

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P. J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 2002 CA 00028
MICHAEL R. MOON	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 2001CR01156

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 9, 2002

APPEARANCES:

For Plaintiff-Appellee

RONALD MARK CALDWELL
ASSISTANT PROSECUTOR
Post Office Box 20049
Canton, Ohio 44701-0049

For Defendant-Appellant

ANTHONY KOUKOUTAS
PITINII & KOUKOUTAS
5440 Fulton Road, NW, Suite 201
Canton, Ohio 44718

[Cite as *State v. Moon*, 2002-Ohio-6850.]

Wise, J.

{¶1} Appellant Michael R. Moon appeals his conviction and sentence for rape in the Court of Common Pleas, Stark County. The Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} In February 2001, a counselor in the Plain Local School District contacted the Stark County DJFS child protective unit concerning sexual abuse allegations made by a minor female student (hereinafter "girl victim"), who was at that time appellant's neighbor. Upon further investigation, the girl victim told a Stark County sheriff deputy that appellant had rubbed her genital area and digitally penetrated her vagina, and that these incidents had occurred "many times." On February 7, 2001, another deputy interviewed appellant at the Stark County Sheriff's Office, where appellant voluntarily appeared after being contacted by telephone. Following further investigation, a secret indictment was issued against appellant on August 31, 2001, charging him with two counts of rape (F1) and two counts of gross sexual imposition (F3).

{¶3} On October 4, 2001, appellant's trial counsel filed a motion seeking an order to allow cross-examination of the girl victim about sexual abuse allegations she had purportedly made against two other men, whom she referred to as her "uncles." Appellant's counsel also sought permission to elicit testimony from these two men. The trial court conducted a hearing on October 10, 2001. The assistant prosecutor and appellant's trial counsel presented their arguments pertaining to the motion, although the girl victim did not testify at that time. The court thereafter issued a judgment entry overruling appellant's motion on the basis of R.C. 2907.02(D), one of Ohio's "rape shield" provisions.

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{¶4} A jury trial was conducted from January 15 to January 17, 2002. The victim had been found competent to testify and took the stand on behalf of the prosecution. Appellant was ultimately found guilty on all counts. He was thereupon sentenced to eight years on each rape count, and three years on each gross sexual imposition count, with all terms to be served consecutively. Appellant was also classified as a sexually oriented offender.

{¶5} Appellant timely appealed¹ and herein raises the following sole Assignment of Error:

{¶6} “I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT RULED THAT THE APPELLANT'S TRIAL ATTORNEY COULD NOT ASK THE VICTIM IN THIS CASE ABOUT ALLEGATIONS OF SEXUAL ABUSE SHE HAD MADE AGAINST TWO OTHER MEN.”

I.

{¶7} In his sole Assignment of Error, appellant contends the trial court erred in denying him the opportunity to question the girl victim concerning alleged sexual abuse accusations against two other individuals made previous to the charges against appellant. We disagree.

{¶8} R.C. 2907.02(D) and (E), part of Ohio's "rape shield" laws, read as follows:

{¶9} “(D)Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's

¹ Appellant died subsequent to the filing of the notice of appeal. However, we have proceeded on this appeal pursuant to the procedures outlined in App.R. 29(A).

sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

{¶10} (E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.”

{¶11} In support of his assigned error, appellant cites *State v. Boggs* (1992), 63 Ohio St.3d 418, 588 N.E. 2d 813, and *State v. Boggs* (1993), 89 Ohio App.3d 206, 624 N.E. 2d 204. Both cases stem from criminal proceedings wherein the defendant, Roger Boggs, was charged with raping, kidnapping, and assaulting a female victim. In the 1992 Ohio Supreme Court decision, the following was held at paragraph two of the syllabus: "Where an alleged rape victim admits on cross-examination that she has made a prior false rape accusation, the trial judge shall conduct an in camera hearing to ascertain whether sexual activity was involved and, as a result, cross-examination on the accusation would be prohibited by R.C. 2907.02(D), or whether the accusation was totally unfounded and therefore could be inquired into pursuant to Evid.R. 608(B)." Because the original *Boggs* trial court had failed to include, in its in camera hearing, an inquiry as to whether the victim's prior accusation was based on sexual activity (see R.C. 2907.02(D), *supra*), or was totally unfounded, the Ohio Supreme Court remanded the case. *Id.* at 423, 588 N.E. 2d

818. However, on remand, the Adams County Court of Common Pleas, after hearing the victim deny having made any prior rape accusations at all, found no reason to reopen the matter, resulting in re-imposition of sentence and a second appeal by defendant Boggs. The Adams County Court of Appeals thereupon held, inter alia, that during the in camera hearing, extrinsic evidence of prior false rape accusations should have been allowed, as Evid.R. 608(B) would not apply in a preliminary admissibility hearing. See *State v. Boggs* (1993), 89 Ohio App.3d 206, 210.

{¶12} As is evident from the aforesaid Ohio Supreme Court syllabus, *Boggs* requires an in-camera hearing where a victim admits on cross-exam to making prior false rape accusations. In contrast, in the case sub judice, prior to reaching such a point, the trial court conducted a hearing on appellant's "motion to offer evidence of the alleged victim's past sexual behavior" to consider the R.C. 2907.02(D) issue. However, our reading of both appellant's motion and the transcript of the hearing thereon reveals that the weight of appellant's trial counsel's arguments centered on the victim's alleged misidentification of her rapist, which in turn was premised on her accusations against her "uncles" actually being true. For example, appellant's motion states that " *** [t]he purpose of the evidence that the complaining witness *had actually been abused by someone other than the accused* during the relevant time period is directly related to her mistaken identification of Mr. Moon." (Emphasis added). It is worth noting that *Boggs* is mentioned in appellant's motion just once, and only in support of allowing into evidence the victim's psychiatric history as "non-sexual activity" outside the scope of rape shield protection. Likewise, the transcript includes the following colloquy between the court and defense counsel:

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{¶13} “THE COURT: Very good. I understand what each one of you are saying I believe. Mr. Pitinii seems to be saying that he wants to view these materials and for purposes of this discussion, let’s talk about the statements that the victim made in regard to the other individuals to see if she is confused as to who her alleged attacker was and/or to show that someone else actually committed the crime rather than Mr. Moon.

{¶14} Is that a fair characterization of some of your argument?”

{¶15} “DEFENSE COUNSEL: That’s a fair characterization of some, but again my defense is that now, but it could change at trial.” Tr. at 26-27.

{¶16} In addition, shortly after the girl victim left the stand, defense counsel emphasized in a sidebar that “* * * no less than two of the specific instances which I asked her, those two instances were things in which she told the police other people did to her. Now, she’s claiming Michael Moon did them to her.” Tr., Vol. 3, at 64.

{¶17} In light of the foregoing circumstances and the remainder of the pertinent record, we find that appellant's primary trial strategy regarding the victim's sexual history was to seek to demonstrate misidentification of her assailant, and that defense counsel effectively abandoned his attempt to impeach the victim's credibility by showing prior false accusations of rape. We therefore hold that appellant has waived any claimed error in this regard, as well as his attempted reliance on *Boggs*, by abandoning his "false accusation" defense theory during the proceedings below. Cf. *State v. Britton* (Oct. 6, 1994), Cuyahoga App.No. 66177, citing *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E. 2d 277.

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{¶18} Appellant's sole Assignment of Error is overruled.

{¶19} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby affirmed.

Judgment affirmed.

Hoffman, P. J., and Edwards, J., concur.

Topic: Rape Shield.

JUDGES

JWW/d 11/1

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