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NOT TO BE PUBLISHED OPINION

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RENDERED: OCTOBER 21, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000650-MR

FINAL
DATE 11-12-10 D.Skaggs

WALTER A. STONE — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
NO. 08-CR-01610

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Walter A. Stone, appeals as a matter of right[1] from a judgment entered upon a jury verdict by the Fayette Circuit Court convicting him of first-degree sodomy and sentencing him to twenty years' imprisonment. In this appeal, Stone raises three arguments: (1) that the trial court erred by not holding a hearing to determine if he was competent to stand trial; (2) that the trial court erroneously excused a juror for cause over his objection; and (3) that he was entitled to a directed verdict on the sodomy charge. For the reasons discussed below, we affirm.

[1] Ky. Const. § 110(2)(b).

I. FACTUAL AND PROCEDURAL BACKGROUND

In the light most favorable to the verdict, the evidence presented at trial was as follows. The victim, C.M., who was age twelve at the time, met Stone in May 2008 because Stone's apartment was in the same area where C.M. lived. As C.M. passed by Stone's apartment the two would speak with each other.

Around the end of May 2008, C.M. again stopped at Stone's apartment to talk. After talking for a while, Stone said he would be right back and went inside. When Stone came back out he grabbed C.M. by his wrist and pulled him inside the apartment. The victim told Stone to let him go and to "get off me." After pulling C.M. inside, Stone took him into his bedroom, threw him onto the bed, pulled down the victim's pants, and held him down with one arm. Stone then orally sodomized the child. After a few minutes Stone stopped and went into another room. C.M. pulled his pants up and ran out of the apartment. As he was leaving he heard Stone say "don't tell anybody."

C.M. eventually told his mother about the incident, and she contacted the police. Detective James Root of the Lexington Police Department was assigned to investigate the case. Following the investigation, Stone was arrested.

Following Stone's arrest, based upon his past record of mental problems and unusual conduct at the detention center, the District Court ordered Comprehensive Care Center (Comp Care) to perform a mental status evaluation. Following its evaluation, Comp Care recommended that Stone be referred for a formal competency evaluation. Stone was subsequently ordered

to the Kentucky Correctional Psychiatric Center (KCPC) for a determination of whether he was competent to stand trial. As further discussed below, following its examination, KCPC concluded that Stone was competent to stand trial, and "was intentionally exaggerating cognitive deficits in order to avoid legal consequences consistent with his diagnosis of malingering."

On December 15, 2008, after the completion of the KCPC evaluation, Stone was indicted for one count of first-degree sodomy by forcible compulsion. At the conclusion of the trial, the jury found Stone guilty of first-degree sodomy and recommended a sentence of twenty years' imprisonment. The trial court subsequently sentenced Stone pursuant to the jury's verdict and sentencing recommendation. This appeal followed.

II. STONE WAIVED HIS ENTITLEMENT TO A COMPETENCY HEARING

Stone first argues that the trial court erred by failing to hold a hearing on his competency to stand trial, citing his statutory rights under KRS 504.100(3), and his constitutional right, under *Drope v. Missouri*, 420 U.S. 162 (1975) not to be tried if he is incompetent.

Upon commencement of this prosecution in the district court, the district judge learned of Stone's past record of mental problems and of his recent conduct in the Fayette County Detention Center, and concluded "there is reason to believe that [Stone] is not mentally capable of understanding the charges against [him], or aiding [his] counsel in the trial of said case[.]" Based upon this conclusion, the district court ordered Comp Care to evaluate Stone's mental status. However, the Comp Care evaluation was largely unsuccessful

because Stone refused to cooperate with the evaluators. Comp Care ultimately recommended that Stone "be referred for a formal competency evaluation." The district court thereafter referred Stone to KCPC for an evaluation of his competency to stand trial.

