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# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-000793-MR
&
NO. 2009-CA-000794-MR

BARBARA SCHAMBON AND
FLOYD SCHAMBON — APPELLANTS

v.

APPEALS FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 89-CR-00635 & 89-CR-00636

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING, VACATING, AND REMANDING

** ** ** ** **

BEFORE: KELLER AND MOORE, JUDGES; HARRIS,[1] SENIOR JUDGE.

KELLER, JUDGE: Floyd and Barbara Schambon appeal from the circuit court's denial of their Kentucky Rule of Civil Procedure (CR) 60.02 motions for relief and their companion motions for a hearing. On appeal they argue, as they did before

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

the trial court, that they are innocent as evidenced by the complete or partial recantation by three witnesses who testified at trial. The Commonwealth, in a brief consisting of less than two pages of analysis, argues that the circuit court correctly determined that the Schambons' motions were not timely. For the following reasons, we reverse, remand, and vacate.

FACTS

The Schambons appealed their convictions to the Supreme Court of Kentucky and we take our recitation of the facts from the Court's opinion.

> Appellants were convicted of eight counts of first degree sodomy, three counts of first degree criminal abuse, twenty-one counts of second degree sodomy, and twenty-eight counts of second degree cruelty to animals. Appellant Barbara Schambon was also convicted of one count of incest. Both were sentenced to a total of eighty-five years in prison and appeal as a matter of right.
>
> In June of 1989, the Warren County Animal Shelter was informed of the presence of animals in a garage. The animals were without food or water and the garage was without any ventilation. The shelter's employees contacted the county dog warden who, accompanied by a deputy sheriff, investigated the complaint. Upon arriving at the location, they noticed a strong dog feces odor coming from the house. The warden then walked to the detached garage. Upon opening the door, he noticed chain link pens containing some seventeen to twenty-three poodles, Yorkshire terriers, and Pomeranians. The garage was not ventilated and the temperature was in excess of ninety degrees. The floor was covered with three to five inches of dog feces, no dog food was noticeable and the water dish was empty. In one of the pens, a poodle was eating the remains of a Pomeranian. The warden reported that the stench was "overpowering." The two officials removed the dogs from the garage. After loading the dogs into a truck, the warden returned

to the animal shelter while the deputy remained to investigate the situation.

After loading the dogs into the warden's truck, the deputy talked to several neighbors who had gathered to observe the situation. The deputy attempted to locate the owners of the house. One of the neighbors told him that the children who lived in the house were across the street at their babysitter's home. The deputy went to the house and spoke to the sitter, but the sitter would not let him talk to the children. However, one of the children overheard the deputy's inquiries and volunteered that her mother was in the house across the street. The girl left the babysitter and went across the street and crawled in a window. A few minutes later, appellant Barbara Schambon appeared at the front door.

The deputy informed appellant that he and the warden had removed the dogs from the garage. Appellant told the deputy that if he walked around to the back, she would talk to him inside the house. When the deputy entered the house, he noticed that two walls were lined with cages containing cats. He observed that the litter boxes were overflowing with feces. He also could hear additional animals barking and crying. While in the kitchen, he saw a badly decomposed Pomeranian lying on the floor in its bodily fluids. Dirty dishes and pots and pans were scattered around the kitchen and the stove was “alive” and “growing” with fungus and moss. A Guinea pig was sitting in a cage on the kitchen counter.

Upon being questioned, appellant maintained that the dogs had been fed and watered. She stated that the animals belonged to her husband and that she had told him to take care of them. She admitted that they had not been groomed. The deputy went outside the house in an effort to avoid becoming nauseated, and upon his refusal to re-enter the house, appellant slammed the door. The deputy left the premises.

After the dog warden returned the dogs to the animal shelter, he obtained a search warrant for the house. Later that afternoon, the warden, the animal shelter manager,

and the deputy returned to the house. When they arrived, appellant Floyd Schambon was standing in the driveway. He was arrested for cruelty to animals. Upon searching the house, the officials noted that dog feces was everywhere, including the walls and the beds.

While the authorities were searching the house, the four children returned from the babysitter's. The children were C.S., a son age thirteen; E.S., a daughter age ten; A.S., a daughter age eight, and R.S., a son age five. While the deputy talked to the children, appellant Barbara yelled and ordered them not to talk to anyone. She informed the deputy that he had no right to talk to her children and that she would contact her attorney and sue him.

