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NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky

FINAL

2006-SC-000286-TG

DATE 3-13-08 E.A. Groupp, Jr.

COMMONWEALTH OF KENTUCKY

APPELLANT

V.

ON APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
NO. 03-CR-00329

JASON E. TERRELL

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A jury found Jason Terrell guilty but mentally ill of the murder of his older brother, Jimmie Kirk Terrell. In accordance with the jury's recommendation, the trial court sentenced Jason Terrell to twenty-four years' imprisonment. The sole issue on appeal is whether the trial court erred in deciding that Jason Terrell was exempted from being considered a violent offender for purposes of limiting his parole eligibility, Kentucky Revised Statutes (KRS) 439.3401, by virtue of its determination that he was a victim of domestic violence. We affirm because we conclude that the trial court's determination was not clearly erroneous based on the testimony introduced at the evidentiary hearing regarding the applicability of the exemption to Terrell.

I. FACTS AND PROCEDURAL HISTORY.

Jason Terrell admitted to shooting Jimmie Kirk Terrell (Kirk) one time in the shoulder and two times in the chest as Kirk sat in Jason's living room eating dinner. Kirk had been staying with Jason for a few days leading up to the shooting because Kirk had been suffering from kidney stones and was violently ill. Jason and Kirk's mother, Joyce Terrell, had also been at the house during that time. Joyce Terrell was assisting both Kirk and Jason, who was severely depressed. Just before Jason shot Kirk, Kirk had been criticizing Jason for refusing to accept help from their father after Jason totaled his car in a single-car accident three days before. Kirk's comments upset Jason. So Jason retrieved a rifle from his bedroom, returned to the living room, and shot Kirk as Joyce Terrell attempted to stop him.

Having heard the circumstances of the shooting and testimony from mental health professionals that Jason Terrell had bipolar disorder and obsessive-compulsive personality disorder, a jury found that Jason Terrell was guilty of murder but mentally ill. And they recommended a sentence of twenty-four years' imprisonment.

Less than two months after the jury trial and before final sentencing, Jason Terrell made a motion for exemption from the terms of both KRS 533.060(1) (effect of use of firearm on probation or conditional release) and KRS 439.3401 (parole for violent offenders). In support, he stated that (1) he was a victim of domestic violence as defined in KRS 403.720, (2) that Kirk Terrell and other family members committed the acts of domestic violence against him, and (3) that Jason Terrell's act of shooting his brother was connected to previous acts of domestic violence committed against him by Kirk Terrell.

Following Terrell's motion, the trial court conducted a hearing to determine whether Jason Terrell had been a victim of domestic violence "with regard to the offenses involving the death of the victim[.]"¹ Following the hearing, the trial court issued an opinion concluding that Terrell (1) was a victim of domestic violence under KRS 533.060 (making Terrell eligible for probation) and (2) was entitled to the domestic violence exemption of KRS 439.3401(5) (exempting Terrell from being labeled a violent offender and from being required to serve eighty-five percent of his sentence before being eligible for parole). In its opinion and order, the trial court found that it was "clear that the victim engaged in domestic violence and abuse against Defendant." And the trial court found "that there was a direct relationship between the victim's subjecting Defendant to past domestic violence and abuse in that the domestic violence contributed to Defendant shooting his brother."

Three days after issuing the order granting Terrell's motion for exemption from the dictates of both KRS 533.060 and KRS 439.3401, the trial court issued its final judgment and sentence of imprisonment in which it incorporated the order allowing Terrell to be considered for probation and/or parole. In accordance with the jury's recommendation, the trial court sentenced Terrell to twenty-four years' imprisonment.

The Commonwealth filed a timely notice of appeal in the Court of Appeals from the trial court's ruling. And Terrell filed a timely notice of direct appeal in this Court. The Court of Appeals entered an order recommending that the Commonwealth's appeal be transferred to this Court to be heard together with Terrell's direct appeal. We granted the transfer but, ultimately, dismissed the direct appeal because Terrell failed to

¹ KRS 439.3401(5).

perfect it. We are left only with the issue of whether Jason Terrell was a victim of domestic violence for purposes of KRS 439.3401.

