IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ROSS CECIL WILLNER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12146 Trial Court No. 3AN-12-4311 CR MEMORANDUM OPINION No. 6613 — March 28, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Jack Smith and Philip R. Volland, Judges.

Appearances: Renee McFarland, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge MANNHEIMER.

Ross Cecil Willner appeals his conviction for second-degree controlled substance misconduct (delivery of heroin). Willner claims that the trial judge committed

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

error by denying various pre-trial discovery requests made by his defense attorney. For the reasons explained in this opinion, we conclude that no error was committed.

The evidence pertaining to the drug transaction

In the spring of 2012, Anchorage Police Detective Frank Stanfield began to use a confidential drug informant named K.L., who agreed to help the police in exchange for favorable consideration on pending criminal charges.

In early May 2012, K.L. identified a potential investigative target: a heroin dealer she was acquainted with, who went by the street name of "Rosco". Using a police database, Detective Stanfield ascertained that "Rosco" was Ross Willner. The Anchorage police decided to have K.L. try to purchase drugs from Willner.

On May 4th, K.L. went to the police station to prepare for the drug buy. At the direction of the police, K.L. called Willner and set up a drug buy for that afternoon. Before the drug buy, a female police officer searched K.L.'s clothing and strip-searched K.L. to make sure that she had no drugs on her person. The police then gave K.L. $150 in marked cash to make the purchase.

Detective Stanfield drove K.L. to the location of the drug buy, near the Timeout Lounge. Four additional officers were already present at the scene, and they provided surveillance when Stanfield and K.L. arrived. K.L., carrying the marked cash, left the police car and proceeded toward the lounge.

One of the officers conducting the surveillance reported that a man matching Willner's description was approaching the buy location. As he neared the lounge, this man waved at K.L. and beckoned her to follow him. The surveillance officers watched as Willner and K.L. met outside the lounge and walked together to the side of a neighboring building. Two officers (Luis Soto and Mark LaPorte), posted in

different locations and using binoculars, observed the actual exchange between Willner and K.L.

Immediately after the exchange, K.L. walked back toward the waiting officers with three packages of heroin. Willner was arrested less than a minute later, as he was leaving the area of the buy. The $150 in marked cash was found on his person.

Procedural facts

Based on these events, Willner was indicted for second-degree controlled substance misconduct (delivery of heroin) and fourth-degree controlled substance misconduct (possession of heroin).[1]

Following this indictment, Willner's attorney filed two pre-trial motions under Alaska Criminal Rule 16(b) in which he asked the superior court to order the State to produce all records of "police contacts [with the] state's witnesses" — and, in particular, all information pertaining to the confidential informant, K.L. According to the defense attorney's motions, this information was to include:

> (1) All APSIN and NCIC printouts;
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> (2) All police reports and recordings concerning any and all police contacts with K.L. from 2007 to the present;
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> (3) All police reports and recordings concerning the 2012 drug charge;
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> (4) All probation "offender history" notes, especially any and all reports of drug testing results for K.L.;

[1] AS 11.71.020(a)(1) and AS 11.71.040(a)(3)(A), respectively.

> (5) K.L.'s "P Packet"; [The record does not contain an explanation of what a "P Packet" is.]
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> (6) All agreements between K.L. and any federal, state, or local prosecuting or police authority, as well as all records, memoranda, notes, e-mails, correspondence, and other communications in which these agreements were discussed or described;
>
> (7) All records of any benefits, money, food, housing, goods, or services provided to K.L by the State, or by local or federal authorities, in conjunction with her assistance to the government.

Superior Court Judge Jack Smith denied the defense motions. With respect to the defense requests for a copy of K.L.'s recorded statements to the police, for recordings of the police radio traffic on the day of the drug purchase, and for copies of all records pertaining to police, prosecution, and probation contacts with K.L. since November 29, 2011, the judge found that the State had already provided these materials to Willner's attorney.