The KCPC report noted Stone's prior history of mental problems, including several prior admissions to Eastern State Hospital as a result of psychiatric problems. The report also noted Stone's history of drug and alcohol abuse. His IQ was found to be in the 70s. The report stated the following in relation to Stone's competency to stand trial:

> During this admission, Mr. Stone was intentionally exaggerating cognitive deficits in order to avoid legal consequences consistent with his diagnosis of malingering. . . . . His level of functioning on the unit was inconsistent with his report of cognitive impairment. Results of psychological testing suggested malingering of cognitive deficits.
>
> Despite malingering, Mr. Stone demonstrated the ability to tolerate the stress of trial and while awaiting trial. He did not appear to be experiencing symptoms of a major mood or psychotic disorder. He was eating and sleeping well. He did not make threats or attempts to harm himself or others. He demonstrated adequate ability to discuss his legal situation and interest in discussing his case with an attorney. *In summary, Mr. Stone demonstrates the capacity to appreciate the nature and consequences of the proceedings against him and the ability to rationally participate rationally* [sic] *in his own defense. He is capable of proceeding to trial.*

(Emphasis added).

After Stone was indicted, at an April 3, 2009, status conference, based upon the KCPC report, stand-in counsel for Stone stated that he was satisfied that Stone was competent to stand trial. Further, shortly before the trial

commenced, Stone's trial counsel acknowledged the KCPC report and stipulated that he was competent to stand trial.

KRS 504.100(1) provides as follows: "If upon arraignment, or during any stage of the proceedings, the court has reasonable grounds to believe the defendant is incompetent to stand trial, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition." Moreover, KRS 504.100(3) states that "[a]fter the filing of a report (or reports), the court *shall* hold a hearing to determine whether or not the defendant is competent." (emphasis added). In addition, the United States Constitution, as a matter of due process, bars trying a defendant who is incompetent to stand trial. *Drope*, 420 U.S. 162.

We recently discussed the scope of a defendant's entitlement to a competency hearing in *Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010), wherein we criticized prior cases, including *Gibbs v. Commonwealth*, 208 S.W.3d 848 (Ky. 2006), for failing to recognize that, when analyzing whether a defendant is competent to stand trial, two separate interests - a statutory right and a constitutional right - are at stake. More importantly, we noted in *Padgett*, that different standards govern those interests. Due process under the Fourteenth Amendment requires that where substantial evidence[2] that a defendant is not competent exists, the trial court is required to conduct an evidentiary hearing on the defendant's competence to stand trial. In contrast,

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[2] Such evidence may include "a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence." *Drope*, 420 U.S. at 180.

under KRS 504.100, "reasonable grounds to believe the defendant is incompetent to stand trial" mandates a competency examination, followed by a competency hearing. Thus, while the failure to conduct a competency hearing implicates constitutional protections only when "substantial evidence" of incompetence exists, mere "reasonable grounds" to believe the defendant is incompetent implicates the statutory right to such a hearing. *Padgett*, 312 S.W.3d at 347.

With respect to the ability of a defendant to waive a competency hearing, we noted in *Padgett*:

> [The] U.S. Supreme Court cases "indicate strongly that a defendant cannot waive a competency hearing." What *Mills*[3] and our other cases were not careful to point out, however, was that these U.S. Supreme Court cases deal with the federal, constitutional right to a hearing which is invoked when there is substantial evidence in the record of incompetency. In contrast, our statutory right to a hearing is not constitutional, and can be waived when there is not substantial evidence of incompetency in the record, because our long-standing rule is that defendants may generally waive statutory rights. Our prior cases have not recognized this either.

Id. at 348-349.

We resolved in *Padgett* that before determining whether the failure of a trial court to conduct a competency hearing was error, and whether a defendant waived entitlement to such a hearing, we must first assess the strength of the evidence of incompetence to ascertain if either the constitutional or the statutory right to a competency hearing has been implicated.

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[3] *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky. 1999).

Turning to this case, we conclude that the trial court's failure to hold a competency hearing is not constitutional error because there was not substantial evidence to give the trial court doubt concerning Stone's competence at the time of the trial. While initial concerns regarding Stone's competency led to the Comp Care and KCPC evaluations, the KCPC evaluation negated any doubts about his competence to stand trial. The fact is that Stone's competency was no longer questioned after the KCPC report specifically concluded that he was competent to stand trial and able to participate rationally in his own defense. At that point in the proceedings, instead of "substantial evidence" that Stone was not competent, the evidence overwhelmingly pointed to Stone being competent to stand trial, and a competency hearing was not required by due process. *Id.* at 349.

