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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001274-MR

ARNOLD DAVIS SPRAGUE, IV — APPELLANT

v.

APPEAL FROM UNION CIRCUIT COURT
HONORABLE C. RENÉ WILLIAMS, JUDGE
ACTION NO. 09-CR-00024

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, STUMBO AND WINE, JUDGES.

STUMBO, JUDGE: Arnold Davis Sprague appeals from a Judgment of the Union Circuit Court reflecting a jury verdict finding Sprague guilty of five counts of First Degree Sexual Abuse. Sprague argues that the Sexual Abuse statute - KRS 510.110 - is ambiguous, that the jury instructions were improper, and that the trial judge erroneously refused the jury's request to interpret or clarify the instructions. We find no error, and affirm the judgment on appeal.

In 1994, Arnold Davis Sprague married Mary Sprague (now Vanover). The marriage produced four children, the oldest of whom is "R.S."[1] In 2007, when R.S. was about 13 years old, she played on a softball team with a 15 year old female named T.F. Over the months that followed, R.S. and T.F. became good friends and they began visiting each other's homes. Through the developing friendship of R.S. and T.F., Sprague became acquainted with T.F. Sprague was employed as a boys' soccer coach at the school and at times was a substitute teacher and school bus driver.

During softball season, the parents of either R.S. or T.F. would transport them to Indiana for batting practice. T.F. also began spending the night at Sprague's home. Between her freshman and sophomore years in high school, T.F. began to view Sprague as more than just R.S.'s father. T.F. would see Sprague at school, at ballgames and at Sprague's home.

On October 9, 2008, Sprague drove T.F. to a farm in Union County, Kentucky, where he had sex with T.F. At the time, T.F. was 16 years old. Thereafter, Sprague and T.F. had sex several other times, including at her house and at Sprague's house. Sprague was going through a divorce at this time, and on occasion T.F. would pick up his children from school. T.F. had committed to play softball at the University of Louisville after she graduated from high school and she talked to Sprague about possibly getting married.

[1] Due to the nature of the criminal charges, and in keeping with the practice of this Court, the names of the minor children will be withheld.

The relationship continued into the spring of 2009, when T.F. began to hear rumors about her relationship with Sprague. Her father confronted her about the relationship, which she denied. In April of 2009, T.F.'s softball team went to Myrtle Beach for spring break. Sprague also went, as did T.F.'s grandfather and her cousin.

The record indicates that around this time, some people became increasingly suspicious about T.F. and Sprague. T.F.'s softball coach confronted her, as did the school's baseball coach. T.F.'s mother also confronted her, and T.F. acknowledged the relationship with Sprague. T.F.'s mother then filed a formal complaint with the Union County Schools, which in turn notified the Commonwealth Attorney. The matter was then reported to the Kentucky State Police, which conducted an investigation.

On May 5, 2009, the Union County grand jury indicted Sprague on 26 counts of First Degree Sexual Abuse. After the Commonwealth moved to dismiss 21 counts of the indictment, the remaining 5 counts were tried before a jury in March of 2010. The jury returned a guilty verdict on each count, and Sprague was sentenced to one year in prison on each count, to run concurrently, for a total sentence of one year in prison. This appeal followed.

Sprague first argues that KRS 510.110(d) is poorly drafted and ambiguous, and that he is entitled to a new trial based on the trial court's failure to determine which interpretation was correct. Sprague also contends that the court erred on this issue by failing to instruct the jury as to the proper meaning of an element of KRS

510.110(d) even after being asked for clarification by the jury foreman. Specifically, Sprague argued at trial that the statutory phrase "with whom he or she comes into contact as a result of that position" requires the Commonwealth to demonstrate either that 1) Sprague initially met the victim as a result of his position of authority, or that 2) the sexual contact occurred as a result of his position of authority. Conversely, the Commonwealth argues that the phrase is not ambiguous and means what it says: that is, that the victim came into *some* contact with Sprague - whether the initial contact, subsequent contact or sexual contact - as a result of Sprague's position of authority. At trial, the Commonwealth maintained that it satisfied this element of the offense by demonstrating that Sprague was in a position of authority relative to T.F., and that Sprague came into contact with T.F. at school and at school-related activities as a result of that position of authority.

