RENDERED: June 12, 1986
TO BE PUBLISHED

# Supreme Court of Kentucky

85-SC-218-TG

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

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

LESLIE WILLIS — APPELLEE

OPINION OF THE COURT BY JUSTICE WINTERSHEIMER

REVERSING AND REMANDING

This appeal is from an order denying a request to take the testimony of a 5-year-old sexual abuse victim pursuant to KRS 421.350(3)(4)(5), and holding those sections unconstitutional because they deny the defendant the right to confrontation and violate the separation of powers doctrine.

Willis was indicted on two counts of first-degree sexual abuse. Before trial, he moved to exclude the testimony of the child victim, claiming that she was incompetent to testify. A competency hearing was held in the chambers of the trial court with the trial judge, the court reporter, defense counsel, the defendant, the prosecutor, the mother of the victim and the victim present.

When the child was asked why she would not respond to certain questions, she stated:

A. I don't want him -- hurt me.

* * *

Q. Somebody here you don't want to see?

A. (Witness nods affirmatively.)

Q. Who's that?

A. Uncle Leslie. (TH 9.)

* * *

Q. Are you going to talk for us?

A. I don't want him here. (TH 10.)

* * *

A. Yes. I don't want Uncle Leslie, Mommy. (TH 19.)

The trial judge was unable to rule on whether she was competent or incompetent because her answers were unresponsive.

The prosecution then pursued a motion to proceed under KRS 421.350(3) or (4), which permits the use of television cameras to present the testimony in a sex abuse case of a victim under the age of twelve so that the child need not be aware of the defendant's presence. After submission of written arguments, the trial judge sustained the defense motion to exclude the testimony of the child witness because he was of the opinion that Sections 3, 4 and 5 of KRS 421.350 were unconstitutional, as a violation of the defendant's right

to confrontation and a violation of the separation of powers doctrine in Section 28 and 109 of the Kentucky Constitution.

The Commonwealth was unable to prosecute the case because the child witness was the only eye witness to the crimes charged and appealed pursuant to KRS 22A.020 which authorizes interlocutory appeals.

This Court reverses the decision of the circuit court and remands this case for completion of the competency hearing and any trial resulting therefrom. Sections 3 and 4 of the statute are constitutional, and there is no violation of the separation of powers doctrine.

The issue is whether the statute in question offends either Section Eleven of the Kentucky Constitution or the Sixth Amendment to the United States Constitution, both of which deal with the right of a criminal defendant to be confronted with the witnesses against him.

The specific language of the Kentucky Constitution, § 11, is as follows:

> In all criminal prosecutions, the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,

> by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

The requirement in the Kentucky Constitution to "meet witnesses face to face" is basically the same as the Sixth Amendment to the federal constitution which provides a right of confrontation. The federal courts have indicated that the Confrontation Clause reflects a preference for face to face confrontation at trial. Roberts v. Ohio, 448 U.S. 56, 63, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). The principal purpose of confrontation is to ensure the right of cross-examination and to protect the accused from conviction by means of ex parte testimony given in his absence. Harris v. Commonwealth, Ky., 315 S.W.2d 630 (1958). In both the federal and state constitutions the right of confrontation has the same underlying purpose which is to provide the right of cross-examination.

Our legislature, after extensive public hearings on the matter of child sex abuse and responding to a plea for witness protection, has accepted the philosophy that testifying in a formal court room atmosphere at a criminal trial before the defendant, judge and jury can be one of the most intimidating and stressful aspects of the legal process for

children. Exercising the legitimate right of legislative policy making, the statute in question was enacted.

I

KRS 421.350(3) and (4) does not unduly inhibit the right of cross-examination. The accused still has the right to hear and observe the witness testify and the jury has the opportunity to view the video and evaluate the demeanor and credibility of the witness.

The sections of the statute apply only to a narrow class of witnesses, children twelve years old or younger who are victims of sex offenses. They impose no restrictions on cross-examination, allow the finder of fact to observe the demeanor of the witness and require that defendant be present to see and hear the testimony. The law is available at the discretion of the trial judge in the interest of the truth determining process. The appropriate balancing of the competing interests of the right of confrontation and the right of a witness to be free of intimidation favors the constitutionality of the statute. See Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895).

The discretion provided to the trial judge pursuant to KRS 421.350 allows the utilization of modern technology so as to enhance the truth determining qualities of a trial.