Furthermore, no hearing pursuant to KRS 504.100 was required in this matter. Prior to the commencement of trial, Appellant's counsel specifically acknowledged the KCPC report and stipulated to Stone's competency to stand trial. Further, after the filing of the KCPC report, the issue of a competency hearing was never raised. Thus, any right to a competency hearing was waived, and the trial court's failure to hold one was not error. *Padgett*, 312 S.W.3d at 349.

III. THE TRIAL COURT PROPERLY EXCUSED JUROR 545 FOR CAUSE

Stone next contends that there was an insufficient basis for the trial court to excuse Juror 545 for cause over his objection. During voir dire the trial court asked the jury panel whether any of them had a close friend or

family member who had ever been the victim of a sexual offense or had been accused of a sexual offense. After the question, Juror 545 approached the bench and the following exchange took place:

> Juror 545: I'm a sexual offender. It was expunged, it was that long ago because . . . but still, I think it would have an impact. And I think that . . . my brother molested my two nieces. So, I'm sure of that, but that's my opinion. And also I have another problem your honor. As a juror, it is my responsibility to tell when the jury pool is possibly tainted.
>
> Court: Ok.
>
> Juror 545: You called the person involved a victim twice.
>
> Court: And [he] is named as the alleged victim. [He] is named as the victim.
>
> Juror 545: But that implies that wrong was done to [him] . . . you see how nervous I am? I really feel uncomfortable doing this. But that implies that wrong was done to this person.
>
> Court: Uh-huh.
>
> Juror 545: And that implies that he's guilty.
>
> Court: Ok, I can see your opinion on that. Alright. Thank you sir.
>
> Court: Sir, I'm sorry. I think I failed to ask you the ultimate question. Based upon your personal experience and your family's experience, then do you believe that that would have an impact on your ability to be fair?
>
> Juror 545: I don't think it would.
>
> Court: You don't think it would?
>
> Juror 545: No, but I can see how other people would think it would.
>
> Court: Ok.

Juror 545: I don't know. I'm kind of on both sides of the fence. I went through counseling on all this and I understand that these things happen and I understand that people do these things and that . . . you know . . . I don't think that would taint the evidence that I would see.

Court: Ok, so you don't think that you would hold the Commonwealth to a higher standard?

Juror 545: Oh, because of . . . because of what you said or because of what I feel?

Court: Both.

Juror 545: I understand what you're saying, and I don't think that you know . . . and I don't think that my sexual offenses or the victims in my family make a difference.

Following the above exchange the Commonwealth moved to excuse Juror 545 for cause. The Commonwealth stated its reasoning as follows:

> I would move to strike him for cause. When he first came up he said he couldn't be fair, and then when he was asked more pointedly he said he could be fair. He has a long history of . . . he was charged with a sex crime and it's been expunged and then he's convinced that his brother has. And just his comments about the victim and the wording. I would ask to strike him. I don't think he can be fair and impartial.

Defense counsel objected to the strike, stating that Juror 545 was "the kind of person we ought to have on the jury." The trial court sustained the Commonwealth's motion to strike, reasoning as follows:

> I'm going to sustain the motion of the Commonwealth. I'll strike Juror 545 for cause. When he first came up he very clearly said he could not be fair.[4] He was shaking, his eyes were watery. He was obviously very upset about this type of case. And I do know at the end he did say an inconsistent statement. But, I think based upon

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[4] This is apparently how the trial court interpreted Juror 545's statement that his prior conviction for a sex offense "would have an impact."

the totality of the statements he made, I do find that it's proper to strike him for cause.

RCr 9.36 provides, in relevant part "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." "[T]he decision to exclude a juror for cause is based on the totality of the circumstances, not [in] response to any one question." *Fugett v. Commonwealth*, 250 S.W.3d 604, 613 (Ky. 2008). "The test for determining whether a juror should be stricken for cause is 'whether, after having heard all of the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict.'" *Thompson v. Commonwealth*, 147 S.W.3d 22, 51 (Ky. 2004) (quoting *Mabe v. Commonwealth*, 884 S.W.2d 668, 671 (Ky. 1994)). "[T]he party alleging bias bears the burden of proving that bias and the resulting prejudice." *Cook v. Commonwealth*, 129 S.W.3d 351, 357 (Ky. 2004) (citing *Caldwell v. Commonwealth*, 634 S.W.2d 405, 407 (Ky. 1982)). Where there is such a showing, "[t]he court must weigh the probability of bias or prejudice based on the entirety of the juror's responses and demeanor." *Shane v. Commonwealth*, 243 S.W.3d 336, 338 (Ky. 2007).

