

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002547-MR

WILLIAM THOMAS PAYNE

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE HENRY M. GRIFFIN, III, JUDGE
INDICTMENT NO. 99-CR-00288

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KNOPF, JOHNSON AND McANULTY, JUDGES.

KNOPF, JUDGE: William Thomas Payne appeals from a judgment of the Daviess Circuit Court, entered December 5, 2002, wherein he was convicted of kidnapping and sentenced to ten years' imprisonment. We affirm.

Payne's conviction arises from events occurring on August 21, 1999. On this date, T.J.S.¹, a fourteen-year-old male, left his mother's house after arguing with her. After leaving his residence, T.J.S. went to the home of a friend,

¹ In order to protect the identity of the children, only their initials are used in this opinion.

J.H., and requested permission to stay there for the night. J.H.'s mother refused to allow T.J.S. to stay, prompting J.H. to take T.J.S. to Payne's residence.² Upon arriving at Payne's house, T.J.S. asked Payne, who had been drinking, if he could spend the night in his home. Payne allowed T.J.S. to stay, provided that T.J.S. perform oral sex on him. Payne immediately informed J.H. and T.J.S. that he was joking about T.J.S. performing oral sex and allowed T.J.S. to stay. Satisfied with Payne's explanation, J.H. went home while T.J.S. entered Payne's house.

After T.J.S. entered Payne's house, Payne slammed and locked the door. Payne then ordered T.J.S. to remove his clothing and threatened to beat T.J.S. if he failed to comply. Faced with Payne's threat, T.J.S. removed his clothes. After T.J.S. removed his clothing, Payne forced T.J.S. to bend over on a couch in the living room. At this point, Payne allegedly sodomized T.J.S. After completing this act, Payne went into another room, obtained some K-Y jelly and returned to the living room. Upon his return to the living room, Payne again allegedly sodomized T.J.S. Afterward, by renewing his threat to beat T.J.S., Payne forced T.J.S. to perform oral sex on him.

Meanwhile, J.H. returned to Payne's residence and knocked on the door. Payne answered the door naked. J.H. asked

² Payne's daughter was an acquaintance of both T.J.S. and J.H.

Payne where T.J.S. was. Payne informed J.H. that T.J.S. had left the residence. However, J.H. saw T.J.S., who was not wearing a shirt, sitting on the couch in Payne's living room. J.H., fearful that something was wrong, left Payne's residence and returned to his house. J.H. told his mother what he saw at Payne's residence. J.H.'s mother immediately called the police.

Owensboro Police officers John Gatewood and Rick Latanza responded to the emergency call from J.H.'s mother. Officers Gatewood and Latanza interviewed J.H. and, after talking with J.H., proceeded to Payne's house. Officer Gatewood knocked on Payne's front door while Officer Latanza knocked on the back door. Both officers also shined their flashlights through the windows of Payne's house, but received no response from Payne or T.J.S.

T.J.S. and Payne, meanwhile, both heard the officers knocking and saw the flashlights. In order to avoid the police officers, Payne moved T.J.S. into the kitchen and covered T.J.S.'s mouth with his hand to prevent T.J.S. from screaming. Payne also told T.J.S. that, if he screamed, Payne would severely beat him. The officers, based upon their observations, believed the residence was empty and left.

After Officers Gatewood and Latanza left Payne's residence, T.J.S. was able to push Payne away from him and escaped from the house. T.J.S., wearing only his shorts, ran to

J.H.'s house while screaming for help. J.H.'s mother again called the Owensboro Police Department and requested that the officers return. Officers Gatewood and Latanza returned to the scene and discovered T.J.S. at J.H.'s house. T.J.S. informed the police officers that Payne was holding him against his will when they first came to Payne's residence. Officers Gatewood and Latanza then entered Payne's home to search for Payne. While they did not find Payne inside the house, Officers Gatewood and Latanza found T.J.S.'s shirt and shoes on a couch in Payne's living room. The officers also found an open tube of K-Y jelly on a mattress in a bedroom. Eventually, the police apprehended Payne in a neighbor's garage. While in custody, Payne denied doing anything to T.J.S.

On August 30, 1999, the Daviess County Grand Jury indicted Payne for one count of kidnapping and three counts of first-degree sodomy. These charges were tried before a jury in November 2002. At trial, the jury acquitted Payne of the sodomy counts and convicted Payne of kidnapping and recommended a sentence of ten years' imprisonment. The trial court, on December 5, 2002, adopted the jury's sentencing recommendation. This appeal followed.