The statute requires that the defendant be present in person so that he may see and hear the witness but he shall

not be seen by the child. The same basic procedure permits the testimony to be taken prior to trial and preserved by video tape. §§ 4. The availability of procedures permits the defendant to fully participate in cross-examination and to adequately see and hear the witness. The reproduced testimony must be of adequate quality for the jurors to assess the demeanor of the witness and to evaluate credibility. The trial judge paraphrased the issue as to whether the privilege of viewing a witness through a one-way mirror or a video monitor is a constitutionally acceptable substitute for face-to-face confrontation. We believe that it is. See Wigmore on Evidence § 1397 (Chadbourne Revision, 1979).

The main purpose of confrontation is to ensure the right of cross-examination and to protect the accused from conviction by means of secret testimony given in his absence. Harris v. Commonwealth, Ky., 315 S.W.2d 630 (1958). The same language is cited with approval in Flatt v. Commonwealth, Ky., 468 S.W.2d 793 (1971). The obvious purpose of these constitutional provisions is to secure to the defendant a right of cross-examination. Flatt, supra.

The legislative authorization of video tape or closed circuit trial testimony by certain child victims pursuant to KRS 421.350 does not violate a defendant's right to confrontation as protected by the constitution.

Mattox v. United States, supra, does not support

the argument that confrontation requires visual contact between the defendant and the witness. Mattox, supra, authorizes admission of dying declarations and the court observed that the general prohibition against hearsay evidence must occasionally give way to considerations of public policy and the necessities of the case. Mattox.

Chambers v. Mississippi, 410 U.S. 284, 295 (1973), states that the right to confront and cross-examine is not absolute and may in appropriate cases be compromised to accommodate other legitimate interests in the criminal trial process.

Ohio v. Roberts, 448 U.S. 56, 100 S.Ct.2531, 65 L.Ed.2d 597 (1980), states in part that the confrontation clause reflects a preference for face-to-face confrontation but that a primary interest secured by the right is the right of cross-examination. The U.S. Supreme Court recognizes that competing interests may warrant dispensing with confrontation at trial.

Generally the preference for face-to-face confrontation establishes a rule of necessity where the prosecution must demonstrate unavailability prior to introduction of a hearsay statement. Its underlying purpose is to augment accuracy in the truth finding process by insuring the defendant an effective means to test adverse evidence.

Roberts, supra, found no violation of the right to confrontation by introduction of written testimony from

a preliminary hearing. Kentucky permits hearsay testimony to be introduced under similar circumstances. Maynard v. Commonwealth, Ky.App. 558 S.W.2d 628 (1977).

The videotaped or televised testimony under §§ 3 or 4 of the statute is not hearsay. It is the functional equivalent of testimony in court. The testimony is taken with the court, counsel and the defendant present in person. Full cross-examination is authorized. The defendant and the jury can see and hear the witness and assess credibility by observation of the demeanor of the witness.

The motion to take the victim's testimony pursuant to KRS 421.350 does not limit the defendant's right to cross-examination in any way. He is not precluded from bringing out any evidence of hostility, bias or other motive for testifying or from otherwise attacking the credibility of the witness. Cf. Barnett v. Commonwealth, Ky., 608 S.W.2d 374 (1980). The right of confrontation is fully protected as required by the constitution and RCr 7.12.

There is no authority to support the proposition that the right of confrontation guaranteed by the Kentucky Constitution should be construed more stringently than the same right in the United States Constitution. The debates on the Kentucky Constitution of 1891 include references to the "face to face" language, but these discussions neither support nor refute the position of the defendant. However,

construction of the Sixth Amendment by federal courts has consistently included identical language. See Snyder v. Massachusetts, 201 U.S. 102, 105-106, 54 S.Ct.330, 78 L.Ed.2d 674 (1933); Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

The Kentucky statute is identical to a Texas law adopted in 1983. Texas Criminal Procedural Code, Anno. § 38.071 (Vernon, 1983). Subsection 2 of the Texas statute has withstood attack on confrontation grounds but the comparable Subsection 2 of KRS 421.350 is not in issue here. Jolly v. Texas, 681 S.W.2d 689 (Tex.App., 1984). A number of other jurisdictions have similar statutes or rules but the specific issue raised here has not been reported by their appellate courts.

State v. Sheppard, 197 N.J.Super. 411, 484 A.2d 1330 (1984), permits the use of closed circuit television testimony taken under circumstances similar to those described in KRS 421.350. After an extensive analysis of various authorities on the right of confrontation and the exceptions thereto as they regard child abuse, Sheppard, supra, held that the video tape procedure did not deny the right of the defendant to confrontation and due process. We are persuaded that the rationale of the Sheppard decision is sound because the exception to the Confrontation Clause is far outweighed by the inability to effectively prosecute child abusers because the

evidence against them cannot be presented without intimidation.

