

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-0002534-MR

RONALD LAKIN DOWNS, JR.

APPELLANT

v. APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 00-CR-00104

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, JOHNSON, AND HENRY, JUDGES.

BARBER, JUDGE: Appellant, Ronald Lakin Downs (Downs), appeals his conviction for first degree rape. We affirm the Montgomery Circuit Court.

A fifteen-year-old victim accused Downs of raping her in his vehicle by using forcible compulsion to make her engage in sexual intercourse with him. The victim was a friend of Downs's stepdaughter. The victim admitted consumption of alcoholic beverages prior to the incident. The victim was staying overnight at Downs's home with his stepdaughter when the attack occurred. Downs's went "riding around" with his

stepdaughter and the victim late at night. The victim testified that Downs tied her hands in the front seat and had sex with her. Initially, Downs' stepdaughter contended that Downs had intercourse with her too, but later modified her story. Downs's stepdaughter was seventeen at the time of the incident. The victim's grandmother noted bruises on the fifteen-year-old the next day, and questioned the girl, who cried and refused to tell her how she got the bruises. At a later date, the victim informed a counselor at Pathways of the rape. The grandmother also testified regarding her observation of bruising on the child, and what she had been told by the girls. At trial, Downs was convicted of the rape of the victim, and acquitted of the rape of his stepdaughter.

Downs admitted that he had consumed alcohol on the night in question. He claims that the girls asked him to drive them around late that evening. He asserted that the victim told him she would make it worth his while if he drove them to town. He took the girls in his car to the Quisenberry tunnel, and then to a remote pipe yard at Grassy Lick. He claims that the victim made advances toward him, but that he did not act on her advances.

At the close of the Commonwealth's case Downs moved for directed verdict on the ground that there was no evidence of forcible compulsion. Downs contends that the court was in error

when it denied his motion for directed verdict. The Commonwealth claims that the evidence showing bruising on the girls, and additional evidence of threats made by Downs following the incident constitute evidence of forcible compulsion. Downs asserted that the evidence of bruising on the girls was not properly attributed to any conduct by him. Downs further asserts that as his stepdaughter recanted the claim of threats at a later date, the alleged threats cannot constitute evidence of forcible compulsion.

Forcible compulsion may be proven by evidence of the use of physical force or a threat of physical force to the victim or to another person. KRS 510.010(2). The victim's claim was that Downs forced her down and tied her hands and had intercourse with her even after she told him no. The earlier testimony of Downs's stepdaughter was that Downs threatened to harm people if the girls ever told anyone what had happened. This testimony was later recanted by the stepdaughter, who was living with Downs at the time she recanted her earlier testimony. The victim did not recant her claims that Downs used force to make her engage in sexual acts with him.

The law requires that on a motion for directed verdict ". . . the trial court must draw all fair and reasonable inferences from the record in favor of the Commonwealth." Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991). A

defendant is entitled to reversal of his conviction on a claim of error in denial of the motion for directed verdict where, "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt. . . ." Id., at 187. Downs has not shown that it would be clearly unreasonable for a jury to find guilt based on the evidence presented by the Commonwealth. For this reason we affirm the trial court's ruling on the motion for directed verdict.

Downs claims error in the jury's inconsistent findings regarding the two rape charges. He contends that the charges and evidence were inextricably intertwined, and that the verdicts must be consistent. The testimony at trial with regard to his actions with the victim was clear and explicit. The testimony given by the victim as to what occurred between Downs and his stepdaughter was that the victim could not see what occurred. The stepdaughter asserted at trial that nothing happened to her and recanted her earlier claim of rape. The record shows that the testimony regarding Downs's actions with his stepdaughter was less clear cut. The finder of fact has the duty to decide which evidence must be given the greatest weight. Commonwealth v. Settles, 80 S.W.3d 424, 426 (Ky. 2002). Where, as here, there is conflicting evidence before the jury, the finder of fact must determine which evidence to believe. Perry v. Motorists Mut. Ins. Co., 860 S.W.2d 762, 764 (Ky. 1993). The

charges and evidence were not so inextricably intertwined that the jury's verdict constitutes reversible error. Downs's request for reversal on this ground is denied.

