

MEMORANDUM

TO: ALL JUSTICES
FROM: JUSTICE WINTERSHEIMER
RE: COMMONWEALTH V. WILLIS (85-SC-218-TG)
DATE: MAY 14, 1986

Attached are Justice Leibson's comments.

Your comments and suggestions, if any, would be appreciated.

MEMORANDUM

TO: Justice Donald Wintersheimer
FROM: Justice Leibson
RE: Commonwealth v. Leslie Willis - 85-SC-218-TG
DATE: May 6, 1986

I concur only insofar as holding that KRS 421.350, §§ 3 and 4, are not unconstitutional per se.

I respectfully disagree with much of the language in the opinion, and I dissent from upholding the constitutionality of subsection five (5) of KRS 421.350.

I am of the opinion that a child's testimony can be presented by video tape deposition taken before trial, by closed circuit television utilized during trial, or 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; and (2) technology is available and utilized so that any impairment of the rights of the accused is wholly technical and insubstantial.

In my view, the constitutionally protected rights of the accused are preemptive. They cannot be impaired, even slightly, except by constitutional amendment. I disagree that this Court has any right to impair constitutionally protected rights because of a "duty of the court to balance the rights of the accused with those

of the victims" (Op., p. 13), and I disagree that this Court has any right to prevent a constitutional right from being "carried . . . farther than the public safety will warrant" (Op., p. 6).

However, I believe that there may be technology available sufficient to completely protect the accused's constitutional rights from any substantive infringement, while keeping the child out of the sight and hearing of the accused while the child testifies.

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. Further, 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.

I disagree that the "mission of the Confrontation Clause is to advance the accuracy of the truth determining process in criminal proceedings" (Op., p. 3). 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. Further, I disagree that the legislature has a right to create an "exception to the hearsay rule" that infringes upon 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 as it existed at the time of the constitution 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.

RCr 7.12 is not consistent with the opinion as written, and we should not suggest that it is. RCr 7.12 specifies that when depositions are to be taken to be used as evidence in a criminal case, the order "shall contain such specifications as will fully protect the rights of personal confrontation and cross-examination of the witness by the defendant." (Emphasis added) The rule further provides that "the commonwealth shall pay in advance the reasonable expenses of travel and subsistence of the defendant and his attorney in attending such examination." (Emphasis added) Further, "if a defendant is in custody, he shall be produced at the examination." >

Thus the deposition process contemplated by RCr 7.12 is one where the accused will be present and have an opportunity to confront a witness at a deposition as fully as he can do so when a

witness appears in court. Our rule RCr 7.12 does not diminish the confrontation clause; rather it enhances it. I believe that technology will permit the purposes advanced by KRS 421.350 to be accomplished consistent with the confrontation clause, whether at trial or deposition, providing the utilization of KRS 421.350 is properly circumscribed.

Next, regardless of whether the child's testimony is video taped 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 be conducted 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 video tape or television is necessary in lieu of personal appearance. The court cannot prejudge that an alternative method of presentation is needed before the primary means is attempted. Under RCr 7.20 a deposition (which includes video tape) can be taken 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. I would permit a televised deposition to be taken (subject to the modified right of confrontation as previously discussed), which could be utilized at the trial after 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.