

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Remanded by Supreme Court October 3, 2005

STATE OF TENNESSEE v. RONALD ALLEN

**Direct Appeal from the Criminal Court for Washington County
No. 27518 Lynn W. Brown, Judge**

No. E2005-02347-CCA-RM-CD - Filed October 24, 2005

The defendant, Ronald Allen, was convicted of rape of a child. On appeal, this court affirmed the conviction but modified the sentences, holding that enhancement factor (7), that the personal injuries inflicted upon the victim were particularly great, see Tenn. Code Ann. § 40-35-114(7) (2003), was applied in violation of the United States Supreme Court's ruling in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). The state filed an application for permission to appeal to our supreme court pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure. Our supreme court granted the application and remanded the case to this court for reconsideration by virtue of its opinion in State v. Gomez, 163 S.W.3d 632, 659 (Tenn. 2005). Based upon the holding in Gomez, the judgment of the trial court must be affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Richard A. Spivey, Kingsport, Tennessee (on appeal), and Ivan Lilly, Assistant Public Defender (at trial), for the appellant, Ronald Allen.

Paul G. Summers, Attorney General & Reporter; Renee W. Turner, Assistant Attorney General; Joe Crumley, District Attorney General; and Janet Hardin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The facts underlying the conviction, as summarized in this court's original opinion, are as follows:

In March of 2001, Investigator Brian Rice of the Johnson City Police Department responded to a report by the Department of Children's Services regarding

allegations of sexual abuse of the four-year-old victim, D.R.¹ When Officer Rice attempted to interview the victim at the Johnson City Pediatric Clinic, however, she was very timid and did not want to talk. Because there was no corroboration of the allegations, no charges were filed at that time. In early 2002, an investigation was opened when Officer Rice learned that the victim was suffering "medical problems" as a result of the alleged abuse. After receiving a letter from the victim's physician, Dr. Martin Olsen, and taking a statement from the victim's aunt, Michelle Reed, Officer Rice interviewed the defendant. The defendant provided the following signed statement:

"I lived at 2207 Indian Ridge Road #8 with my girlfriend, Michelle Reed. Michelle's niece, [D.R.], would come over and stay with us at least once a week. [D.R.] was staying with us one night, and I woke up the next morning and made a pot of coffee. I drank one cup of coffee and went back to sleep. About nine o'clock that morning I woke up and had an erection. When I woke, [D.R.] was on top of me squirming. I had on underwear but my erect penis was coming out the top about an inch or two. [D.R.] had on a sleep shirt that was pulled up above her waist. I was laying on my back and [D.R.] was on top of me. I could tell that my penis was rubbing her vagina and may have went inside her barely, but no way it went far. When I was asleep my finger could have went inside her vagina because when I sleep I rub around on my girlfriend a lot. When I realized that she was on top of me, I slid her off to my left side. I know I did something with [D.R.] because she has genital warts just like me."

Prior to making the statement, the defendant signed a waiver of rights form. The interview, which lasted approximately forty-five minutes, was not videotaped. Afterward, the defendant was charged with rape of a child.

Michelle Reed, who had been living with the defendant for approximately five years at the time of the offense, testified that the victim spent nearly every weekend at her house during the spring of 2001. She recalled that in March of 2001, the victim was taken to the pediatrician by her mother, Roberta Reed, because she complained that she was "sore." According to Michelle Reed, the victim had spent the night with her and the defendant a couple of days before the doctor visit. She stated that during that time period, she observed genital warts on the defendant's penis. Michelle Reed testified that as a result of the victim's diagnosis, she confronted the defendant, who, after having denied the allegations for almost a year, finally acknowledged, "I can no longer fight these allegations [be]cause my test results came back and I'm positive for genital warts." She stated that the defendant

¹It is the policy of this court to identify minor victims of sexual crimes only by their initials.

admitted penetrating the victim's vagina with his penis, claiming that he had done so by accident. Michelle Reed described the defendant's demeanor as "humble [and] apologetic" but testified that he "was acting like [D.R.] did it to him."

