

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001149-MR

PAUL BRADY FAUST

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 06-CR-000943

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, CLAYTON, AND TAYLOR, JUDGES.

CAPERTON, JUDGE: Paul Brady Faust appeals from the denial of his motion for segregation of records per KRS 17.142. Finding no error, we affirm.

Appellant was initially indicted in 06-CR-253 for kidnapping, wanton endangerment in the first degree, intimidating a participant in the legal process, assault in the fourth degree, and terroristic threatening in the first degree. The

offenses arose out of acts of domestic violence against Appellant's wife, A.F.

Appellant was later indicted in 06-CR-943 for additional offenses directed against A.F.: criminal solicitation to commit murder, stalking in the first degree, tampering with a witness, intimidating a participant in the legal process, violation of a pretrial order of release, violation of a protective order, and menacing.

On motion of the Commonwealth the trial court consolidated the indictments for trial but reserved Appellant's motion to sever the count of criminal solicitation to murder, which was based on an allegation by an inmate, D.H., that Appellant solicited him to kill A.F. No documents in the record reflect a later ruling that the court granted Appellant's motion to sever the count of criminal solicitation to commit murder, and no order to that effect is in the record. No video recordings are included in the appellate record reflecting such a ruling.

On October 3, 2006, Appellant entered guilty pleas in 06-CR-253 to unlawful imprisonment in the first degree (amended from kidnapping), wanton endangerment in the first degree, intimidating a participant in the legal process, assault in the fourth degree and terroristic threatening in the third degree. He also entered guilty pleas in 06-CR-943 to stalking in the first degree, tampering with a witness, intimidating a participant in the legal process, violation of a pretrial order of release, violating a protective order, and menacing. Appellant received concurrent five year sentences for each of the felonies, except that two of the felony sentences under 06-CR-253 were to run consecutively for a total of ten years. The sentences were to be probated; with the probationary period to begin

after Appellant's release from custody in 06-CR-943. The charge of solicitation to commit murder in the later indictment was dismissed pursuant to the guilty pleas.¹

Probation of Appellant's sentence in 06-CR-253 was revoked on November 13, 2009, based on violations of an order for him not to contact the victim and his failure to appear for the revocation hearing. On May 16, 2012, Appellant applied for segregation of the record of the charge of criminal solicitation to commit murder, which the trial court summarily denied. It is from this denial that Appellant now appeals.

On appeal, Appellant presents two arguments, (1) the court did not give any reason for denying segregation of records pursuant to KRS 17.142; and (2) the Appellant clearly meets the requirements of KRS 17.142 and segregation should be granted. The Commonwealth's response is that Appellant was not entitled to segregation of the charge of criminal solicitation to commit murder. In support thereof, the Commonwealth directs this Court's attention to the multiple offense indictments, arising from the same scheme to control and intimidate A.F., in which only the charge of solicitation to commit murder was dismissed. The Commonwealth contends that the charge of solicitation to commit murder was indicted with other charges relating to a continuing course of conduct that included offense in both indictments. The Commonwealth argues that the charges arose out of his protracted assault on A.F. on November 13, 2005, followed by two days of unlawful imprisonment of her and intimidating her. An emergency EPO was

¹ The Commonwealth recognized in its written offer that there was little to no evidence to corroborate D.H.'s accusations.

issued against him in November 15, 2005. From then he continued a campaign of criminal offenses to prevent her from cooperating and testifying against him.

We turn first to Appellant's argument that the court below erred by summarily dismissing his motion without findings of fact. We direct Appellant's attention to CR 52.01 which states: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02." As his motion was not under Rule 12, 56, or 41.02, the trial court was not required to issue findings of fact or conclusions of law *sub judice*. Accordingly, we decline to reverse on this ground.

Next, we turn to Appellant's last argument that he clearly meets the requirements of KRS 17.142 and the motion for segregation of the solicitation to commit murder charge should be granted.

At issue, KRS 17.142 states in part:

- (1) Each law enforcement or other public agency in possession of arrest records, fingerprints, photographs, or other data whether in documentary or electronic form shall upon written request of the arrestee as provided herein segregate all records relating to the arrestee in its files in a file separate and apart from those of convicted persons, if the person who is the subject of the records:
 - (a) Is found innocent of the offense for which the records were made; or
 - (b) Has had all charges relating to the offense dismissed; or
 - (c) Has had all charges relating to the offense withdrawn.
- (2) A person who has been arrested and then has come within the purview of subsection (1) of this section may apply to the court in which the case was tried, or in which it would have been tried in the event of a dismissal or withdrawal of charges, for segregation of the records in

the case. Upon receipt of such application the court shall forthwith issue an order to all law enforcement agencies in possession of such records to segregate the records in accordance with the provisions of this section.

We believe *Aaron v. Commonwealth*, to be persuasive:

Even if the PSI report is not considered a court record, KRS 17.142 can only be interpreted to require the reasonable separation of records. Thus, where records are fused based upon a multiple count indictment, the public agency is not required to delete on a line by line basis in the event of one charge being dismissed.

Aaron, 810 S.W.2d 60, 62 (Ky. App. 1991).

Sub judice, only one charge was dismissed in multiple count indictments against Appellant. We agree with the Commonwealth that this was sufficient for the court below to deny Appellant's motion. There is nothing in the appellate record that shows the court below severed the charges and, thus, we must assume that the charge for solicitation related to the others. Ultimately, when the record is incomplete, we assume that the omitted record supports the decision of the trial court. *Harper v. Commonwealth*, 371 S.W.3d 763, 769 (Ky. App. 2011) citing *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky.1985).

Finding no error, we affirm.

CLAYTON, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEFS FOR APPELLANT:

Paul Brady Faust, *Pro Se*
Saint Mary, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

James Havey
Assistant Attorney General
Frankfort, Kentucky