II. RESOLUTION OF THE ISSUE: THE TRIAL COURT'S DETERMINATION WAS NOT CLEARLY ERRONEOUS BASED ON THE TESTIMONY INTRODUCED AT THE EVIDENTIARY HEARING REGARDING THE APPLICABILITY OF THE EXEMPTION TO TERRELL.

Under KRS 439.3401(3),

[a] violent offender² who has been convicted of a capital offense or Class A felony with a sentence of a term of years or Class B felony who is a violent offender shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.

KRS 439.3401(5), however, creates an exemption to the requirement of KRS 439.3401(3):

This section shall not apply to a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving the death of the victim or serious physical injury to the victim. The provisions of this subsection shall not extend to rape in the first degree or sodomy in the first degree by the defendant.

KRS 533.060(1) reads:

When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of the offense involved the use of a weapon from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, the person shall not be eligible for probation, shock probation, or conditional discharge, except when the person establishes that the person against whom the weapon was used had previously or was then engaged in an act or acts of domestic violence and abuse as defined in KRS 403.720³ against either the person

² As applied to this case, "violent offender" is defined in KRS 439.3401(1) as any person who has been convicted of a capital offense.

³ Under KRS 403.720(1), "[d]omestic violence and abuse" means physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple[.]"

convicted or a family member as defined in KRS 403.720 of the person convicted. If the person convicted claims to be exempt from this statute because that person was the victim of domestic violence and abuse as defined in KRS 403.720, the trial judge shall conduct a hearing and make findings to determine the validity of the claim and applicability of this exemption. The findings of the court shall be noted in the final judgment.

The trial court determined that Jason Terrell was a victim of domestic violence for purposes of both the parole eligibility provisions of KRS 439.3401(5) and the probation eligibility provisions of KRS 533.060(1). In the argument section of the Commonwealth's brief, however, the Commonwealth only challenges the trial court's factual determination under KRS 439.3401(5). So we limit our review and analysis to that issue.

To obtain the benefit of KRS 439.3401(5)'s exemption, Terrell was required to show by a preponderance of the evidence that he was a victim of domestic violence.⁴ That standard "merely requires that the evidence believed by the fact-finder be sufficient that the defendant was more likely than not to have been a victim of domestic violence."⁵ So we review the trial court's determination that Jason Terrell was a victim of domestic violence under a "clearly erroneous"⁶ standard of review, that is, whether or not the determination is supported by substantial evidence.⁷

In Commonwealth v. Vincent,⁸ in interpreting the language of KRS 439.3401(5), which reads "with regard to the offenses involving the death of the victim or serious physical injury to the victim[,]," we held that the statute requires "some connection or

⁴ Commonwealth v. Anderson, 934 S.W.2d 276, 278 (Ky. 1996).

⁵ *Id.*

⁶ *Id.* at 279.

⁷ Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003).

⁸ 70 S.W.3d 422, 424 (Ky. 2002).

relationship between the domestic violence suffered by the defendant and the underlying offense committed by the defendant.” While we could not state definitively beyond that what proof was necessary to show that a defendant was eligible for the domestic violence exemption, we could state that “[p]roof of history of domestic violence between the defendant and the victim is not, by itself, sufficient to trigger the statute's parole exemption.”⁹

Here, the trial court found that it was “clear that the victim engaged in domestic violence and abuse against Defendant.” Upon review, we conclude that this finding is supported by substantial evidence. But the Commonwealth does not dispute this finding. The Commonwealth disputes the trial court’s determination that the domestic violence had a sufficient connection to the shooting death of Kirk Terrell. Having reviewed the evidentiary hearing, however, we conclude that there is substantial evidence to support the trial court’s determination.

We turn to the testimony introduced at the evidentiary hearing in this case. Six witnesses testified: (1) Paresh Merchant, Jason Terrell’s long-time friend; (2) Joyce Terrell, Jason and Kirk’s mother; (3) Mary Buurman, Kirk Terrell’s former fiancée; (4) Dr. Stephen Montgomery, a psychiatrist who had evaluated Jason Terrell; (5) Jason Terrell; and (6) Steven J. Simon, Ph.D., a licensed clinical psychologist from the Kentucky Correctional Psychiatric Center who had evaluated Jason Terrell.

