Buckley v. Commonwealth

2008 | Cited 0 times | Kentucky Supreme Court | August 21, 2008

IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Thomas Eugene Buckley, Jr., was convicted of first-degree rape of a minor child less than 12 years of age. He was sentenced to 20 years. On appeal, he alleged two errors: (1) that the trial court abused its discretion by denying his motion for a new trial based on newly discovered evidence alleging that the prosecuting attorney met with the Appellant's family prior to trial, when the prosecuting attorney was still a private defense attorney; and (2) that the trial court abused its discretion by excluding testimony regarding the victim's previous sexual behavior. For the reasons set forth herein, Appellant's conviction is affirmed.

I. Background

On March 8, 2006, Appellant was arrested on charges of first- and second-degree rape. Specifically, the charges alleged that Appellant engaged in sexual intercourse with a minor child under the age of 12 years old, and continued to have intercourse with said minor subsequent to her 12th birthday. Appellant was at least 18 at the time of these allegations.

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The victim, AX, and Appellant were neighbors living in the same trailer community. In September 2002, Appellant, due to domestic abuse concerns in his home, moved in with A.N. and her family. At that time, Appellant and A.N. were friendly and their contact was casual. There were numerous people living in the home when Appellant moved in, including A,X's mother, her mother's boyfriend, AX's brother, AX, and the Appellant. AN gave conflicting statements regarding the dates and number of sexual contacts between her and Appellant; however, all of her statements support that she had sexual intercourse with the Appellant in the summer of 2002 or 2003, and that she was under the age of 12 when this sexual relationship began.

After his arrest, Appellant was interrogated for approximately 45 minutes by the Christian County Police Department. At the end of the interrogation Appellant confessed to having intercourse with AX, and he prepared a written statement admitting it. Appellant later claimed that he was under the influence of marijuana when he confessed and that he was coerced. The trial court, however, determined that the confession was voluntary and there was no indication of coercion by the officers. This issue was not raised upon appeal.

While in jail Appellant waived his right to appointed counsel, and shortly after this waiver, a private attorney, Richard Kip Cameron, entered an appearance on behalf of Appellant. Approximately one month later, Belinda Buckley, Appellant's wife, and her mother Mary Jo Fauler, contacted attorney Lynn Pryor, who would later become the Commonwealth's Attorney. Pryor and her husband, John Thompson, met with the two for approximately one hour, at a local restaurant. Affidavits in the record indicate that during this meeting Mrs. Buckley and Ms. Fauler disclosed information and documentation regarding Appellant's charges in an attempt to obtain legal advice from Pryor. The documentation included a letter from Appellant to A. N., a letter from A.N. to Appellant, a copy of the confession, a copy of the police case log, and photographs of the victim. Additional information was communicated, including detailed explanations of the previous documents, Appellant's opinion of the circumstances surrounding his confession, information about Appellant and /Ws relationship and A. N.'s relationship with her family, Pryor's opinion on the ability to prosecute with the evidence available at that time, and advice on filing a motion to reduce bond. Pryor did not terminate the meeting. Pryor claimed she simply advised them to contact the local sheriff's office with their concerns. This meeting occurred in mid-April of 2006.

On February 19, 2007, three days before trial, Appellant submitted a motion pursuant to KRE 412, stating that the Appellant had just received from the prosecutor new information about a potential witness. This information was a police report identifying Robed McGar as a witness to the victim's participating in consensual sexual acts with an adult friend of the family. This information was presented to the defendant six days before trial. The trial court excluded this testimony as it was directly prohibited by the rape shield rule; however, his testimony was taken by avowal. Appellant claimed that the exclusion of the evidence was an abuse of discretion because it directly pertained to the offense charged and thus fell under an exception to the rape shield law. Additionally, the Appellant claimed that while KRE 412(c)(1)(a) specifies that such a motion shall be made no less than

14 days before trial, the information was newly discovered and thus is an exception to the notice provision. Appellant's motion was denied, and the trial commenced on February 22, 2007. Appellant was found guilty of first-degree rape, and sentenced to 20 years.