After jury instructions were tendered and the matter was submitted to the jury for its decision, the jury foreman stated to the trial judge that the jury "was having difficulty reaching a decision concerning the understanding of instruction (d)[.]" That element of the instruction asked the jury if "the defendant came into contact with T.F. as a result of his position of authority and/or position of special trust." The trial judge responded that she was "sorry but that is something you have to make a decision on based on what you heard already in the testimony and the arguments. I can't give you further instruction other than what is in there [pointing at the printed jury instructions] on that issue." Another juror then asked if the judge could define a couple of words from instruction section (d), to which

the judge responded negatively. The jury then continued its deliberations resulting in the guilty verdict.

Sprague argues that the trial judge erroneously refused to clarify the jury instruction at issue. He contends that because there are two conflicting and irreconcilable interpretations of the phrase "comes into contact as a result of that position," the court, as the trier of law, had a duty to clarify the law for the jury. After directing our attention to the legislative history of KRS 510.110(d) and to extra-jurisdictional case law, Sprague concludes that KRS 510.110(d) "was directed [at] . . . a person in a position of authority and special trust [that] *uses that position* as do sexual predators." In sum, it is Sprague's contention that the trial court was required to instruct the jury that he could be found guilty only upon a showing that his position of authority led to either the initial contact or the sexual contact.

Having closely examined the record and the law, and having heard the oral arguments of counsel, we find no error on this issue. We look first to KRS 510.110, which states that,

> (1) A person is guilty of sexual abuse in the first degree when: . . . (d) Being a person in a position of authority or position of special trust, as defined in KRS 532.045, he or she, regardless of his or her age, subjects a minor who is less than eighteen (18) years old, with whom he or she comes into contact as a result of that position, to sexual contact[.]

Additionally,

> (a) "Position of authority" means but is not limited to the position occupied by a biological parent, adoptive parent, stepparent, foster parent, relative, household member, adult youth leader, recreational staff, or volunteer who is an adult, adult athletic manager, adult coach, teacher, classified school employee, certified school employee, counselor, staff, or volunteer for either a residential treatment facility, a holding facility as defined in KRS 600.020, or a detention facility as defined in KRS 520.010(4), staff or volunteer with a youth services organization, religious leader, health-care provider, or employer;
>
> (b) "Position of special trust" means a position occupied by a person in a position of authority who by reason of that position is able to exercise undue influence over the minor[.]"

KRS 532.045(1).

The question for our consideration, then, is whether the phrase "with whom he or she comes into contact as a result of that position" required the Commonwealth to prove that Sprague met or had sexual contact with T.F. as a result of his position of authority as Sprague contends, or whether it merely had to demonstrate that Sprague has *some* contact with T.F. as a result of his position of authority as the Commonwealth argues.

All statutes in the Commonwealth shall be liberally construed to promote their purposes and carry out the intent of the Legislature. KRS 446.080(1). In *Cosby v. Commonwealth*, 147 S.W.3d 56, 58-59 (Ky. 2004), the Kentucky Supreme Court noted that,

> General principles of statutory construction hold that a court must not be guided by a single sentence of a statute but must look to the provisions of the whole

> statute and its object and policy. No single word or sentence is determinative, but the statute as a whole must be considered. In addition, we have a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion. Moreover, in construing statutory provisions, it is presumed that the legislature did not intend an absurd result. The legislature's intention shall be effectuated, even at the expense of the letter of the law.
>
> We must further acknowledge that the General Assembly intends an Act to be effective as an entirety. No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that significance and effect shall, if possible, be accorded to every part of the Act. (Internal citations, quotations, and brackets omitted).

In applying these principals to the matter at bar, we look to the clear language of KRS 510.110, but must do so in the context of giving proper effect to the whole statute and the legislative intent. Was Sprague a person in a position of authority or position of special trust, as defined in KRS 532.045? Sprague acknowledges that he was, and the record bears this out. Did Sprague come into contact with T.F. as a result of that position? It is acknowledged that he did, both at school and by way of extra-curricular activities such as sporting events and trips. Sprague and T.F. each testified, for example, that they had contact with each other at school while he was a substitute teacher, as well as at school-related activities. We also find as well-reasoned the trial court's determination that it is

> difficult to distinguish the different positions of authority and special trust the Defendant had over T.F. because they are all intertwined. The Defendant's employment with the school system and his role as a parental figure

> for T.F., when she was a guest in his home and when he transported her to different events, can be likened to series of threads woven together over time to create a fabric that cloaked the Defendant with numerous positions of authority and special trust over her.