With respect to the defense attorney's requests for probation files, and for reports prepared by the Anchorage Police Department pertaining to K.L.'s unrelated municipal charges of shoplifting, trespass, and theft, the judge denied these requests on the ground that the requested materials were not in the hands of the State prosecutors, nor in the hands of the officers who were working on Willner's case. Rather, these materials were in the possession of other officials. Because of this, the judge concluded that Criminal Rule 16(b) did not require the State prosecutors to search for and assemble these materials.

And with respect to the defense attorney's requests for all records pertaining to any and all police contacts with K.L., the judge concluded that this request was "overbroad, duplicative, and partially moot".

Willner was tried by jury in December 2013. At his trial, the State presented K.L.'s testimony, the testimony of the various police officers who arranged and surveilled the drug purchase, and the corroborating physical evidence (the marked money recovered from Willner, and laboratory analysis of the heroin that K.L. handed to the police immediately after the drug purchase).

The sole defense witness was Willner himself. He testified that he never gave drugs to K.L., and that she gave him the $150 in cash because she owed him money.

In his testimony, Willner offered no explanation of how K.L. obtained the three packages of heroin that she handed to the police immediately after the exchange. But during the defense summation to the jury, Willner's attorney suggested that K.L. had somehow hidden these packages in her clothing — and that the police missed these small items when they removed and searched all of K.L.'s clothes before the drug buy. Willner's attorney told the jurors that the key to Willner's case was the thoroughness — or lack of thoroughness — of the police search of K.L.'s clothing.

The jury found Willner guilty as charged. At sentencing, the superior court merged the two counts, so that Willner received a single conviction for second-degree controlled substance misconduct. He was sentenced to serve 30 months in prison.

Willner's claim that the superior court committed error by denying some of his requests for pre-trial discovery

On appeal, Willner argues that Judge Smith should have granted some of the defense attorney's motions to compel pre-trial discovery of information pertaining to K.L. In particular, Willner argues that the judge should have ordered the State to produce K.L.'s probation files, and to produce the Anchorage Police Department's reports pertaining to K.L.'s arrests for shoplifting, trespass, and theft in 2012. (Those arrests led to the filing of municipal misdemeanor charges against K.L., and those municipal charges precipitated K.L.'s agreement to work as a confidential informant.)

Our first ground for rejecting this claim of error is that Willner has not shown that the judge's ruling precluded him from obtaining the requested discovery. As we explained earlier, Judge Smith denied the defense attorney's motion on the ground that Criminal Rule 16(b) did not require the prosecutor's office to assemble and produce these documents — because the requested materials were not in the possession of the state prosecutor's office nor in the possession of police officials who participated in the investigation or evaluation of Willner's state case. *See* Criminal Rule 16(b)(4).

Because Judge Smith denied the defense attorney's requests on this ground, the defense attorney remained free to seek the requested materials by filing a motion under Criminal Rule 16(b)(5).[2] However, the defense attorney did not renew his request for this discovery.

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[2] Criminal Rule 16(b)(5) reads: "*Availability of Information to Defense Counsel*. Whenever defense counsel designates and requests production of material or information which is not in the possession or control of the prosecuting attorney but would be discoverable if in the possession or control of the prosecuting attorney, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel."

For this reason, Willner's attorney never obtained a final ruling on whether he was entitled to this discovery. The only ruling that Willner received was the ruling that the *prosecutor's office* was not required to assemble the requested documents and deliver copies of them to the defense. For this reason, Willner's current claim appears to be based on a misreading of the record: the judge never ruled that Willner was not entitled to this discovery at all.

Second, and just as importantly, Willner cannot show that the lack of these discovery materials prejudiced his defense at trial.

The materials that Willner's attorney sought were relevant solely for the purpose of attacking the credibility of K.L. But as the defense attorney implicitly acknowledged during his summation, K.L.'s credibility as a witness was not the centerpiece of the State's case.

The primary difficulty for the defense in this case was the fact that, less than a minute after the exchange between K.L. and Willner (an exchange that was arranged and directly observed by a team of officers), K.L. returned to the waiting police and handed them three packages of heroin. According to the State's evidence, the police both strip-searched K.L. and thoroughly searched K.L.'s clothing before this exchange, to make sure that she had no drugs in her possession before she met Willner.