We realize that the statute in question does limit the manner of confrontation, but it does not infringe on the right of confrontation, and a proper balancing of the competing interests of society in general and the accused require that the statute be upheld.

Concern about the proper way to present the testimony of child victims in sex abuse cases is not new. An early review of the problem can be found in Libai, The Protection of Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne Law Review 977 (1969). See Ordway, D.P. Proving Parent-Child Incest, 15 University of Michigan Journal of Law Reform 131 (1981).

Some jurisdictions are expanding the hearsay exceptions to accommodate the special problems involved in child sex abuse cases. See A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Columbia Law Review 1745-1766 (1983). A recent comprehensive review of the entire question may be found in Symposium Issue: Child Abuse and the Law, 89 Dickinson Law Review 3 (Spring 1985).

The rights of the defendant must be balanced with the legitimate concern for victims of the crime. Kentucky has long recognized on a broader scale, special treatment for child witnesses by authorizing leading questions on direct examination. Meredith v. Commonwealth, 265 Ky. 380, 96 S.W.2d

1049 (1936); Peters v. Commonwealth, Ky., 477 S.W.2d 154 (1972).

Kentucky also recognizes various exceptions to the right of confrontation. Business records, dying declarations, res gestae statements and excited utterances are admissible despite the inability of the defendant to cross-examine. Written depositions may be introduced at trial. RCr 7.12; Noe v. Commonwealth, Ky., 396 S.W.2d 808 (1965). A defendant may be excluded from the court room because of his misconduct and consequently be denied the right of physical confrontation. RCr 8.28; Scott v. Commonwealth, Ky., 616 S.W.2d 39 (1981).

The statutory provisions are not automatic but instead rest in the sound discretion of the trial judge. If the prosecution is unable to show any necessity for use of the statute, it could be an abuse of discretion to grant a motion over defense objection.

The intent of the legislature in enacting the statute is obvious. If unavailability of the witness in the traditional sense is construed to be a statutory prerequisite, then the legislature did a vain act in adopting KRS 421.350 because it would provide no further protection for child witnesses than was already available. Obviously to carry out the true legislative intent to protect child victims of sex abuse under the age of twelve, the trial court must have wide discretion to consider the age and demeanor of the child witness, the nature of the offense and the likely impact of testimony in

court or facing the defendant.

Here the defendant was known to the victim and the trial judge specifically found that the child would not testify as to any details of the alleged offense and appeared to be reluctant to testify in the presence of the defendant.

It is entirely possible that when a child witness is too frightened or inarticulate to allow any significant examination, even at a competency hearing, then a finding of unavailability may be justified. Ironically, putting the child through the ordeal of testifying in open court may denigrate the reliability of her testimony. Ordway, supra at 132.

Confrontation does not require live presentation of evidence to the trier of fact. A photographic or electronic presentation is not perfect as a substitute for live testimony but it will suffice. Video tape cannot be any less helpful in enabling a jury to assess credibility than a bare transcript read by the prosecutor. See United States v. King, 552 F.2d 833 (9th cir. 1976).

Under the statute a defendant has the right to object to and seek exclusion of all portions of a tape which he considers unfair or unduly prejudicial. The credibility of the witness can be fully explored on cross-examination and can be argued to the jury. Video tapes have received wide accept-

ance in criminal trials and have been uniformly held admissible upon showing of a proper foundation. See Admissibility of Video Tape Film Evidence in Criminal Trial, 60 A.L.R.3rd 333. The argument by Willis regarding the reliability of video tape testimony is unconvincing.

The reliance by Willis on Herbert v. Superior Court of the State of California, 117 Cal.App.3rd 661, 172 Cal.Rptr. 850 (1981) is misplaced. In that case there was no record that the child required the special seating arrangement or that any one had requested it or that the child was intimidated by the defendant. Here the trial judge found that the child witness was unable to testify because of the defendant's presence. In Herbert, supra, the accused was not able to see the witness which is not the case here. Davis v. Alaska, 415 U.S. 308 (1975), is distinguishable in that the victim there suffered mere temporary embarrassment from disclosure of his juvenile record whereas the defendant was precluded from his defense theory of bias by the witness. Under KRS 421.310, no defense theory is blocked and the state has compelling interests in prosecuting crimes in which the only witness is a young, fearful and uncommunicative child and protecting that child from the prolonged ordeal of recounting the abusive acts in open court.

