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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002832-MR

JESSIE R. KEMPLIN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 96-CR-000714

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: Appellant, Jessie R. Kemplin ("Kemplin"), appeals from a final judgment of the Fayette Circuit Court imposing a sentence of seven years upon a jury verdict convicting her of two counts of first-degree criminal abuse. Upon reviewing the record, we affirm.

In January of 1993, the Kentucky Department of Social Services ("DSS") placed a group of siblings, ranging from age six months to three years of age, with Kemplin and her husband who had applied to become foster parents. The children had various special needs, and had been removed from their natural parents due to abuse. On August 31, 1993, DDS placed newborn A. E., a

half-sister to the three children in the Kemplin home, with the Kemplins. The Kemplins made plans to adopt the four children.

Mike Henderson of the paramedic unit of the Lexington-Urban County Fire Department responded to a 911 call at the Kemplin residence on May 17, 1996. He found A. E. unconscious, gasping for air, and exhibiting a bluish tint on her arms and legs. He rushed her to the University of Kentucky Medical Center. On the way to the hospital, Henderson revived A. E. who had stopped breathing. A. E. also had blood in her mouth. The paramedics noticed a large number of bruises and red marks on A. E.

A. E., who was totally unresponsive, was admitted to the Pediatric Intensive Care Unit. A CT scan revealed severe and diffuse swelling in A. E.'s brain. Dr. Benjamin Warf labeled the head injury as life threatening due to the pressure being placed on the brain. This condition was treated for three to four days at which time A. E. regained consciousness.

Officer Stella Plunkett of the Crimes Against Children Unit ("Officer Plunkett") began an investigation regarding A. E.'s injuries and the possibility of child abuse. On May 20, 1996, Officer Plunkett spoke with Kemplin at Kemplin's home. During this interview, Kemplin told Officer Plunkett that A. E.'s injuries were a result of her falling several times hitting her head. After doing further investigation, Office Plunkett, along with Sergeant Eastin, went back to the Kemplin house the next day, May 21, 1996, to interview Kemplin. Before beginning the interview, Officer Plunkett read Kemplin her rights as mandated

by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1692, 16 L.Ed.2d 694 (1966), and Kemplin indicated that she understood these rights. It was during this interview that Kemplin alleges she repeatedly asked Officer Plunkett if she needed her attorney present. Kemplin contends that Officer Plunkett told her that she did not because she was not being charged with a crime. Upon being confronted with photographs of A. E.'s injuries, Kemplin admitted hitting A. E. repeatedly with a flyswatter to discipline her. Kemplin also admitted pinching A. E. on the inner thighs in an attempt to get her to talk. Finally, Kemplin admitted forcibly jerking A. E. off the sink counter top causing her to strike her head on the floor.

On July 25, 1996, a Fayette County grand jury indicted Kemplin with one count of assault in the first degree and three counts of criminal abuse in the first degree. Following a two-day trial in September of 1997, the jury convicted Kemplin of count two, alleging criminal abuse in the form of striking A. E. with a flyswatter, and count three, alleging criminal abuse for pinching A. E. on the inner thighs. She was sentenced to seven (7) years' imprisonment. She raises five claims of error in this appeal.

Kemplin alleges that the trial court erred in allowing in her May 21, 1996 statements. She testified in an October 24, 1996, hearing on her motion to suppress, that during this second interview she repeatedly asked if she needed her attorney present. She alleges Officer Plunkett told her that she was not charged with a crime; therefore, she did not need an attorney.

However, Officer Plunkett testified that Kemplin never asked her anything about an attorney. Sergeant Eastin also testified that Kemplin never asked about an attorney, but he stated he missed about five minutes of the interview while making a phone call. However, thereafter, Sergeant Eastin, appearing confused about the question being asked, stated that Officer Plunkett told Kemplin that she was not being charged with a crime so she did not need an attorney. Nonetheless, he again clearly stated that he did not recall Kemplin asking for an attorney.

The burden is on Kemplin to show that the trial court's ruling was clearly erroneous. Clark v. Commonwealth, Ky. App., 868 S.W.2d 101 (1993). Generally, a trial court's ruling in suppression matters is conclusive if supported by substantial evidence. Canler v. Commonwealth, Ky., 870 S.W.2d 219, 221 (1994); Crawford v. Commonwealth, Ky., 824 S.W.2d 847, 849 (1992).