On March 2, 2007, Appellant filed a motion for a new trial based on the rape shield claim. At the hearing on that motion on March 21, twenty-eight days after the guilty verdict, Appellant raised another issue not included in the motion, based on supposedly "newly discovered information" regarding the prosecutor's meeting with the Appellant's family prior to trial (and prior to her becoming the prosecutor). The Appellant's wife, Belinda Buckley, claimed that she contacted Appellant's attorney the previous day to inform him that she had met with the prosecutor, Lynn Pryor, regarding Appellant's case when Pryor was still in private practice. During this hearing the prosecutor stated that she had never been asked to recuse herself from prosecuting the case, and that she did not receive any information that was not included in the case file presented to her when she became the Commonwealth's Attorney. She also claimed that there was no attorney-client relationship established, and that she never agreed to represent Appellant The trial court set an evidentiary hearing for April 18, 2007. On April 16, just prior to the hearing, Appellant filed a separate motion for a new trial raising the conflict issue. With the motion, he provided affidavits of his wife, mother-in-law, and various other persons working in the restaurant where the meeting occurred. At the April 18 hearing, Pryor made further statements in her own defense describing the meeting. At the conclusion of this hearing the Court determined that no privileged information had been exchanged and no prejudice resulted, and denied the motion for a new trial.

This appeal follows as a matter of right. Ky. Const. §110(2)(b).

II. Analysis

A. Disqualification of the Prosecutor

1. No Conflict

Appellant argues that the trial court abused its discretion when it refused to grant him a new trial based on the prosecutor's meeting with his wife and mother-in-law prior to trial, at which information was exchanged. Appellant provided the court with several affidavits, which confirmed that Lynn Pryor, the Commonwealth's Attorney who prosecuted Appellant, met with the Appellant's family and discussed for approximately one hour specifics regarding the Appellant's case when she was still in private practice. Appellant cites KRS 15.733(2)(e) as his authority for a new trial, which states that "[a]ny prosecuting attorney shall disqualify himself in any proceeding in which he... has served in private practice or government service, other than as prosecuting attorney, as a lawyer or rendered a legal opinion in the matter in controversy...." Various ethical rules also prohibit the prosecutor from proceeding against a former client. E.g., SCR 3.130-1.9; SCR 3.130-1.11.

The rule that a prosecutor is barred from prosecuting a defendant whom she previously represented is rooted partly in the attorney-client privilege, as are many of the attorney-conflict rules. In fact, the test of whether such an attorney is disqualified depends on "the depth to which the attorney/client relationship was established." Whitaker v. Commonwealth, 895 S.W.2d 953, 956 (Ky. 1995). As the Court went on to note,

An appointed counsel whose contact with his client has been brief and perfunctory without an exchange of confidential information in the form of planning trial strategy, or discussions of potential witnesses to be called on the defendant's behalf, or avenues of investigation to be undertaken by defense counsel would not be considered to have had personal and substantial participation.

Id. (emphasis added).

Pryor's discussion with Appellant's wife' was not particularly brief and included information that could give rise to an attorney-client privilege in the proper context. However, any attorney-client privilege was effectively waived in this case because the otherwise confidential information was disclosed while third parties were present. "A client who discloses protected communications to persons outside the lawyer-client relationship (or authorizes legal counsel to do so) waives the protection of the privilege." Robert G. Lawson, The Kentucky Evidence Law Handbook § 5.05[10], at 361 (4th ed. 2003). Additionally, according to KRE 503, "[a] communication is `confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." KRE 503(a)(5). Four people were present during the exchange of information with Pryor, including John Thompson, Pryor's husband, and Mary Jo Fauler, Appellant's mother-in-law. Even though Mrs. Buckley, Appellant's wife, obtained power-of-attorney for Appellant, she waived any confidentiality by communicating this information in the presence of the two individuals outside any attorney-client relationship. Thus, because no privilege was attached to Pryor's meeting with Appellant's wife, and Pryor was never employed as Appellant's attorney, it is clear that no confidential attorney-client relationship was created. The trial court was thus correct in concluding that because there was no privileged information exchanged, a new trial was not warranted under KRS 15.733, and did not abuse its discretion.

2. Timeliness of the Motion

Even assuming that an attorney-client relationship had been created, the untimeliness of Appellant's raising the issue would also support affirming his conviction. Appellant first raised the issue of the alleged conflict 28 days after the verdict against him was returned, and his motion for a new trial addressing the issue was not filed until 52 days after the guilty verdict was returned. Criminal Rule 10.06(1) states:

The motion for a new trial shall be served not later than five (5) days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for a good cause so permits.

RCr 10.06(1).

Appellant claims that the discovery of Pryor's communication with the Appellant's family was newly discovered information, thus entitling him to the one-year time limit. Appellant contends that only two days prior to his first raising the issue did his wife reveal that she and Pryor had met before trial to discuss the case.

