Kenny SMITH v. STATE of Arkansas

CR 96-573 932 S.W.2d 753

Supreme Court of Arkansas
Opinion delivered November 4, 1996

1. CRIMINAL PROCEDURE — DISCLOSURE RULE APPLIES TO EXCULPATORY AND IMPEACHMENT EVIDENCE — FAILURE TO DISCLOSE DOES NOT WARRANT REVERSAL WITHOUT SHOWING OF PREJUDICE. — The disclosure rule contained in Ark. R. Crim. P. 17.1(d) applies to exculpatory and impeachment evidence; however, a failure to disclose will not warrant reversal absent a showing of prejudice; when the State fails to provide discovery information, the burden then falls on the appellant to show that the omission was sufficient to undermine confidence in the outcome of the trial; a failure of the State to provide information is not deemed to be prejudicial when the defendant already has access to it.

2. DISCOVERY — PENDING CHARGE NOT DISCLOSED — FAILURE TO DISCLOSE NOT PREJUDICIAL. — Where it was apparent that appellant knew of the charge pending against the witness prior to trial, he could not claim he was prejudiced by the State's failure to disclose it.
3. APPEAL & ERROR — ARGUMENT GIVEN WITHOUT CITATION TO AUTHORITY — POINT AFFIRMED. — Where appellant complained, without citation to any authority, that the forty-year sentence constituted cruel and unusual punishment under the Eighth Amendment, the point was affirmed; the appellate court will not do appellant's research.

Appeal from Conway Circuit Court; *Paul Danielson*, Judge; affirmed.

Michael L. Allison, for appellant.

Winston Bryant, Att'y Gen., by: *Gil Dudley*, Asst. Att'y Gen., for appellee.

ROBERT L. BROWN, Justice. Appellant Kenny Smith claims in his appeal that the trial court erred in denying his motion for a new trial. We disagree and affirm the judgment of conviction for aggravated robbery.

The criminal charge in this case arose out of a robbery at gunpoint, and we take the facts from the testimony of the prosecution witnesses, Anthony Roseburrow and Stephanie Robinson. Roseburrow testified that on March 21, 1995, he and Stephanie Robinson were sitting in his car listening to the radio in Morrilton. Between midnight and 1:00 a.m., Roseburrow saw Kenny Smith walk down the middle of the street and by his car. Roseburrow dozed off but later felt Robinson nudging him. He looked up and saw a gun at the car window. He got out of the car, and Smith pointed the gun at him over the car trunk. Roseburrow dove for cover and then ran behind a brick wall. Smith told Robinson to get out of the car. She got out, and Smith got in the car and drove off. As Smith was leaving, he turned left and shot twice in the direction of the prosecution witnesses. Roseburrow ran to a friend's house and called the police.

The following day, Smith approached Roseburrow in Morrilton and said:

> Well, man, if you think I stole your car, then you need to handle your business and don't take it to the white man

> because if you take it to the white man and I go to the pen, when I get out, I'm going to have to handle mine.

Roseburrow understood this to be a threat. Roseburrow reported this conversation to Officer Rusty Quinn of the Morrilton Police Department. Roseburrow's car was found three days later in College Station. It had been stripped. Stephanie Robinson confirmed the essential points of Roseburrow's testimony and added that Smith had telephoned her and wanted to return some of Roseburrow's things on the condition that he drop the charges.

Kenny Smith took the stand in his defense and denied his participation in the crime. The jury found him guilty of aggravated robbery and assessed his penalty at 40 years' imprisonment, to be served concurrently with his prior sentence for drug possession, which was reinstated after Smith violated the terms of his parole by committing this robbery.

Smith moved for a new trial on two grounds: (1) the State withheld evidence from him of a pending felony charge against Roseburrow, and (2) the 40-year sentence was excessive. The trial court denied the motion.

