

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001449-MR

TODD J. VAUGHN

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH ABRAMSON, JUDGE
ACTION NO. 99-CR-000259

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND MILLER, JUDGES.

MILLER, JUDGE: Todd J. Vaughn brings this appeal from a June 9, 1999, judgment of the Jefferson Circuit Court. We reverse.

In January, 1999, a Jefferson County Grand Jury indicted appellant upon one count of first-degree rape (Kentucky Revised Statutes (KRS) 510.040), two counts of first-degree sodomy (KRS 510.070), and three counts of first-degree sexual abuse (KRS 510.110). On April 23, 1999, a jury found appellant guilty of one count of sexual misconduct (KRS 510.140). The circuit court entered judgment fixing appellant's sentence at three months in jail, probated for a period of two years. This appeal follows.

Appellant contends the circuit court committed error by excluding evidence of the victim's prior accusations of rape. Appellant sought to introduce evidence that the victim had previously accused other people of raping her. The trial court excluded such evidence relying upon Hall v. Commonwealth, Ky. App., 956 S.W.2d 224 (1997).

In Hall, the court determined a victim's unrelated allegations of rape against third parties were properly excluded. The court fashioned the following rule to determine when unrelated allegations of rape should be admitted:

If the unrelated accusations are true, or reasonably true, then evidence of such is clearly inadmissible primarily because of its irrelevance to the instant proceeding. Additionally, unrelated allegations which have neither been proven nor admitted to be false are properly excluded. If demonstrably false, the evidence still must survive a balancing test, i.e., the probative value must outweigh the prejudicial effect.

Id. at 227. Appellant, however, contends Hall is distinguishable as it dealt with only subsequent allegations of rape. We disagree. The rule in Hall is clearly broad enough to encompass both prior and subsequent allegations of unrelated rape. Indeed, some of the cases cited by Hall involve **prior** unrelated rape allegations. As such, we do not think the circuit court erred by excluding from evidence the victim's prior allegations of rape.

Appellant also asserts the circuit court committed reversible error by denying him the opportunity to properly impeach Commonwealth's witness, Victor Bradley. Specifically, appellant sought to introduce evidence of Bradley's recent arrest for domestic violence upon a third party and of Bradley's

intimate relationship with victim. The record, however, indicates the jury already heard evidence that Bradley was the victim's boyfriend. As to Bradley's recent arrest, appellant relies upon Kentucky Rules of Evidence (KRE) 404b. We simply do not believe KRE 404b relevant to impeachment of a mere witness; rather, we think it only applicable to parties to the case. Even if KRE 404b were applicable, we do not think Bradley's arrest would be admissible thereunder. See Gray v. Commonwealth, Ky., 843 S.W.2d 895 (1992). Hence, we perceive no error.

Appellant lastly argues the circuit court erred by instructing the jury upon sexual misconduct. Appellant was originally indicted upon first-degree rape, first-degree sodomy, and first-degree sexual abuse. The Commonwealth argues that sexual misconduct was a lesser included offense of the indicted crimes, thus the instruction was proper. We must disagree.

In Cooper v. Commonwealth, Ky., 550 S.W.2d 478, 479 (1977), the Court held:

[T]he basic purpose of KRS 510.140 is to preserve the concept of statutory rape and statutory sodomy. When read in conjunction with the rape and sodomy statutes, KRS 510.140 is designed primarily to prohibit nonconsensual sexual intercourse or deviate sexual intercourse under two circumstances: (i) when the victim is 14 or 15 and the defendant is less than 21; or (ii) when the victim is 12, 13, 14, or 15 and the defendant is less than 18 years of age. In this context the ages of the defendant and the victim are critical. Force is not an element of this offense. The victim is statutorily incapable of consent. However, mistake as to age is a defense under KRS 510.030.

Indeed, in Spencer v. Commonwealth, Ky., 554 S.W.2d 355, 357 (1977), the Court specifically concluded that KRS 510.140 "is not

applicable where both parties are over 21 years of age and neither was physically or mentally incapacitated at the time of the occurrence." In the case *sub judice*, the evidence reflects that the victim and appellant were both over the age of twenty-one and that neither were "physically or mentally incapacitated" at the time of the alleged rape. As such, we are compelled to conclude the circuit court committed reversible error by instructing the jury upon sexual misconduct.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Tim McCall
Louisville, Kentucky

BRIEF FOR APPELLEE:

A. B. CHANDLER III
Attorney General of Kentucky
Frankfort, Kentucky

Anitria M. Franklin
Assistant Attorney General
Frankfort, Kentucky