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Supreme Court of Kentucky

85-SC-218-TG

COMMONWEALTH OF KENTUCKY — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HON. GEORGE BARKER, JUDGE
84-CR-346

LESLIE WILLIS — APPELLEE

CONCURRING OPINION BY JUSTICE LEIBSON

I concur in the opinion that KRS 421.350, Sections Three (3) and Four (4) are not necessarily unconstitutional on their face, with the caveat that both the trial court and our Court must take care to see that they are not unconstitutionally applied.

I believe that there is technology now available sufficient to adequately protect the accused's constitutional rights of confrontation from any substantive infringement, while keeping the accused out of the sight and hearing of the child witness while the child testifies.

With that in mind this Concurring Opinion expresses my views as to the minimum requirements for applying this statute constitutionally, keeping in mind that the accused's constitutional rights are preeminent. They cannot rightfully be impaired by either the General Assembly or the Judiciary, no matter how appealing the

reason for doing so may appear at the time. This includes the constitutional protections afforded the accused in both the United States and Kentucky Bill of Rights. There are no counterbalancing constitutional guarantees of victim's rights which justify their impairment.

A court's idea, or a legislature's idea, of what serves to advance the accuracy of the truth determining process does not preempt the accused's constitutional right to confront his accusers. The legislature has no right to create an exception to the hearsay rule that substantially impairs the defendant's right to confront his accusers. The exceptions to the hearsay rule were created from longstanding, traditional rationales consistent with the common law's understanding of the right to confront one's accusers, and cannot be rewritten simply to satisfy a court's or a legislature's predilections as to what rules of evidence will best serve the interests of justice.

However, it is constitutionally possible to present a child's testimony, (a) by videotape deposition taken before trial, (b) by closed circuit television utilized during trial, or (c) by in-court screening of the defendant from the sight and hearing of the witness, provided: (1) primary consideration is given to the defendant's constitutional right of confrontation as guaranteed by the Sixth Amendment of the U.S. Constitution and Section 11 of the Kentucky Constitution; (2) technology is available and utilized so that any impairment of the rights of the accused to confront the witness is technical and insubstantial; and (3) due regard is paid to the necessity principle.

Before being permitted to take the child's deposition, or to otherwise use television as a substitute for personal appearance in court, the Commonwealth should be required: (1) to persuade the trial court that such is reasonably necessary; and (2) to provide the technical details whereby (a) the testimony will be taken with the child screened from the sight and hearing of the defendant while, at the same time, (b) the defendant can view and hear the child and maintain continuous audio contact with his defense counsel.

Thus the only incursion on the defendant's right of confrontation is that the child is not required to look at the defendant's face or listen to his comments.

It is my opinion that where the defendant has legitimately undertaken to defend himself pro se, his right to question all witnesses (including the child) cannot be impaired. However, he cannot elect to selectively question the child, or the child and one or two other witnesses, and utilize the services of an attorney for the remainder of his defense.

Regardless of whether the child's testimony is videotaped in advance or presented by contemporaneous television transmission, there is no reason why the competency hearing conducted by the trial judge to determine whether the child is (or was at the deposition) qualified to give testimony should not initially be attempted in open court before the testimony is received in evidence. To do so enhances the judicial determination as to the admissibility of the

child's evidence by giving the jury first hand insight into the credibility of the child.

Further, and more important for present purposes, only after we bring the child into court and initiate questioning can we determine as a fact that videotape or television is necessary in lieu of personal appearance. The trial court should not prejudge that the child would not testify in open court, and decide that an alternative method of presentation is needed before the primary means is attempted. Under RCr 7.20 a deposition (which includes videotape) can be taken before trial and objections to competency reserved for trial.

In the present case, the competency hearing was attempted in the court's chambers in the presence of the defendant and it is quite possible that the child was unable or unwilling to speak because the defendant was in such close quarters. If the child were on the witness stand being questioned by the judge, separated from the defendant by substantial space and a counsel table, the child may not have been reluctant to answer. The court's mistake in the present case was to initiate the competency hearing in the wrong place, this is to say, in chambers rather than in open court. A televised deposition can be taken, utilizing the techniques previously discussed to preserve the substance of the right of confrontation, and the videotape then could be utilized at the trial after attempting a competency hearing in open court. If during the attempt to conduct this competency hearing in open court it should become necessary to screen the defendant from the child's sight, a

brief recess for rearrangements as necessary to accommodate the problem should not present a major obstacle.

Finally, I consider subsection (5) of KRS 421.350 as constitutionally impermissible under any circumstances. Subsection (5) specifies that:

> "If the court orders the testimony of a child to be taken under subsections (3) or (4) of this section, the child may not be required to testify in court at the proceeding for which the testimony was taken."

This provision conflicts with my views regarding qualifying the child in open court, as expressed in the preceding paragraph. More fundamentally, this section conflicts with the accused's Sixth Amendment right to call witnesses in his own defense, which must necessarily include the right to call adverse witnesses, including a child who has given evidence against him.

Regardless of how the Commonwealth conducts its case, including utilization of KRS 421.350(3) or (4), when the time comes for the defendant to put on his case, he is entitled to call any witness he wishes. If the child will not answer questions when called by the defendant, the jury is entitled to know this and evaluate this aspect of the case.

It is important to protect the sensibilities of a child, but it is more important to protect the accused's right to properly defend himself within the law as guaranteed by the Constitution. No person should be convicted of a felony and sent off to prison when he has not been able to defend himself as guaranteed by the

Constitution of the United States and the Constitution of the Commonwealth of Kentucky.

Under my view of the problem, if technology is properly applied, the only element that is eliminated is that the child is not required to look at or listen to the defendant while testifying. Since a witness always has this option, except where the accused is representing himself, I view the procedure as nothing more than a technological accommodation.