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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000749-MR

BILLY JOE LEDFORD — APPELLANT

APPEAL FROM MENIFEE CIRCUIT COURT
v. HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 02-CR-00022

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 2004-CA-000750-MR

BILLY JOE LEDFORD — APPELLANT

APPEAL FROM MENIFEE CIRCUIT COURT
v. HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 03-CR-00025

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE. Billy Joe Ledford has appealed from two orders of the Menifee Circuit Court denying his motions to suppress evidence obtained from confidential communications he had with his psychotherapist on the grounds that such communications were privileged pursuant to KRE 507. We affirm.

On August 8, 2002, the Menifee County grand jury indicted Ledford on one count of Sexual Abuse, First Degree,[2] charging him with having sexual contact with a minor under the age of twelve during the winter of 2001-2002. After entering a not guilty plea, Ledford filed a motion to suppress all of the confidential communications he made to psychotherapist Stephen Johnson in 2002 for purposes of diagnosis or treatment of his mental condition, relying upon KRE 507. Johnson disclosed those communications to Kentucky State Police in a letter dated June 11, 2002. At a suppression hearing in early 2003, Johnson testified that he was a licensed clinical social worker and psychotherapist, and worked for the University of Kentucky, Department of Psychiatry. He first saw Ledford in early June 2002 on a self-referral for treatment. After discussing with him that all of the information he shared with him would be

[1] Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] KRS 510.110.

confidential, unless it related to harm to himself or others in the future, Ledford made admissions to him regarding child sexual abuse he had committed. Johnson then told him he needed to determine whether he had to report his admissions. When he determined that he was "mandated" to report Ledford's admission, Johnson contacted the Department of Social Services by telephone to report the information. KSP Detective David Owens contacted him regarding the report and requested that he draft a letter memorializing the report, which he did. Johnson saw Ledford again, and told him about the report he made to law enforcement. At the conclusion of the hearing, the circuit court indicated that it would delay its ruling on the motion to suppress pending a decision by the Supreme Court of Kentucky on an identical issue.

On August 18, 2003, the Menifee County grand jury indicted Ledford on three more charges, related to actions that took place between 1980 and 1990. He was charged with one count each of Sodomy, First Degree,[3] for deviate sexual intercourse with a minor under the age of twelve, and of Sodomy, Third Degree,[4] for deviate sexual intercourse with a minor under the age of sixteen. He was also charged with one count of Sexual Abuse, First Degree, for sexual contact with a minor under the

[3] KRS 510.070.

[4] KRS 510.090.

age of twelve. Ledford again entered a not guilty plea, and filed another motion to suppress evidence pursuant to KRE 507.

On January 23, 2004, the circuit court signed identical orders denying Ledford's motions to suppress.[5] Ledford then moved to enter conditional guilty pleas pursuant to RCr 8.09 in both cases. Following the guilty plea hearing, the circuit court accepted his pleas and entered a Judgment and Sentence in each case on March 30, 2004.[6] Pursuant to his agreement with the Commonwealth, the circuit court found Ledford guilty on the sexual abuse counts of the two indictments and sentenced him to two three-year sentences, to be served concurrently. The sodomy charges in indictment No. 03-CR-00025 were both dismissed. Ledford was permitted to remain free on bond pending resolution of his appeals. This Court held Ledford's consolidated appeals in abeyance pending final disposition by the Supreme Court in Carrier v. Commonwealth,[7] which became final on September 23, 2004.

On appeal, Ledford presents two arguments, neither of which was raised before the circuit court in the motions to suppress. He argues that because his communications to Johnson

[5] These orders, as well as the other motions filed and orders signed that day, were filed into the official record on January 27, 2004.

[6] The judgments were amended on April 2, 2004, to show that the guilty pleas were conditional.

[7] 142 S.W.3d 670 (Ky. 2004).

dealt with past conduct and no child was in present danger of abuse, his communications were protected by the psychotherapist-patient privilege and Johnson was not mandated to report his admissions. Ledford also makes a public policy argument, in that a mental health professional should not be permitted to deceive a patient by claiming that communications are confidential and then disclose that information to authorities. On the other hand, the Commonwealth argues that the circuit court did not commit any error in denying Ledford's motions to suppress. Furthermore, the Commonwealth points out that Ledford failed to preserve his arguments for appellate review by first raising them before the circuit court, that his first argument is based on facts not in the record, and that it is beyond the power of the courts to set aside the public policy of the legislature as being contrary to public interest.

We shall first address the Commonwealth's concerns that Ledford's arguments were based on facts not in the record and that he failed to preserve either of his arguments for appellate review. Pursuant to CR 76.12(4)(c)(iv), the statement of the case is to include "ample references to the specific pages of the record . . . supporting each of the statements narrated in the summary." We agree with the Commonwealth that Ledford's statement of the case contains factual assertions that are not in the certified record on appeal. Therefore, we shall

ignore any factual references that are not found in the record before us. Likewise, we agree with the Commonwealth that Ledford did not first raise the arguments in his brief to the circuit court. The law of this Commonwealth is clear that this Court "is without authority to review issues not raised in or decided by the trial court."[8] To be considered on appellate review, errors "must be precisely preserved and identified in the lower court."[9] At the circuit court level, Ledford merely argued that his confidential communications should be suppressed pursuant to the psychotherapist-patient privilege found in KRE 507. However, on appeal, he presents arguments that Johnson did not have a duty to report pursuant to KRS 620.030, as he only reported past conduct and no child was presently in danger, and that the ruling was against public interest. While we agree with the Commonwealth that Ledford did not raise those precise arguments to the circuit court, meaning that his appeal is subject to dismissal, we shall nevertheless review these arguments on a *de novo* basis.

