

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001586-MR

ZACHARY THOMPSON

APPELLANT

v. APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE PAUL ISAACS, JUDGE
ACTION NO. 02-CR-00107

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Zachary Thompson was convicted after a bench trial of one count of first-degree sexual assault and one count of second-degree sexual assault stemming from admitted sexual activity with his first cousin who was thirteen years of age at the time. He argues in this appeal that the trial court erred: 1) in failing to conduct a *Boykin* hearing concerning admissions made in his counsel's post-trial memorandum; 2) in refusing his post-judgment request for findings of fact regarding the verdict; 3) in

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

failing to grant a directed verdict of acquittal on the basis of insufficient evidence; and 4) in admitting taped interviews of the victim, her brother and himself with a state police officer. We find no reversible error in any of these contentions and affirm.

Thompson, who is approximately four years older than the victim, was initially indicted on 216 counts of first-degree rape and 46 counts of first-degree sodomy stemming from alleged sexual relations with the victim and her brother who are his first cousins. Prior to trial, all counts were dismissed except for two counts of first degree rape regarding his female cousin. Thompson does not dispute the victim's claim of a longstanding course of frequent sexual activity commencing, according to her trial testimony, when she was seven or eight years old and Thompson was eleven. Although Thompson repeatedly denied the use of any force in these encounters, the victim initially told the investigating officer that Thompson had raped her beginning at age twelve by holding her down and that this continued for approximately two years. At trial, however, the victim denied that force was involved and described the sexual encounters as mere "experimentation."

The Commonwealth then moved without objection the admission of the investigating officer's taped interviews with the victim, her brother (who had also lodged charges against Thompson but refused to testify at trial), and Thompson himself. The officer testified without objection as to the victim's initial version of Thompson's actions, as well as to her statement that she did not come forward sooner out of fear. In his testimony, Thompson admitted having sex with the victim and her brother but emphasized that the sex was consensual and that no force was involved. On cross-

examination, he stated that was not retreating from the taped statement he had given the state trooper.

At the conclusion of the testimony, the trial judge directed counsel to submit written memoranda concerning Thompson's guilt or innocence, the degree of guilt, and the degree of proof introduced at trial. He also offered an opportunity for oral argument if either side desired it. The memorandum submitted on behalf of Thompson sought amendment of the rape charges to first-degree sexual abuse and that the sentences be probated. The trial court thereafter entered a verdict finding Thompson guilty of one count of first-degree sexual abuse and one count of second-degree sexual abuse. Thompson was ultimately sentenced to three years' imprisonment on each count, probated for a period of five (5) years.

After a notice of appeal was filed, Thompson acquired new counsel who filed a motion requesting findings of fact, a correction of the judgment to conform to the verdict, and a modification of the verdict by finding him guilty of two counts of second-degree sexual abuse. Although the trial court corrected what appeared to be a clerical error in the judgment, the rest of the motion was denied.

Thompson first argues in this appeal that the post-trial memorandum filed by his counsel was tantamount to a guilty plea which, pursuant to the requirements of *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), necessitated an on-the-record waiver of his constitutional rights. We disagree.

In the post-trial memorandum, counsel submitted argument to the court that based upon the evidence adduced at the bench trial the charges against Thompson should

be amended from first-degree rape to first-degree sexual abuse and the resulting sentences probated. The record in this case is clear that by Thompson's own admission he was guilty of no less than second-degree sexual abuse. At trial and during the taped interview, Thompson admitted to a pattern of sexual conduct with the victim which, together with the trial testimony of the investigating officer, would have supported a finding of guilt on both charges of first-degree sexual abuse, if not rape. On these facts, we find the rationale of *Furnish v. Commonwealth*, 95 S.W.3d 34, 52 (Ky. 2002), persuasive:

In *Wiley*, [*Wiley v. Sowders*, 647 F.2d 642 (6th Cir.1981), *cert. denied*, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981)], the Sixth Circuit Court of Appeals granted a petitioner's request for a writ of habeas corpus on the grounds that petitioner's counsel had admitted petitioner's guilt as a trial tactic, but had not gained petitioner's knowing consent prior to the admission. The Court held:

[A]n attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of 'not guilty' unless the defendant unequivocally understands the consequences of the admission. Counsel may believe it tactically wise to stipulate to a particular element of a charge or to issues of proof. However, an attorney may not stipulate to facts which amount to the 'functional equivalent' of a guilty plea.