After the animals were taken to the shelter, the staff cleaned and treated them. Most of the dogs had to be sheared because their hair was completely matted with feces. One poodle was so badly matted that it had to be sedated before it could be sheared. Most of the dogs were underweight and infested with lice and fleas. Many of the dogs had ear, eye and penis infections. Several of the dogs had parvo and distemper. One Pomeranian puppy died from parvo within an hour of arrival at the shelter and a poodle died from distemper the following week. Other dogs had mange and ringworm. A Yorkshire terrier had toenails an inch and a half long and one gave birth to puppies at the shelter. Both puppies died immediately after birth.

Due to the unsanitary conditions of appellants' house, the children were removed pursuant to an emergency custody order and placed in foster homes. The two boys were placed in the foster care of Mr. and Mrs. Bobby Bright while the two girls were placed in another foster home.

The Brights noticed that the younger boy, R.S., while in foster care, did not have good bathing habits and required assistance and training in the bathroom. They also noticed that he was terrified to go into the bathroom. When questioned about his fear, he responded that he was “afraid to go into the bathroom because you'll be there,” and “you might hurt me.” The Brights also

noticed that R.S. had a bedwetting disorder. In an attempt to correct the disorder, the Brights would awaken the child during the night so he could use the bathroom. Upon entering the bathroom, the child would climb onto the toilet, then up to the sink where he would blankly stare at his foster parents.

The Brights also noticed that R.S. had severe apprehensions of adults. Specifically, he would not allow Mr. Bright to hold his hand while crossing the street and was extremely apprehensive near public restrooms. Upon questioning, R.S. informed the Brights of sexual improprieties involving appellants and other persons. The Brights notified the Cabinet for Human Resources (CHR) who conducted several interviews with the four children. Based on this investigation, appellants were indicted for various sexual and physical abuse crimes involving the children.

At trial, R.S., then six years old, testified that both appellants forced him to engage in deviate sexual intercourse. Specifically, he stated that Barbara placed her mouth on his "privates" "a whole lot" and that she had him place his mouth on her "privates" "more than ten times." R.S. stated that "a whole lot" constituted nine times. He also stated that Barbara forced him to engage in anal sex with her more than five times.

R.S. further testified that both appellants handled his penis and that he touched Floyd's penis. He also testified that Floyd performed oral sex on him, that he performed oral sex on Floyd, and that he placed his penis in Floyd's anus. R.S. stated that these activities occurred at night when Floyd would awaken him, take him into the bathroom, and have him climb onto the sink so that their bodies would be at the same height. At this time, they performed sexual activities on each other, including, but not limited to anal sex.

Additionally, R.S. testified that Floyd took him to a park to meet men and women "by a tree." At the park, appellant would tie him up with a rope and force him to perform oral sex on men and women and allow the men

to perform anal sex on him. He testified that he was "afraid" of these people and that he would ask them to stop. He also testified that at times his anus bled and that sometimes the people would give his father money.

In addition to the above testimony, R.S. testified that appellants took pictures and made movies of him naked and, while filming him, Barbara would have him say "bad words." He also stated that Barbara spanked him with "her hand and a belt" and Floyd with a "horse whip and a little bitty whip." He also testified that after he had been placed in foster care Barbara warned him not to talk about their sexual activities and threatened to harm him if he discussed them.

The thirteen-year-old boy, C.S., was hesitant and evasive in his testimony. He admitted, however, that Floyd chased the children with a horse whip and that appellants and the children walked around the house naked. When asked directly about his sexual contact with appellants, C.S. would only give vague answers. As a result, the trial court allowed the Commonwealth to question him about a report he had written detailing his sexual contacts with appellants and question him concerning statements he made to Detective Bill Jenkins.

In this report, C.S. wrote that as a form of punishment, Floyd sometimes hit him on his penis. He further wrote that the two "usually put our penises in each other mouths, sometimes we put our penises up our butts, we suck penises, put penises up each other's butts, and we suck other people's for money." In his interview with the detective, C.S. stated that he and Floyd had engaged in oral and anal sex. He also stated that Floyd had taken him to a park to meet another guy to have sex "lots of times."

C.S.'s written report also detailed sexual activities with Barbara. In the report he wrote, "I put my penis up her private or butt, and I sometimes suck her private." C.S. additionally told the detective that he and Barbara had oral sex, sexual intercourse and anal sex.

> After receiving directed verdicts on numerous counts, both appellants were convicted and sentenced to eighty-five years in prison. They now appeal.

*Schambon v. Commonwealth,* 821 S.W.2d 804, 806-08 (Ky. 1991).

