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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000505-MR

BYRON A. BRADFORD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, JUDGE
ACTION NOS. 00-CR-002687 & 01-CR-001847

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, KNOPF, AND TAYLOR, JUDGES.

KNOPF, JUDGE: In January 2003, a Jefferson County jury found Byron Bradford guilty of several counts of rape and related offenses. Bradford thereupon offered to waive his right to a direct appeal, and in exchange for the waiver the Commonwealth recommended that he be sentenced to a total of twenty years in prison. By order entered January 16, 2003, the trial court accepted the agreement and sentenced Bradford accordingly. In January 2004, Bradford moved for collateral relief from that

order. He maintained that prosecutorial misconduct rendered his trial unfair and that he was denied the effective assistance of counsel. It is from the trial court's February 16, 2004, order rejecting those contentions that Bradford has appealed. We affirm.

In May 2000, Brandi Mack reported to the Louisville Police that she had been raped and sodomized in her neighborhood in the west end of Louisville by a black male who claimed to be a police officer and who had used a camcorder to record the sexual activity. A medical examiner obtained semen samples from Mack's body. A few months later Mack noticed Bradford at the Louisville waterfront park and identified him to a police officer as the man who had assailed her. DNA tests eventually confirmed the identification.

Bradford's DNA also matched semen samples obtained from an alleged rape victim in West Memphis, Arkansas. This victim, too, described her assailant as a black male who claimed to be a police officer and who would have recorded the encounter with a camcorder had she not protested. On the basis of those allegations, West Memphis police officers arrested Bradford and obtained a warrant to search his car. In the spare-tire well in the trunk they found ten video cassettes, which contained about twenty-two hours of sexually explicit recordings. Many of the recordings showed Bradford in a series of encounters with more

than twenty different women. Apparently most of the recordings were silent, but at least two of them included the sound of Bradford threatening the women and ordering them not to look at him and of the women crying and begging him not to hurt them.

When the Louisville officers investigating Mack's case obtained a copy of the recordings, they televised a picture of Bradford and asked women he may have assaulted to come forward. Three women did so. Tanitha Clemons, Marcella Gibson, and Lawandra Williams each alleged that late at night or early in the morning Bradford had offered her a ride, had told her he was a police officer but would not arrest her if she cooperated, had driven her to a secluded spot, had forced her to engage in sodomy and intercourse, and had recorded the acts with a camcorder. The incidents involving Gibson and Williams were among those recorded on the tapes seized from Bradford's car.

In December 2000, a Jefferson County grand jury indicted Bradford on charges stemming from Mack's allegations. In July 2001, he was again indicted on charges arising from the allegations of Clemons, Gibson, and Williams. Finally, in September 2002, Bradford was indicted for rape and sodomy offenses allegedly perpetrated against two Jane Doe victims. These charges were based on the tapes, mentioned above, that apparently included the sounds of forcible compulsion. The

indictments were consolidated for trial, which commenced in January 2003.

At trial all four named victims testified that Bradford compelled them to perform intercourse and sodomy by threats of arrest and by threats of physical violence. The Commonwealth introduced the recording of the Gibson incident; Bradford, on cross-examination, introduced that of Williams. The Commonwealth also showed that Bradford had initially denied any involvement with Mack, but had changed his story when confronted with the likelihood of DNA evidence. The Commonwealth abandoned the Jane Doe charges, and the trial court ruled that the recordings upon which those charges were based were not admissible during the Commonwealth's case in chief.

Bradford testified that he had never raped anyone, but that all of the sexual acts were consensual. He claimed he was an amateur producer of pornographic videos who taped his encounters with prostitutes or with women solicited through classified ads. He denied ever having impersonated a police officer, and he speculated that the complainants were angry at him because he had refused to pay them or had performed acts they had asked him not to perform. During cross-examination, the court ruled that Bradford's blanket denial of having raped anyone opened the door to the admission of the Jane Doe recordings, a few minutes of which were played for the jury.

Bradford testified that his threats on those recordings and the women's pleas that he not hurt them were staged to make the encounters seem non-consensual because that is what the purchasers of pornographic videos prefer.