Id. at 649. (citations omitted). The Court concluded that the client's knowing consent to such trial strategy must appear on the record, outside the presence of the jury, in a manner consistent with *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

However, in a subsequent companion case, *Wiley v. Sowders*, 669 F.2d 386, 389 (6th Cir.1982), the Court clarified its prior holding, stating "an on-the-record inquiry by the trial court to determine whether a criminal defendant has consented to an

admission of guilt during closing arguments represents the preferred practice. **But we did not hold in *Wiley*, and do not now hold, that due process requires such a practice.”** Thus, contrary to Appellant's argument, the trial court did not err in failing to conduct a *sua sponte* inquiry as to Appellant's consent to his counsel's strategy.

More importantly, while Appellant couches this issue in terms of the trial court's duty, this is essentially an ineffective assistance of counsel claim. This court has held as a general rule that claims of ineffective assistance are not properly raised on direct appeal, but rather must proceed by way of a post-trial motion under RCr 11.42 to allow the trial court the opportunity to review the issues. *Humphrey v. Commonwealth, Ky.*, 962 S.W.2d 870, 872 (1998). [Emphasis added.]

We find that reasoning applies with even greater force where, as here, the arguments in question were addressed to the judge as fact-finder and defendant had previously admitted the factual underpinnings of the charges, save for the use of force. It must also be emphasized that the proof before the trial court would have supported the far more serious charges. Under these circumstances, we find no violation of Thompson's constitutional right of due process.

Thompson also alleges that the judgment must be vacated and the case remanded for factual findings pursuant to CR 52.01. We disagree for two reasons. First, we are convinced that the more appropriate citation is to RCr 9.26 which provides:

2) In a case tried without a jury the court shall make a general finding and shall in addition, **on request made before the general finding, find the facts specially**. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear in it. [Emphasis added.]

Clearly, the request for specific findings did not comport with the rule as it was lodged only in a post-trial motion. However, even if we were to agree that CR 52.02 findings would have been appropriate, their denial in this case was not error. In *Commonwealth v. Harrelson*, 14 S.W.3d 541, 548 (Ky. 2000), the Supreme Court clarified the purpose of making such findings:

One of the major reasons for CR 52.01 is to have the record show the basis of the decision of the trial court so that on appellate review, the appellate court may understand more completely the entire controversy. *Reichle v. Reichle*, Ky., 719 S.W.2d 442 (1986). The reviewing court may test the accuracy of the findings and conclusions and determine whether they are sufficiently comprehensive and pertinent to the issues so as to provide a basis for a decision. The clearly erroneous standard is sufficiently broad to permit a reviewing court to adopt a method of review which best fits the questions involved and the particular facts in a specific case. **The appellate court should review each case according to what is most appropriate under the specific circumstances.** [Emphasis added.]

Here, the general finding in the verdict falls within the *Harrelson* criterion because it is sufficient to afford review.

Secondly, because the victim was thirteen years of age at the time of the crimes charged, Thompson could be guilty of first-degree sexual abuse only if the trial judge was convinced from the evidence that force had been employed in the commission of the offense. The elements of first-degree sexual abuse are set out in KRS 510.110:

- (1) A person is guilty of sexual abuse in the first degree when:
 - (a) He or she subjects another person to sexual contact by forcible compulsion; or
 - (b) He or she subjects another person to sexual contact who is incapable of consent because he or she:

1. Is physically helpless;
2. Is less than twelve (12) years old; or
3. Is mentally incapacitated.

Because the Commonwealth's proof was that the acts of sexual intercourse occurred after Thompson turned eighteen and that he was four years older than the victim, there is no dispute that the element set out in part (1)(b)(2) is inapplicable because she would have been at least thirteen or fourteen years old at the time of the offense. Accordingly, guilt under this statute could be predicated only upon a finding of forcible compulsion under part (1)(a). The failure to make specific findings did not in any way impede appellate review and thus did not constitute reversible error.