When these factors are considered in light of the purpose of KRS 510.110 - that is, the protection of minors from the sexual advances of persons in positions of authority - we cannot conclude that the phrase "comes into contact as a result of that position" means anything other than what it says. The trial court determined in its Order denying Sprague's motion for a directed verdict that this language merely requires proof that Sprague came into contact with T.F. as a result of his position of authority, but that the contact could, though did not have to be the initial contact or the sexual contact. We find no error in this conclusion, and accordingly find no error on this issue. We are not persuaded by Sprague's contention that the Commonwealth's interpretation of KRS 510.110(d) effectively creates a strict liability statute that raises the age of consent from 16 to 18 and could ensnare all adults who have sexual contact with minors between the ages of 16 and 18. It applies only to those who come in contact with the child while serving in a position of trust or authority.

On the related issue of whether the trial court erred in refusing to address the jury's request for clarification as to the meaning of this phrase, we also find no error. The statutory language at issue is not ambiguous and the instructions mirrored the statutory language. The jury was charged with determining whether

Sprague came into contact with T.F. as a result of his position of authority and the jury determined that he did. We find no error on this issue.

Sprague next argues that the trial court erroneously gave to the jury five sexual abuse instructions, four of which were identical instructions and without proper identifying characteristics. He points to *Harp v. Commonwealth*, 266 S.W.3d 813 (Ky. 2008), in support of his contention that the law requires specific identifiers to be placed in each instruction so that the jury can determine which instruction is associated with each count of the offense. Without these identifiers, Sprague contends that the jury could not have ascertained which instruction was associated with which charge of the indictment.

Though we acknowledge the import of *Harp*, we find no error on this issue. The Kentucky Supreme Court noted in *Harp* that erroneous jury instructions create a presumption of prejudice; however, that presumption may be successfully rebutted by showing that the error did not affect the verdict. *Id*. at 818. In the matter at bar, Sprague acknowledged the sexual contact with T.F. on each of the five occasions culminating in the five counts of the indictment. It was uncontroverted at trial that he held positions of authority at T.F.'s high school, that he had contact with her at school, at his home and other places, and that T.F. was under the age of 18 when the sexual contact occurred. That is to say, the timing of the sexual contact and the facts related to the sexual contact were not at issue. The instructions charged the jury with the duty of applying the law to those uncontroverted facts. When viewing the record in its totality, and in light of

Harp's recognition that a presumption of prejudice may be overcome, we conclude that the Commonwealth overcame the presumption of prejudice, and we find no error on this issue.

Lastly, Sprague notes that KRS 510.020(1) states that lack of consent is an element of "every offense" set out in KRS Chapter 510, and he contends that the trial court erred in refusing to instruct the jury that the sexual contact must have occurred without T.F.'s consent. Sprague argues that in failing to instruct the jury on consent, the trial court improperly disregarded the admonition that "courts are bound by statutory law as written and cannot write into it an exception which the legislature did not make." *Bedinger v. Graybill's Executor & Trustee*, 302 S.W.2d 594, 599 (Ky. 1957).

The parties and the trial court acknowledged that the element of lack of consent is expressly included in KRS 510.020. The question is whether its inclusion in this provision of KRS Chapter 510 requires *every* jury instruction on sexual abuse to include the element of lack of consent. The Commonwealth contends that KRS 510.020 is merely a vestigial remnant of a prior version of KRS Chapter 510 which the General Assembly inadvertently failed to remove when the Chapter was amended, and that it is subsumed in KRS 510.110 or should otherwise be disregarded.

It was the duty of the trial court, as it is now our duty, to harmonize apparently conflicting statutes to the extent possible so as to give effect to both provisions. *Porter v. Commonwealth*, 841 S.W.2d 166, 168 (Ky. 1992). Where

harmonizing is not possible, we are bound by the rule of statutory construction that the latter enacted and/or the more specific statute prevails. *Id.*

One may reasonably conclude that the lack of consent provision of KRS 510.020(1) is subsumed by KRS 510.110. That is to say, it is implicit in KRS 510.110 that a minor under the age of 18 is incapable of consenting to sexual contact with a person in a position of authority, even though that element is not expressly set out in KRS 510.110. *Arguendo*, if the statutes are in conflict, the latter enacted and more specific statute prevails. *Porter*, *supra.* In this case, KRS 510.110 must prevail as it was enacted after KRS 510.020(1) and is more specific. We find no error in the trial court's conclusion that lack of consent is not an express element of KRS 510.110.

For the foregoing reasons, we affirm the Judgment of the Union Circuit Court.

ALL CONCUR.

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