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SUPREME COURT OF KENTUCKY

FILE NO. 85-SC-218-TG

COMMONWEALTH OF KENTUCKY — APPELLANT

VS. APPEAL FROM FAYETTE CIRCUIT COURT
HON. GEORGE BARKER, JUDGE

LESLIE WILLIS — APPELLEE

REPLY BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

This is to certify that a copy of the within Reply Brief has been mailed, postage prepaid, to Honorable George Barker, Judge, Fayette Circuit Court, Courthouse, Lexington, Kentucky 40507; and Honorable John P. Schrader, Geralds, Moloney & Jones, 259 West Short Street, 2nd Floor, Lexington, Kentucky 40507-1237, Counsel for Appellee, on this the 11th day of September, 1985. I further certify that the record has not been withdrawn.

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PURPOSE

The purpose of this brief is to reply to claims and authorities raised by appellee.

INTRODUCTION

Appellee argues five separate issues in response, most of which were not presented to the trial court. The Commonwealth submits this appeal is limited to the two issues addressed in the trial court's Opinion and Order and briefed by the Commonwealth, but will alternatively respond briefly to the additional issues.

ARGUMENT

I. THE LEGISLATIVE AUTHORIZATION OF VIDEOTAPE OR CLOSED CIRCUIT TRIAL TESTIMONY BY CERTAIN CHILD VICTIMS UNDER KRS 421.350 DOES NOT VIOLATE A DEFENDANT'S RIGHT OF CONFRONTATION.

Appellee first relies upon general language in the case of Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), for the proposition that confrontation requires visual contact between the witness and the defendant. Yet, the holding of Mattox rejected any such reasoning by authorizing admission of dying declarations. The Court observed the general prohibition of hearsay evidence "must occasionally give way to considerations of public policy and the necessities of the case," Id., 156 U.S. at 243, and continued:

> "A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant." Id.

Subsequent decisions further refute appellee's claim. In Chambers v. Mississippi, 410 U.S. 284, 295 (1973), the Court reiterated this principle as follows:

> "Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."

Most recently, in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Court reviewed the prohibition against hearsay evidence and stated,

> "The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the provision] is the right of cross-examination.' Douglas v. Alabama, 380 U.S. 415 (1965).
>
> * * *
>
> The Court, however, has recognized that competing interests, if 'closely examined,' Chambers v. Mississippi, 410 U.S. at 295, may warrant dispensing with confrontation at trial." Id., 448 U.S. at 63-64.

Generally, the preference for face-to-face accusation establishes a rule of necessity whereby the prosecution must demonstrate unavailability prior to introduction of a hearsay statement. Id. at 65. Secondly, "[r]eflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence," Id., the Clause requires the hearsay statement bear "indicia of reliability." Id. at 66.

The Roberts Court reviewed application of this test to the facts in California v. Green, 399 U.S. 149 (1970), in which a youth identified Green at a preliminary hearing but professed a lapse of

memory at trial. Id. at 68. The Court found no error in admission of the preliminary hearing transcript at trial, reasoning as follows:

> "'Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel--the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.' [Green] 399 U.S. at 165.
>
> These factors, the Court concluded, provided all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement." Roberts, supra, at 69, quoting Green at 166. (Emphasis added.)
>
> * * *
>
> "Since there was an adequate opportunity to cross-examine [the witness], and counsel . . . availed himself of that opportunity, the transcript . . . bore sufficient 'indicia of reliability' and afforded '"the trier of fact a satisfactory basis for evaluating the truth of the prior statement."'" Roberts, at 73, quoting Green at 216.

In Roberts, as in Green, the Court found no violation of the right of confrontation by introduction of written testimony from a preliminary hearing. Kentucky, likewise, permits hearsay testimony to be introduced under such circumstances. Maynard v. Commonwealth, Ky.App., 558 S.W.2d 628, 633 (1977).

