TRONDELL ASKEW v. COMMONWEALTH OF VIRGINIA.

Court of Appeals of Virginia. Chesapeake. (10 Feb, 2004)

CITATION CODES

DOCKET NO.

Record No. 0235-03-1.

ATTORNEY(S)

Richard E. Railey, Jr. (Railey and Railey, P.C., on brief), for appellant. Jennifer R. Franklin, Assistant Attorney General (Jerry W. Kilgore, Attorney General, on brief), for appellee.

Important Paras

JUDGEMENT

MEMORANDUM OPINION

Pursuant to Code § 17.1-413, this opinion is not designated for publication.

JUDGE JAMES W. BENTON, JR.

The trial judge convicted Trondell Askew of carnally knowing by mouth another man in violation of Code § 18.2-361. Askew contends the judge erred in convicting him of violating the statute and argues that the statute is unconstitutional. We hold that the issue Askew raises on appeal is barred by Rule 5A:18, and we affirm the conviction.

I.

Askew pleaded not guilty to the indictment charging a violation of Code § 18.2-361. He stipulated, however, that the Commonwealth's evidence was sufficient to convict him of the offense. In view of the stipulation, the prosecutor recited that the witnesses would testify that Askew, an inmate in a penal facility, committed oral sodomy on another inmate by putting another inmate's penis into Askew's mouth. The event occurred by a fence in a recreation area and was observed by two correctional officers. Askew agreed the prosecutor gave an accurate summary of the evidence.

The trial judge convicted Askew of the offense. Askew did not object to the conviction or to any incident that occurred at trial. At the sentencing hearing, Askew's attorney asserted that the three-year sentence sought by the prosecutor was too harsh and argued in mitigation that Askew had been punished administratively and that his conduct was not disruptive because it involved two consenting adults.

II.

Although Askew concedes he did not object at trial or otherwise raise a constitutional claim, he now contends that the conviction violates his right to privacy and that the decision in Lawrence v. Texas, **539 U.S.** ___ (2003), establishes good cause for this Court to invoke the ends of justice exception to Rule 5A:18.

Rule 5A:18 provides, of course, that "[n]o ruling of the trial court . . . will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals

to attain the ends of justice." Applying the rule, we have consistently held that when an appellant has failed to present an issue in the trial court or object to a ruling, we will not consider that issue on appeal. Barrett v. Commonwealth, 41 Va. App. 377, 403, 585 S.E.2d 355, 368 (2003);Jacques v. Commonwealth, 12 Va. App. 591, 593, 405 S.E.2d 630, 631 (1991). We have also held that the rule's procedural bar requirements "apply even to . . . constitutional claims." Deal v. Commonwealth, 15 Va. App. 157, 161, 421 S.E.2d 897, 900 (1992). See also Commonwealth v. Washington, 263 Va. 298, 304-05, 559 S.E.2d 636, 639 (2002) (holding that appellant waived his right to assert a Fifth Amendment double jeopardy violation by failing to object to a mistrial); Jones v. Commonwealth, 230 Va. 14, 18 n. 1, 334 S.E.2d 536, 539 n. 1 (1985) (holding that appellant's First and Fifth Amendment arguments were not raised at trial and, thus, procedurally defaulted); Waye v. Commonwealth, 219 Va. 683, 690 n. 1, 251 S.E.2d 202, 207 n. 1 (1979) (holding that appellant's claim of a denial of equal protection was barred by Rule 5A:18); Palmer v. Commonwealth, 14 Va. App. 346, 347-48, 416 S.E.2d 52, 53 (1992) (dismissing appellant's Fifth Amendment claims by application of Rule 5A:18).

The "good cause" exception cannot be invoked merely because appellant's trial attorney believed the law was settled and, thus, failed to make an objection, reasoning it would have been futile. Snurkowski v. Commonwealth, 2 Va. App. 532, 536, 341 S.E.2d 667, 669 (1986). Moreover, the "ends of justice" provision of the rule may only be invoked "when the record affirmatively shows that a miscarriage of justice has occurred, not when it merely shows that a miscarriage might have occurred." Mounce v. Commonwealth, 4 Va. App. 433, 436, 357 S.E.2d 742, 744 (1987).

In this case, Askew stipulated that the evidence proved his conduct occurred in the openness of the recreation area and was readily observable. The Lawrence decision barred the state from enforcing statutes that criminalized consensual sexual acts occurring in a "dwelling or other private places." 539 U.S. at ___. Thus, we cannot say that this case raises either a good cause or ends of justice basis to forego the primary requirements of the rule.

Accordingly, we affirm the conviction.

Affirmed.