

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000721-MR

JIMMY "BO" BUSH

APPELLANT

v.

APPEAL FROM MENIFEE CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 98-CR-00009-002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND KNOPF, JUDGES.

KNOPF, JUDGE: Jimmy Bush appeals from a judgment of the Menifee Circuit Court, entered March 8, 2002, finding him guilty of tampering with physical evidence in violation of KRS 524.100 and of second-degree arson in violation of KRS 513.030. The court sentenced him to consecutive terms of imprisonment totaling fifteen years. Bush contends that the trial court violated his constitutional and statutory rights to a speedy trial and that the court erred by admitting gruesome pictures into evidence and

by refusing to instruct the jury on the defense theories of duress and choice of evils. We affirm.

In February 1998, in the course of an illegal drug transaction at Bush's Pendleton County residence, Danny Trent, Bush's friend and neighbor, shot and killed David Koch with a rifle. Because Trent was confined to a wheelchair, he and Bush were obliged to enlist their wives to help load Koch's body into Koch's pick-up truck and drive it to a remote area of Menifee County. There, in separate locations, Bush set fire to both the body and the truck.

The crime soon came to light, and indictments issued from both Pendleton and Menifee Counties. In Pendleton County Bush and Trent were charged with murder; in Menifee County that pair and their wives were charged with evidence tampering and arson. Apparently Bush pled guilty in Pendleton County to robbery and the wives pled guilty to reduced charges in Menifee County. Bush received a jury trial on his Menifee County charges in January 2002. By then Bush was divorced, and at trial both his former wife and Trent's wife testified for the Commonwealth. The Commonwealth's proof also included Bush's description of the shooting to the Pendleton County prosecutor and testimony by the police officers who had discovered and identified Koch's remains. The Commonwealth's theory was that Koch had been carrying \$6,000.00 in cash and that Trent had

killed him to steal the money. Bush, the Commonwealth alleged, had at least countenanced the killing, had taken half the money, and had participated in the attempt to conceal the crime.

Bush's theory, which counsel attempted to develop through cross-examination of the Commonwealth's witnesses, was that Trent had acted alone in killing Koch and had then forced the others to help with the cover-up.

At the close of proof, the court ruled that the evidence would not support a finding that Trent had coerced Bush to help hide Koch's body and the truck and thus refused to instruct the jury on the defense theories of duress and choice of evils. Bush contends that the evidence did support these instructions and that the trial court's failure to give them rendered the trial unfair. We disagree.

Bush is correct, of course, that the trial court's duty to instruct on the whole law of the case "requires instructions applicable to every state of the case deducible or supported to any extent by the testimony."¹ He claims that he was entitled to instructions on the defenses of duress and choice-of-evils based on the testimony of the two wives to the effect that they had felt oppressed throughout the trip to Menifee County with Koch's body by the sense that Trent might do

¹ Taylor v. Commonwealth, Ky., 995 S.W.2d 355, 360 (1999).

anything and was apt to hurt anyone who crossed him. The only testimony about specific threats, however, came from Trent's wife. She testified that upon her arrival at Bush's residence Trent told her he would kill her unless she helped move Koch's body to his truck. Later, she testified, Trent had threatened her with a knife when she refused to remove the truck's cd player. Although our Supreme Court has cautioned that even implausible defense theories are entitled to instructions if there is an evidentiary basis for them,² we agree with the trial court that in this case the evidentiary basis was lacking.

The defenses of duress and choice of evils both require evidence that the defendant engaged in the otherwise criminal conduct in response to a specific and imminent threat of force or substantial injury in circumstances that left him no reasonable alternative but to violate the law.³ The wives' testimony that they were apprehensive during this ordeal and that Trent directed what were apparently habitual threats toward his wife, does not amount even to some evidence that Trent specifically threatened Bush so as to leave him no reasonable alternative but to aid in covering-up Koch's murder. The trial

² *Id.*

³ KRS 501.090; KRS 503.030; Taylor v. Commonwealth, *supra*; Senay v. Commonwealth, Ky., 650 S.W.2d 259 (1983).

court did not err when it refused Bush's tendered duress and choice-of-evil instructions.

