

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001059-MR

ZELAND L. DOUTHITT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
INDICTMENT NO. 96-CR-1069

COMMONWEALTH OF KENTUCKY

APPELLEE

AFFIRMING IN PART,

VACATING IN PART AND REMANDING

** ** * * * * *

BEFORE: HUDDLESTON, KNOFF and SCHRODER, Judges.

HUDDLESTON, Judge. Zeland Douthitt was convicted of Sexual Abuse in the First Degree, a violation of Ky. Rev. Stat. (KRS) 510.110, and was sentenced to five years' imprisonment. Douthitt initially pled guilty to the charge, but after the circuit court declined to accept the Commonwealth's sentencing recommendation, withdrew his plea and proceeded to trial.

Douthitt claims on appeal that the trial court erred when it allowed the Commonwealth to introduce a juvenile adjudication at

the sentencing phase of his trial¹ and evidence about changes in the behavior of the child witness after the report of the alleged sexual abuse was made. He also insists that the trial court abused its discretion when it allowed the mother of the child witness to stand near the witness stand during the child's testimony.

Douthitt argues that the statute in effect at the time of his trial prohibited the admission of his juvenile adjudication at the penalty phase of the trial.² The trial court admitted Douthitt's prior juvenile record, relying upon Sanders v. Commonwealth, Ky., 844 S.W.2d 391 (1992). The Sanders court admitted evidence of the defendant's prior "juvenile convictions" during the PFO phase of the trial because KRS 532.055(2)(a)(2), setting out the procedure for sentencing in felony cases, authorizes evidence of all "prior convictions." Id. at 395.

The trial court's reliance upon Sanders in admitting Douthitt's juvenile record for sentencing purposes was inappropriate. It is unclear to what the term "juvenile convictions" refers in the Sanders decision. Such convictions could mean either matters adjudicated in juvenile court or convictions received by a juvenile in an adult court. Since the court in Sanders does not

¹ A final adjudication from the Fayette District Court juvenile division of a rape charge against Douthitt was admitted.

² Ky. Rev. Stat. (KRS) 532.055, in effect at the time of trial, makes admissible in the penalty phase of felony cases evidence of "prior convictions of the defendant, both felony and misdemeanor."

specify which distinction it is observing, it would be presumptuous of this Court to do so.³ Even should the court in Sanders have been referring to matters adjudicated in juvenile court, KRS 635.040 forbids treating a juvenile adjudication as a conviction.⁴ Moreover, KRS 532.055 admits evidence, at the sentencing phase, of all "prior convictions, felony and misdemeanor." Since juvenile adjudications are not classified as convictions, they cannot be admitted pursuant to KRS 532.055.

KRS 532.055 has subsequently been amended to allow admission of certain juvenile adjudications.⁵ The trial court, justifying the admission of Douthitt's juvenile adjudication,

³ The trial court felt that since the Sanders decision does not specify that only felony convictions in circuit court are admissible, the decision allows a defendant's juvenile record to be used for truth-in-sentencing purposes. Were there no statutes that contravene that argument, it might be persuasive.

⁴ KRS 635.040 provides that "[n]o adjudication by a juvenile session of district court shall be deemed a conviction"

⁵ Since July 15, 1997, KRS 532.055(2)(a) has provided, in relevant part, that:

Evidence may be offered by the Commonwealth relevant to sentencing including:

* * *

6. Juvenile court records of adjudications of guilt of a child for an offense that would be a felony if committed by an adult. Subject to the Kentucky Rules of Evidence, these records shall be admissible in court at any time the child is tried as an adult, or after the child becomes an adult, at any subsequent criminal trial relating to that person

observed that the amendment to KRS 532.055 was simply a codification of the Sanders ruling. However, since the Sanders ruling on the admissibility of "juvenile convictions" is ambiguous, it cannot be determined whether or not KRS 532.055, as amended, was a codification of Sanders.⁶ For that reason, this Court will follow the Legislature's dictate that the effective date of the amendments to KRS 532.055 would become effective on July 15, 1997. Since Douthitt's trial was prior to that date, KRS 532.055, as amended, was not applicable at his trial.

For these reasons, we agree with Douthitt that the trial court erred when it allowed the introduction of his juvenile adjudication at the sentencing phase of the trial.

