

Summary of SC93435, *State of Missouri v. Nicholas Robert Hillman*

Appeal from the Warren County circuit court, Judge James D. Beck

Argued and submitted October 2, 2013; opinion issued December 10, 2013

Attorneys: Hillman was represented by N. Scott Rosenblum and Erin R. Griebel of Rosenblum, Schwartz, Rogers & Glass PC in St. Louis, (314) 862-4332; and the state was represented by Jennifer A. Rodewald of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man appeals his convictions for distribution of a controlled substance to a minor and attempted second-degree statutory sodomy. In a decision written by Judge George W. Draper III and joined by four other judges, the Supreme Court of Missouri affirms the judgment. Although portions of the transcript of the man's trial are indiscernible, the man fails to demonstrate that any indiscernible portion caused him prejudice. The trial court did not abuse its discretion in sanctioning the man for a discovery violation by preventing him from calling on his behalf 10 witnesses he failed to disclose in a timely manner. The trial court did not err in admitting marijuana seized from the man's home, as he told police where it could be found and then freely consented to their search of his home.

Judge Richard B. Teitelman writes separately, concurring in part and dissenting in part. He disagrees with the principal opinion to the extent it holds the trial court did not abuse its discretion in excluding the man's witnesses.

Facts: In January 2011, Nicholas Robert Hillman asked a 15-year-old girl to babysit his three children so he could go out drinking; she agreed. Before leaving, Hillman offered marijuana to the girl, who smoked it. She and the children later fell asleep. When Hillman returned, he woke the girl, smoked more marijuana and twice made sexual advances toward her, touching her, and both times she pushed him away. Hillman told her not to tell anyone, but eventually, she wrote about her experience in a school writing assignment. Her teacher passed it to a guidance counselor, who spoke with the girl and then called the police. A lieutenant arranged for her to speak with Hillman while the lieutenant listened to their conversation, during which Hillman admitted touching her. The lieutenant then went to Hillman's residence. They talked on the porch, going inside only a few steps while Hillman retrieved his cell phone. Ultimately, Hillman told police there was marijuana in his home, and he consented to a search of his residence. Police found the marijuana and paraphernalia where Hillman said it would be. Hillman was arrested and charged with distribution of a controlled substance to a minor and attempted second-degree statutory sodomy. The jury found him guilty, and the trial court sentenced him to consecutive prison sentences totaling nine years and placed him in the sex offender assessment unit. The trial court subsequently denied his release on probation and ordered the prison sentence to be executed. Hillman appeals.

AFFIRMED.

Court en banc holds: (1) Hillman fails to demonstrate that any indiscernible portion of the trial transcript prejudiced him. Although an appealing party is entitled to file a full and complete transcript for appellate review, an incomplete or inaccurate record does not warrant automatic reversal of a conviction. Here, Hillman's only act of due diligence to correct the deficiency in the transcript was to request a transcript; there is no indication he made any attempt to supplement the record in any way to show the substance of missing testimony or argument. Further, many of the indiscernible instances are not relevant to issues Hillman presents on appeal. The only issue he claims is relevant is a discussion regarding the exclusion of certain individuals Hillman wished to call as witnesses. But the portion to which he points contains only a discussion of whether Hillman's counsel should make an offer of proof regarding certain defense witnesses the court was excluding by having them take the stand and place their proffered testimony on the record. Although the court would have allowed such an offer of proof, it made clear it was excluding the witnesses solely because the defense did not endorse them in a timely manner, not because of any question as to the relevance of their testimony.

(2) The trial court did not abuse its discretion in sanctioning Hillman for a discovery violation by preventing him from calling on his behalf 10 witnesses he failed to disclose in a timely manner. Two days before the trial was scheduled to begin and 95 days after the trial court ordered him to submit a list of names and addresses of his potential witnesses, Hillman sought to endorse 17 witnesses. At a hearing, the state objected to 10 of these witnesses because it did not know who they were or what they would say, nor did it have time to track them down before trial. Hillman countered the witnesses were listed in the police report. The court overruled Hillman's motion, and the trial began. As a matter of law, no abuse of discretion exists when the court refuses to allow the late endorsement of a defense witness whose testimony would have been cumulative (repetitive to testimony already offered), collateral (not relevant to the issues in the case) or if the late endorsement would have surprised the state unfairly, and excluding a witness may be appropriate if there is no reasonable justification for the failure to disclose. Here, while the state made a compelling argument that it would be surprised unduly by some of the witnesses Hillman sought to endorse, Hillman neglects to provide any justification regarding the late endorsement. He says he wanted to call the excluded witnesses to challenge the girl's veracity, but Hillman called and questioned the girl's mother at trial, demonstrating the girl did not always tell the truth. Presenting additional evidence about the cousin's veracity would have been cumulative, and Hillman fails to demonstrate the sanction caused fundamental unfairness.

(3) The trial court committed no error in admitting marijuana seized from Hillman's home. Although the police did not have a warrant, Hillman told police he had marijuana in his home, explained where he kept it and then freely consented to a search of his home, during which the police discovered the marijuana where he said it was located.

(4) A statute providing that neither probation nor parole shall be granted between the time a defendant files a transcript on appeal in the appellate court and the court's disposition of that appeal is not unconstitutional as applied to Hillman, nor does it make him ineligible for the sex offender assessment unit. The record from the court of appeals indicates that Hillman's record on appeal would not be due until nine days after his participation in the sex offender assessment program was scheduled to end. Although he had every opportunity to participate in that program the full 120 days, the record shows his participation had ended at least three weeks early.

Opinion concurring in part and dissenting in part by Judge Teitelman: The author agrees with the principal opinion's recitation of facts and explanation of the applicable law, but he dissents to the extent the principal opinion holds that the trial court did not abuse its discretion in excluding Hillman's witnesses. The relative credibility of Hillman and the girl was an important consideration in this case, and the girl's veracity is not a fact that is readily susceptible to objective verification from a single source. While testimony from the girl's mother supported Hillman's argument that the girl did not always tell the truth, it does not sufficiently establish that fact so as to render subsequent sufficient evidence cumulative.