By comparison, KRS 421.350 more than adequately meets the requirements of confrontation. First, unlike a statement taken under subsection (2) of the statute, the videotaped or televised testimony under subsections (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 witness' demeanor. One recent commentator assessed the confrontation argument as follows:

> "Two arguments support [the nonhearsay treatment] approach. First, in those cases in which the Supreme Court has treated past testimony as ordinary hearsay, it has done so either because the defendant had no adequate opportunity for cross-examination at the earlier hearing or because the defendant had no way of knowing that the witness would not testify at trial and hence may have failed to conduct vigorous cross-examination. In contrast, videotaping statutes provide full opportunity for cross-examination and alert the defendant that the videotaped testimony may be offered in lieu of the child's testimony at trial. Second the statutes preserve the essential elements of confrontation--the oath, the opportunity to observe the witness's demeanor, and the right to cross-examine. These elements provide 'all that the Sixth Amendment demands: "substantial compliance with the purposes behind the confrontation requirement."' Even the defendant's right to confront the child face to face during the videotaping session is not critical to the purposes of cross-examination. As long as the defendant can observe the child's testimony and can confer with his attorney, the essential safeguards of cross-examination are preserved." Note: "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," 98 Harvard Law Review 806 (February 1985), at 823 [hereafter "Innovations"].

See also, Parker, J., "The Rights of Child Witnesses: Is The Court a Protector or Perpetrator?" 17 New England Law Review 642 (1982), at 695. The Commonwealth respectfully submits appellee's claims regarding violation of his right of confrontation and the need for a showing of unavailability must fail.

Second, even if this Court should construe the videotaped testimony as hearsay, confrontation requirements are met. The statutory provisions are not automatic, but instead rest within the sound discretion of the trial court. If the prosecution is unable to show any necessity for use of the statute, it would be an abuse of discretion to grant the motion over defense objection. However, to avoid further victimization of the victim by the justice system, this Court should take notice of the numerous persuasive authorities on child victims as witnesses and consider the obvious intent of the Legislature in enacting the statute.[1] If unavailability in the traditional sense is construed to be a statutory requirement, then the Legislature did a "vain thing" in enacting KRS 421.350. See, Tabor v. Commonwealth, Ky., 625 S.W.2d 571, 572 (1982). The "unavailability" and "indicia of reliability" test was adopted in Kentucky in 1977. Maynard, supra. The 1984 statute would provide no further protection for child witnesses or defendants than was already available. Courts must assume legislative acts are intended for some purpose. Martin v. Cassidy, Ky.App., 628 S.W.2d 888, 890 (1982). To carry out legislative intent the trial court must have

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[1]See, for example: State v. Gilbert, 109 Wis.2d 501, 326 N.W.2d 744 (1982); Parker, J., supra; Innovations, supra; Melton, "Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings," Child Sexual Abuse And The Law (J. Bulkley ed. 1982); Berliner & Barbieri, "The Testimony of the Child Victim of Sexual Assault," 40 J. Soc. Issues, No. 2 (1984); Libai, "The Protection of the Child Victim of Sexual Offense in the Criminal Justice System," 15 Wayne L. Rev. 977 (1969); Ordway, D. P., "Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim," 15 U. of Mich. J. of L. Reform 131 (1981); Meyers, "When Children Take The Stand," 11 Student Lawyer 14 (No. 1, Sept. 1982).

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.

In the present case, the defendant was known to the victim and the trial judge specifically found, "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." (TR 50.) "Many observers . . . have maintained that child witnesses are traumatized and often intimidated into silence by the presence of the accused." Innovations, at 815. "Children who are prevailed upon to testify may be more damaged by their traumatic role in the court proceedings than they were by their abuse." State v. Sheppard, 197 N.J.Super. 411, 484 A.2d 1330, 1342 (1984). The Commonwealth submits that when a child is called to testify, and proves too frightened or inarticulate to allow any meaningful examination even at a competency hearing, then a finding of unavailability is justified. Appellee would automatically require an examination by a psychiatrist and expert testimony on the prolonged traumatic impact to the child of courtroom testimony. Such a rigid requirement would further harass victims of child sexual abuse and result in needless delay and expense.

Appellee's claim that video testimony lessens witness reliability ignores the teaching of Roberts, supra, that a written transcript of a preliminary hearing bore sufficient indicia of reliability when there was an adequate opportunity to cross-examine the witness and counsel availed himself of that opportunity. Id. at 73. It further ignores the findings of studies and commentators.

"Ironically, putting the child through the ordeal of testifying in open court also denigrates the reliability of her testimony." Ordway, supra, at 132, 137-138. Appellee's argument that a jury is not able to adequately assess credibility was rejected in United States v. King, 552 F.2d 833, 841 (9th Cir. 1976), as follows:

> "It is true that a photographic or electronic presentation is not a perfect substitute for live testimony on the witness stand. But confrontation does not require perfect presentation and availability of demeanor evidence to the trier of fact; . . ."

