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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001734-MR

EARL WARNER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 07-CR-00853

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON AND DIXON, JUDGES.

CLAYTON, JUDGE: This is an appeal from a conviction of robbery and rape in the Fayette Circuit Court. The appellant, Earl Warner, brings his appeal based upon evidence he contends should have been suppressed as well as other errors he argues were made by the trial judge.

For the reasons that follow, we affirm Warner's conviction.

BACKGROUND INFORMATION

Warner was indicted on June 26, 2007, for first-degree rape and first-degree burglary stemming from a crime that occurred on December 15, 1988. It was alleged at trial that Warner entered the home of E.G. in Fayette County with the intent to commit a crime. While in E.G.'s home, it was alleged that Warner raped her.

On the night of the incident, E.G. went to the University of Kentucky Medical Center for treatment. Dr. Charles Eckerline examined her and was allowed at trial to testify regarding the comments E.G. made at that time.

Lt. James Curless testified that E.G. had reported to police that she had been raped by a black male who had forced his way into her house. E.G. was a seventy-four-year-old woman at that time living alone. During the contemporaneous investigation, a fingerprint of the intruder was obtained at E.G.'s house. It was from a piece of broken glass. On February 23, 2005, the fingerprint was matched to Warner.

In January of 2006, Lt. Curless obtained a search warrant in order to get DNA from Warner to be tested against the DNA evidence in E.G.'s rape kit. Warner went to the police station of his own accord. Lt. Curless testified that there was no reason Warner should have believed he was under arrest at the time of the ensuing conversation between the two. In fact, Curless stated that he informed

Warner on several occasions during the conversation that he was not under arrest. Curless read Warner his Miranda[1] rights.

Lt. Curless showed Warner a lab report that his DNA was found on E.G.'s slip that she was wearing on the night of the incident. Lt. Curless finished the interview and allowed Warner to leave.

The trial court found that Warner had been Mirandized and that he had been informed by Lt. Curless that he was not under arrest during his interview. Warner stated that he did not remember the night in question due to his drug use at that time.

At trial, Warner contended that his rights had been violated by the questioning of Lt. Curless. The trial court found that the interview by Lt. Curless was non-custodial. The trial court then overruled Warner's motion to suppress the statements he made during the interview.

On February 1, 2008, Warner moved the trial court to suppress the statements made by the victim during her examination by medical personnel on the night of the incident. Relying on *Heard v. Com.*, 217 S.W.3d 240 (Ky. 2007), the trial court found that a medical doctor could testify at trial as to what the victim had said during an examination based upon the medical exception to the hearsay rule. Kentucky Rules of Evidence (KRE) 803(4).

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694(1966).

The trial court excluded certain statements made by E.G. during her examination that did not pertain to her symptoms, pain, or cause of her seeking medical treatment.

After Warner was convicted, he brought this appeal contending that the trial court erred in not suppressing his statements made to Lt. Curless during his interview and the statement E.G. made during her medical examination on the night of the incident. For the foregoing reasons, we affirm the decision of the trial court.

STANDARD OF REVIEW

In a direct appeal from circuit court, an appellate court must review evidentiary rulings made by the trial court under an abuse-of-discretion standard. "[A]buse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." *Woodard v. Com.*, 147 S.W.3d 63, 67 (Ky. 2004), citing *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000).

DISCUSSION

The trial court found that the statement by Dr. Eckerline should not be suppressed based upon KRE 803(4), which provides that a statement made:

> for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

Warner, however, contends that the statement was testimonial and that his right to confront the witness was denied. E.G. died on January 4, 2004, and therefore was not available to testify at trial. In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 177 (2004), the state played a tape recording made by Sylvia, the wife of the defendant Michael Crawford. Michael Crawford stabbed a man who was allegedly trying to rape Sylvia. Sylvia's tape-recorded statement to the police described the stabbing but she did not testify at trial because of the marital privilege which bars a spouse from testifying without the other spouse's consent. The Supreme Court then considered whether the Sixth Amendment Confrontation Clause was violated by the failure of having the accused confront the witnesses against him. The Court held that the Sixth Amendment right of confrontation applied to both in court and out of court statements of witnesses. The Court accepted the dictionary definition of testimony as "typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* at 51. The Court held that "[s]tatements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." *Id.* at 52. However, if the hearsay at issue is nontestimonial, then states had flexibility to develop their own hearsay rules. The Supreme Court declined to further define testimonial evidence.