KRE 507 defines the general psychotherapist-patient privilege as follows:

> A patient, or the patient's authorized representative, has a privilege to refuse to

[8] Regional Jail Authority v. Tackett, 770 S.W.2d 225, 228 (Ky. 1989).

[9] Forester v. Forester, 979 S.W.2d 928, 931 (Ky.App. 1998), citing Skaggs v. Assad, By and Through Assad, 712 S.W.2d 947, 950 (Ky. 1986).

> disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

There are several exceptions to the general rule set out in KRE 507(c), none of which apply here. However, another exception is found in KRS Chapter 620, which abrogates this privilege in establishing a mandatory duty to report dependency, neglect or abuse of a child. KRS 620.030(1) provides that:

> Any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky State Police; the cabinet or its designated representative; the Commonwealth's attorney of the county; by telephone or otherwise.

KRS 620.050(3) further provides that:

> Neither the husband-wife nor any professional-client/patient privilege, except the attorney-client and clergy-penitent privilege, shall be a ground for refusing to report under this section or for excluding evidence regarding a dependent, neglected, or abused child or the cause thereof, in any judicial proceedings resulting from a report pursuant to this section. This subsection shall also apply in any criminal proceeding in District or Circuit Court regarding a dependent, neglected, or abused child.

Ledford first argues that the reporting requirements of KRS 620.030 and 620.050 apply only to communications regarding a child who is currently being abused or is otherwise at risk. He relies upon the present tense language in the statute, as well as the expressed purpose of the KRS Chapter 620 (which he identifies as preventing abuse, neglect and dependency of children), to argue that the reporting requirement does not apply to past instances of abuse. He states that the minors at issue in these cases were out of danger at the time of the communication, and therefore do not fall within KRS Chapter 620's exception to the privilege. On the other hand, the Commonwealth correctly points out that the record in these cases is scant, and that there is no evidence concerning whether Ledford was seeking to suppress communications regarding either past or present abuse.

The appellant in Carrier raised a similar argument in the context that the provisions of KRS Chapter 620 should not apply after a child victim reaches the age of majority, when protection as a dependent, neglected or abused child is no longer needed. The Supreme Court disagreed, citing the opinion on review of the Court of Appeals in apparent reliance on its rationale:

> Under KRS 620.030(1) and (2), the duty to report arises when there is 'reasonable cause to believe that a child *is* dependent,

> neglected or abused.' (emphasis added). In the present case, that would have been at the time appellant confessed to Dr. Runyon that he had sexually abused the victims. However, KRS 620.050(2) contains no requirement that the challenged evidence be recent or relate to a recently abused or neglected child. That statute merely speaks in terms of 'evidence regarding a dependent, neglected, or abused child.' Thus, in our view, if the person had a duty under KRS Chapter 620 to report the neglect or abuse *at the time the communications were made*, whether or not the records of these communications were being sought contemporaneously, then the claimed privilege to these records is abrogated by the statute. In essence, KRS Chapter 620 is triggered not by the time when the communications (or records thereof) regarding the abuse or neglect is being sought but rather by the time the communications regarding the abuse is made. Accordingly, the trial court properly found that the records of Dr. Runyon in the instant case, although not sought until 1999, were not privileged.[10]

While this rationale applies more specifically to the records documenting abuse, we nevertheless conclude that Ledford has failed in his burden of proving that the privilege of KRE 507 applies,[11] and that the circuit court properly denied his motions to suppress.

Ledford's second argument is a public policy one, in which he argues that it is in the best interest of the public to allow those individuals who need mental health treatment to

[10] Carrier, 142 S.W.3d at 675.

[11] Stidham v. Clark, 74 S.W.3d 719 (Ky. 2002).

obtain it, without the risk of disclosure. In particular, he alludes that Johnson deceived him into disclosing his conduct by assuring him that his communications were privileged, all the while, he claimed, planning to disclose the information he received. The Commonwealth argues that the court does not have the power to set aside the public policy of the legislature as being contrary to the public interest.

In Commonwealth, ex rel. Cowan v. Wilkinson,[12] the Supreme Court held:

> The establishment of public policy is granted to the legislature alone. It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest. It is the prerogative of the legislature to declare that acts constitute a violation of public policy.

Here, the legislature expressed the purpose of KRS Chapter 620 in KRS 620.010, which clearly evidences a desire and public policy to protect children from being dependent, neglected or abused. This Court cannot set aside this expressed public policy, as Ledford requests we do.

For the foregoing reasons, the orders of the Menifee Circuit Court are affirmed.

ALL CONCUR.

[12] 828 S.W.2d 610, 614 (Ky. 1992).

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