Filed 7/25/18 Smith v. Superior Court CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LINCOLN TESTRO SMITH, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	B286259 (Los Angeles County Super. Ct. No. GA100138)

ORIGINAL PROCEEDINGS; petition for writ of mandate. Jared D. Moses, Judge. Petition granted.

Kenneth I. Clayman, Public Defender, Albert J. Menaster, Stacey Donoso and Lara Kislinger, Deputy Public Defenders, for Petitioner.

No appearance for Respondent.

Jackie Lacey, District Attorney, Phyllis C. Asayama and Matthew Brown, Deputy District Attorneys, for Real Party in Interest.

Petitioner Lincoln Testro Smith (petitioner) challenges by writ of prohibition the trial court's denial of his motion to set aside count one of the information against him, which alleges he engaged in sexual intercourse with his daughter, a child 10 years old or younger. Petitioner twice confessed to the crime, but he argues the evidence at the preliminary hearing failed to establish the corpus delicti of the offense. The People acknowledge that the evidence independent of petitioner's confession—a king-sized comforter found on top of the daughter's twin bed found to have a single sperm cell from petitioner when tested—was "thin." But the People maintain it is sufficient to constitute the necessary "slight" or "minimal" evidence that would permit a reasonable inference the crime occurred. This court initially denied petitioner's request for writ relief, but at our Supreme Court's direction, we now consider the matter anew with the benefit of full briefing and oral argument.

I. BACKGROUND

The Los Angeles County District Attorney filed a felony complaint charging petitioner with sexual intercourse or sodomy with a child 10 years old or younger (Pen. Code, § 288.7, subd. (a) [count 1]),[1] attempted murder (§ 664/187, subd. (a) [count 2]), arson of an inhabited structure (§ 451, subd. (b) [count 3]), and child abuse (§ 273a, subd. (a) [count 4]). Four witnesses testified at petitioner's preliminary hearing: an arson investigator, the detective to whom petitioner first confessed, a criminalist with expertise in DNA analysis, and the People's investigating officer

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[1] Undesignated statutory references that follow are to the Penal Code.

who heard petitioner's second confession (three days after the first). The facts established by their testimony are essentially undisputed for purposes of the issue we decide in this proceeding.

A. The Preliminary Hearing Evidence

On December 2, 2016, firefighters responded to a fire at petitioner's single-story house. A firefighter heard a girl screaming from inside the home, and a fire captain saw a young girl, later identified as petitioner's daughter A.S., run from the home.[2] Firefighters discovered petitioner naked in a tree in the backyard with a noose around his neck. Petitioner told the firefighters and a police officer that had arrived on scene that he was "Jesus"; petitioner demanded they "repent to him." Over the next couple hours, the first responders coaxed petitioner down from the tree and he was transported to a hospital.

While there, petitioner told Alhambra Police Department Detective Quinones that he (petitioner) started the fire at his house. Petitioner also told the detective he had been molesting A.S. (born in February 2011) since she was three years old. Elaborating, petitioner stated he had been "insert[ing] his finger and penis into her vagina," with the most recent incident having occurred the prior evening (i.e., December 1, 2016) when he inserted his penis into A.S.'s vagina while on A.S.'s bed. Petitioner told the detective he wished A.S. had perished in the fire because "it [would have been] better for her based on the trauma that he had inflicted." Some of petitioner's answers to

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[2] Before setting the fire, petitioner put A.S. and her brother in a car behind the house. A.S., however, got out of the car to use a bathroom in the house and was inside when the fire started.

other questions Detective Quinones asked "were not making sense."

A.S. was taken to the hospital for a sexual assault examination on the day of the fire, December 2, 2016. All samples from A.S.'s sexual assault kit were tested for the presence of semen and the majority were tested for saliva—none of either was found. A.S. also later underwent a forensic interview and she denied anything of a sexual nature ever happened between her and her father.

Detective Quinones went to petitioner's house and collected bedding on the top bunk of a bunk bed where A.S. slept. The bed was not made, and the detective found the bedding "just thrown on the top." Detective Quinones collected a twin-sized floral bed sheet, two pillow cases, a knit blanket, and a "pink floral" king-sized comforter. The items were submitted for lab testing.

