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RENDERED: FEBRUARY 19, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 3-11-04 Ent'd Grou:tt, D.C.

2002-SC-0013-MR

RICKY CAMPBELL — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
01-CR-00518

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

A Fayette Circuit Court jury found Appellant guilty of one (1) count each of First-Degree Rape and First-Degree Sodomy and also found him to be a Second-Degree Persistent Felony Offender (PFO). The trial court sentenced Appellant in accordance with the jury's penalty-phase verdict to PFO-enhanced sentences of thirty (30) years imprisonment for each conviction, and ordered the sentences to run consecutively to each other for a total sentence of sixty (60) years. Appellant appeals to this Court as a matter of right.[1] After a review of the record, we affirm the judgment of the Fayette Circuit Court.

II. BACKGROUND

On October 23, 2001, Appellant's case was tried before a Fayette Circuit Court jury. Testimony at trial revealed that in March 2001, and for approximately

[1] KY. CONST. § 110(2)(b).

three weeks before the sexual assault upon R.H, the victim in this case, Appellant and R.H. had been living together in R.H.'s residence and had engaged in consensual sexual relations on a regular basis during that time period. On the day of the events in question, March 31, 2001, Appellant and R.H. went to the store to purchase liquor. Later that day, R.H. testified that she witnessed Appellant in two altercations, and during each he brandished a knife. Based on this conduct, R.H. asked Appellant to leave her residence.

Appellant did not leave, but instead asked R.H. to go upstairs to the bedroom with him. R.H. testified that once they were in the bedroom, Appellant asked her whether she was "playing him." She understood this question to pertain to whether or not she was "cheating" on him. R.H. testified that she denied that she was "cheating" on Appellant, however, he reacted by striking her on the side of the face and knocking her to the bed. Appellant maintained that the disagreement was the result of R.H. taunting him for listening in on her phone call with the father of her daughter. Although Appellant did not contest the fact that he struck R.H. in the face, he stated that this was the only physical force he exerted against her.

R.H. testified that appellant asked her to perform oral sex on him and she refused. When he again asked her to fellate him, she complied because she feared that Appellant would harm her with his knife. R.H. testified that Appellant then instructed her to remove her pants and although she protested, Appellant told her to lie down on her stomach, attempted to have anal sex with her, and then penetrated her vagina. R.H. testified that she repeatedly told Appellant that she was in pain and that she did not want to have sex with him. Appellant maintained that the sex was consensual.

Appellant and R.H. then went downstairs and he informed her that he was going to kill himself. Appellant testified that he had been very distraught over the

deaths of his father and grandmother in the preceding months. R.H. then left the residence and took her daughter next door to the house of Appellant's sister, Michelle Campbell ("Campbell"). R.H. asked Campbell to remove Appellant from her residence and Campbell was able to convince Appellant to depart R.H.'s residence for Campbell's own residence. Campbell testified that when Appellant arrived at her residence, she called the police because Appellant was angry and upset and she was worried that he would hurt himself. When the police arrived, they became concerned about Appellant's state of mind and decided to take him into emergency protective custody so he would not be a threat to himself. However, after interviewing R.H., the police decided to place Appellant under arrest. Sometime after Appellant's arrest, the police transported R.H. to the hospital for a medical examination.

The sexual assault examiner testified that R.H. reported that she was hit on the side of the head, was forced to perform oral sex on her assailant, and was raped and sodomized. R.H. informed the examiner that by holding her mouth and pulling her hair the assailant was able to force her to perform oral sex, he penetrated her vagina from behind twice, penetrated her anus, and then penetrated her vagina twice more. The examiner testified that she observed an abrasion on the side of R.H.'s head, a small abrasion and a small laceration on the outside of the vagina as well as some swelling and tenderness. At the conclusion of her testimony, the examiner opined that the injuries she observed on R.H. were consistent with R.H.'s account of what happened. She further stated that although R.H.'s injuries would be consistent with the sort of injuries that occur in a number of rape cases, the type of injuries sustained by R.H. could also arisė from consensual sex. The examiner was unable to testify as to when the injuries were most likely sustained and stated that they could have occurred as a result of other sexual encounters from one or two days prior. She furthered

testified that under circumstances of forced oral sex, one would generally see injuries to the mouth, which were not present on R.H.

The jury found Appellant guilty of First-Degree Rape and First-Degree Sodomy and, at the conclusion of the penalty phase of the trial, found Appellant to be a Second-Degree PFO. The jury fixed Appellant's sentences at twenty (20) years for each count, and with a PFO enhancement the sentences increased to thirty (30) years on each count. The jury recommended that the sentences run consecutively.

The Fayette Circuit Court reviewed a pre-sentence investigation report and conducted a formal sentencing hearing on November 29, 2001. The court declined to impose a sentence of probation or conditional discharge and, following the jury's recommendation, sentenced Appellant to PFO-enhanced sentences of thirty (30) years for First-Degree Rape and thirty (30) years for First-Degree sodomy, to run consecutively for a total of sixty (60) years. As Appellant was convicted of a sexual offense, the court also required Appellant to register with Probation & Parole for his lifetime, advised him of his duty to execute a "Sex Offender Duty to Register Notification Form," and imposed an additional three (3) year period of conditional discharge, pursuant to KRS 532.043. This appeal followed.

