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Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001978-MR

MICHAEL WAYNE CROWE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 14-CR-00768

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * ** * **

BEFORE: KRAMER, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Michael Wayne Crowe appeals from an order of the Fayette Circuit Court denying (upon remand from this Court¹) Crowe's motion to be

¹ *Crowe v. Commonwealth*, No. 2016-CA-000134-MR, 2017 WL 3129204 (Ky. App. July 21, 2017).

classified as a domestic violence victim pursuant to Kentucky Revised Statutes (KRS) 439.3401(5). We reverse.

Crowe had entered a conditional guilty plea to the amended charge of manslaughter in the first degree (KRS 507.030) for the death of his wife. He was sentenced to fifteen years' imprisonment. Crowe then sought determination that he was entitled to be exempted from the violent offender statute's requirement that he serve 85% of his sentence before becoming parole eligible. The Fayette Circuit Court held a hearing on January 20, 2016, and entered its order sentencing Crowe the following week. Although the circuit court made oral findings about Crowe's motion on the record at the hearing, it failed to reflect its reasoning in its written decision. Thus, this Court remanded the matter, on initial appeal, "with instructions to make specific findings as to the validity of Crowe's domestic violence claim, particularly after analyzing the exemption provided in KRS 439.3401(5), and include them in the final written judgment." *Crowe*, 2017 WL 3129204 at *1.

Upon remand, the Fayette Circuit Court relied upon the extensive testimony taken during the 2016 hearing as its basis for once again denying Crowe's motion to qualify for the exemption to the violent offender statute. The circuit court accepted Crowe's assertion that he was the victim of domestic violence during his relationship with his late wife. However, the court found that

Crowe failed to prove the required nexus “between the domestic violence and the violent offense for which the defendant stands convicted.” *Commonwealth v. Vincent*, 70 S.W.3d 422, 425 (Ky. 2002). *See also Gaines v. Commonwealth*, 439 S.W.3d 160, 164 (Ky. 2014). The circuit court instead concluded that the victim’s taunting about her extramarital affair provoked Crowe to smother her to death. Crowe fled the scene and was found in a wooded area by family members near his abandoned car. His dead wife was later discovered by a motel employee.

Both parties agree, as did the circuit court, that Crowe was a victim of domestic violence (physical and verbal abuse) during his marriage to the victim. All witnesses testified to it, including the Commonwealth’s detective that investigated the case. Crowe bore visible signs (scratches, bruises, and bite marks) of the violent encounters with his late wife, including on the night of her death. But the parties disagree on whether domestic violence was directly related to the crime for which Crowe stands convicted.

Our analysis begins with the applicable statutes involved, as discussed in *Fuston v. Commonwealth*, 217 S.W.3d 892, 898 (Ky. App. 2007):

KRS 439.3401(3) mandates that a violent offender, as defined by the statute, “shall not be released on probation or parole until he has served at least eighty-five percent (85%) of the sentence imposed.” KRS 439.3401(5) exempts from this requirement, however, any person who has “been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving the death of the

victim[.]” Further, KRS 533.060(1) permits the exemption of a defendant who

establishes that the person against whom the weapon was used had previously or was then engaged in an act or acts of domestic violence and abuse as defined in KRS 403.720 against either the person convicted or a family member as defined in KRS 403.720 of the person convicted.

Finally, KRS 403.720 contains the following definitions:

(1) “Domestic violence and abuse” means physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple[.]

Fuston, 217 S.W.3d at 898.

Crowe argues that the evidence presented to the circuit court sufficiently met the burden of proving the nexus required by *Vincent, supra*. He cites *Holland v. Commonwealth*, 192 S.W.3d 433 (Ky. App. 2005), in support of this argument.

In general, the legislative enactment relating to domestic violence victims is intended to provide leniency to persons for whom the traditional notions of self-defense do not apply. Thus, we do not believe that eligibility for the exemption to the violent offender statute needs to be looked at in the same way that a self-defense provision would be, in which it must be established that the abuse was contemporaneous with the offender’s crime. In fact, because it relates only to parole, it seems to anticipate

those situations in which the person could not establish self-defense and was denied probation.

Holland, 192 S.W.3d at 438-39.²

Upon review, this Court will not reverse the trial court's determination regarding the applicability of KRS 439.3401(5) unless its ruling was clearly erroneous. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278-79 (Ky. 1996). The Supreme Court of Kentucky has defined "clearly erroneous" in those cases where the finding was against the party with the burden of proof, like in the present case, and has held that a finding that is reasonable given the evidence is by necessity not clearly erroneous. In contrast, a finding that is unreasonable, given the evidence, is clearly erroneous. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

The circuit court, after examining and analyzing all the evidence in this case, concluded thusly:

This Court finds that Crowe had been subjected to ongoing verbal and domestic abuse and occasional domestic violence during his entire marriage to the victim. However, this Court cannot find the required nexus between the domestic abuse perpetrated by the victim upon Crowe during the marriage, including the day of the incident and death of Walker, and the

² *Holland* was another case which was remanded for further findings. After remand, the defendant was determined ineligible for the domestic violence exception because she was found to have killed her husband in a jealous rage over her husband's extramarital affair rather than motivated by "her husband's purported acts of domestic violence or abuse." *Holland v. Com.*, No. 2006-CA-001650-MR, 2007 WL 2812559, at *1 (Ky. App. Sept. 28, 2007). Thus, the ultimate holding of *Holland* does not support Crowe's assertions.

smothering of Walker by Crowe as charged. This Court further finds that the smothering of Walker by Crowe did not occur as the result of domestic violence and abuse. Rather, this Court finds that Crowe killed Walker because of her admission to him during the argument that she had been having an affair and engaging in sexual relations with “Dennis” during their marriage.

The circuit court’s holding is unreasonable, given the evidence before it. *Francis*, 708 S.W.2d at 643. Crowe’s evidence (and even some of the Commonwealth’s evidence) indicated constant physical and verbal abuse from his late wife. In fact, on the night of the incident, not only did the victim taunt Crowe about her relationship with her sister’s husband, but she also physically attacked him, biting him on the chest and nipple. The wounds were so significant that he was still bleeding from them days after the incident that resulted in his wife’s death. Conversely, there was no evidence to contradict Crowe’s position that he had smothered his wife with a pillow to quiet and restrain her.

“*Vincent* makes no more requirement than that the evidence *connect* the crime and the abuse.” *Holland*, 192 S.W.3d at 438. Crowe had successfully connected the physical and verbal domestic violence to the crime he committed. Accordingly, the circuit court erred in ruling otherwise.

The judgment of the Fayette Circuit Court is reversed.

NICKELL, JUDGE, CONCURS.

KRAMER, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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