Ellen Andrews (Andrews), a Los Angeles County Sheriff's Department criminalist, performed DNA analysis on ten samples from the "under side" of the king-sized comforter. In nine of the samples petitioner was found (by statistical probability) to be a major DNA contributor, and in four of those nine, A.S. (by statistical probability) was found to be a possible minor DNA contributor. Upon microscopic examination of one of the samples in which petitioner was a major contributor and A.S. was a possible minor contributor, Andrews found a single sperm cell from petitioner.[3] No semen was detected on the twin bed sheet.

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[3] Andrews did not offer an opinion on how a sperm cell might be transferred to the comforter or when the sperm cell she saw was likely to have been deposited.

On December 5, 2016, three days after his first statement to Detective Quinones, petitioner again agreed to speak to detectives while being held at an Alhambra police station. Petitioner again told the interviewing detectives he had been molesting his daughter for approximately three years. Petitioner said he had digitally penetrated A.S. about 12 times and, beginning in 2016, had also inserted his penis into her vagina—again estimating he had done so about 12 times. Petitioner said he ejaculated on roughly six of these occasions, sometimes in her vagina and sometimes on top of her. He stated the last instance of intercourse had occurred on November 30, 2016, in A.S.'s bedroom. Petitioner told detectives "he didn't get any sexual gratification from it, that it was just more to show that he cared about her." He also stated A.S. would cry sometimes during the sexual penetration, but he would "convince her that what he was doing was normal."

B. Defense Efforts to Seek Dismissal of the Sexual Intercourse or Sodomy with a Child Charge

At the close of the preliminary hearing evidence, the defense argued the sexual intercourse or sodomy with a child charge (count one) should be dismissed because there was insufficient proof of the corpus delicti, i.e., the body of the crime, which must be assessed independent of petitioner's self-incriminating statements.[4] The magistrate found the People adduced sufficient proof of the corpus of the crime charged in

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[4] The defense also moved to dismiss the attempted murder charge (count two) on sufficiency of the evidence grounds and the court agreed it must be dismissed.

count one because DNA testing of A.S.'s comforter indicated petitioner's DNA was present and A.S. was a minor contributor in some of those locations on the comforter. The magistrate believed "[t]hat coupled with [petitioner's] statements that he did engage in sex, sexual acts, with the victim, I think, is sufficient for purposes of preliminary hearing."[5]

The People thereafter filed an information charging defendant with the three crimes on which he was held to answer: sexual intercourse or sodomy with a child ten years old or younger (§ 288.7, subd. (a)), arson of an inhabited structure (§ 451, subd. (b)), and child abuse (§ 273a, subd. (a)). Petitioner filed a motion asking the trial court to set aside the sexual intercourse or sodomy with a child charge pursuant to section 995, again arguing the evidence at the preliminary hearing failed to establish the corpus delicti of the offense. The respondent court denied the motion, finding the comforter with "multiple DNA samples taken from it with mixtures including the defendant, the child, and a sperm" was "more than sufficient to satisfy . . . the slight evidence showing that is required by the corpus delicti rule."

Petitioner then filed a petition for writ of mandate seeking relief from the respondent court's denial of his section 995 motion. This court summarily denied the petition. Our Supreme Court granted a petition for review and transferred the matter back to us with directions to vacate our summary denial order and to issue an order to show cause why the relief sought in the

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[5] The magistrate also held petitioner to answer on the other remaining counts charging arson and child abuse.

petition should not be granted. We did so and now issue this opinion to decide the matter.

II. DISCUSSION

It is well established that the threshold level of proof required to satisfy the corpus delicti rule is not high. But the rule does invariably require some independent proof a crime has occurred apart from a defendant's confession. Putting petitioner's statements aside, this is the evidentiary picture: A.S. said she had not been sexually assaulted, her sexual assault examination revealed no signs of abuse, petitioner set fire to their home and was found up a tree with a noose around his neck, and one sperm cell from petitioner was found on a comforter heaped on A.S.'s bed in the home where she and petitioner lived. Although we are mindful that the People often do not present all evidence they possess at a preliminary hearing, and that further investigation while a case is pending sometimes turns up additional incriminating evidence, it is still the People's burden to ensure the low corpus delicti threshold is met at the preliminary hearing stage. That burden was not met here, and we are compelled to grant the petition.

