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Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001951-MR

JAMES COURSEY

APPELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 14-CR-00349

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON,
JUDGES.

CLAYTON, CHIEF JUDGE: James Coursey appeals from the Boyd Circuit
Court's denial of his motion to suppress testimony by his ex-wife pursuant to
Kentucky Rules of Evidence (KRE) 504. Upon careful review, we affirm.

BACKGROUND

On September 2, 2014, James's wife, Allison Coursey, found a folder on the family computer containing files titled "5 year old," "6 year old," and "10 year old." The Kentucky Incident Based Reporting System (KYIBRS) report in the record on appeal states the following:

Allison opened the files and discovered they were videos of adults performing sexual acts on children. Some videos were off (sic) small girls undressing, one was an African American girl performing oral sex on an adult male, another was two young girls playing in a pool wearing bikinis. There was a video of a male using his fingers on a small girl's vagina. There were multiple videos of adults having sex with small boys and girls. Allison then called the police.

When officers arrived on scene James had just gotten home. Officers and James went back to the computer to view the files, Allison asked James to open the recycle bin. James instead of opening the recycle bin, (sic) he emptied the recycle bin. James was then arrested for tampering with physical evidence.

Officers asked James what files he just deleted and James stated, "it's just porn." James was then advised he was under arrest for tampering with physical evidence and was taken outside and placed in a cruiser. Officers (sic) then called for supervisors and a detective to come on scene. A consent to search was obtained from Allison and the residence was searched. Detective Gavin Patrick assisted in seizing multiple computer/electronic devices from the residence as they are believed to contain or may contain child pornography.

Police obtained consent from Allison to search the residence and seized multiple computers and electronic devices. Officers subsequently secured a warrant to search the electronic devices seized from the residence, as well as to search James's chiropractic office. Additional computers and electronic devices were seized from James's office. According to the KYIBRS report, upon forensic examination of the home and work computers:

[a] large quantity of suspected child pornography was located on several of the items seized. Due to the overwhelming amount of child exploitation related files on the images, attempts at locating more files ceased after 323 images and videos of child pornography were identified. Of those files 92 were identified as known child pornography files according to a database maintained by several federal law enforcement agencies.

James and Allison subsequently divorced.

On October 1, 2014, James Coursey was indicted by the Boyd Circuit Grand Jury on charges of tampering with physical evidence, ten counts of possession and viewing of matter portraying a sexual performance by a minor, and one count of distribution of matter portraying a sexual performance by a minor. James filed a motion to suppress any testimony to be provided by Allison in his case. In his motion to suppress, James argued that the spousal testimony privilege contained in KRE 504 applied, thus barring Allison from testifying in the matter. In response, the Commonwealth argued that Kentucky Revised Statutes (KRS) 620.030(1) placed an affirmative duty on "[a]ny person" who "knows or has

reasonable cause to believe that a child is dependent, neglected, or abused” to report the same to appropriate law enforcement agencies. Further, the Commonwealth argued that KRS 620.030(4) specifically stated that the husband-wife privilege could not be “a ground for refusing to report under this section or for excluding evidence . . . in any judicial proceedings resulting from a report pursuant to this section.” Finally, the Commonwealth argued that Kentucky courts have consistently construed the spousal privilege in a narrow manner, as it had the potential effect of keeping the truth from the court. The defense responded that KRS 620.030 was not applicable, as James himself had not abused any specific child.

The trial court found that the marital privilege contained in KRE 504 did not attach in this instance, stating that any child involved in pornography was an abused child and KRS 620.030 placed an affirmative duty on persons with knowledge of such activity to report the same to law enforcement. The trial court further found that application of the marital privilege in this case would not further the objective of promoting marital harmony, as James and Allison were at that point divorced.

James thereafter entered a conditional guilty plea, reserving for appeal the issue of the trial court’s denial of his motion to suppress. The trial court entered a final judgment on December 4, 2017 sentencing James to five years’

imprisonment and requiring that he register as a sexual offender for twenty years. James filed a notice of appeal on December 6, 2017.

ANALYSIS

James argues that the provisions of KRE 504(a) and (b) bar Allison from testifying against him. Therefore, we must first start with an examination of the language and case law interpreting KRE 504. Such examination is done *de novo*. See *Nash v. Campbell County Fiscal Court*, 345 S.W.3d 811, 816 (Ky. 2011) (citation omitted) (“Issues of law are reviewed *de novo* by a reviewing court.”). Second, we must determine whether the trial court abused its discretion in denying James’s motion to preclude Allison from testifying against him under our interpretation of KRE 504(a) and (b). See *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000) (citations omitted) (“[A]buse of discretion is the proper standard of review of a trial court’s evidentiary rulings.”). When reviewing a trial court’s decision for an abuse of discretion, an appellate court must determine whether the decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citation omitted). Moreover, an appellate court may affirm a lower court for any reason supported by the record. *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991).