Bush also contends that the trial court should not have permitted the Commonwealth to introduce into evidence photographs of Koch's body, one taken where the body was found about three weeks after the killing and one taken during the autopsy. The general rule is that photographs depicting the state of the body as the defendant left it are admissible notwithstanding that such photographs may be painful or distressing to see.⁴ Photographs depicting conditions of the body unrelated to the crime, however, are far less relevant, and courts have not hesitated to exclude them.⁵

This case is somewhat unusual in that the crime charged is not the murder but the covering-up of the murder. Alterations to the body tending to hide it or to make it difficult to identify, even shocking alterations such as the burning and animal mutilation here, are relevant to this charge and may be proved. The trial court did not abuse its discretion, therefore, by admitting the photograph depicting Koch's body as it was found. Nor did it abuse its discretion by admitting the autopsy photo, which provided strong proof of the

⁴ Adkins v. Commonwealth, Ky., 96 S.W.3d 779 (2003).

⁵ Clark v. Commonwealth, Ky., 833 S.W.2d 793 (1991).

victim's identity and otherwise only showed again the conditions depicted in the other photo.

Finally, Bush contends that he was denied both statutory and constitutional rights to a speedy trial. The statute upon which he relies is KRS 500.110, which provides that a person who has begun a term of imprisonment at a Kentucky penal or correctional institute and who faces untried charges in any jurisdiction of the state on the basis of which a detainer is lodged against him, may, by providing proper notice to the charging authority and corresponding court, obtain a trial upon those charges within 180 days.

The record does not indicate when Bush entered upon a term of imprisonment in this state, but apparently he had done so by February 11, 2000, when Menifee County lodged a detainer against him based on the charges then pending in this case. On September 7, 2000, Bush filed on his own behalf in the Menifee Circuit Court a motion for "a fast and speedy trial." He based the motion on the Sixth Amendment to the United States Constitution. The Commonwealth responded to the constitutional claim on September 19, 2000, and the trial court denied the motion without hearing or explanation by order entered January 17, 2001. Bush contends that Menifee County's detainer and his motion for a speedy trial satisfy KRS 500.110's conditions and that he was thus entitled to a trial within 180 days of

September 7, 2000, or to a showing in open court that there was good cause for delay.

There is no dispute that Bush was not tried within that period or provided with a good-cause hearing. We are not persuaded, however, that Bush's September 7th motion invoked KRS 500.110. In construing the similar provisions of the interstate agreement on detainers (KRS 440.450 et seq.) our Supreme Court in Ellis v. Commonwealth,⁶ stated that

Ellis' motion for a speedy trial makes no reference to the I.A.D. or the 180-day time limitation. He cites only the Sixth Amendment of the Federal Constitution, the Indiana Constitution and the Indiana Rules of Criminal Procedure. The motion cannot be considered as a request for disposition under K.R.S. 440.450.⁷

Bush's motion, likewise, referred to the federal constitution and the general right to a speedy trial, but not to KRS 500.110 or to the statutory 180-day time limit. The motion, therefore, cannot be considered a request for disposition under the statute.

Nor are we persuaded that Bush's constitutional right was violated. As he notes, it took the Commonwealth more than three-and-a-half years to bring him to trial. He was indicted in April 1998 and not tried until January 2002. The United

⁶ Ky., 828 S.W.2d 360 (1992).

⁷ *Id.* at 360.

States Supreme Court, however, has noted that delays of this length are sometimes justified, particularly where the defendant is responsible for the delay or acquiesces in it.⁸ Delay occasioned by a co-defendant is also justified.⁹ These were the factors before the trial court.

The parties agreed that the more serious Pendleton County charges should be tried before the Menifee County charges. Apparently co-defendant Trent's Pendleton County trial was postponed several times due to Trent's poor health. Bush acquiesced in several continuances based upon the Pendleton County delays, including one granted in January 2001, after his motion for a speedy trial. He did not object to a continuance until November 2001. The January 2002 trial, however, followed that objection reasonably promptly.

Nor did the delay prejudice Bush's defense. Bush has identified no evidence lost to him because of the delay nor has he identified any unfair advantage gained by the Commonwealth. He complains that had the trial been conducted prior to his divorce his wife would not have testified against him. Even if this was the case, however (and it is by no means certain that it would have been), it does not amount to undue prejudice.

⁸ Barker v. Wingo, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972).

⁹ Gabow v. Commonwealth, Ky., 34 S.W.2d 63 (2000).

Trent's wife would still have testified, and of the two her testimony was the more inculpatory. Bush has suggested no reason to think that the result of an earlier trial would have been any different.

In sum, the delay in bringing Bush to trial, although unfortunate, was amply justified by events beyond the trial court's control. Notwithstanding that delay, Bush's trial was fundamentally fair; it was impaired neither by painful but relevant photographs nor by the court's refusal to give unwarranted instructions. Accordingly we affirm the March 8, 2002, judgment of the Menifee Circuit Court.

ALL CONCUR.

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