RENDERED: SEPTEMBER 23, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000099-MR

JAMES A. WALTERS — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE RODERICK MESSER, SPECIAL JUDGE
ACTION NO. 05-CR-00078

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON, JUDGE; LAMBERT,[1] SENIOR JUDGE.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

TAYLOR, CHIEF JUDGE: James A. Walters brings this appeal from a December 21, 2009, judgment and sentence of imprisonment of the Whitley Circuit Court upon a guilty plea to incest. We affirm in part, reverse in part, and remand.

Appellant was indicted by the Whitley County Grand Jury upon two counts of first-degree rape and two counts of incest. The indictment stemmed from appellant's alleged rape of his minor biological daughter, A.W., on two separate occasions.[2] Appellant filed a motion to suppress evidence seized from the warrantless search of his apartment and also sought a pretrial ruling on both the admissibility of statements made by appellant to detectives and of A.W.'s psychotherapy records. The circuit court ultimately denied the motion to suppress and decided that appellant's statement to detectives was admissible and A.W.'s psychotherapy records were inadmissible.

Thereafter, the Commonwealth and appellant reached a plea agreement. Under its terms, appellant entered a conditional guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) to one count of incest and preserved for appellate review the court's ruling on the above evidentiary issues and the motion to suppress. The Commonwealth dismissed the remaining charges and recommended a ten-year sentence of imprisonment. By final judgment entered December 21, 2009, appellant was sentenced to ten-years' imprisonment. This appeal follows.

[2] At the time of the alleged rapes, A.W. was sixteen years old.

Appellant initially contends that the circuit court erred by denying his motion to suppress evidence seized from the warrantless search of his apartment. For the reasons hereinafter elucidated, we disagree.

In the case *sub judice*, the record indicates that appellant was placed under arrest while at work and that appellant's place of employment was directly across the street from his apartment. After placing him under arrest, police went to appellant's apartment where they found appellant's girlfriend, Tammy Aguilar. According to Detective Stacy Anderkin of the Kentucky State Police, Aguilar informed the detective that Aguilar was currently living at appellant's apartment and gave the detective oral consent to search the apartment. Conversely, Aguilar disclaimed giving consent. Aguilar testified that the detective did not ask permission before conducting the search and that she would never have given such permission. Moreover, appellant testified that he instructed Detective Anderkin not to search his apartment without a search warrant; whereas, Detective Anderkin stated that appellant never made such a statement.

Our review of a circuit court's decision to deny a motion to suppress evidence is essentially two-fold. First, we review the circuit court's findings of fact, which are conclusive if supported by substantial evidence of a probative value, and second, we review issues of law *de novo*. Kentucky Rules of Criminal Procedure 9.78; *Talbott v. Com.*, 968 S.W.2d 76 (Ky. 1998).

Generally, a warrantless search of a home offends both the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky

Constitution. However, an exception exists where the owner or third party possessing the premises validly consents to a warrantless search. *Colbert v. Com.*, 43 S.W.3d 777 (Ky. 2001). To be valid, the consent to search must be given by an individual who possesses either actual or apparent authority over the premises. *Com. v. Nourse*, 177 S.W.3d 691 (Ky. 2005); *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990); *see also*, 68 Am. Jur. 2d *Searches and Seizures* § 156 (2011). The inquiry for apparent authority is "whether a reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common authority over the premises to be searched." *Com. v. Nourse*, 177 S.W.3d 691, 696 (Ky. 2005).

In the case at hand, Detective Anderkin testified that Aguilar affirmatively stated that she resided at the apartment with appellant and then consented to a search of the apartment. Moreover, Detective Anderkin denied that appellant ever refused consent to search the apartment. According to Detective Anderkin, she believed Aguilar was living at the apartment and was capable of giving consent to search same. Considering the above evidence, we believe that the detective could have reasonably believed that Aguilar possessed common authority over the apartment to authorize the search thereof. Although there existed evidence to the contrary, a reasonable police officer could have reasonably relied upon Aguilar statements, and it is clear that the circuit court viewed Detective Anderkin's testimony as more credible. *See Nourse*, 177 S.W.3d 691.

Also, we attach little significance to appellant's argument that Detective Anderkin's reliance was unreasonable because she knew that Aguilar no longer resided at appellant's apartment.[3] Aguilar's statements to the detective at the time of the search were sufficient to induce a reasonable officer to rely thereupon. Upon the whole, we conclude that the circuit court properly denied appellant's motion to suppress evidence seized pursuant to a warrantless search of his apartment.

Appellant next asserts that the circuit court erred by ruling that A.W.'s psychotherapy records were inadmissible. Appellant maintains that these psychotherapy records were admissible to impeach the credibility of A.W. Appellant points out that these records demonstrated that A.W. suffered from hallucinations and mental illness. Appellant also sought to introduce the psychotherapy records relating to A.W.'s past and unrelated allegations of rape against two other men. Appellant believes these records were admissible to cast doubt upon A.W.'s mental capacity and the veracity of her allegations of rape against him.