Thompson's third allegation of error focuses upon the denial of his motion for a directed verdict of acquittal. Admittedly, this issue has not been properly preserved for our review and we are convinced that the failure to renew the motion for a directed verdict does not rise to the level of palpable error. Nevertheless, we will briefly address Thompson's contention that there was no evidence of forcible compulsion or evidence that more than one episode of sexual activity occurred after Thompson turned eighteen years of age.

Thompson's argument in this regard centers upon the contention that the investigating officer's testimony was improperly admitted in violation of KRE 801A. Contrary to statements made to the investigating officer, the victim testified at trial that the sexual activity with Thompson was entirely consensual and that no force was ever involved. The investigating officer subsequently testified without objection as to the victim's contrary statements made in the course of his investigation. Thompson

complains that the officer's testimony regarding these statements could not be considered an exception to the hearsay rule for failure to comply with the foundation and examination requirements of KRE 801A. This Court recently rejected this precise complaint in *Whalen v. Commonwealth*, 205 S.W.3d 238, 241-2 (Ky.App. 2006):

Whalen counters that Sergeant Palmer's recollection of Newman's prior statements does not qualify for the hearsay exception under KRE 801A(a)(2) because the rule requires that the prior consistent statement be admitted into evidence through the impeached declarant rather than a third party. The appellate courts of this state have not had occasion to rule upon this issue. Thus, we turn to the federal courts for guidance.

Although Whalen's argument would appear to be supported by the wording of KRE 801A(a)(2), the federal courts have unanimously taken a position advanced here by the Commonwealth. According to the federal courts, testimony of a prior consistent statement may be elicited from someone other than the declarant if the person testifying has personal knowledge of the prior consistent statement and if the declarant testifies at the trial and is subject to cross-examination about the prior statement. In the case at hand, it does not appear that Newman was actually cross-examined concerning the challenged statement she made to Sergeant Palmer. But actual cross-examination of Newman, the declarant, concerning the challenged statement is not required. **Rather, the cross-examination requirement is satisfied so long as the declarant is merely subject to being recalled as a witness. Since there is no indication that Newman was not subject to recall as a witness, then the fact that she was not actually cross-examined by Whalen's counsel is immaterial.**

After closely examining the arguments and the relevant authority, we conclude that the unanimous opinion of the federal courts regarding the admissibility of statements like the one at issue in this case is a correct statement of the law. So the Commonwealth's argument that Newman's statement to Sergeant Palmer falls within KRE 801A(a)(2)'s exception to the hearsay rule is correct. Accordingly, the trial court did

not err in admitting the challenged testimony. [Citations omitted, emphasis added.]

Because the victim in this case was subject to recall, the testimony of the investigating officer was admissible as an exception to the hearsay rule and is clearly sufficient to withstand Thompson's motion for a directed verdict.

Finally, Thompson argues that it was error to admit the investigating officer's taped interviews of the victim, her brother, and Thompson. Although he admits that there was no objection to admission of the tape, he suggests that the issue must be reviewed as palpable error. We have reviewed the tape which contains very little questioning of the victim who was apparently too distraught to continue and a lengthy interrogation of Thompson in a police squad car. Because that tape contains no incriminating statements from the victim and Thompson stated at trial that he was "not changing [his] statement" to the investigating officer, we fail to discern any basis for a claim of palpable error in the admission of the tape.

The judgment of the Bourbon Circuit Court is affirmed.

ALL CONCUR.

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