This Court is not convinced from the record that the information was in fact the type of "newly discovered" evidence contemplated by RCr 10.06. "'[I]n order for newly discovered evidence to support a motion for a new trial it must be of such decisive value or force that it would, with reasonable certainty, have changed the verdict or that it would probably change the result if a new trial should be granted."' Commonwealth v. Harris, 250 S.W.3d 637, 640-41 (Ky. 2008) (quoting Jennings v. Commonwealth, 380 S.W.2d 284, 285-86 (Ky. 1964)). Essentially, the Rule anticipates that exculpatory or similar evidence would be raised in a motion for a new trial. However, this is not a situation where the evidence would have had an effect on the verdict. Rather, this is a due process issue where the evidence may have unfairly assisted the prosecution in preparation for the case or the prosecutor's participation violated a privilege or conflict rule. Thus, it is not clear that the "evidence" satisfies RCr 10.06(1).

More importantly, however, Harris further states that "[n]ewly discovered evidence is evidence that could not have been obtained at the time of trial through the exercise of reasonable diligence." Id. at 642. Even assuming the evidence of the prosecutor's meeting with Appellant's family is the kind of evidence the Rule requires, it must also satisfy this "newly discovered" test.

Mrs. Buckley testified during trial, and was actually cross examined by Pryor, but she did not mention having met Pryor in her testimony. Prior to trial, Appellant and his counsel had the opportunity to inquire about Mrs. Buckley's communications with other attorneys, especially considering that Appellant was on bail and at home for well over seven months prior to trial. This latter point is especially salient given that Mrs. Buckley was operating under a power-of-attorney for her husband when he was still in jail. Surely a reasonable person would have inquired into whether his wife met with any attorneys on his behalf once he was free on bail. That said, Appellant has not established that the information was "newly discovered," since reasonable diligence would have revealed it, and thus he cannot raise it in support of a new trial outside the five-day time frame in the Rule.

B. Robert McGar's Testimony

Appellant also argues that the trial court's exclusion of Robert McGar's testimony was an abuse of discretion. McGar's testimony, which was taken by avowal, included that he witnessed A.N. participating in sexual intercourse with another adult, David Berry (A.N.'s mother's boyfriend), in October 2000 or 2001. Additionally, McGar identified A.N. and David Berry in a photograph, which illustrated the two kissing on the lips. The date written on the back of the photograph was Friday, October 5, 2001. Both incidents predate the acts Appellant is alleged to have committed, which took place in 2003. Finally, McGar testified to telling AX's mother of his observations, to which she responded that he should mind his own business.

The trial court correctly exercised its discretion in excluding McGar's testimony. The rape shield rule, KRE 412, is designed "`to protect alleged victims of sex crimes against unfair and unwarranted assaults on character.'" Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.30[3], at 161 (4th ed. 2003) (quoting Evidence Rules Study Committee, Kentucky Rules of Evidence---Final Draft at 36 (1989)). This is done by excluding evidence offered to prove a victim's sexual behavior as well as evidence that is offered to prove a victim's sexual predisposition. Id. § 2.30[3], at 162. However, KRE 412(b)(1)(C) allows for the introduction of such evidence when it directly pertains to the offense charged, and Appellant contends that McGar's testimony falls under this exception.

The "directly pertaining to" exception has previously been utilized by this Court to allow into evidence a victim's past sexual behavior in response to evidence of a medical finding which tended to show that a young female victim had sexual intercourse. Anderson v. Commonwealth, 63 S.W.3d 135, 139-41 (Ky. 2001). Prior to adoption of the rape shield rule, such evidence was admitted because child victims are presumed not to be sexually active, and to allow medical evidence tending to show that the child had been penetrated infers guilt on the part of the defendant. The residual exception allows the defendant to present evidence of the child's sexual behaviors in order to rebut this inference of guilt. Id. The present case is simply not the sort of factual scenario that would warrant the use of the residual exception as allowed in Anderson. Although A.N. was a child, 11 years old, when the Appellant was alleged to have commenced a sexual relationship with her, there was no medical testimony to prove that any intercourse had occurred, and consequently no inference of Appellant's guilt. Additionally, as stated in Anderson, the exception is limited to the facts of that particular case, which meant "by no means... to expand the law to admit more evidence than necessary to allow a defendant a fair trial." Id. at 141. This comports with the notion that the exception "needs to be administered `carefully and sparingly [and without violating] the objective of protecting against unwarranted attacks on the character of an alleged victim.'" Robert G. Lawson, The Kentucky Evidence Law Handbook § 2.30[4][d], at 166 (4th ed. 2003) (quoting Evidence Rules Study Committee, Kentucky Rules of Evidence--Final Draft at 36 (1989)) (alteration in original). As such, the trial court correctly determined that the testimony was prohibited pursuant to the rape shield rule, and did not abuse its discretion.

For the foregoing reasons, the judgment of the Christian Circuit Court is affirmed.

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Minton, CJ; Abramson, Cunningham, Noble, Schroder and Scott, JJ., concur. Venters, J., not sitting.