In their appeal to the Supreme Court, the Schambon's argued that the trial court erred by trying them jointly, by trying the animal cruelty and sex offenses together, by admitting certain evidence, by denying their motion for a directed verdict on the sex offenses, and by permitting the prosecutor to make improper arguments. The Supreme Court affirmed. We set forth additional facts as necessary below.

STANDARD OF REVIEW

"The standard of review of an appeal involving a CR 60.02 motion is whether the trial court abused its discretion." *White v. Commonwealth,* 32 S.W.3d 83, 86 (Ky. App. 2000); *see also Kurtsinger v. Board of Trustees of Kentucky Retirement Systems*, 90 S.W.3d 454, 456 (Ky. 2002); *Brown v. Commonwealth,* 932 S.W.2d 359, 362 (Ky. 1996). To amount to an abuse of discretion, the trial court's decision must be "arbitrary, unreasonable, unfair, or unsupported by sound legal principals." *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007) (*quoting Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Absent a "flagrant miscarriage of justice," the trial court will be affirmed. *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983).

When "mere recantation of testimony" is involved, the granting of a new trial is only justified "in extraordinary and unusual circumstances." *Thacker*

*v. Commonwealth*, 453 S.W.2d 566, 568 (Ky. 1970). Recanting testimony should be viewed with suspicion and given very little weight. *Id.; Hensley v. Commonwealth*, 488 S.W.2d 338, 339 (Ky. 1972). Statements recanting testimony

> will form the basis for a new trial only when the court is satisfied of their truth; the trial judge is in the best position to make the determination because he has observed the witnesses and can often discern and assay the incidents, the influences and the motives that prompted the recantation; and his rejection of the recanting testimony will not lightly be set aside by an appellate court.

*Thacker,* 453 S.W.2d at 568.

ANALYSIS

At the outset, we note that the Schambon children are all now adults; therefore, we will use their first names rather than initials. In their brief, the Schambons argue that three of their children, Amanda, Elisa, and Clayton (referred to respectively as A.S., E.S., and C.S. in the Supreme Court's Opinion), have now changed their testimony, in whole or in part, thus justifying a new trial. We separately address below each child's testimony at trial and any current changes in that testimony as well as other evidence of innocence offered by the Schambons.

1. Amanda

Amanda, who was nine at the time, testified at trial that the house she lived in with her parents, brothers, and sister contained a number of dogs and cats, smelled "horrible," and was a mess. She indicated that dogs had died in the house and their remains occasionally stayed in the house for several days. Amanda also

testified that her parents spanked her, that her parents walked around the house naked, and that her mother and father touched her "private parts" with their hands. However, she could not remember how many times her parents did this or when. She did state that her clothes were "probably on" and that she was alone with each parent when this touching occurred.

On cross-examination, Amanda testified that she considered her parents to be naked if they only had on their underwear. She denied that her brothers ever touched her or that she ever touched them. Furthermore, she stated that if her brothers said that they had touched her and that she had touched them, they were not telling the truth.

In conjunction with their CR 60.02 motion, the Schambons filed a "statement" signed by Amanda. In that statement, Amanda said that she had no objection to her parents being released from prison. However, she did not state that she wanted to change her trial testimony. Therefore, this statement does not act as a recantation of Amanda's trial testimony.

The Schambons state in their brief that Amanda told an investigator that she does not believe that any abuse occurred, but she was not willing to take "any active role in the case." The Schambons believe that Amanda will, if called to testify, say that no sexual abuse occurred. Because the Schambons have not been able to procure any statement from Amanda recanting her trial testimony or stating that no sexual abuse occurred, we agree with the trial court's conclusion

that the Schambons' speculation about what Amanda might testify to at an evidentiary hearing or on re-trial is not a basis for relief.

2. Elisa

Elisa, who was eleven at the time, testified that the family's house was "real messy" because of the number of dogs that lived there. Elisa remembered at least ten dogs dying in the house and that their remains stayed in the house for "one night or two."

According to Elisa, all of the family members walked around the house nude; however, no one ever touched her while she was nude and she did not see anyone else get touched. She testified that both of her parents touched themselves on their "private parts" while nude but did not touch each other. On cross-examination, Elisa testified that neither of her brothers did anything of a sexual nature with her or to her.

In support of their CR 60.02 motion, the Schambons offered Elisa's affidavit. In her affidavit, Elisa stated that, although her family was dysfunctional, she had not been sexually abused by either her parents or her brothers. Furthermore, she stated that the allegations of sexual abuse by her parents were false and that her brothers lied.

As noted by the trial court, Elisa's affidavit does not contradict but is consistent with her trial testimony. Therefore, Elisa's affidavit does not form a basis for relief under CR 60.02.