In Miranda, supra, the United States Supreme Court extended the Fifth Amendment right to remain silent to include the right to counsel during interrogation. Dean v. Commonwealth, Ky., 844 S.W.2d 417, 419 (1992). However, the rights as outlined in Miranda only attach to custodial interrogation. Davis v. United States, 512 U.S. ___, 129 L.Ed.2d 362, 114 S.Ct. 2350 (1994). Thus, the court must determine whether the May 21 interview constituted a custodial interrogation. Secondly, the court must determine whether Kemplin actually asserted her right to counsel. Dean, 844 S.W.2d 417.

The United States Supreme Court has held "that a defendant is 'in custody' when there has been a restriction on that person's freedom such that [she] is in a coercive environment." Farley v. Commonwealth, Ky. App., 880 S.W.2d 882, 884 (1994) (citing Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 711 (1977)). The test for determining whether the interrogation is custodial is how a reasonable person in Kemplin's position would have understood the situation. Id.

In the present case, Officer Plunkett read Kemplin her Miranda rights prior to the May 21 interview. During the October 24, 1996, suppression hearing, Officer Plunkett stated that she did so because she perceived that Kemplin was in custody. However, it is not Officer Plunkett's perception that is at issue. Instead it is Kemplin's perception that is tested. At the time Officer Plunkett read Kemplin's rights, unbeknownst to Kemplin, Officer Plunkett had interviewed numerous persons with relevant information about A. E. and had photographs of the numerous injuries on A. E.'s body. Kemplin was interviewed at her home where no force, restraint, or coercion was placed on her. Farley, 880 S.W.2d at 885. She indicated that she understood her Miranda rights, yet voluntarily spoke with Officer Plunkett. It was not until the end of the interview, after Kemplin admitted injuring A. E., that Kemplin asked whether she would be arrested. With these facts before the court, we cannot say that Kemplin reasonably believed that she was in custody during the interview. Thus, no right to counsel attached.

Alternatively, even if we determined that the May 21 interview was a custodial interrogation, we find that Kemplin failed to invoke her right to counsel. In Dean, 844 S.W.2d at 420, the Kentucky Supreme Court enunciated the standard for invoking the right to counsel. The Court held that the request must be "unambiguous and unequivocal." Id. Thus, "custodial interrogation must cease when an accused who has received Miranda warnings and has begun responding to questions 'has clearly asserted his right to counsel.'" Id. (citing Edwards v. Arizona, 451 U.S. 477, 485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981)). As held in Davis, 512 U.S. ___, 129 L.Ed.2d at 371, 114 S.Ct. ___:

> Invocation of the Miranda right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning. Rather, the suspect must ambiguously request counsel. As we have observed, "a statement either is such an assertion or it is not." (Citations omitted) (emphasis in original).

In Davis, the Court upheld the lower court's finding that defendant's remarks that "Maybe I should talk to a lawyer" was not a request for counsel. In the present case, Kemplin alleges that she asked Officer Plunkett if she needed a lawyer. The statement made by the suspect in Davis was more closely an affirmative request for a lawyer than Kemplin's inquiry into whether she needed one. Nonetheless, the United States Supreme

Court held that Davis' statement did not constitute a request for counsel. Under this standard, we cannot find that Kemplin's inquiry into the status of her need for counsel was unambiguous or unequivocal. Thus, Officer Plunkett was not required to cease questioning.

Not to belabor the issue, we are also not convinced that Kemplin even made the statements regarding whether she needed an attorney. Both Officer Plunkett and Sergeant Eastin testified during the October 24, 1996 suppression hearing that Kemplin did not mention an attorney. Although at one point in the questioning Sergeant Eastin testified otherwise, he appears confused when answering the question and thereafter, reaffirms that he did not recall Kemplin's asking for an attorney. Thus, substantial evidence existed for finding that Kemplin did not even ask whether she needed an attorney.

Kemplin also appeals the trial court's decision to allow the Commonwealth to introduce twenty-nine (29) photographs of A. E.'s injuries as unduly prejudicial and inflammatory. Testimony given during the trial indicated that A. E. had thirty-four (34) bruises and abrasions scattered all over her body. She had bruises behind her ear and under her chin. She had numerous pinch marks on her upper thighs. Her back was covered with bruises. A. E. also had numerous marks all over her body from being hit with a flyswatter. Thus, because of the large number of injuries A. E. had, we can find no abuse in allowing the photographs. Moreover, many of the photographs were necessary to illustrate patterns to prove that injuries were

caused by the flyswatter. Additionally, numerous photographs were relevant to show that the injuries were intentionally inflicted. Finally, ten of the photographs were introduced because they were used during Officer Plunkett's May 21, 1996 interview with Kemplin. Thus, we find nothing clearly erroneous in the trial judge's admission of the photographs.