There is no constitutional right to eyeball to eyeball confrontation. The choice of the words "face to face" may have resulted from an inability to foresee technological develop-

ments permitting cross-examination and confrontation without physical presence.

In the Eighteenth Century, live testimony was the only way that a jury could observe the demeanor of a witness. The use of video tapes does not represent a significant departure from that tradition because the goal of providing a view of the witness's demeanor to the jury is still achieved.

The intervention of a video screen or a one-way mirror does not infringe upon the defendant's right to confrontation. There is a difference between confrontation and intimidation. It would be unconstitutional for the government to take evidence in secret and outside of the presence of the defendant, but there is no right to eyeball to eyeball presence.

The right to be present at trial and the right to confrontation must be applied in such a way as to produce a fair result and enhance the truth-determining process. The right to confront does not confer an automatic right to intimidate. The sound discretion of the trial judge is the best gauge to determine the fairness of a proceeding.

II

The statutory adoption of a discretionary method for the admission of evidence is not a violation of the separation of powers doctrine as enunciated in Sections 28 and 109 of the Kentucky Constitution.

The statute provides for total discretion in the

trial judge as to the use of the provisions of the law. Consequently there is no invasion of any judicial power. The statute does not interfere with or threaten interference with the orderly administration of justice and it has not been superseded by any rule of procedure.

Rule 7.12 does not diminish the Confrontation Clause; rather it enhances it. Technology will permit the purposes advanced by KRS 421.350 to be accomplished consistent with the Confrontation Clause whether at trial or deposition.

The statute does not conflict or violate the requirements of RCr 7.12. The right of cross-examination is fully protected. The accused is permitted to see and hear the child and has the opportunity to participate in cross-examination through consultation with his attorney. Obviously the witness in this kind of situation is unable to testify under normal, traditional trial conditions because of age and the nature of the crime. Therefore, her deposition would ordinarily be admissible. See RCr 7.20(1). Wells v. Commonwealth, Ky., 562 S.W.2d 622 (1978), held that RCr 7.20 regarding the use of depositions should not be so narrowly construed to preclude other circumstances when a witness is unavailable. RCr 7.20 is intended to preserve the evidence in the event the witness becomes unavailable to testify.

The use of video or television equipment as a substitute for personal appearance, either in trial or in deposition, requires

the Commonwealth to demonstrate that such use is reasonably necessary and to provide the technical details whereby the testimony will be taken with the child screened from the sight and hearing of the accused, while at the same time, the defendant can view and hear the child and maintain continuous audio contact with his defense counsel. Consquently, 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.

There is no authority under traditional court room procedures which specifically requires any witness to look at the defendant. A witness has never been disqualified by mere refusal or inability to look at the defendant. The testimony of a blind victim would not be invalid. The same is true for the testimony of a witness who refuses to look on the accused. By analogy a defendant would not be denied the right of confrontation when a young victim is so intimidated by his mere presence that she cannot testify unless she is unable to see or hear him.

The strength of the State and Federal Constitutions lies in the fact that they are flexible documents which are able to grow and develop as our society progresses. The purpose of any criminal or civil proceeding is to determine the truth. KRS 421.350 provides such a statutory plan while protecting the fundamental interests of the accused as well as the victim.

The statute does not interfere or threaten to interfere with the orderly administration of justice and it has not been preempted by the rule-making authority of this Court. Total discretion remains with the trial judge.

It is the holding of this Court that the limited provisions of KRS 421.350(3) and (4) as they apply to child witnesses 12 years of age or younger who are the victims of sex abuse are constitutional. They do not deny the right of confrontation by a defendant nor do they violate the separation of powers doctrine.

The decision of the circuit court is reversed. This matter is remanded to the trial court for completion of the competency hearing.

Gant, Leibson, Vance and Wintersheimer, JJ., concur. Stephens, C.J., Stephenson and White, JJ., dissent.

ATTORNEYS FOR APPELLANT:

David L. Armstrong
Attorney General,
Penny R. Warren
Assistant Attorney General
Capitol Building
Frankfort, Ky. 40601

Raymond M. Larson
Commonwealth Attorney
Special Assistant Attorney General
Patrick M. Malone
Assistant Commonwealth Attorney
Special Assistant Attorney General
275 West Main Street, Suite 300
Lexington, Ky. 40507

ATTORNEY FOR APPELLEE:

John P. Schrader
Geralds, Moloney & Jones
259 West Short Street
Lexington, Kentucky 40507