A. Standard of Review

"'[I]n proceedings under section 995 it is the magistrate who is the finder of fact; the superior court has none of the foregoing powers, and sits merely as a reviewing court; it must draw every legitimate inference in favor of the information, and cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate. [Citation.] On review . . . the appellate court in effect disregards the ruling of

the superior court and directly reviews the determination of the magistrate holding the defendant to answer.' [Citation.]" (*People v. Jones* (1998) 17 Cal.4th 279, 301 (*Jones*), quoting *People v. Laiwa* (1983) 34 Cal.3d 711, 718.)

B. The Preliminary Hearing Evidence Is Insufficient to Satisfy the Corpus Delicti Rule

"In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.]" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168-1169 (*Alvarez*); see also *People v. Powers-Monachello* (2010) 189 Cal.App.4th 400, 405-406 (*Powers-Monachello*).) "This rule is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*Alvarez, supra,* at p. 1169.)

"In the preliminary hearing context, it has long been held that '[a] defendant cannot be held to answer unless the corpus delicti of the offense with which he is charged is established independently of his extrajudicial statements.' [Citation.]" (*Powers-Monachello, supra,* 189 Cal.App.4th at p. 406.) "There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency." (*Alvarez, supra,* 27 Cal.4th at p. 1171.)

The amount of independent proof required is quite low. Our Supreme Court has described it as "'slight'" or "'minimal,'"

explaining that the "People need make only a prima facie showing "'permitting the reasonable inference that a crime was committed.'"" (*Jones*, *supra,* 17 Cal.4th at p. 301; see also *Alvarez, supra,* 27 Cal.4th at p. 1171 ["The independent proof may be circumstantial and need not be beyond a reasonable doubt, but is sufficient if it permits an inference of criminal conduct, even if a noncriminal explanation is also plausible"].) Although "[t]he inference [a crime has been committed] need not be 'the only, or even the most compelling one,'" it still must be a reasonable one. (*Jones*, *supra,* at pp. 301-302.) "[O]nce the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues. [Citations.]" (*Alvarez*, *supra*, at p. 1171.)

Giving full force to these permissive standards, the evidence here is still insufficient to establish the corpus delicti of the section 288.7, subdivision (a) charge. In their return to the petition, the People acknowledge "[t]he only other evidence of this assault [on A.S.] was a stained king-sized comforter recovered from [A.S.'s] bed that contained both her and [petitioner's] DNA" plus "[o]ne tested sample [that] contained both [petitioner's] DNA and a sperm cell." Even if we assume in a hypothetical case with different facts that the presence of DNA and a single sperm cell on a comforter in a home where both a child and a suspected molesting parent live could inferentially support the corpus of the charged crime at issue, no such inference is reasonable here. (*Powers-Monachello*, *supra*, 189 Cal.App.4th at p. 410 [inference must be reasonable]; see also *Jones*, *supra*, 17 Cal.4th at pp. 301-302.) A.S. denied she had been sexually abused when interviewed, no findings of abuse were made during her sexual

assault examination (which occurred, if petitioner's incriminating statements are credited, one or at most two days after the most recent date of criminal intercourse), and there was no expert testimony that might suggest the presence of the sperm cell was attributable to nefarious activity.

Thus, this is not a case like *Jones*, *People v. Robbins* (1988) 45 Cal.3d 867, or *People v. Jennings* (1991) 53 Cal.3d 334 (*Jennings*). (*Jones*, *supra*, 17 Cal.4th at p. 302 [circumstantial evidence of the commission of multiple other criminal sex acts against deceased victim (e.g., semen discovered in her vagina) sufficient proof of the corpus delicti of charged oral copulation offense]; *Robbins*, *supra*, at p. 886 [defendant's presence near the scene of the crime, diagnosed pedophilia, and physical evidence concerning the death of a child victim found unclothed sufficient to establish corpus of the lewd and lascivious act on a minor special circumstance]; *Jennings*, *supra*, at p. 367 [evidence that a woman dead for several weeks was found unclothed in a remote location, and with a broken jaw, sufficient to establish the corpus of rape].) Rather, it is an instance where we must give effect to the limits imposed by our Supreme Court's continued adherence to the corpus delicti rule. (*Jennings*, *supra*, 53 Cal.3d at p. 368 ["'Today's judicial retention of the [corpus delicti] rule reflects the continued fear that confessions may be the result of . . . the mental instability of the accused, and the recognition that juries are likely to accept confessions uncritically'"].)

DISPOSITION

The petition is granted. The matter is remanded to the trial court with directions to dismiss count one of the information, charging a violation of section 288.7, subdivision (a).

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.