Douthitt's second contention is that the testimony of the victim's mother regarding changes in the victim's behavior should not have been allowed into evidence because it was irrelevant and prejudicial. The victim's mother testified, over Douthitt's objection, that since the time of the alleged sexual abuse the victim was staying to herself, was not as talkative as before and was afraid to go places by herself.

Douthitt cites several Kentucky Supreme Court cases that stand for the proposition that in cases involving "Child Sexual

⁶ Inasmuch as there is uncertainty as to whether KRS 535.055, as amended, is a codification of Sanders, we follow the rule of lenity which is to give the appellant the benefit of the doubt. Roney v. Commonwealth, Ky., 695 S.W.2d 863, 864 (1985).

Abuse Accommodation Syndrome," the Commonwealth may not introduce evidence about the victim's behavior in order to demonstrate that behavior is consistent with abuse. Brown v. Commonwealth, Ky., 812 S.W.2d 502 (1991); Lantrip v. Commonwealth, Ky., 713 S.W.2d 816 (1986); Bussey v. Commonwealth, Ky., 697 S.W. 139 (1985).

Analogizing the testimony presented in this case with expert testimony about a child's behavior consistent with abuse, which is not allowed, Douthitt concludes that the testimony in this case should not have been admitted. In Mullins v. Commonwealth, Ky., 956 S.W.2d 210, 213 (1997), the Supreme Court ruled that where the evidence is not of the kind which has been previously disapproved by that Court, such as hearsay testimony and syndrome evidence, the trial court may determine it to be more probative than prejudicial.⁷ Such was the situation in this case. The trial court considered the evidence and determined that its probative value outweighed its prejudicial nature. Whether to admit or exclude evidence to ensure a fair trial is within the discretion of the trial court, and its determination will not be overturned on

⁷ The court in Mullins also cites Simpson v. Commonwealth, Ky., 889 S.W.2d 781 (1994), where testimony regarding the emotional distress of the victim and the need for counseling was determined to be relevant because probative of the fact that the victim did not consent to a sexual act. Mullins at 213.

appeal in the absence of a showing of an abuse of such discretion. Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988).⁸

Douthitt's final contention is that the victim's mother should not have been allowed to stand near the witness stand when the nine-year old victim was testifying. The videotape of the trial shows that, during the victim's testimony, her mother simply stood behind her and there was no interaction between the two parties. Douthitt asserts that Gaines v. Commonwealth, Ky., 728 S.W.2d 525 (1987), disallows a victim's mother to stand near the witness stand while the victim is testifying since "after a child has been found competent to testify, the child becomes a witness the same as any other witness who has taken an oath or affirmed." Id. at 526. Douthitt misapplies the import of Gaines, which requires the trial court to determine whether a child is competent to testify and is morally obligated to tell the truth.

Furthermore, Ky. Rev. Stat. (KRS) 421.350 allows courts to order that testimony of a child, twelve years of age or younger, allegedly the victim of illegal sexual activity, be conducted in a room other than the courtroom and be televised to the court proceeding. KRS 421.350 also allows "any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his

⁸ Even if error, the admission of the testimony of the victim's mother was harmless and must be ignored. Ky. R. Civ. Proc. (CR) 9.24.

testimony." This statute was enacted in recognition of the fact that testifying in a formal courtroom can be an intimidating experience for children. Commonwealth v. Willis, Ky., 716 S.W.2d 224, 227 (1986). Such provisions counter Douthitt's claim that courts may not accommodate children's needs when testifying at trial in sexual abuse. The trial court properly exercised its discretion in accommodating the needs of the child victim testifying in this case.

Douthitt also contends that this procedure violated Ky. R. Evid. (KRE) 615, **Exclusion of Witnesses**. However, since Douthitt did not request that the victim's mother be excluded, this issue was not preserved for appellate review. RCr 9.22.

The judgment convicting Douthitt of Sexual Abuse in the First Degree is affirmed. Douthitt's sentence is vacated and this case is remanded to Fayette Circuit Court for resentencing in accord with the guidelines established in Boone v. Commonwealth, Ky., 821 S.W. 813 (1992).

SCHRODER, Judge, CONCURS.

KNOFF, Judge, CONCURS IN RESULT.

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