III. ANALYSIS

A. OFFICER BROSIK'S TESTIMONY

Appellant first claims that it was error for the trial court to allow the introduction of testimony concerning an exchange that occurred between Appellant and his sister, Campbell, in Officer Brosik's presence. Officer Brosick testified that while at Campbell's home, Appellant stated, "I'm not going back to prison." Officer Brosick testified that Campbell then stated, "[y]ou're going to prison for raping that girl," and Appellant did not respond. Appellant argues three

(3) distinct grounds upon which he asserts that this testimony was improperly admitted: first, admitting the evidence was a violation of Appellant's Fifth Amendment rights, second, the statement was investigative hearsay, and third, the statement did not satisfy the requirements for adoptive admission under KRE 801A(b)(2). Our review of the record, however, reflects that the only basis upon which defense counsel objected to the admission of Officer Brosick's testimony was an alleged violation of the defendant's Fifth Amendment right to remain silent, and the trial court overruled the objection on that basis, ruling that the evidence did not present any "Fifth Amendment problems." Because Appellant's second and third grounds were not presented to the trial court, and appellants are "not permitted to feed one can of worms to the trial judge and another to the appellate court[,]"[2] those allegations of error were not properly preserved for our review, and we will address only the objection that was made in the trial court.

In support of his contention that Officer Brosick's testimony infringed upon his Fifth Amendment right to remain silent, Appellant primarily relies on Combs v. Coyle,[3] a Sixth Circuit case decided pursuant to a petition for federal habeas relief. In Combs, the Sixth Circuit held that the introduction of the defendant's statement, "talk to my lawyer," made in response to a police officer's question, was a violation of the Fifth Amendment, even though the defendant had not been formally arrested or given Miranda warnings at the time he said it.[4] The court ruled that "the use of a defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination" and "the application of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the

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[2] Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976).

[3] 205 F.3d 269 (6th Cir. 2000).

[4] Id.

investigation of a crime."[5] Appellant argues that the court's decision in Combs does not permit the use of a defendant's pre-arrest silence as substantive evidence of guilt as this would, "greatly undermine the policies behind the privilege against self-incrimination while adding virtually nothing to the reliability of the criminal process"[6] and the use of such evidence in the prosecution's case in chief "is not a legitimate government practice."[7]

We find three significant (3) differences in this case, however, that distinguish it from Combs. First, the Sixth Circuit determined that Combs was in police custody when he directed the police to consult with his attorney and that his reference to an attorney was a specific invocation of his privilege against self-incrimination.[8] In contrast, Appellant was not in police custody or under arrest at the time of Campbell's statement, nor was Officer Brosick aware at that time that a crime had even occurred. Based on testimony at trial, Campbell called for police assistance because she feared her brother would harm himself. Thus, the police did not arrive on the scene in order to investigate a crime; they arrived in order to calm Appellant and perhaps place him in emergency custody. These circumstances were quite different from those present in Combs, in which the questioning officer arrived in response to a shooting.

Second, in Combs the exchange at issue occurred between an investigating officer and the suspect, who later became the defendant. It occurred fifteen (15) to twenty (20) minutes after the officer first arrived at the scene and took the gun from the suspect, and was the second time the officer

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[5] Id. at 283 (quoting Coppola v. Powell, 878 F.2d 1562, 1565 (1st Cir. 1989)).

[6] Id. at 285-86.

[7] Id.

[8] Id.

asked the suspect the same question.[9] The Combs court determined that under the circumstances, a reasonable person would have believed him or herself to be in custody.[10] In the instant case, the alleged exchange occurred between Appellant and his sister; Officer Brosick was merely present, he was not interrogating Appellant or asking him routine investigative questions. In addition, Officer Brosick's presence was for the identified purpose of calming Appellant and ensuring that he did not harm himself. Thus, Appellant could not reasonably have assumed that he was in custody or the subject of a custodial interrogation.

Finally, in contrast to the defendant in Combs, who did not testify on his own behalf, Appellant elected to testify at trial. Although Officer Brosick's testimony was elicited during the prosecution's case in chief, the Appellant's act of testifying would have allowed the prosecution to introduce the testimony, not as substantive evidence of guilt but for impeachment purposes.[11] Further, while on the stand Appellant did not attempt to explain his silence or lack of response to his sister's statement. In fact, Officer Brosick's testimony likely provided necessary context for other testimony regarding Appellant's subsequent statement that he "did not rape that girl," which was made immediately after his arrest but before he was informed of the charges upon which he was arrested. The Sixth Circuit in Combs found that Combs's pre-arrest silence was used as substantive evidence of guilt and based this conclusion on Combs's refusal to testify.[12] In Seymour v. Walker,[13] the Sixth Circuit distinguished Combs,[14] stating

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[9] Id. at 284.