Kemplin also raises arguments that her actions were a continuing course of conduct and that the three separate counts of criminal abuse in the first degree should have been consolidated.[1] We disagree. Each count was specifically directed at a separate and distinguishable action initiated against A. E. Count two addressed Kemplin's use of the flyswatter to "discipline" A. E. Count three concerned Kemplin's pinching A. E. on the inner thighs in attempt to make the toddler talk. Count four regarded Kemplin's striking A. E. in the bathroom. Each count identified a separate course of conduct and a separate purpose for the injuries inflicted. Thus, we find no abuse by the trial court in refusing to consolidate the counts.

Kemplin also argues, maintaining again that her actions were a continuing course of conduct, that the counts were inconsistent in that count one for assault in the first degree requires wanton conduct while the remaining three counts for criminal abuse require intentional conduct. This argument must also fail. As noted above, we do not believe Kemplin's actions were a continuous course of conduct. Moreover, the jury took the

[1]Count one was assault in the first degree for the allegation that Kemplin wantonly caused A. E. to sustain a severe closed head injury.

evidence of A. E.'s injuries into consideration and found Kemplin guilty on only two charges of criminal abuse. Thus, we affirm.

Finally, Kemplin argues that she was denied the right to a speedy trial. The trial court granted three continuances to the Commonwealth. The first was in November, 1996 for a psychological evaluation to be conducted on Kemplin. The second was in March, 1997 because the Assistant Commonwealth Attorney assigned to the case was changing employment. The third was in July, 1997 because Officer Plunkett was on medical leave. Thus, there was a delay of fourteen (14) months from the time of the indictment until the trial. On July 18, 1997, Kemplin filed a motion for a speedy trial, less than three months before her trial.

In Preston v. Commonwealth, Ky. App., 898 S.W.2d 504 (1995), the Court, following United State Supreme Court precedents, listed four factors to be utilized in analyzing claims of denial of speedy trial. They are as follows: "(1) the length of the delay; ;(2) whether the delay was more the fault of the defendant or the government; (3) the defendant's assertion of his right to a speedy trial; and (4) whether the defendant suffered prejudice as a result of the delay." Id. at 506.

"In order to trigger the speedy trial analysis, a defendant must establish that the delay between the accusation and trial was 'presumptively prejudicial.'" Id. (citing Doggett v. United States, 505 U.S. ___, 112 S.Ct. 2686, 2690, 120 L.Ed.2d 520, 528 (1992)). Kemplin only presents a conclusory statement on this issue without a supporting argument. We cannot say that

on its face a fourteen (14) month delay is presumptively prejudicial; nor are we required to. However, since "no single factor is 'either necessary or sufficient condition of the finding of a deprivation of the right of speedy trial," Id. (citing United States v. Tranakos, 911 F.2d 1422, 1427 (10th Cir. 1990)), we will review the remaining factors.

Kemplin also conclusorily asserts that the delay was more the fault of the Commonwealth. However, the first delay was the result of Kemplin's October 31, 1996 notice of her intent to introduce evidence of mental disease or defect at trial which was less than one month before the trial was scheduled. Since Kemplin put the Commonwealth on notice of such, the Commonwealth was entitled to prepare a defense and an evaluation completed on Kemplin.

While the other two delays were not Kemplin's fault, they can hardly be deemed as within the control of the Commonwealth. If Kemplin's counsel or an important witness was not available for trial as was the case for the Commonwealth, Kemplin would have rightfully asked for a continuance. The Commonwealth was certainly entitled to the same without being penalized for such. Moreover, upon reviewing the video tapes in the record, the court notes that on August 23, 1996, the trial court attempted several times to set the trial. However, it was defense counsel who had conflicts on various dates.

Kemplin cannot meet the third factor either, regarding her assertion of the right to a speedy trial. She did not file a motion for a speedy trial until July 17, 1997. Her trial was

thereafter held within three months, well within the 180 day mandate of KRS 500.110.

Finally, Kemplin cannot show prejudice as a result of the delay. In fact, she presents no argument on this issue other than just to say that she was prejudiced. This is fatal as "[t]he possibility of prejudice alone is not sufficient to support the position that speedy trial rights have been violated. It is the burden of the defendant to establish actual prejudice." Preston, 898 S.W.2d at 507 (citing United States v. Loud Hawk, 474 U.S. 302, 315, 106 S.Ct. 648, 88 L.Ed.2d 640, 654 (1986)). She asserts that three times she served over ten subpoenas for witnesses because of the delays. However, she does not allege that this prejudiced her in any manner. Moreover, the record indicates that Kemplin was free on bond pending the trial. Thus, we find that Kemplin has failed to meet her burden. Based upon the foregoing, we hold that no speedy trial violation occurred.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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