As the King court noted, "a videotape cannot be any less helpful in enabling a jury to assess credibility than a bare transcript alone, read by the prosecutor." Id. Under Kentucky's videotape statute, a defendant is free to object and to urge exclusion of all portions of a tape which he deems unfair or unduly prejudicial. Credibility of the witness can be fully explored upon cross-examination and can be argued to the jury at length in closing. Videotapes generally have received widespread acceptance in criminal trials and have been uniformly held admissible upon a showing of a proper foundation. "Admissibility of Videotape Film In Evidence in Criminal Trial," 60 A.L.R.3d 333. In sum, appellee's claims regarding reliability of videotape testimony are without merit.

Appellee's reliance upon Herbert v. The Superior Court of the State of California, 117 Cal.App.3d 661, 172 Cal.Rptr. 850 (1981), is misplaced. In Herbert, there was no record that the child required the special seating arrangement, that anyone had requested it, or that the child was intimidated by the defendant. In the present case the trial judge found that the child was unable

to testify in the defendant's presence. Also, in Herbert, the defendant was not able to see the witness, a problem avoided by the Kentucky statute. Davis v. Alaska, 415 U.S. 308 (1975), is also distinguishable in that the victim there suffered mere "temporary embarrassment" from disclosure of his juvenile records, whereas the defendant was precluded from his defense theory of bias of the witness. By contrast, under KRS 421.350 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 protection of that child from the prolonged ordeal of recounting the abusive acts in open court.

Lastly, appellee's claim that he has a constitutional right to eyeball-to-eyeball presence must be rejected. The choice of the words "face-to-face" by the Court "may have resulted from its inability to foresee technological developments permitting cross-examination and confrontation without physical presence." Melton, supra, at 188. One commentator discussed the issue as follows:

> Perhaps it is because in the Eighteenth Century live testimony was the only way that a jury could observe the demeanor of a witness that it has traditionally been preferred. In this respect, the use of videotapes does not represent a substantial departure from tradition since the goal of providing a view of the witness' demeanor to the jury is achieved.
>
> Similarly, the fact that the defendant will be viewing the live or videotaped cross-examination from behind a one-way screen does not infringe the defendant's right of confrontation. There is no doubt that it would be unconstitutional for the state to take evidence in secret and outside the defendant's presence, however, there seems to be no right to eyeball-to-eyeball presence." Parker, supra, at 695-696.

Even if this Court were to construe the Kentucky Constitution as affording a right to visual observation of the defendant by the witness, the Commonwalth submits that the compelling state interests in protection of child victims of sexual abuse outweigh this limited protection afforded the defendant. See Innovations at 823-824.

II. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IS NOT INFRINGED BY KRS 421.350.

Appellee incorrectly presumes that communication between the defendant and his counsel is not available. He ignores the presumption that the Legislature is familiar with constitutional requirements and that the statute should be construed as constitutional. Fiscal Court Commissioners v. Jefferson County Judge Executive, Ky.App., 614 S.W.2d 954 (1981). This issue was not raised in the trial court and is not available for review. This Court should also decline appellee's invitation to render an advisory opinion on a hypothetical case involving self-representation.

III. THE TRIAL COURT'S ASSESSMENT OF COMPETENCY OF THE WITNESS IS NOT AFFECTED BY KRS 421.350.

Appellee incorrectly interprets KRS 421.350 as a presumption of competency of the witness. No such interpretation is warranted. Assessment of the competency of a witness has long been a matter of trial court discretion. KRS 421.200; Denny v. Commonwealth, Ky., 670 S.W.2d 847 (1984). Implied repealer is strongly disfavored. Fiscal Court, supra. In the present case, the trial court exercised his discretion by declining to decide at the present time whether or not the witness was competent. Appellee's claim of automatic competency is without merit and is a new issue inappropriately raised for the first time in the appellate court.

IV. APPELLEE'S CLAIM CONCERNING THE RIGHT TO COMPEL PRODUCTION OF WITNESSES IS NOT PROPERLY BEFORE THIS COURT AND IS WITHOUT MERIT.

Appellee claims that his inability to call the child witness at trial violates his constitutional right to compel production of witnesses. Again, this issue is raised for the first time on appeal and is not properly before this Court. Moreover, under KRS 421.350, the child is made available for full and complete examination and for observation of the child's demeanor by the jury. Appellee's claim, perhaps applicable to a hearsay statute, is without merit here.

Respectfully submitted,

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