[1] For his sole point on appeal, Smith claims that the trial court erred in denying his new trial motion and reasserts the two arguments made in his motion for new trial. He complains that the State should have disclosed that Roseburrow had another felony charge pending against him for carrying a weapon, "which was being held in abeyance by the State," and he contends that the State violated Ark. R. Crim. P. 17.1(d) by failing to disclose this matter to him. He was prejudiced, he argues, by this gap in information because the pending charge could have had a substantial impact on the credibility of Roseburrow as a prosecution witness.

The apposite criminal rule reads:

> (d) Subject to the provisions of Rule 19.4, the prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

Ark. R. Crim. P. 17.1(d). This disclosure rule applies to exculpatory and impeachment evidence. *See Yates* v. *State*, 303 Ark. 79, 794

S.W.2d 133 (1990); *see also United States* v. *Bagley*, 473 U.S. 667 (1985). A failure to disclose, however, will not warrant reversal absent a showing of prejudice. *Esmeyer* v. *State*, 325 Ark. 491, S.W.2d (1996); *Alford* v. *State*, 291 Ark. 243, 724 S.W.2d 151 (1987); *Snell* v. *State*, 290 Ark. 503, 721 S.W.2d 628 (1986). When the State fails to provide the information, the burden then falls on the appellant to show that the omission was sufficient to undermine confidence in the outcome of the trial. *Esmeyer* v. *State*, *supra*; *Bray* v. *State*, 322 Ark. 178, 908 S.W.2d 88 (1995). Furthermore, we have not deemed a failure of the State to provide information to be prejudicial when the defendant already had access to it. *See Esmeyer* v. *State*, *supra*; *see also Johninson* v. *State*, 317 Ark. 431, 878 S.W.2d 727 (1994).

The State argues that there was no prejudice here because Smith's counsel knew of the weapons charge and because, in any event, the confidence in the jury's verdict was not undermined. We agree. It is apparent that Smith knew of the pending charge prior to trial because during the testimony of Officer Tim Starr of the Morrilton Police Department, counsel for Smith asked the police officer if he remembered ever arresting Roseburrow "on a failure to appear, for carrying a prohibited weapon, drug charges or anything like that." Smith's attorney then referred to "five pages of criminal history" pertaining to Roseburrow. The prosecutor objected to the form of the question because no foundation had been established for it. The prosecutor asked for an admonition to the jury and specifically pointed to the charges for failure to appear and for carrying a prohibited weapon as being inadmissible. In response to the prosecutor's objection, Smith's counsel agreed to limit his cross-examination of Roseburrow to felony convictions.

[2] There is, too, the fact that Smith admitted at the hearing on the motion for new trial that he had the printout listing those charges at trial. Thus, because the weapons charge complained of was listed in the criminal history that Smith's attorney had in his possession at trial, Smith had knowledge of Roseburrow's pending weapons charge and cannot claim that he was prejudiced by a discovery violation. But even if Smith had had no knowledge of this charge, it seems implausible that the failure to disclose this charge jeopardized the outcome of the trial in light of the fact that the jury was advised of Roseburrow's two prior convictions for theft by receiving and sexual abuse.

[3] Without citation to any authority, Smith next complains that the 40-year sentence constituted cruel and unusual punishment under the Eighth Amendment. The entire substance of Smith's argument is: "Although the sentence falls within the statutory range, the circumstances as first related to the police and the different circumstances related to the jury should have been sufficient to allow the trial court to grant the new trial." We decline to research this point for Smith. We have affirmed for failure to cite authority for an argument in the past, and we do so again today. *See Stevens* v. *State*, 319 Ark. 640, 893 S.W.2d 773 (1995); *Jacobs* v. *State*, 317 Ark. 454, 878 S.W.2d 734 (1994); *Tisdale* v. *State*, 311 Ark. 220, 843 S.W.2d 803 (1992); *Dixon* v. *State*, 260 Ark. 857, 545 S.W.2d 606 (1977).

Affirmed.