However, in *Davis v. Washington,* 547 U.S. 813, 822, 126 S.Ct. 2266, 2273, 165 L.Ed 2d 224 (2006), the Supreme Court opined that in *Crawford* they had "set forth 'various formulations' of the core class of 'testimonial' statements . .

. but found it unnecessary to endorse any of them, because 'some statements qualify under any definition[.]"' Clearly again, statements made in the course of police interrogation were testimonial statements; however, statements made to enable police to meet an ongoing emergency and statements given by someone who is not acting as a witness were not testifying. Therefore, the hearsay rules apply.

The Kentucky Supreme Court in *Heard,* 217 S.W.3d 240, addressed whether a doctor's testimony, which would include statements given by victims who seek medical treatment, is an exception to the hearsay rule. The Kentucky Court held that it was. *Heard* also held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id* at 243. In the case *sub judice*, Dr. Eckerline and the nurse testified about what E.G. had told them concerning the rape during her course of treatments. These statements were not from individuals who were employed by the police or a part of the investigation. Therefore, we agree with the trial court that the defendant's right of confrontation was not violated by allowing the testimony of Dr. Eckerline into evidence.

Next, Warner contends that the trial court erred in denying his motion to suppress the statements he made to Lt. Curless while being interviewed. The trial court determined that these statements were made by Warner when he was not

in custody. In fact, although not required to, Lt. Curless informed Warner of his rights under Miranda.

While Warner was being interviewed at the police station, Lt. Curless informed him that he was free to leave at any time. There is no doubt from the conversation between Lt. Curless and Warner that the former was trying to elicit information from Warner. He specifically told him that he had DNA evidence from E.G.'s person and clothing and that he was investigating Warner for the rape of E.G.

While Warner contends that he did at one point say he thought he needed a lawyer, it does not appear from the conversation that Warner would believe he was in a custodial situation where he was not free to leave. The mere mention of needing a lawyer is not sufficient to require officers stop questioning a suspect. *Davis v. U. S.*, 512 U.S. 452, 458-462, 114 S.Ct. 2350, 2354-2357, 129 L.Ed. 2d 362 (1994).

Warner also argues that the trial court abused its discretion when it imposed a consecutive sentence, rather than a concurrent one, as was recommended by the jury. He also asserts that the trial court erred in enhancing his sentence from fourteen to eighteen years. The trial judge's reasoning regarding the imposition of an enhanced sentence was the age of the victim and the fact that Warner was under the influence of drugs at the time of the crime.

In *Dotson v. Com.*, 740 S.W.2d 930 (Ky. 1987), the Court held that a trial judge could determine at the time of the sentencing whether to run the

sentence concurrently or consecutively. Warner's argument that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000), prohibits the trial judge running the sentences consecutively also fails since *Oregon v. Ice*, 129 S.Ct. 711, 172 L.Ed. 2d 517 (2009), clearly set forth that *Apprendi's* holding is inapplicable in consecutive/concurrent sentencing situations.

Finally, Warner argues that he should not be required to register as a sex offender due to his conviction as such violates the Ex Post Facto Clause of the U.S. Constitution. The Kentucky Supreme Court, however, has held that the sex offender registration and notification statutes are constitutional. *See Martinez v. Com.*, 72 S.W.3d 581, 584 (Ky. 2002), and *Hyatt v. Com.*, 72 S.W.3d 566, 572-574 (Ky. 2002). Thus, we affirm the trial court on this issue as well.

Based upon the discussion set forth above, we affirm Warner's conviction.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Edward Dove
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky