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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000435-MR
&
NO. 2005-CA-000511-MR

COMMONWEALTH OF KENTUCKY — APPELLANT/ CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES BOTELER,JR., JUDGE
INDICTMENT NOS. 00-CR-00068 & 00-CR-00291

JOHN RAY PRICE — APPELLEE/ CROSS-APPELLANT

AND

NO. 2006-CA-000454-MR

JOHN RAY PRICE — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES BOTELER,JR., JUDGE
INDICTMENT NOS. 00-CR-00068 & 00-CR-00291

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HOWARD[1] AND VANMETER, JUDGES; GUIDUGLI,[2] SENIOR JUDGE.

HOWARD, JUDGE: These appeals and cross-appeal are from an order of the Hopkins Circuit Court granting in part and denying in part a motion filed by John Ray Price (hereinafter Price), pursuant to RCr 11.42 and CR 60.02, to set aside his conviction on five counts of first-degree sexual abuse, one count of first-degree sodomy, one count of attempted first-degree rape and two counts of first-degree rape.

Price was convicted in 2001, after a jury trial, and was sentenced to a total of 69 years' imprisonment. He appealed as a matter of right to the Kentucky Supreme Court, which affirmed the judgment of conviction in an unpublished opinion, rendered August 21, 2003.[3] The Supreme Court summarized the facts leading to Price's conviction as follows:

> Appellant's [Price's] acquaintance with F.P., the victim in this case, developed as a result of her membership at Life Temple Church in Madisonville, Kentucky, where Appellant started as youth pastor and eventually became full pastor of the congregation. F.P., one of four children of a paraplegic father and a double amputee mother, began attending Appellant's church when she was seven (7) years old. She became heavily

[1] Judge James I. Howard completed this opinion prior to the expiration of his appointed term of office on December 6, 2007. Release of the opinion was delayed by administrative handling.

[2] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[3] *Price v. Commonwealth,* 2001-SC-1023-MR.

> involved in the church youth group and traveled with Appellant and other church members on numerous mission trips to countries in Africa and Europe. She enrolled in and graduated from the church school rather than the public schools in her home county. In addition, F.P. frequently performed gratuitous domestic services in Appellant's home; she cooked, cleaned and helped his wife care for their children. She testified that she would be picked up at school at approximately three o'clock and would stay at the Price home until they finished a televised evangelist program around 10 o'clock in the evening. F.P.'s family lived some distance away from the Price home. Appellant told her that it was a hassle to take her home in the evenings, and since a school administrator lived nearby, someone was available to take F.P. to school the following day. So, F.P. often stayed overnight at the Price home. As time passed, F.P. became increasingly enmeshed with the church and eventually began working as Appellant's full-time administrative assistant.
>
> F.P. testified that Appellant first initiated inappropriate sexual contact with her in the fall of 1983 when she was fourteen (14) years of age. The opportunity to engage in the alleged unwelcome sexual advances primarily came about because of F.P.'s frequent overnight stays at the Price home after assisting his family with various household tasks. F.P. was taught by Appellant that service in his home was equivalent to serving God. F.P., recognizing Appellant as an authority figure, did not challenge Appellant's instruction. In the beginning, Appellant began inappropriate contact with F.P. by fondling her breasts. The contact escalated to attempting digital penetration, actual digital penetration, and then the performance by F.P. of sexual acts on Appellant. The attempted rape allegedly occurred when F.P. was seventeen (17). While F.P. was between the ages of eighteen (18) and twenty-two (22), Appellant raped F.P. twice.

Price's argument on direct appeal was that the trial court erred in failing to direct a verdict on all counts because the Commonwealth failed to introduce sufficient

evidence of forcible compulsion. The Supreme Court held that sufficient evidence of forcible compulsion existed and affirmed the conviction.

