

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001840-MR

NORMAN LANE MORTON

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 99-CR-00082

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART AND REMANDING
** **

BEFORE: BARBER, COMBS AND TACKETT, JUDGES.

BARBER, JUDGE: Norman Morton (Morton) appeals the judgment of the Daviess Circuit Court sentencing him to two (2) years' incarceration for third-degree rape. Morton argues the court erred in retroactively imposing KRS 532.043, conditional discharge and in excluding testimony regarding the prosecuting witness' prior allegations of sexual abuse and mental illness. Having reviewed the record and applicable law, we affirm, in part; reverse, in part and remand.

On the evening of March 5, 1997, Morton met a former school mate and her sister in an Owensboro nightclub. At the end of the evening, Morton provided the two women a ride home. In the early hours of the morning of March 6, 1997, Morton engaged in non-consensual intercourse with one of the women, which ultimately resulted in the birth of a child.

On May 22, 2000, Morton was convicted by a jury of third-degree rape. Thereafter, on July 24, 2000, the court imposed the jury's recommendation and sentenced Morton to two (2) years' imprisonment to be followed by an additional three (3) year period of conditional discharge pursuant to KRS 532.043. This appeal ensued.

Before this Court, Morton argues that the trial court erred in retroactively applying KRS 532.046 in that the act for which he was ultimately convicted occurred prior to the inception of the statute. He contends that *ex post facto* application of that law is unconstitutional. We agree.

In Purvis v. Commonwealth, Ky., 14 S.W.3d 21 (2000), our Supreme Court decided this very issue. Therein, the court held that retroactive application of KRS 532.043 is unconstitutional as applied to offenses committed before the effective date of the act. The conduct which resulted in Morton's conviction occurred on March 6, 1997. The statute was not effective until July 15, 1998. As such, application of the statute to Morton's case is impermissible; therefore, we reverse that portion of the court's judgment.

Morton also appeals the trial court's refusal to permit testimony regarding the victim's prior allegations of sexual abuse and attempted suicide. However, the record reflects that this objection was not properly preserved for appellate review. Although a hearing was held on the matter wherein the attorneys discussed the nature of the testimony, our Supreme Court has held that same is insufficient. Rather, trial attorneys in Kentucky

are required to proffer witness testimony in order to preserve such an issue for appellate review. Commonwealth v. Ferrell, Ky., 17 S.W.3d 520 (2000).

A review of the record discloses that appellant did not request that an examination be conducted outside the presence of the jury and offer testimony by avowal under RCr 9.52. As stated in *Cain v. Commonwealth*, Ky., 554 S.W.2d 369 (1977), "without an avowal to show what a witness would have said an appellate court has no basis for determining whether an error in excluding his proffered testimony was prejudicial." Counsel's version of the evidence is not enough. A reviewing court must have the words of the witness. As a result, we find this issue has not been preserved.

Id. at 523-24. (Quoting Partin v. Commonwealth, Ky., 918 S.W.2d 219, 223 (1996) [Citation omitted and emphasis added.]). As such, we pretermitt any further discussion of this issue raised on appeal.

The judgment of the Daviess Circuit Court is affirmed, in part; reversed, in part and remanded for re-sentencing in conformity with this opinion.

ALL CONCUR.

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