Paresh Merchant testified that he observed Kirk Terrell choke Jason a number of times. He also witnessed Kirk berate Jason constantly. Merchant testified that what went on between Kirk and Jason was not horseplay and was terrifying to both Jason

⁹ *Id.*

and him. Jason responded to the physical and verbal abuse by avoiding his brother whenever he was home. Merchant testified that he would often have to get Joyce Terrell to pull Kirk off Jason. But one time, Joyce was not home; and Merchant tried to get Kirk off Jason by kicking Kirk in his shin, to no avail. Merchant also heard verbal and physical abuse between Joyce Terrell and her husband, the children's father.

Joyce Terrell testified that Kirk was eight years older than Jason and was always much bigger than Jason. She described the home in which her boys grew up as a "war zone." Her husband abused her physically and verbally on a nightly basis; her husband abused Kirk physically and verbally; and Kirk abused Jason physically and verbally. And when Kirk left the home to join the Marines, her husband began abusing Jason. Kirk's "brutal behavior" toward Jason began when Jason was a toddler and continued well into their adult years. According to Joyce Terrell, the physical and verbal abuse that Kirk heaped upon Jason never stopped. And she could recall two occasions during which Jason lost consciousness because Kirk was choking him and another occasion when Kirk attempted to get Jason out of bed by destroying his room, pulling the mattress off the bed, and pinning Jason to the floor. Kirk controlled and belittled Jason constantly.

Joyce Terrell further testified that Jason witnessed Kirk pushing and shoving her, and he would tell her that it bothered him a great deal. But the abuse was not confined to her and Jason. About six months before the shooting, Kirk was harassing Jason's two young sons. Jason did not stand up to Kirk. So Joyce finally stepped in and told Kirk to stop. When Kirk left the house, Jason held his head in hands and cried.

In the days leading up to the shooting, Kirk berated his mother again in front of Jason while she was caring for Kirk. When Joyce and Jason were alone together on those days, Jason confided in her that he could not bear to see how Kirk treated her. Joyce was with Kirk and Jason around the clock at that time because Kirk was physically ill and Jason was depressed, which had recently caused his separation from his wife. His wife had taken their two children and moved to Tennessee.

Mary Buurman, Kirk Terrell's former fiancée, testified about further specific acts of aggression, violence, and brutality that Kirk directed toward Jason. She observed Kirk push Jason off a twenty-five-foot deck, throw Jason into studs in a room that was under construction, punch Jason, and yell at him uncontrollably.

Dr. Stephen Montgomery testified that Jason Terrell had been diagnosed as having bipolar disorder and obsessive-compulsive personality disorder. At the time of the shooting, he was not taking any medication to manage the mood instability that he experienced with the bipolar disorder. In speaking with family members and Jason Terrell, Dr. Montgomery learned that Jason Terrell had been subjected to abuse by Kirk Terrell and that Jason was powerless to resist the abuse because of the size and age difference between the two. In his opinion, Jason Terrell was a victim of domestic violence; and his home environment had a noxious effect on him, even making his mental health issues more severe. As a victim of chronic abuse, it was natural for Jason to develop fear and anger toward Kirk Terrell, his abuser. In his opinion, being forced to live with his brother again during a particularly vulnerable time for Jason Terrell lead to the explosive event of shooting Kirk Terrell.

Jason Terrell testified that his brother was older, larger, and more aggressive. Jason feared Kirk all his life and described himself as a coward toward him. He described how his brother choked him, pinned him down, punched him, and restrained him for hours by wrapping him up in a sleeping bag.

Dr. Steven J. Simon testified that the domestic violence that Jason endured and observed was an important component of the fabric of his adjustment and had been for quite some time. While he was reluctant to quantify how much being a victim of domestic violence had contributed to the act of shooting his brother, he reiterated that it was a significant factor amongst many other factors that day.

Jason Terrell offered significant evidence that connected the shooting with the history of domestic violence between Kirk Terrell and him. The Commonwealth argues that the evidence concerned incidents that occurred many years before the murder, and there was no “direct” connection between the abuse and the murder. KRS 439.3401(5) and Vincent, however, do not require a “direct” connection. Instead, Vincent requires some connection or relationship between the domestic violence suffered by the defendant and the underlying offense committed by the defendant. Here, the trial court determined that there was a direct relationship between the domestic violence and the shooting. And we conclude that that determination is not clearly erroneous based on the testimony.

III. CONCLUSION.

For the foregoing reasons, we affirm the circuit court’s judgment.

All sitting. All concur.

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