"A trial court's decision whether a juror possessed '[a] mental attitude of appropriate indifference' must be reviewed in the totality of the circumstances. It is not limited to the juror's response to a 'magic question." *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991). This Court reviews a trial

court's determination regarding the exclusion of a juror for cause for an abuse of discretion. *Fugett*, 250 S.W.3d at 613.

Upon the totality of the circumstances, we cannot say that the trial court abused its discretion in striking Juror 545. He was a convicted sexual offender and this was a sexual abuse case. By the juror's own admission he believed his experience with his past conviction "*would* have an impact." While the juror did later state in response to questioning "I don't think that my sexual offenses or the victims in my family make a difference," there is no "magic question" which rehabilitates an otherwise disqualified juror. *Montgomery*, 819 S.W.2d at 717-18.

Add to this Juror 545's demeanor – his shaking, watery eyes and nervousness – when discussing the matter, there existed sufficient doubt concerning his impartiality for us to conclude that the trial court did not abuse its discretion in striking the juror.

IV. STONE WAS NOT ENTITLED TO A DIRECTED VERDICT

Finally, Stone contends that he was entitled to a directed verdict based upon insufficiency of the evidence.[5] More specifically, Stone argues that there was a lack of physical evidence for the crime, the victim provided inconsistent statements, the victim delayed reporting the incident, and the victim had a

[5] The Commonwealth contends that this argument is not properly preserved because in moving for a directed verdict at the conclusion of trial Stone did not specify the grounds in support of his motion. While Stone's motion indeed did not comply with CR 50.01, we nevertheless decide to address the issue on the merits.

reputation for being untruthful. In light of these factors, Stone contends his absolute denial of the crime should prevail.

The proper standard of review on a motion for directed verdict is stated in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991) as follows:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.
>
> . . . [T]here must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence.

Id. at 187-188 (internal citations omitted).

Upon examining the evidence introduced at trial in the light most favorable to the Commonwealth, we find no error in the trial court's decision to deny Stone's motion for a directed verdict. The record contains sufficient evidence to support a first-degree sodomy conviction.

The first-degree sodomy statute, KRS 510.070, provides as follows:

> (1) A person is guilty of sodomy in the first degree when:
>
> > (a) He engages in deviate sexual intercourse with another person by forcible compulsion; or
> >
> > (b) He engages in deviate sexual intercourse with another person who is incapable of consent because he:

1. Is physically helpless; or

2. Is less than twelve (12) years old.

KRS 510.010(1) defines deviate sexual intercourse as "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; or penetration of the anus of one person by a foreign object manipulated by another person."

At trial, C.M. testified that Stone grabbed him by his wrist and pulled him inside his apartment. C.M. told Stone to let him go and to "get off me." After pulling the victim inside, Stone took him into the bedroom, threw him onto the bed, pulled down his pants, and held him down with one arm. Stone then orally sodomized C.M. while holding him down. Thus, the attack described by the victim meets the statutory definition of first-degree sodomy by forcible compulsion. While there was a delay in reporting the incident and no physical evidence was found, C.M. was able to describe the inside of Stone's residence, thereby corroborating that he had been inside the apartment.

Stone's claims are directed more towards the credibility and weight of the victim's testimony, arguing, in effect, that the jury should have believed him instead of the victim. Because credibility and weight are exclusively jury issues, and we are not at liberty to substitute our judgment for its determinations, Stone's argument fails. *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983).

Moreover, the testimony of the victim, alone, was sufficient to withstand Stone's motion for a directed verdict. *See Commonwealth v. Suttles*, 80 S.W.3d

424, 426 (Ky. 2002) ("The testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary if, after consideration of all of the evidence, the finder of fact assigns greater weight to that evidence."); *see also Garrett v. Commonwealth*, 48 S.W.3d 6, 8 (Ky. 2001) (The testimony of the victim alone is sufficient to support a rape conviction.).

As demonstrated above, there was sufficient evidence to support the first-degree sodomy conviction by forcible compulsion. Accordingly, we find no error.

V. CONCLUSION

For the foregoing reasons the judgment of the Fayette Circuit Court is affirmed.

All sitting. All concur.

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