

RENDERED: JANUARY 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000456-MR

JERRY LEWIS GUY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JUDGE
ACTION NO. 07-CR-01653

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Jerry Lewis Guy entered a conditional plea of guilty to an amended charge of rape in the third degree. He appeals from the pre-trial denial of his motion to dismiss the indictment.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

In September of 1998, a 15-year-old female reported she had been forcibly raped. She was unable to tell the police where the sexual assault occurred but as she had been picked up on Versailles Road in Lexington, the detective “assumed” the rape occurred in Fayette County. The victim told the investigating detective three conflicting versions of the alleged incident and ultimately, the detective found it “impossible to further investigate this case.” Years later, in March of 2007, police received information that led them to believe Guy had committed the rape. Thereafter, police obtained a DNA sample from Guy and it compared favorably to DNA found on the female victim’s undergarments. An indictment was returned in the Fayette Circuit Court in December of 2007 charging Guy with one count of rape in the first degree.

There were a number of difficulties encountered by the lapse of time from the date of the crime to indictment. The original detective had by then retired and was unable to recall many of the details surrounding her investigation. Although the detective’s original report indicated that the victim told three conflicting versions of what occurred, police were not able to produce any of those statements. The undergarment containing the DNA sample matching Guy’s sample was not included in the original property and evidence record. As it turned out, the undergarment was collected almost a week after the alleged rape at the residence of one of the victim’s friends.

Guy filed a motion to dismiss the indictment alleging that the Commonwealth was unable to prove jurisdiction because of a failure to establish in

what county the rape occurred and that the Commonwealth had failed to produce the potentially exculpatory inconsistent statements from the victim. That motion was denied and Guy entered a conditional plea to an amended charge of rape in the third degree, and he was sentenced to serve three years in prison.

Guy argues that because the Commonwealth failed to preserve potentially materially exculpatory evidence in the form of the inconsistent statements of the victim and because the Commonwealth was unable to prove an element of the charge, the location of the crime, the indictment should have been dismissed.

“[A] trial judge has no authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases.” *Commonwealth v. Bishop*, 245 S.W.3d 733, 735 (Ky. 2008). The Supreme Court of Kentucky has recognized a distinction between failure to preserve evidence and failure to create evidence. In *Metcalf v. Commonwealth*, 158 S.W.3d 740 (Ky. 2005), the Court categorized an equipment malfunction as a failure to create evidence rather than as a failure to preserve exculpatory evidence. The Court recognized that ideally, perfect evidence in the form of recordings would be available, but it concluded that the failure to create such evidence did not undermine fundamental fairness because factual disputes could be resolved on the basis of testimony from the persons involved. Moreover, even assuming that the Commonwealth had an affirmative duty to preserve the various statements from

the victim, dismissal of the indictment was not an appropriate remedy when the statements were found to be unavailable.

When an indictment is properly returned to the trial court, “it must be taken and considered as having been found and returned in due form of law, and the court has no authority to inquire into evidence heard by the grand jury[.]” *Holland v. Commonwealth*, 114 S.W.3d 792, 808 (Ky. 2003) (quoting *Sebree v. Commonwealth*, 260 Ky. 526, 86 S.W.2d 282, 284 (1935)). Guy argues and the record reflects that no evidence was presented to the grand jury regarding the location of the offense. The indictment does, however, charge that the offense occurred in Fayette County. It was the Commonwealth’s burden to prove venue at trial. Guy removed that burden from the Commonwealth when he accepted the offered plea bargain and entered a plea of guilty.

We will not speculate concerning evidence that may or may not have been produced at trial nor upon a fact-finder’s view of that evidence. Our review is limited to the sole question of whether the trial court improperly refused to dismiss the indictment prior to trial. Upon the facts presented in this case, the trial court lacked authority to dismiss the indictment.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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