

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio

Court of Appeals No. H-03-017

Appellee

Trial Court No. CRI-2002-0801

v.

Grover Sparkman

DECISION AND JUDGMENT ENTRY

Appellant

Decided: March 19, 2004

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, for appellee.

Gregory A. Shell, for appellant.

* * * * *

LANZINGER, J.

{¶1} Grover Sparkman appeals his conviction for arson from the Huron County Court of Common Pleas. Because we conclude that the spousal communication privilege did not exist because Sparkman and his wife were not living in coverture, we affirm.

{¶2} Sparkman was indicted September 16, 2002 on one count of arson, a violation of R.C. 2909.03 (A)(2) and (B)(2)(b) and one count of insurance fraud, a violation of R.C. 2913.47(B)(1) – both felonies of the fourth degree. Sparkman filed a

motion to suppress incriminatory statements he made to his estranged wife during certain audiotaped conversations, arguing they were protected by the spousal communication privilege. In its judgment entry denying the motion, the court stated that the “recorded telephone conversations between the Defendant and Lisa Sparkman made at a time when they were living separate and apart with divorce proceedings pending are not privileged communications protected by R.C. 2945.42 and R.C. 2317.02(D).”

{¶3} Sparkman entered a no contest plea to arson,¹ which the court accepted and upon which he was found guilty. He now appeals from the denial of his motion to suppress and raises a sole assignment of error: “The trial court erred by not suppressing the tapes of the June 19, 2002 telephone conversations between the defendant and his wife.”

{¶4} The Ohio Supreme Court recently stated that “[a]ppellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.” *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. (Citations omitted.) Accord, *State v. Moore*, 6th Dist.

¹The insurance fraud count was dismissed at the time of the no contest plea.

No. E-02-049, 2003-Ohio-3983, at ¶7. This standard, furthermore, also applies if, as the prosecutor argues, Sparkman's motion were to be considered to be a motion in limine because the trial court held a hearing similar to that in a suppression case, including the calling and cross-examining of witnesses. *State v. Ullis* (1992), 65 Ohio St.3d 83, 85-86. Compare, *State v. Dugan* (June 19, 1998), Erie App. No. E-97-118.

{¶5} Two statutes discuss the spousal communication privilege in the state of Ohio: R.C. 2317.02(D)² and R.C. 2945.42.³ Though they are substantially similar, only R.C. 2945.42 controls when the privilege is being asserted in a criminal case. *State v. Bradley* (1986), 30 Ohio App.3d 181, 183-184. This privilege, however, does not apply when the husband and the wife are not living in coverture – in other words, not living as husband and wife. *Bentleyville v. Pisani* (1995), 100 Ohio App.3d 515, 517-518; *State v. Shaffer* (1996), 114 Ohio App.3d 97, 101. Federal courts, likewise, have refused to

²R.C. 2317.02(D) states:

“Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, *during coverture*, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist;” (Emphasis added).

³R.C. 2945.42 states in pertinent part:

“Husband or wife shall not testify concerning a communication made by one to the other, or act done by either in the presence of the other, *during coverture*, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness ***. The presence or whereabouts of the husband or wife is not an act under this section. The rule is the same if the marital relation has ceased to exist.” (Emphasis added).

extend this privilege to situations where the husband and wife are separated and there is no real hope of reconciliation. *United States v. Singleton* (C.A.11, 2001), 260 F.3d 1295, 1297-1301; *United States v. Porter* (C.A.6, 1993), 986 F.2d 1014, 1018-1019.

{¶6} Grover and Lisa Sparkman were permanently separated, living in different states, and had filed for divorce on April 19, 2002. Two months later, Lisa recorded her phone conversations with Grover. The trial court found that any comments that Lisa made to Grover about reuniting were not genuine but an “apparent subterfuge” to get Grover to make incriminating statements. After listening to the audiotapes in question and reviewing the record, we conclude that the trial court’s factual findings were supported by competent credible evidence. We also agree with the trial court’s legal conclusions.

{¶7} *Pisani* and *Shaffer*, the appellate cases that refused to apply the spousal communication privilege, both concern instances where a separated spouse made audio recordings of conversations with his or her estranged spouse to aid in a criminal prosecution. Those courts found that recorded conversations were not privileged because the spouses were not living in “coverture” at the time.

{¶8} *Pisani* explains the term this way: “Coverture has been defined as ‘the condition or state of a married woman.’ Black’s Law Dictionary (6 Ed.1990) 366. Coverture originates from the antiquated principles that husband and wife are one in the person of the man, and the woman’s legal existence is suspended during marriage. See *State v. Mowery* (1982), 1 Ohio St.3d 192, 193-194, 1 OBR 219, 221-222, 438 N.E.2d

897, 898-899. ‘Today, however, many of these archaic principles have been superseded by more modern logical concepts. Women are no longer considered chattels and have through various movements in history attempted to gain equality with men. The goal of equality has by no means been achieved; however, hopefully by the constant application of logic by rational thinking individuals these medieval anachronisms will be totally surmounted.’ *Id.* at 194, 1 OBR at 221, 438 N.E.2d at 899. Coverture suggests a man and a woman are married under the law, whether by license or common law, and cohabitating as such. Under more modern logical concepts, a fitting definition for coverture is the condition or state of a married person, whether man or woman.” *Bentleyville v. Pisani* (1995), 100 Ohio App.3d 515, 517.

{¶9} The facts here show that Grover and Lisa Sparkman were separated and not living as husband and wife when Lisa recorded her conversations. Lisa’s actions show that she had no intention of returning to Grover, and it is clear that her statements to him about coming back were not genuine. Grover’s wish to reunite with Lisa does not change the outcome. He cannot claim the spousal communication privilege because he and Lisa were not living as husband and wife when the statements were made. The purpose of the spousal communication privilege under R.C. 2945.42, furthermore, would be subverted if a spouse was permitted exclude statements that were made to an individual with whom he or she was no longer living in coverture. As a result, Sparkman’s sole assignment of error is found not well-taken.

{¶10} Since substantial justice was done to appellant, Grover Sparkman, the judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal.

JUDGMENT AFFIRMED.

Peter M. Handwork, P.J.

JUDGE

Richard W. Knepper, J.

JUDGE

Judith Ann Lanzinger, J.
CONCUR.

JUDGE