In February 2004, Price filed his motion for post-conviction relief pursuant to RCr 11.42 and CR 60.02, leading to this appeal. The Hopkins Circuit Court conducted an evidentiary hearing and on February 22, 2005, entered an order which set aside Price's conviction and 20-year sentence for sodomy. However, the court denied Price's motion as to all other offenses for which he had been convicted. The Commonwealth appeals from the trial court's order vacating the sodomy conviction. Price cross-appeals from the denial of his other claims for relief, and has also filed a separate appeal from the denial of his motion for a new penalty phase trial or a new sentencing hearing.[4]

The Commonwealth, on its appeal, asserts that the circuit court erred in vacating Price's conviction and 20-year sentence for sodomy. The trial court granted Price's motion based on the argument that his conviction violated the *ex post facto* clause of Article 1, Section 10 of the United States Constitution. Specifically, Price argued that KRS 500.050(4), adopted in 1990, provided that a charge of deviate sexual intercourse could not be prosecuted unless it was reported to police within one year of the offense. *See* 1990 Ky. Acts Ch. 448 Sec. 2. Since the victim testified that the underlying acts were committed in 1986 and the offense was not reported until 1998, 12 years later, he argued

[4]Price additionally filed a separate notice of appeal from the Hopkins Circuit Court February 22, 2005, order, which appeal was docketed in this court as 2005-CA-000577-MR. Pursuant to a show cause order of this court, Price filed a motion to withdraw appeal number 2005-CA-000577-MR as duplicative of his cross-appeal. Appeal number 2005-CA-000577-MR was dismissed by order of this court on July 24, 2005. Also, Price filed a motion in the Kentucky Supreme Court to transfer these appeals and cross-appeal to that court, which motion was denied.

that it was ineffective assistance of counsel to fail to raise this defense at his trial. KRS 500.050(4) was repealed effective July 14, 2000. *See* 2000 Ky. Acts Ch. 401 Sec. 5. The Commonwealth apparently attempted to "cure" this potential problem before trial by dismissing the first indictment and obtaining a second indictment, charging the same offense, after KRS 500.050(4) was repealed. Relying on *Stogner v. California*, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003), the circuit court held that the charge was still barred under the *ex post facto* clause, and agreed with Price's argument that his counsel was ineffective for failing to raise this "statute of limitations" defense.

At the trial court level, Price argued, the Commonwealth agreed,[5] and the circuit court held, that KRS 500.050(4), in effect from 1990 to 2000, established what amounted to a one-year statute of limitations for all charges of deviate sexual intercourse. This section read as follows:

> (4) No offense in KRS Chapter 510 involving deviate sexual intercourse or sexual intercourse by the other spouse shall be prosecuted unless formally reported to the police within one (1) year after the commission of the offense. The report shall be signed by the victim of the offense.

[5] The trial court noted, after its discussion of the doctrine of the last antecedent, "It may be that the preceding discussion was unnecessary, as evidently the Commonwealth concedes Price's construction of the legislature's grammar and syntax but not the effect of *Stogner.*" The Commonwealth has attempted to raise this issue in this Court only in a footnote to its brief and candidly acknowledged at oral argument that the issue was not preserved for appeal by being argued in the trial court.

It seems clear to us that the one-year reporting requirement[6] set out in KRS 500.050(4) applied only to acts between marriage partners, whether involving "sexual intercourse" or "deviate sexual intercourse." Price's argument, accepted by the Commonwealth and the trial court, was that, based on the doctrine of the last antecedent, the phrase "by the other spouse" modified only "sexual intercourse", and not "deviate sexual intercourse." This would make the one-year reporting requirement apply to non-deviate sexual intercourse only when it occurred between spouses, but would apply the requirement to all deviate sexual intercourse. The doctrine of the last antecedent is a reputable doctrine and a valid rule of statutory interpretation. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet,* 133 S.W.3d 456 (Ky. 2004). However, it is not the only such rule. It is also established that the "seminal duty" of a court in interpreting a statute is to effectuate the intent of the legislature. *Commonwealth v. Plowman,* 86 S.W.3d 47 (Ky 2002). Statutes should not be interpreted to bring about an absurd or unreasonable result. *Estes v. Commonwealth,* 952 S.W.2d 701 (Ky. 1997); *Executive Branch Ethics Commission v. Stephens,* 92 S.W.3d 69 (Ky. 2002); *Schoenbachler v. Minyard,* 110 S.W.3d 776 (Ky. 2003); *Lamb v. Holmes,* 162 S.W.3d 902 (Ky. 2005).