Psychotherapy records are absolutely privileged and may not be disclosed absent a waiver of that privilege. Kentucky Rules of Evidence (KRE) 507(b). However, in a criminal action, the compulsory process clause guarantees the accused the right to access exculpatory evidence regardless of such absolute privilege. U.S. Const. amend. VI; Ky. Const. § 11; *Com. v. Barroso*, 122 S.W.3d

[3] Appellant cites to the detective's affidavit attached to a search warrant for appellant's person.

554 (Ky. 2003). And, it is well recognized that psychotherapy records may be directly relevant to the issue of a witness's credibility:

> "The capacity of a witness to observe, recollect and narrate an occurrence is a proper subject of inquiry on cross-examination. If as a result of a mental condition such capacity has been substantially diminished, evidence of that condition before, at and after the occurrence and at the time of trial is ordinarily admissible for use by the trier in passing on the credibility of the witness."

Id. at 562 (quoting *State v. Esposito*, 192 Conn. 166, 471 A.2d 949, 955 (1984)). Bearing on the issue of credibility, certain mental conditions are highly probative of a witness's ability to comprehend and accurately recall the subject matter of her testimony. KRE 401.[4] Our Supreme Court noted "a mental illness that causes hallucinations or delusions is generally more probative of credibility than a condition causing only depression, irritability, impulsivity, or anxiety." *Barroso*, 122 S.W.3d at 563. To summarize, psychotherapy records impeaching the credibility of a witness may be relevant and, thus, admissible if such records are not unduly prejudicial. KRE 403.[5]

[4] Kentucky Rules of Evidence (KRE) 401 provides:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[5] KRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

Herein, we reviewed A.W.'s psychotherapy records included in the record by avowal. These records demonstrate that A.W. suffers from a variety of mental conditions, including "bipolar disorder most recent episode mixed and severe with transient psychotic features." The records detailed myriad hallucinations experienced by A.W. These hallucinations involved both visual and auditory components, and most included members of her family involved in violent acts. A.W. reported that these hallucinations were so real that she could sometimes feel "blood."

While generally the introduction of an alleged victim's psychotherapy records presents a difficult issue for a trial court, it is clear that the records in this case reflect that A.W. suffered from psychotic episodes and experienced hallucinations involving family members. The psychotherapy records bearing upon A.W.'s mental diagnosis of transient psychotic features and her hallucinations are highly probative of A.W.'s credibility as a witness and specifically her ability to accurately recall the subject matter of her testimony (alleged rapes). Moreover, under the unique facts of this case, the probative value of such psychotherapy records is not outweighed by the prejudicial effect on the jury. KRE 403. In short, we conclude that the psychotherapy records evidencing A.W.'s specific diagnosis of transient psychotic features and her hallucinations are properly admissible as impeaching her credibility of a witness and the circuit court erred by excluding the same. Any such records should be properly redacted to exclude inadmissible or prejudicial evidence. This includes any references to or

facts concerning A.W.'s unrelated rape allegations, which are inadmissible per KRE 412. *Capshaw v. Com.*, 253 S.W.3d 557 (Ky. App. 2007).[6]

Finally, appellant argues that the circuit court erred by ruling admissible his statement to Detective Anderkin. Appellant sought to exclude a statement he made to Detective Anderkin after being arrested. Apparently, he instructed Detective Anderkin to go to his apartment and talk with his girlfriend, Aguilar, because they were together when the alleged rapes occurred. Appellant points out that the detective had not read any warnings under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) before appellant made this statement.

It is well established that *Miranda* warnings are only required when the suspect is subjected to custodial interrogation. *Miranda*, 384 U.S. 436; *Jackson v. Com.*, 187 S.W.3d 300 (Ky. 2006). An "interrogation" occurs when "any words or actions on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Wells v. Com.*, 892 S.W.2d 299, 302 (Ky. 1995)(quoting *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)).

In this case, Detective Anderkin testified that she was merely placing appellant under arrest and read to him the warrant of arrest. At this time, the detective recounted that appellant voluntarily told her to go to his apartment and

[6] Before the circuit court, appellant did not allege that A.W.'s prior allegations of unrelated rape were untrue or "demonstrateably false," and appellant failed to offer by avowal or otherwise any evidence demonstrating the falsity of such rape allegations.

speak to his girlfriend because they were together when the alleged rapes occurred. Although the evidence was conflicting upon whether the detective further questioned appellant, the circuit court viewed Detective Anderkin's testimony more credible and ultimately found appellant's statement to have been a voluntary statement.

Considering the record as a whole, we believe substantial evidence supports the circuit court's finding that appellant's statement was voluntary. By merely reading the arrest warrant to appellant and placing him under arrest, Detective Anderkin did not engage in either words or actions that were reasonably likely to elicit an incriminating statement from appellant. Hence, we hold that the circuit court properly concluded that appellant's statement to Detective Anderkin was admissible.

For the foregoing reasons, the judgment of the Whitley Circuit Court is affirmed in part, reversed in part, and this case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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