Hold to June 22, 1987 again

Supreme Court of Kentucky

85-SC-218-TG

COMMONWEALTH OF KENTUCKY circulated 6-3-86 APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GEORGE BARKER, JUDGE
84-CR-346

LESLIE WILLIS APPELLEE

DISSENTING OPINION BY CHIEF JUSTICE STEPHENS

What the majority of this Court has wrought in this case is the substantial watering down of one of our most traditional constitutional protections afforded our citizens - the right of an accused at his criminal trial to have a personal confrontation, before a jury of his peers, with his accuser. The majority has put the imprimatur of this Court on a new revision of the rule which says that the right of confrontation is no longer "face to face", but is rather, "face - to television screen - to face".

Because of occasional problems with the testimony of alleged young victims in child abuse cases, our General Assembly enacted, in 1984, the questioned statute - KRS 421.350(3)(4) and (5). In brief that statute provides that in criminal prosecutions involving a child alleged to have been the victim of sexual activity, the trial judge may order that the testimony

of the child at the trial be taken in a room other than the public courtroom and be televised by closed circuit equipment or be recorded for showing in the courtroom.

Further, it provides that although counsel for the accused may be present in the room with the child during his or her testimony, the accused may not be present. The accused may see and hear the child's testimony (presumably through the use of video equipment), but the witness may not see or hear the accused.

Under the aegis of this statutory scheme the accused may not be physically present before his accuser. The jury may also be removed, physically, from the presence of the accuser.

Is such a procedure consistent with the letter and the spirit of the Sixth Amendment to the United States Constitution or with the spirit and letter of Section Eleven of the Kentucky Constitution? The majority has answered this question in the affirmative. I respectfully disagree.

The Sixth Amendment is the cornerstone of the rights accorded an accused at his trial on criminal charges. It mandates that:

> "In all criminal proceedings, the accused shall enjoy the right . . .to be confronted with the witnesses against him...." U.S. Const. Amend. VI.

Our Kentucky Constitution reiterates this historical right, in more definitive language.

> "In all criminal prosecutions, the accused has the right . . .to meet the witnesses face to face . . . ." Ky. Const. Sec. 11.

It is my personal view that this right is not to be abrogated. Convenience or ease of prosecution of any criminal offense is not, and should not be, a factor in interpreting the basic rights of an accused person.

Historically, the right of confrontation has had two purposes. The primary purpose is to secure for the accused the full and unfettered right of cross-examination of the witnesses against him. The secondary purpose is to allow through the "personal appearance" of the accuser, the judge and the jury to closely observe, first hand, the "elusive and uncommunicable evidence of a witness' deportment while testifying." 5 Wigmore, Evidence §1395 (Chadbourn rev. 1974).

The rationale of the primary purpose is well set out in the case of People v. Fish, 125 N.Y. 136, 26 N.E. 319 (1891)

> "It is quite a valuable right to a prisoner to be confronted upon his trial with the witnesses against him, so that he may cross-examine them, and the jury see them, and thus judge their credibility . . . ." 26 N.E. at 322.

The United States Supreme Court - not unexpectedly - views the matter in the same vein. In Mattox v. U.S., 156 U.S. 237, (1895) the Court stated that the primary purpose of the right of confrontation is to permit

> ". . . personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him [the accuser] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand, and the manner in which he gives his testimony whether he is worthy of belief." 156 U.S. at 242-243. (emphasis added).

The rationale of the secondary purpose is well expressed in Wigmore's treatise on Evidence where personal confrontation is described as:

> "The witness present, the promptness and unpremeditatedness of his answers or the reverse, their distinctness and particularity or the want of these essentials, their incorrectness in generals or particulars, their directness or evasiveness, are soon detected....The appearance and manner, the voice, the gestures, the readiness and promptness of the answers, the evasions, the reluctance, the silence, the contumacious silence, the contradictions, the explanations, the intelligence or the want of intelligence of the witness, the passions which move or control - fear, love, hate, envy, or revenge - are all open to observation, noted and weighed by the jury." 5 Wigmore, Evidence § 1395 (Chadbourn rev. 1974) quoting Chief Justice Appleton, Evidence (1860).

This court has, of course, enunciated the right of confrontation and has embraced the mandate of the United States Constitution and the Kentucky Constitution. Harris v. Commonwealth, Ky., 315 S.W.2d 630 (1958). In Flatt v. Commonwealth, Ky., 468 S.W.2d 793 (1971) this Court held that,"[t]he right of confrontation is limited to witnesses and one who would be a witness in a criminal case must confront the accused." Id. at 794. (emphasis added).

The majority, it seems to me, has not followed the historical guidelines and tests of the right of confrontation. The majority has decided that the right of confrontation does not have to be "face-to-face". The majority has decided that the right of confrontation is satisfied by the interposition of a television screen between the accused and his accuser. The majority has decided that the right of confrontation is fulfilled when the accused, and the jury, are not even

in the same room - an open courtroom - with the accused. The majority has decided that a television screen will reveal to the accused and to the jury the complete picture of the accuser, with all his emotions and mannerisms. The majority has denied the right of the accused and the jury to see the reaction of the accuser to the physical presence of the accused.

The majority opinion - no matter how carefully one slices it - has virtually eliminated the right of effective cross-examination. One can only imagine the multitude of unacceptable logistical scenarios when the accused is in one room attempting to communicate with his counsel in another room. One can picture the accused or a messenger attempting to run back and forth with notes everytime a question seems necessary. Or, perhaps, a private telephone line or a private radio communication system would be provided. Under these circumstances it is difficult to imagine that cross-examination could exist as a helpful tool for the defense and I believe any trial attorney would find these conditions intolerable. Any substantial limitation on the effectiveness of cross-examination strikes right to the heart of the right of confrontation.

By declaring the statutory scheme constitutional, the majority of this Court has taken a giant step in diminishing, if not eliminating, a fundamental right granted to all of us. No one does, and I certainly do not, condone the virulent and growing crime of child abuse. But, no one should, and I certainly do not, condone any policy of the General Assembly which effectively negates a constitutional right.

Much of the Attorney General's oral argument dealt with the statutory goal of making it easier to prosecute alleged perpetrators of child abuse. I do not subscribe to such reasons when the Bill of Rights of the United States Constitution and a provision of the Kentucky Constitution are clearly abrogated by such legislation. "Face to face" means just that.

I would affirm the trial court.