For this reason, when the defense attorney argued this case to the jury, he asserted that K.L. had somehow managed to hide the three packages of heroin in her clothing. The defense attorney declared that the "key" to Willner's case was "the search or the alleged searches" of K.L.'s clothing.

Obviously, the jury needed to assess the credibility of K.L.'s testimony as well. But K.L.'s credibility was openly attacked by the defense; the jury understood that K.L. was a drug-user and a criminal who was seeking favorable treatment by working as a police informant.

Indeed, it was obvious that the *police* did not trust K.L. either — because the police went to elaborate lengths to ensure that their case against Willner would *not* rest solely on K.L.'s assertion that she obtained the drugs from Willner. Because of these police precautions, Willner's defense attorney had to focus on the assertion that the *police testimony* concerning the search of K.L.'s clothing was not credible or convincing.

Given this record (the evidence and the way the case was litigated), we conclude that even if the superior court committed error when it ruled on the defense motion to compel the pre-trial discovery, that error was harmless. [3]

Willner's claim that the superior court committed error by refusing to instruct the jurors that they could consider unproven allegations of shoplifting and theft when they assessed K.L.'s credibility

Under Alaska Evidence Rule 608, a party is generally forbidden from impeaching the character of a witness by introducing evidence of specific instances of the witness's conduct. But Evidence Rule 609 contains an exception to this principle. Under Rule 609(a), a party is allowed to attack the credibility of a witness — *i.e.*, attack their character for truthfulness — by introducing evidence that the witness has been convicted of a crime involving dishonesty or false statement.

In Willner's case, evidence was introduced that K.L. was facing municipal charges of shoplifting, trespass, and theft when she agreed to work as a confidential informant for the Anchorage police. Shoplifting and theft are "crimes of dishonesty" for purposes of Evidence Rule 609. [4] But K.L. was never convicted of these crimes.

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[3] *See Love v. State*, 457 P.2d 622, 631-32 (Alaska 1969) (holding that, for instances of non-constitutional error, the test for harmlessness is whether the appellate court "can fairly say that the error did not appreciably affect the jury's verdict").

[4] *See Jensen v. Goresen*, 881 P.2d 1119, 1122 (Alaska 1994).

Instead, the shoplifting and theft charges were dismissed in exchange for K.L.'s assistance in police drug investigations.

When the court and the parties were discussing the jury instructions in Willner's case, Willner's attorney asked the trial judge (Superior Court Judge Philip R. Volland) to instruct the jurors that shoplifting and theft were crimes of dishonesty, and that the jurors could consider the fact that K.L. had been arrested for shoplifting and theft when they assessed the credibility of K.L.'s testimony.

Specifically, the defense attorney argued that K.L. *likely would have been* convicted of these crimes of dishonesty if she had not agreed to work as a confidential informant — and that it would be unfair to allow K.L. to "skirt" the consequences of her criminal acts.

Judge Volland declined to give the defense attorney's proposed jury instruction, and Willner now asserts that the judge's ruling was error.

We affirm the judge's ruling for two reasons. First, as Judge Volland noted, Alaska Evidence Rule 609 is clearly limited to *convictions* of crimes of dishonesty. The rule does not permit litigants to introduce evidence that a witness was arrested for a crime of dishonesty, or evidence that the witness likely committed a crime of dishonesty.

Second, the jury in Willner's case knew that K.L. had been arrested for shoplifting and theft, and the jurors also knew that these charges were dismissed in exchange for K.L.'s work as a confidential informant. Judge Volland noted that this evidence was admitted because it was relevant to assessing K.L.'s potential bias, and also because it showed that K.L. was committing crimes to support her own drug addiction. And the record shows that Willner's attorney argued both of these theories to the jury.

Under these circumstances, we can confidently say that the judge's ruling on the proposed jury instruction had no appreciable effect on the jury's verdict. [5]

Conclusion

The judgement of the superior court is AFFIRMED.

[5] *See Love v. State*, 457 P.2d 622, 631-32 (Alaska 1969).