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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001626-DG

TODD LAYMON APPELLANT

ON DISCRETIONARY REVIEW FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 08-XX-00007

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: KELLER AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: This Court granted discretionary review of Appellant's misdemeanor conviction for second-degree sexual abuse for which he was sentenced to six months confinement in the county jail and a fine of $500.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

KRS 510.120. The sole issue presented is whether Appellant was denied his Confrontation Clause rights under the Sixth Amendment to the Constitution of the United States by virtue of the admission of the hearsay testimony of the victim's mother, the mother's boyfriend William DeRose, and Deputy Sheriff Vallelunga.

At or about 8:00 a.m. on July 8, 2006, officers of the McCracken County Sheriff's Department, responding to a call, discovered 13-year-old J.A. sleeping in her mother's car. Upon questioning, J.A. stated that Appellant had entered her bed and touched her inappropriately. According to J.A., as repeated by witnesses at trial, Appellant had "felt her arms, down the side of her legs, and over her butt" several hours earlier. There was no physical evidence, and J.A. was not taken to the hospital or given any medical or forensic examination.

Although J.A. was present in the courthouse on the day of trial, she was not called as a witness. Over objection, the three persons who heard her account of the incident were permitted to repeat her out-of-court statements as to what she claimed had occurred. According to the child's mother, the act would have occurred some two and a half to three and a half hours prior to the discovery of J.A. sleeping in the car.

On appeal the circuit court affirmed. The court relied on *McClure v. Commonwealth*, 686 S.W.2d 469 (Ky. App. 1985), a case dealing with the excited utterance exception to the hearsay rule, and discussed the decision of the Supreme

Court of the United States in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The circuit court, sitting as a court of review, concluded that "the statements made by the victim in the case below were made as she was suffering under the stress of the nervous excitement and shock produced by the act at issue. Accordingly, such statements were properly admitted under KRE 803(2)." The court held that J.A.'s statements were not testimonial and were not, therefore, barred by the Confrontation Clause of the Sixth Amendment.

We will not unduly lengthen this opinion as we are firmly persuaded that the lower courts erred. There appears to have been insufficient consideration of *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), decided by the Supreme Court of the United States in 2006, or of *Heard v. Commonwealth*, 217 S.W.3d 240 (Ky. 2007), and *Rankins v. Commonwealth*, 237 S.W.3d 128 (Ky. 2007), decisions of the Supreme Court of Kentucky that bear directly on this issue. *Davis v. Washington* clearly distinguished between statements that are nontestimonial and those that are testimonial. Statements in the former category do not violate the Confrontation Clause while statements in the latter are violative of it. *Davis* explains the distinction as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822, 126 S.Ct. at 2273-74. We have no doubt in the conclusion that J.A.'s statements made to members of her family and police officers two or more hours after the alleged abuse were testimonial. There was no ongoing emergency. She was questioned in an effort to facilitate criminal prosecution.

The opinion of the Supreme Court of Kentucky in *Rankins v. Commonwealth* is dispositive of this case. Under facts far more compelling and urgent than those presented here, the Court nevertheless enforced the Confrontation Clause decisions in *Crawford v. Washington* and *Davis v. Washington*. It concluded as follows:

> Here, the police officer responded to a call, and discovered Nicole Weaver. She proceeded to tell the officer "what happened," recounting the assault by Rankin. Under *Davis* and *Crawford*, Weaver's statements are testimonial. The Sixth Amendment prescribes that the only method for testing their reliability is through cross-examination. We cannot consider whether they fit into the excited utterance, or any other hearsay exception. To do so "would perpetuate . . . what the Sixth Amendment condemns." *Crawford*, 541 U.S. at 67, 124 S.Ct. at 1373, 158 L.Ed.2d at 202.

Rankins, 237 S.W.3d at 131-32 (footnotes omitted).

For the foregoing reasons we reverse the courts below, vacate Appellant's conviction, and remand to the McCracken District Court for further proceedings.

ALL CONCUR.

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