Finding no prejudice to Kincaid in the denial of a continuance, we affirm.

THE JUDGMENT OF THE CIRCUIT COURT OF WINSTON COUNTY OF CONVICTION OF GRAND LARCENY AND SENTENCE OF FOUR (4) YEARS IN THE CUSTODY OF MISSISSIPPI DEPARTMENT OF CORRECTIONS, WITH ONE (1) YEAR SUSPENDED AND THREE (3) YEARS TO SERVE, AND RESTITUTION OF \$540, PAYMENT OF COURT COSTS AND ASSESSMENTS WITHIN ONE (1) YEAR OF RELEASE, IS AFFIRMED. SENTENCE TO RUN CONSECUTIVELY TO ANY SENTENCE PREVIOUSLY IMPOSED. COSTS OF APPEAL ARE ASSESSED AGAINST WINSTON COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, MCMILLIN, AND PAYNE, JJ., CONCUR.

KING, J., DISSENTS WITH SEPARATE OPINION.

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KING, J., DISSENTING:

I respectfully dissent and would remand this matter for a new trial.

Discovery violations are not to be taken lightly. Unif. Crim. R. Cir. Ct. P. 4.06(i). Having jumped through all of the hoops prescribed, the defendant was entitled to a continuance.