[10] Id.

[11] See Seymour v. Walker, 224 F.3d 542 (2000).

[12] Id. at 285-86.

[13] Seymour, 224 F.3d at 560 (2000).

[14] Combs, 205 F.3d at 269 (2000).

that Combs did not control because "Seymour chose to testify in her own defense and to propound a theory of self-defense."[15] The court found that the prosecutor in Seymour had "a legitimate interest in impeaching her testimony and in not allowing Seymour to use the Fifth Amendment as a sword rather than a shield."[16] In the instant case, Appellant also testified on his own behalf, providing the Commonwealth with a legitimate interest in impeaching his testimony.

This Court's decision is consistent with the Combs court's statement that,

> [T]he use of a defendant's prearrest silence as substantive evidence of guilt violates the Fifth Amendment's privilege against self-incrimination. Like [other] circuits, we believe "that application of the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime."[17]

We decline to extend Combs to encompass the circumstances in the instant case and find that the admission of Officer Brosick's testimony was not a violation of appellant's Fifth Amendment privilege against self-incrimination.

B. FAILURE TO INSTRUCT ON SEXUAL MISCONDUCT

Appellant's second claim of error concerns the trial court's failure to instruct the jury on Sexual Misconduct as a lesser-included offense of First-Degree Rape and First-Degree Sodomy. In order to find merit in Appellant's claim, however, this Court would not only have to rely upon questionable dicta from previous opinions, but would also have to ignore the fact that the evidence upon which Appellant bases his claim was never introduced at trial. A person is guilty of Sexual Misconduct when "he engages in sexual intercourse or deviate

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[15] Seymour, 224 F.3d at 560 (2000).

[16] Id.

[17] Combs, 205 F.3d at 283 (2000) (citations omitted).

sexual intercourse with another person without the latter's consent."[18] Although the commentary to KRS 510.140 indicates that the ages of the victim and defendant are not always material, "our longstanding rule" is that this statute "was intended to apply *only* in cases where the victim is fourteen or fifteen and the defendant less than twenty-one, or where the victim is twelve-to-fifteen and the defendant is less than eighteen years of age."[19] Here, the victim was over twenty-one years of age, rendering the offense of Sexual Misconduct inapplicable. Accordingly, the trial court properly denied Appellant's request for lesser-included offense instructions on Sexual Misconduct.

C. AGGREGATE SENTENCE

Appellant's final claim of error is that the trial court erred in ordering his sentences to run consecutively for a total aggregate sentence of sixty (60) years because, he maintains, the maximum aggregate sentence authorized by statute for the relevant convictions is fifty (50) years. We find no merit to Appellant's claim. KRS 532.110(1)(c), which governs concurrent and consecutive terms of imprisonment, reads:

> The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term that would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed. In no event shall the aggregate of consecutive indeterminate terms exceed seventy (70) years.

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[18] KRS 510.140(1).

[19] Johnson v. Commonwealth, Ky., 864 S.W.2d 266, 277 (1993) (emphasis added). See also Cooper v. Commonwealth, Ky., 550 S.W.2d 478 (1977).

The above statute relies upon KRS 532.080 to determine the maximum term of years to which an individual may be sentenced. Appellant was deemed a Second Degree PFO, thus KRS 532.080(5) is the relevant section to determine his enhanced sentences. KRS 532.080(5) states: "[a] person who is found to be a persistent felony offender in the second degree shall be sentenced to an indeterminate term of imprisonment pursuant to the sentencing provisions of KRS 532.060(2) for the next highest degree than the offense for which convicted.

Appellant was convicted of two Class B felonies, however, because he was found to be a PFO Second-Degree, his sentences were enhanced to the next highest degree, Class A felonies, as set forth under KRS 532.060(2), which reads: "[t]he authorized maximum terms of imprisonment for felonies are: (a) For a Class A felony, not less than twenty (20) years nor more than fifty (50) years, or life imprisonment[.]"

Thus, Appellant was sentenced under the guidelines for a Class A felony, which is subject to a maximum penalty of life imprisonment. Appellant received two sentences of thirty (30) years each, to run consecutively. He contends that because fifty (50) years is the longest "term of years" possible under KRS 532.080 and KRS 532.060, a longer consecutive sentence is not permitted. However, as stated by this Court in Bedell v. Commonwealth,[20] KRS 532.110(1)(c) refers to the longest "extended term" authorized by KRS 532.080; it does not refer to the longest "term of years." For a Class A felony, life imprisonment is the longest "extended term" authorized and KRS 532.110(1)(c)

[20] Bedell v. Commonwealth, Ky., 870 S.W. 2d 779, 783 (1993).

thus places the ceiling for consecutive Class A felony sentences at seventy (70) years. As Appellant's sentence is less than the upper limit of seventy (70) years, the trial court did not exceed the statutory cap when it ordered Appellant's PFO-enhanced thirty (30) year sentences to run consecutively to each other.

IV. CONCLUSION

For the above reasons, we affirm the judgment of the Fayette Circuit Court.

All concur.

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