Downs asserts that the court mistakenly permitted the trial to continue following an earlier mistrial. Downs claims that the case was dismissed on mistrial on October 8, 2001, when his stepdaughter failed to show up to testify. The court did call a mistrial on October 8, 2001, due to the failure of a complaining witness to appear. The court used a verdict form to record the mistrial, and the reason therefore. Downs states that the form constitutes a dismissal of the indictment, and that he was discharged of any charges against him when the court signed the verdict form.

The record shows that the case was called for trial on October 8, 2001. At that time the Commonwealth announced ready despite the fact that the victim's stepdaughter was not present. Her mother informed the court that the minor would arrive shortly. The witness never arrived and could not be located. Downs made a motion to dismiss the case, which was denied orally by the court. The court filled out AOC verdict form 103-16, listing "mistrial called prior to jury being sworn due to the failure of the victim [Downs's stepdaughter] to appear, though under subpoena."

The court did not review or cross out a sentence pre-printed on the back of the form, which deals with preparation of a PSI and contains the sentence "if there are no findings of guilt shown above, the charges are hereby dismissed and the defendant discharged." As there was no jury finding, since trial had yet to be conducted, this sentence was not applicable to the case. The charges were not dismissed, the defendant remained under indictment, and neither defense nor the Commonwealth acted in any way as if the charges were dismissed.

The record contains a "Request for Leave Pursuant to RCr 10.10 to Amend Order Dated October 8, 2001, Nunc Pro Tunc." This request was made on the court's own motion to correct clerical error in the record. The request states that there was a provision in the trial verdict form that the court erroneously failed to exclude due to oversight. The court asserted in its request that failure to cross out this sentence constituted clerical error. The request notes that both cases were on appeal at the time the request was filed.

Trial was held on August 13, 2002. Downs was sentenced on November 8, 2002. A motion for bond pending appeal was heard on February 7, 2003. At that time, Downs contended that he should be allowed out on bond pending appeal as the charges against him had been dismissed pursuant to the trial verdict form in 2001. The court contends that the AOC form was

not the one she regularly used for mistrials, and that she neglected to review the back of the form prior to signing it. The court asserted that it could properly correct the clerical error pursuant to RCr 10.10. RCr 10.10 holds, in pertinent part, that clerical errors and oversights in the record “. . . may be corrected by the Court at any time on its own Initiative. . . .” This motion was made before the Appellate Court. This Court granted the trial court’s motion, and permitted the court leave to correct the clerical error.

Downs asserts that this case is analogous to Commonwealth v. Tabor, 941 S.W.2d 463, 464 (Ky. 1997), and Commonwealth v. Hicks, 869 S.W.2d 35, 37-38 (Ky. 1994). Those cases dealt with the trial court’s intentional dismissal of charges against a defendant. At issue in both those cases was whether the court intended the dismissal to be with or without prejudice. No attempt was made in either case to amend the orders of dismissal. Rather, the prosecutors attempted to re-indict or re-file the charges against the defendants. Those cases do not deal with the question at issue here, whether a court may request leave to correct its own clerical error. Downs’s authority is inapplicable to the situation at hand, that being correction of clerical error.

In determining whether an error in a judgment is clerical or judicial, the reviewing Court must review “whether

the amended judgment embodies the trial court's oral judgment as expressed in the record." Viers v. Commonwealth, 12 S.W.3d 672, 674 (Ky. 2000). A clerical error is an error in the writing or keeping of records, and may properly be corrected by the trial court. Cardwell v. Commonwealth, 12 S.W.3d 672, 674 (Ky. 2000). A trial court may properly set aside or correct a judgment where there is a lack of accuracy or truth in the original judgment. Potter v. Eli Lilly & Co., 926 S.W.2d 449, 453-454 (Ky. 1996). Common sense dictates that this provision should apply to other documents executed by the trial court as well. As the trial court denied the oral motion for dismissal, and later reset the trial, it was obvious that the preprinted line allowing dismissal of the charges did not embody the trial court's oral judgment.

The judgment of the Montgomery Circuit Court is affirmed.

ALL CONCUR.

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