KRE 504 states in applicable part:

- (a) Spousal testimony. The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.
- (b) Marital communications. An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage. The privilege may be asserted only by the individual holding the privilege or by the holder's guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.

Therefore, Kentucky recognizes two distinct but narrowly construed spousal privileges: the “adverse testimony privilege” contained in KRE 504(a) and the “confidential communications privilege” contained in KRE 504(b). Further, the Kentucky Supreme Court has stated that “[t]he privilege exists only to protect marital harmony[,]” and that “[t]he courts have approached the privilege by narrowly and strictly construing it because it has the potential for shielding the truth from the court system.” *Mullins v. Commonwealth*, 956 S.W.2d 210, 212 (Ky. 1997) (citation omitted).

In this case, we agree with the trial court that the provisions of KRE 504 are inapplicable, but do so for different reasons. We shall initially consider whether the trial court should have granted James's motion to suppress pursuant to

the adverse testimony privilege of KRE 504(a). The operative word in the “adverse testimony privilege” of KRE 504(a) is “spouse[,]” and the rule “clearly requires a claimant to prove the existence of a valid ongoing marriage at the time spousal testimony is sought (meaning that the [spousal testimony] privilege does not survive divorce).” *Gonzalez De Alba v. Commonwealth*, 202 S.W.3d 592, 595 n.2 (Ky. 2006) (internal quotation marks and citations omitted). As stated by the Kentucky Supreme Court in *Winstead v. Commonwealth*:

Since Rainwater was no longer Winstead’s wife at the time of trial, the testimonial privilege of KRE 504(a) was inapplicable; and the trial court did not err in allowing Rainwater to testify against Winstead about events occurring during their marriage. Although in a published case we did not explicitly hold—but strongly hinted—that the spousal testimony privilege survives only as long as the marriage, we have explicitly held in an unpublished case that the spousal testimony privilege does not extend to a former spouse. *We now, again, definitively hold that the spousal testimony privilege ends when the marriage is dissolved.*

327 S.W.3d 386, 391 (Ky. 2010) (emphasis added) (internal citations omitted).

Both the plain language of KRE 504(a) and the Kentucky case law interpreting such language provide that the privilege may only be invoked by a spouse. In this case, it is undisputed that James and Allison were no longer married at the time James filed the motion to suppress, as James clearly refers to Allison as his “ex-spouse” in his motion. Consequently, there was no spousal

privilege to bar calling Allison as a witness, and we believe the circuit court properly denied James's motion to exclude Allison's testimony under KRE 504(a).

Our next inquiry is whether Allison's testimony should be excluded under the "confidential communications" privilege of KRE 504(b). Pursuant to the express language of KRE 504(b), a confidential communication is one which is (1) "made privately" between a husband and a wife and (2) "not intended for disclosure" outside of the marriage. *See* KRE 504(b). In *Slaven v. Commonwealth*, the Kentucky Supreme Court explained that "confidential" as used in KRE 504 requires "not only that the communication was made in private, but also that it was not intended for disclosure to any other person, *i.e.*, there must have been a positive expectation of confidentiality." 962 S.W.2d 845, 852 (Ky. 1997). Further, unlike the adverse testimony privilege of KRE 504(a), the confidential communications privilege of KRE 504(b) survives the dissolution of the marriage and may be asserted by a former spouse if the communication occurred during the marriage. *Wadlington v. Sextet Mining Co.*, 878 S.W.2d 814, 816 (Ky. App. 1994).

In the case *sub judice*, James gives no example, either in his motion to suppress or in his brief, of any specific confidential statement to or communication with Allison that he sought to have excluded. The burden was on James to prove the existence of specific confidential communications, as the party invoking the

marital privilege has the burden of proving its applicability. *Sanders v. Commonwealth*, 89 S.W.3d 380, 391 (Ky. 2002), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky. 2009). Moreover, the record on appeal indicates that James was attempting to hide the evidence of his activities from his wife rather than make any confidential communications to his wife about his activities. Thus, not only does the record fail to reflect any communications made by James to Allison regarding anything to do with his activities, it fails to reflect that James had any “positive advantage” on his part of her maintaining such confidentiality. *Id.* Therefore, we cannot agree that the trial court abused its discretion in denying James’s motion to suppress any confidential communications made to his wife pursuant to KRE 504(b).

For the foregoing reasons, the order of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roy Alyette Durham II
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky