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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002396-ME

T.D.H. APPELLANT

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE PAMELA ADDINGTON, JUDGE
ACTION NO. 05-J-00233-001

COMMONWEALTH OF KENTUCKY, CABINET
FOR HEALTH AND FAMILY SERVICES APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: This appeal from an abuse adjudication of the Hardin Family Court centers upon appellant's contention that he was denied procedural due process when the trial judge: 1) denied his request for a copy of the victim's statement recorded at the children's advocacy center; 2) granted summary judgment at the conclusion of the Commonwealth's case; and 3) erred in refusing his request for a continuance when the Cabinet failed

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

to observe the 72-hour requirement for provision of its report and recommendations. Finding no reversible error in any of these contentions, we affirm.

On March 8, 2005, after receiving a report of suspected sexual abuse regarding appellant's daughter, Detective Jody Ennis of the Radcliff Police Department and Cynthia Little of the Cabinet's Department of Social Services came to Radcliff Middle School where Detective Ennis interviewed the child claiming to have been sexually abused from age 11 to age 13. In a subsequent interview with Detective Ennis, appellant himself admitted sexually abusing his daughter by inappropriate touching. He was immediately arrested on charges of several counts of first-degree sodomy, first-degree sexual abuse and incest, for which he was later indicted. An appeal from the July 19, 2006 judgment convicting him of those charges is currently pending in the Kentucky Supreme Court.

While these criminal charges were pending, social worker Little filed an abuse petition on behalf of the child in the Hardin Family Court. A temporary removal hearing was conducted in April 2005, at which the trial judge concluded that there were reasonable grounds to believe that the appellant's daughter, J.H., was a sexually abused child and that appellant was the perpetrator of the crimes against her. An adjudication hearing was set for June 1, 2005. Appellant's attorney moved

for a continuance and the statutory time constraints were waived by the guardian ad litem appointed for the child. The adjudication hearing was rescheduled for July 6, 2005, at which time it was again continued until September 7.

On June 17, 2005, appellant's attorney filed a discovery motion and a dispute developed as to whether the Commonwealth was required to provide counsel an actual copy of interview tapes or if it could merely allow him to review any such recordings at the office of the county attorney. The trial judge ordered appellant's counsel to file a brief on the matter by August 3, 2005, and set a discovery hearing for August 24. At that hearing, appellant's counsel reported to the judge that he had decided to simply "go over and take a look at it." He acknowledged that he had found no caselaw supporting his request for his own copy of the tape and thus he had not prepared a brief on the subject. It is undisputed that at this point in the proceedings, both the Commonwealth and appellant's counsel were under the assumption that the only recorded interview was that of appellant.

However, in the course of her testimony at the adjudication hearing conducted on September 7, social worker Little disclosed that she had been present with Detective Ennis during a recorded interview of the victim at the Children's Advocacy and Support Center. During Detective Ennis's

testimony, appellant's interview in which he admitted fondling the child over a period of time was played for the Court. Because the victim had left the courtroom in tears during the playing of that tape, the Commonwealth decided not to call her as a witness and announced its case closed. Thereafter, the trial judge inquired as to whether appellant was prepared to present witnesses.

Appellant's counsel informed the Court that he had advised appellant not to testify and objected to her proceeding to make findings without giving him an opportunity to view the videotaped interview of the child victim. After discussion, the trial judge concluded that because the Commonwealth had not been aware of the taped interview until the day of the hearing and had decided not to call the victim as a witness because of her mental state, appellant had not been prejudiced by the lack of prior access to the tape. The trial judge also denied appellant's subsequent request to call the victim as a witness despite having failed to subpoena her. After meeting with counsel in chambers, the trial court announced her finding that the Commonwealth had met its burden of establishing by a preponderance of the evidence that appellant had sexually abused his daughter. This appeal followed the dispositional hearing conducted in October 2005.

Appellant first argues that KRS 620.050(10) establishes his absolute right to receive a copy of the victim's taped interview prior to the adjudication hearing. We disagree. That statute provides in part pertinent to this appeal:

> (10) (a) An interview of a child recorded at a children's advocacy center shall not be duplicated, except that the Commonwealth's or county attorney prosecuting the case **may**:
> 1. Make and retain one (1) copy of the interview; and
> 2. **Make one (1) copy for the defendant's counsel that the defendant's counsel shall not duplicate.**[2]

Far from establishing an absolute right to a copy of the taped interview, the statute uses permissive language. In any event, our review of the proceedings removes any doubt that appellant's case could have been prejudiced by the lack of a copy of the tape.

First, appellant clearly admitted in his taped interview facts which are more than sufficient to support the trial judge's finding. Furthermore, because the Commonwealth was not previously aware of the victim's interview and did not call the child as a witness, appellant was not subjected to any unfair surprise at the nature of the offenses alleged against him. In sum, because appellant's own statements provided the factual basis for the trial judge's decision, the failure to

[2] Emphasis added.

provide him with a copy of the victim's interview prior to the adjudicatory decision cannot constitute reversible error.

Next, citing Brown v. Shelton,[3] appellant complains that the trial judge entered "summary judgment" without affording him his opportunity to be heard. Again, the record makes plain that is not what transpired in this case. The trial judge offered appellant every opportunity to put on his case. As previously noted, the only person appellant sought to call was the victim whom he had not subpoenaed. Under these circumstances, the rule set out in Brown precluding a plaintiff from moving for a directed verdict at the close of his own case simply is not implicated. It was clearly proper for the trial judge as fact-finder to render her decision after both sides announced they had no other witnesses to present.

Finally, appellant argues that it was reversible error to fail to provide him with a copy of the pre-dispositional report 72 hours prior to the disposition hearing conducted on October 26, 2005. Unless waived by the child, KRS 610.100 requires the trial judge to "cause an investigation to be made concerning the nature of the specific act complained of and any surrounding circumstances which suggest the future care and guidance which should be given the child." The portion of that statute pertinent to appellant's complaint states:

[3] 156 S.W.3d 319 (Ky. 2004).

> The result of the investigation shall be reported in writing to the court and to counsel for the parties three (3) days prior to the child's dispositional hearing and shall become a part of the record of the proceedings. The child may waive the three (3) day requirement. Objections by counsel at the dispositional hearing to portions of the dispositional report shall be noted in the record.

It is abundantly clear that the legislative purpose for this enactment is to ensure that the child victim is appropriately placed and counseled, if necessary.

The contents of the report in this case could not have come as a surprise to appellant who had previously admitted sexually abusing his daughter. The Cabinet recommended that appellant have no contact with either of his children; that the children and their mother continue counseling as needed; that should appellant regain access to employment, he provide support for his children; and that appellant undergo counseling prior to any supervised face to face visits upon completion of his criminal case. In light of the fact that appellant had been incarcerated during the entirety of the family court proceedings, as well as considering his admission of abuse, we cannot perceive any prejudice in the failure to be provided the report prior to the hearing. The statute makes clear that the child, and only the child, could have waived not only the 72-hour requirement but the entire disposition investigation

report. Noticeably absent from the argument pressed in this appeal is any indication of what objection appellant might have lodged had he received a copy of the report in a more timely fashion. On these facts, we fail to perceive any error in the failure to supply the report prior to the disposition hearing.

Accordingly, the judgment of the Hardin Family Court is affirmed.

ALL CONCUR.

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