On appeal, Payne argues that the trial court erred by refusing to dismiss the kidnapping charge based upon the exemption provision contained in KRS 509.050. Payne concedes

that this specific argument was not made at trial, making the issue unpreserved. As such, we review this issue pursuant to RCr 10.26 under the standards for palpable and substantial error. The requirement of "manifest justice" as used in RCr 10.26 means that the error must have prejudiced the substantial rights of the defendant in that, absent the error, a substantial possibility exists that the result of the trial would have been different.³

KRS 590.050 provides in relevant part:

A person may not be convicted of unlawful imprisonment in the first-degree, unlawful imprisonment in the second-degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of the offense, unless the interference exceeds that which is ordinarily incidental to the commission of the offense which is the objective of his criminal purpose.

The kidnapping exemption statute is to be strictly construed and the burden is upon a defendant to show that it should apply.⁴ It is the duty of the trial judge to determine if a kidnapping charge is excessive or unfounded under the

³ Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996); Schaefer v. Commonwealth, Ky., 622 S.W.2d 218 (1981); Castle v. Commonwealth, Ky. App., 44 S.W.3d 790, 793-794 (2000).

⁴ Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 180 (2001), citing Timmons v. Commonwealth, Ky., 555 S.W.2d 234, 241 (1977).

circumstances of the case.⁵ This Court will not disturb the trial judge's determination absent an abuse of discretion.⁶

Application of the exemption is determined on a case-by-case basis.⁷ A three-part test must be satisfied before the exemption is applicable. First, the criminal purpose must be the commission of an offense defined outside Chapter 509. Second, the interference with the victim's liberty must occur immediately with and incidental to the commission of the underlying offense. Third, the interference with the victim's liberty must not exceed that which is normally incidental to the commission of the underlying offense.⁸ If the evidence does not establish all of these three factors, then the defendant is not entitled to the benefit of the exemption statute.⁹

It is clear that Payne satisfies the first prong of the inquiry because sodomy is defined outside KRS Chapter 509. The question now becomes whether the interference with the victim's liberty was immediate with and incidental to the commission of the sexual abuse and of a type normally associated with such offense. In Timmons, we held that "if the victim of a

⁵ Murphy, supra, citing Calloway v. Commonwealth, Ky., 550 S.W.2d 501 (1977).

⁶ Murphy, supra.

⁷ Murphy, supra.

⁸ Griffin v. Commonwealth, Ky., 576 S.W.2d 514, 516 (1978).

⁹ Id.

crime is going to be restrained of his liberty in order to facilitate its commission, the restraint will have to be close in distance and brief in time in order for the exemption to apply."¹⁰

In this case, the record reveals that J.H. estimated that 15 to 20 minutes passed between his departure from Payne's residence and his return. Upon his second arrival at Payne's house, Payne answered the door naked and T.J.S. was sitting on Payne's couch without his shirt. T.J.S. testified that Payne committed three acts of sodomy during J.H.'s 15 to 20 minute absence. Moreover, J.H. noted that another 15 to 20 minutes elapsed between his mother's first call to the Owensboro Police Department and the first arrival and departure from Payne's residence. Officer Gatewood testified that his initial, unsuccessful investigation took approximately 10 minutes. After the police left Payne's residence, following their initial investigation, T.J.S. escaped from Payne's home screaming for help. It thus appears that Payne was alleged to have sodomized T.J.S. only during the first 15 to 20 minutes of T.J.S.'s stay. Payne was not alleged to have committed any further acts of sodomy on T.J.S. during the remaining 15 to 30 minutes. Instead, during the final 15 to 30 minutes of T.J.S.'s captivity, Payne allegedly restrained T.J.S. not to commit or

¹⁰ Timmons, 555 S.W.2d at 241.

attempt to commit any additional acts of sodomy on T.J.S., but rather to hide T.J.S. from the police. As such, T.J.S.'s alleged confinement did not occur immediately with or incidental to the commission of the alleged acts of sodomy.

Given our holding that Payne did not satisfy the second prong of the kidnapping exemption test, we need not consider whether the facts of this case satisfactorily meets the test's final prong.¹¹ Accordingly, the trial court correctly refused to dismiss the kidnapping charge against Payne because Payne was simply not entitled to the KRS 509.050 kidnapping exemption.

For the aforementioned reasons, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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¹¹ Griffin, supra.