

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001143-MR

ANGELA COMBS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 97-CR-000235

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ABRAMSON, GARDNER, and KNOX, Judges.

ABRAMSON, JUDGE¹: Angela Combs appeals from her conviction for two counts of trafficking in a controlled substance in the first degree and the resulting consecutive five-year sentences on each count. Combs claims on appeal that the trial court erred when it refused to allow an alibi witness to testify in her defense. Having reviewed the record at the trial and the applicable law, we affirm the trial court's judgment.

On October 31, 1996 (at about 12:30 p.m.) and again on November 5, 1996 (at 4:25 p.m.), Detective Pete Ford of the

¹This opinion was prepared and concurred in prior to the departure of Judge Abramson from the Court on November 22, 1998.

Lexington-Fayette Urban County Police Department "wired" a paid informant with an audio monitoring device. Each time Ford supplied the informant with money to purchase illegal drugs at Combs's residence on Shropshire Avenue. On each occasion, the informant entered Combs's residence and returned to Ford with a substance which a state forensic laboratory employee later determined was crack cocaine. Ford testified that on each occasion he saw Combs as she walked the informant to the door of her Shropshire Avenue residence.

The defense presented testimony from a K-Mart Loss Control Manager who testified about a form which had been prepared by a trainee about two African-American women who had been detained for suspected shoplifting on October 31, 1996 at the K-Mart on New Circle Road in Lexington. One of the detainees had signed the form "Teresa Lewis" after first starting to sign her name with the initial letter "A." Combs offered evidence of the October 31, 1996, shoplifting incident to establish that she was not even at home when the first alleged drug buy occurred. As for the November 5, 1996 drug buy, Yvette Leigh testified that she had "done" Combs's hair for years and had been doing her hair at the time of the second cocaine purchase. Leigh specifically remembered the day because it was Election Day, 1996. Other testimony, not relevant to the issue before us, was also offered in Combs's defense.

Combs's counsel began his defense by announcing his intent to call Tracy Williams, an alibi witness who would testify that she and Combs were shoplifting at K-Mart at the time of the

informant's October 31, 1996 drug purchase. Out of the presence of the jury, the trial court placed Williams under oath and advised her about her constitutional rights. Although she initially stated that she had no need for an attorney, Williams then asked for an attorney and a Department of Public Advocacy lawyer was summoned to advise her. Again, out of the hearing of the jury, Williams stated that she and Combs had been shopping together at the K-Mart, but this time she invoked her Fifth Amendment privilege against self-incrimination when asked if she had been an accomplice to Combs in any shoplifting. Williams remained willing to testify, however, that she saw Combs being detained by K-Mart security personnel on October 31, 1996. The trial court granted the Commonwealth's motion to strike Williams as a witness because the prosecution could not effectively cross-examine her.

Combs contends that the trial court committed reversible error when it refused to allow Williams to testify in her defense after Williams invoked her privilege against self-incrimination. Combs maintains that Commonwealth v. Gettys, Ky. App., 610 S.W.2d 899 (1980) governs her appeal. In Gettys, the defendant was charged with accepting a bribe from a person who was a Commonwealth's witness and who had already pled guilty to a related offense. The witness asserted his privilege against self-incrimination because other parts of the grand jury testimony he had given could be the basis for additional charges against him. This Court held that a trial court first should "endeavor to make thorough examination of the questions to be

asked to determine whether or not responsive answers would be incriminating." 610 S.W.2d at 901. The trial court must also determine "what crimes might reasonably be anticipated to be elicited by responsive answers on the part of the witness claiming the privilege." Id.

In Gettys, the Commonwealth, which called the witness to testify, stated that it would ask only about Gettys's case and not about other matters during its direct examination. For the prosecution, then, it was "remote" and speculative that the witness would be asked incriminating questions. Defense counsel's cross-examination strategy, however, was quite different. The defense approach was to attempt impeachment of the witness with evidence of collateral criminal activity. Because the trial court condoned that tactic, it approved of the Fifth Amendment claim and the witness did not testify, resulting in an acquittal and then a certification of the question of law to the Court of Appeals. This Court stated that if the questions for the witness were collateral to Gettys's case, they could not be the subject of impeachment and the witness's claim of privilege therefore would be forbidden. The Gettys decision is significant because it emphasizes the need for judicial assessment of the validity of the assertion by a witness of a testimonial privilege.

The Commonwealth counters that Combs's appeal is governed by the more recent case of Clayton v. Commonwealth, Ky., 786 S.W.2d 866 (1990). In Clayton, the defense tried to call a witness whom the defendant, Clayton, claimed was the actual drug

dealer. Clayton insisted that he had been merely acting as an intermediary. When the witness invoked the Fifth Amendment privilege, the trial court inquired about the validity of that claim. The trial court determined that the witness had a pending indictment, that a videotape existed which showed the witness's involvement, that the witness had been advised by an attorney, and that the defendant would attempt to shift the blame for the crime to the witness. The trial court used its discretion to exclude the defense witness's testimony. Our Supreme Court held that the trial court did not abuse its discretion when it excluded the witness. Equally important, the Court stated that

[i]n Kentucky, the prosecution may not call a witness knowing that the witness will invoke the Fifth Amendment immunity. There is no Kentucky case which applies the same standards to a defendant. Clayton has failed to demonstrate why a different standard should be applied to the defendant.

786 S.W.2d at 867.

In this case, defense counsel announced the intent to call Williams as a witness who would corroborate Combs's alibi. Indeed, defense counsel stated that Williams would say more than that Combs was not at her residence at the time of the cocaine purchase by the informant, i.e., Williams would testify that she and Combs were merely shoplifting at K-Mart instead of selling crack cocaine. Out of the hearing of the jury, Williams refused to confirm defense counsel's claim about what they were doing at the K-Mart. She was willing to confirm only that they were at the K-Mart, claiming the Fifth Amendment privilege and refusing

to testify about whether she was an accomplice to Combs's shoplifting.

The trial court followed Gettys, implicitly finding that Williams's claim of privilege was valid. Based upon defense counsel's initial claim about what Williams and Combs were doing at the time of the cocaine purchase, the trial court advised Williams of her constitutional rights. Thereafter, Williams requested to consult counsel. Finally, the close connection between what Williams was willing to admit she and Combs were doing and the nature of the shoplifting crime she refused to discuss convinced the trial court that Williams's answers to the Commonwealth's questions would be incriminating. Having confirmed the incriminating nature of Williams's complete answers, the nature of the crime to be elicited by responsive answers was obvious. The trial court's treatment of the validity of Williams's assertion of the privilege against self-incrimination was correct.

Having validated Williams's claim of testimonial privilege, the lesson of Clayton was clear: neither the Commonwealth nor the defense has the right to call a witness knowing that the witness intends to answer some questions and not answer others. Here, as a result of defense counsel's bold claim at the beginning of the defendant's case-in-chief, the trial court was wary about allowing Williams to testify before the jury until the court was persuaded that she indeed was willing to admit commission of a crime. Williams's Fifth Amendment claim confirmed the trial court's initial reluctance. The trial court

thereafter followed Clayton and refused to allow the witness to testify when it was known that she would claim a testimonial privilege.

For the reasons stated, we affirm the May 6, 1997 Judgment of Fayette Circuit Court.

ALL CONCUR.

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