Roberta Reed, the victim's mother, testified that she first took the victim to her pediatrician, Dr. Charles Fish, in March of 2001 and returned several months later when she noticed blood in the victim's panties. She recalled that the victim was referred to Dr. Martin Olsen, a gynecologist who eventually performed surgery. Roberta Reed stated that the victim, who had previously been very friendly, became "standoffish towards people," refused to leave her side, had nightmares, and did not want to be left alone in her room.

The victim, who was six years old at the time of trial, testified that the defendant hurt her when she spent the night at the residence he shared with her aunt and told her not to tell anyone. The victim said that she did not remember what the defendant had done to hurt her but could recall having to visit several doctors. She identified the defendant by his nickname, "Twin."

Dr. Charles Fish, who examined the victim in March of 2001, testified that the victim was "very defensive" about being examined in the genital area. He found that the victim's hymen was intact but observed that she had some "minimal irritation from the clitoris to the anterior edge of the hymen." In an examination eight months later, Dr. Fish discovered "a lesion on the left inner aspect of the vulva" which was "five . . . to six . . . millimeters in diameter elevated from the surface of the skin and slightly friable." Because that was uncommon in children, he referred the victim to Dr. Martin Olsen for a biopsy.

Dr. Martin Olsen, who examined the victim in November of 2001, observed a genital wart near her hymenal ring. At trial, he explained that genital warts are caused by a virus which is common in sexually active people, uncommon in children, and which can live in the skin without causing warts. It was his opinion that the wart discovered on the victim's genitalia was a "severe squamous dysplasia" which will require "constant medical care to make sure it doesn't turn into cancer." According to Dr. Olsen, the victim must have complete genital examinations every three months and, because she has an aversion to the examinations, general anesthesia will be required. It was Dr. Olsen's opinion that the victim contracted the disease through sexual contact. He testified that "something had to touch [the victim] at the location of the hymenal ring, so something passed the labia majora, passed the labia minora. . . . I guess [there is] a very small percent chance it could have been a finger, but much more likely an adult male penis."

The defendant testified that when Investigator Rice asked him to come to the police station he "basically . . . just cooperated with him" and signed the statement

without having read it. While he claimed that the statement was not his, he acknowledged having told the officer that "something must have happened" because both he and the victim had genital warts. The defendant also denied admitting the abuse to the victim's aunt. When asked if he had ever penetrated the victim with his finger or his penis, the defendant responded, "To my knowledge, no. I would not do that intentionally to [D.R.]." He claimed that the victim's aunt lied about his having visually obvious genital warts and insisted that he was unaware of his infection until both he and the victim's aunt tested positive. The defendant maintained that his signing the statement written by Investigator Rice was "the biggest mistake of [his] life."

This court affirmed the conviction but modified the sentence after concluding that the application of one enhancement factor violated the requirements of Blakely, a United States Supreme Court opinion that called into question the continuing validity of portions of the 1989 Sentencing Act. In that case, the Court, applying the rule in Apprendi v. New Jersey, 536 U.S. 466, 490 (2000), struck down a provision of the Washington sentencing guidelines that permitted a trial judge to impose an "exceptional sentence" upon the finding of certain statutorily enumerated enhancement factors. The Court observed that "the 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 124 S. Ct. at 2537. Finally, the Court concluded that "every defendant has a right to insist that the prosecutor prove to a jury [beyond a reasonable doubt] all facts legally essential to the punishment." Id. at 2543.

In State v. Gomez, 163 S.W.3d 632, 659 (Tenn. 2005), decided shortly after the filing of our original opinion in this case, a majority of our supreme court held that "[u]nlike the statutes at issue in Blakely and Booker, a judicial finding of an enhancement factor in Tennessee does not affect the range of punishment to which a defendant is exposed." Our supreme court's ruling in Gomez establishes that the defendant is not entitled to any relief from his sentence. Because the defendant made no other challenge to the propriety of his sentence, it is our view that the sentence imposed by the trial court must be affirmed.

GARY R. WADE, PRESIDING JUDGE