In this case, we believe it would be an unreasonable and absurd result to conclude that the legislature intended to establish a one-year reporting requirement for all crimes involving deviate sexual intercourse, but not for crimes involving non-deviate

[6] KRS 500.050(4) provided a requirement that offenses be reported within one year, not that charges be filed within that time. Therefore, it was not technically a statute of limitation. However, the effect in this case is the same. This section, if applicable, would clearly have barred this prosecution, as to the charge of sodomy, as such was not reported within one year.

sexual intercourse (except between spouses) or any other felony crimes. We believe the clear intent of the legislature, in adopting KRS 500.050(4) was to protect and support the institution of marriage, not to grant leniency to deviate sex offenders.

However, because the Commonwealth did not raise this issue in the trial court, agreeing that the doctrine of the last antecedent made the qualifying language, "by the other spouse" apply only to "sexual intercourse" and not to "deviate sexual intercourse," it cannot now raise this issue on appeal.

Neither has Commonwealth argued the doctrine of palpable error, under RCr 10.26, on this appeal. Therefore, we are limited to consideration of the sole argument that the Commonwealth did raise in the trial court and thus preserve for appellate review. That argument is that since KRS 500.050(4) was not adopted until 1990, it was not in effect when this offense occurred in 1986, and therefore the *ex post facto* clause is not implicated by this prosecution.

In *Stogner v. Californis, supra.*, the United States Supreme Court held that "a law enacted after expiration of a previously applicable limitations period violates the E*x Post Facto* Clause when it is applied to revive a previously time-barred prosecution." *Id.* 539 U.S. at 632-633, 123 S.Ct. at 2461. The Court explained the rationale for this holding as follows:

> The law at issue here created a new criminal limitations period that extends the time in which prosecution is allowed. It authorized criminal prosecutions that the passage of time had previously barred. Moreover, it was enacted after prior

> limitations periods for Stogner's alleged offenses had expired. . . .
>
> Judge Learned Hand . . . wrote that extending a limitations period after the State has assured "a man that he has become safe from its pursuit ... seems to most of us unfair and dishonest." . . . It has deprived the defendant of the "fair warning," . . . that might have led him to preserve exculpatory evidence. . . . "The statute [of limitations] is ... an amnesty, declaring that after a certain time ... the offender shall be at liberty to return to his country ... and ... may cease to preserve the proofs of his innocence." . . .
>
> Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. . . . And that judgment typically rests, in large part, upon evidentiary concerns-for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable. . . .
>
> [L]ike Judge Learned Hand, we believe that this retroactive application of a later-enacted law is unfair. And, like most other judges who have addressed this issue, . . . we find the words *"ex post facto"* applicable to describe this kind of unfairness.

Id. 539 U.S. at 610-611, 615, 621, 123 S.Ct. 2449-2450, 2452, 2455. (Internal citations omitted.)

The trial court rejected the Commonwealth's argument and held that the *ex post facto* clause, as interpreted by *Stogner,* prevented the prosecution of deviate sexual intercourse which occurred either before 1990 or between 1990 and 2000, unless those charges were reported within one year, and further held that to allow the Commonwealth to prosecute the second indictment, issued after the repeal of KRS 500.050(4), and the voluntary dismissal of a previous indictment brought before that repeal, would raise due

process concerns. It is not necessary for us to discuss the due process issue, because we believe that the trial court correctly interpreted *Stogner,* and that the repeal of KRS 500.050(4) cannot be constitutionally interpreted to allow the prosecution of any crime previously barred by that statute, which occurred prior to the date of its repeal. Inasmuch as the Commonwealth failed to preserve any other issue for our consideration on this appeal, we conclude that the court did not err in finding that Price's counsel was ineffective for failing to raise the "limitations" defense under KRS 500.050(4).