The jury found Bradford guilty of five counts of first-degree rape,¹ four counts of first-degree sodomy,² one count of kidnapping,³ one count of first-degree unlawful imprisonment,⁴ and four counts of impersonating a peace officer.⁵ As noted above, Bradford waived his right to appeal in exchange for a twenty-year sentence. He contends now, however, that he should be relieved of his conviction and sentence because of prosecutorial misconduct and because his counsel rendered ineffective assistance.

Bradford maintains that the prosecutor brought the Jane Doe charges in bad faith as a ploy to introduce the recordings whereon Bradford can be heard apparently threatening very fearful women. Not only is this alleged error not prejudicial—the prosecution was not allowed to introduce those recordings during its case in chief—but it is one that could

¹ KRS 510.040.

² KRS 510.070.

³ KRS 509.040.

⁴ KRS KRS 509.020.

⁵ KRS KRS 519.055.

have been raised on direct appeal. Bradford's waiver of that appeal thus waived his right to consideration of this issue.

To be entitled to relief on the ground of counsel's ineffective assistance, Bradford must show both that counsel erred so seriously that the error cannot be deemed objectively reasonable and that the error was prejudicial in the sense that absent the error "there is a reasonable probability that the jury would have reached a different result."⁶ Bradford's contentions do not meet this standard.

He contends first that counsel erred by failing to challenge the validity of the search-warrant application the West Memphis police officer submitted prior to the search of Bradford's car. The officer's affidavit noted the DNA evidence linking Bradford to the alleged victim, the allegation that the perpetrator used a vehicle, and the fact that Bradford was in possession and was the registered owner of a 1998 Toyota. The affidavit also stated that the victim described her assailant's car as "a small four door gray car with Tennessee license plates." In fact, the victim described the car as "a little gray car, it was a two seater, it had something like a little foam-like mattress over the back."

In describing the place to be searched, the officer referred to the car as a "98 Toyota, silver in color, VIN#

⁶ Hodge v. Commonwealth, 116 S.W.3d 463, 468 (Ky. 2003).

2T1BR18L7WC011807, TN tag GDD544." In fact, the car was gold and the VIN had an E instead of an L. Bradford contends that the officer deliberately misstated the color of the car and the victim's description so as to make the description seem more accurate. We agree with the trial court, however, that even without the officer's mistakes, the affidavit establishes probable cause to search a relatively small car in Bradford's possession that could appear grey at night. The warrant was properly limited to a single car clearly enough identified and reasonably answering that description.⁷ Counsel thus did not err by failing to challenge the validity of the warrant.

Bradford next contends that counsel erred by permitting the Commonwealth to introduce the Jane Doe recordings into evidence. The first alleged error occurred during the Commonwealth's case in chief. Immediately after the court denied the Commonwealth's motion to introduce those recordings, the prosecutor asked the detective who had watched them several questions about their contents. Bradford's counsel did not object until after the detective had described Bradford's apparent threats and the women's pleas not to be hurt.

⁷ Wangrow v. United States, 399 F.2d 106, 115 (1968) ("It is enough if the description is such that the officer with a search warrant can, with reasonable effort ascertain and identify the place (the automobile) intended." Internal quotation marks omitted).

The second alleged error was counsel's first question to Bradford: "Have you ever raped anyone?" which, once Bradford asserted that he had not, opened the door to the Jane Doe recordings. Even if these errors be deemed so serious as to be below the standard of reasonably competent counsel, we agree with the trial court that they were not prejudicial. It is true, as Bradford points out, that the testimonial accounts by the four named victims of how their encounters with Bradford began differed in some instances from less incriminating accounts they had initially given the police. Nevertheless, their cumulative testimony that Bradford claimed to be a police officer and that the encounters became coercive and non-consensual was overwhelming. There is no reasonable possibility that without the Jane Doe evidence the result would have been different.

Accordingly, we affirm the February 16, 2004, order of the Jefferson Circuit Court.

ALL CONCUR.

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