The majority of the issues raised on Price's appeal seek to revisit the Kentucky Supreme Court's opinion which affirmed his judgment of conviction. Price asserts that the judgment of conviction must be reversed and the charges dismissed, or in the alternative that he should be granted a new trial, because the Supreme Court, in his view, expanded the definition of forcible compulsion and converted forcible rape and other sex crimes requiring forcible compulsion to strict liability crimes. The Supreme Court's opinion is the law of the case and is binding upon the parties, the trial court, and our Court. *Hogan v. Long*, 922 S.W.2d 368 (Ky. 1995). "[I]f a party is aggrieved by an adverse appellate determination, his remedy is in an appellate court at the time the adverse decision is rendered." *Williamson v. Commonwealth*, 767 S.W.2d 323, 325 (Ky. 1989). Price filed no petition for rehearing or petition for writ of certiorari. Post-conviction motions for relief, under RCr 11.42 or CR 60.02, may not be used to collaterally attack a judgment on grounds that could have have been raised on a direct appeal. *Thacker v. Commonwealth*, 476 S.W.2d 838 (Ky. 1972). Therefore, we shall not

consider Price's claims requesting us to reconsider the Kentucky Supreme Court opinion in his direct appeal.

Price also contends that the trial court erred in denying his motion for post-conviction relief on the convictions for offenses other than sodomy, on the grounds that he received ineffective assistance of counsel in the penalty phase of his trial and at his sentencing hearing. We disagree.

The standard governing RCr 11.42 relief was recently reiterated in *Simmons v. Commonwealth*, 191 S.W.3d 557, 561 (Ky. 2006):

> In order to be classified as ineffective, the performance of counsel must be below the objective standard of reasonableness and so prejudicial as to deprive a defendant of a fair trial and a reasonable result. *Strickland* [*v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)]. "Counsel is constitutionally ineffective only if performance below professional standards caused the defendant to lose what he otherwise would probably have won." . . . The critical issue is not whether counsel made errors, but whether counsel was so thoroughly ineffective that defeat was snatched from the hands of probable victory. . . .
>
> In reviewing a claim of ineffective assistance, the court must focus on the totality of evidence before the judge or jury and assess the overall performance of counsel throughout the case in order to determine whether the identified acts or omissions overcome the presumption that counsel rendered reasonable professional assistance. . . . A defendant is not guaranteed errorless counsel or counsel judged ineffective by hindsight, but counsel likely to render and rendering reasonably effective assistance. . . .
>
> *Strickland* notes that a court must indulge a strong presumption that the conduct of counsel falls within the wide range of reasonable professional assistance. . . .

> The movant has the burden of establishing convincingly that he or she was deprived of some substantial right which would justify the extraordinary relief provided by post-conviction proceeding. . . . A reviewing court must always defer to the determination of facts and witness credibility made by the circuit judge.

(Internal citations omitted.).

Applying these principles to the case at bar, we find no error in the trial court's order denying Price's contention that he received ineffective assistance of counsel. Price raises numerous assertions of ineffectiveness of his trial counsel during the penalty and sentencing phases of the trial. The circuit court conducted an evidentiary hearing on these allegations, during which the trial attorney explained his reasons for his trial strategy. The trial court found that "[m]uch of the evidence that could have been presented at the penalty phase had been presented in the guilt phase." Further, Price's trial attorney testified that he decided not to introduce additional evidence during the penalty phase based on his estimation of the jury's perception of his client and his knowledge of adverse testimony that the Commonwealth would have attempted to introduce to rebut Price's witnesses. In assessing trial counsel's decision as to what witnesses to call or arguments to make, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689. Furthermore, "It is not the

function of [an appellate court] to usurp or second guess counsel's trial strategy." *Baze v. Commonwealth,* 23 S.W.3d 619, 624 (Ky. 2000).

Likewise, Price fails to show that his trial attorney's performance during the sentencing hearing was deficient. After reviewing trial counsel's overall performance throughout the trial, we conclude that Price received reasonably effective assistance of counsel and that Price failed to demonstrate that there is a reasonable probability that the jury in the penalty phase of his trial or the court at his sentencing would have reached a different result had his case been presented as he now believes it should have been.

Finally, Price contends that his conviction for sodomy, vacated by the trial court, "spilled over" and affected the jury's guilty verdict on the other charges. Price advances this argument without citation to legal authority or to any evidence of record. We will not indulge in mere speculation. The trial court did not err in denying Price's motion in this respect.

Based on the foregoing analysis, the order of the Hopkins Circuit Court, granting in part and denying in part Price's motion to set aside his conviction, is affirmed in all respects.

ALL CONCUR.

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