3. Ross

Ross, who was seven at the time, testified at trial that the house was a mess and smelled because of the dogs. With regard to the sexual abuse allegations, Ross testified on direct examination consistent with the Supreme Court's summary as set forth above.

On cross-examination, Ross testified that, after the children were removed from their parents' custody, he and Clayton lived in the same foster home for a time. However, Clayton was removed from the foster home because he "hurt" Ross.

Ross also testified that he and Clayton had conversations about girls and that they discussed being together at a house where a woman sexually abused him. The two also discussed a man named "David," who Ross said was a real person that he met at the park or at David's house.

Ross testified that he, Clayton, and their father had sex with Amanda and Elisa and that Amanda and Elisa had oral sex with their mother. According to Ross, the children's sexual encounters with each other occurred at the Schambon home and at the babysitter's house. However, the babysitter was unaware of these activities.

The Schambons' attorneys obtained conflicting testimony from Ross regarding the race of some of the men who sexually abused him and his allegations that his mother used cocaine. Finally, the Schambons' attorneys obtained testimony from Ross that at least one investigator had told him that his "private part" is called a penis.

Apparently anticipating that the Schambons would argue that Clayton told Ross how to testify, the Commonwealth asked Ross on re-direct if Clayton told him "to make up anything." Ross responded that Clayton had not and that his testimony was true.

According to the Schambons' brief, "Ross . . . has expressed an unwillingness to become involved in this case in any manner (either for or against his parents.)" Therefore, the Schambons have produced no affidavit or other evidence that Ross is willing to or will recant his testimony.

4. Clayton

Clayton, who was fourteen at the time, gave testimony that was, as the Supreme Court stated, "vague." With regard to the sexual abuse allegations, Clayton testified on direct examination consistent with the Supreme Court's summary as set forth above. Additionally, we note that, when questioned about his handwritten statement, Clayton testified that it was his handwriting but stated that he did not remember what he wrote. In his testimony, he also appeared to be somewhat surprised by what was in that statement. However, Clayton testified that he did remember making statements to a detective regarding sexual activity with his father, mother, and others. Furthermore, he testified that he might have said that the story was not "made up" but he could not remember saying that. He did remember saying that what he told the detective happened, "actually happened."

On cross-examination, Clayton admitted that, in his handwritten statement, he made up a person named "David Johnson" and that his allegations of

sexual contact with David Johnson were not true. He also admitted that his statements that he had sex with two of his friends' and/or neighbors' family members and with his sisters were not true. Although he had accused his mother of having oral sex with him, Clayton testified at trial that he did not know what oral sex is. He also testified that he learned about oral sex from the detective and social worker who interviewed him and that he and Ross discussed the case when they lived with the same foster family. Finally, when questioned about specific activities with his mother, Clayton stated that he could not answer.

In his affidavit, Clayton stated that he fabricated allegations of sexual abuse against his parents because he was angry with them. He also stated that he coached Ross to say that their parents and others had sexually abused them, and that Ross did so because he wanted to do what his older brother did. Clayton believes that any allegations of sexual abuse by Ross are false because Ross never told him about and he never witnessed any such abuse; any activity in the park would have been seen by passing motorists; and his parents were not at home long enough to have done all that Ross said they did. Finally, Clayton stated that Ross has indicated that he does not remember what occurred and that he does not want to get involved.

5. Hon. Kelly Thompson

In addition to the affidavits summarized above, the Schambons have offered the 2003 affidavit of the children's guardian *ad litem,* Hon. Kelly Thompson. Thompson stated, in pertinent part, that, prior to trial**,** Clayton said that

he had not been abused; that he had deceived law enforcement and social service personnel; that he had influenced Ross; and that he had been encouraged in his deception by social services personnel. According to Thompson, Clayton said that he would tell the truth when he testified; however, "no one ever really asked him what happened" or "to tell the truth." Thompson's affidavit notwithstanding, we note that Clayton was asked what happened and that, several times during cross-examination, counsel for the Schambons told Clayton that he needed to tell the truth.

6. Polygraph Tests

The Schambons underwent polygraph testing which revealed that neither was being deceptive when asked whether they had any sexual contact with Ross.

7. Reports of Eric Y. Drogin, J.D., Ph.D., ABPP

Dr. Drogin reviewed the videotape of the August 10, 1989, interview of Ross. Based on that review, he concluded that there were sufficient deficiencies in the interviewer's techniques to "cast significant doubt" on Ross's responses and his subsequent testimony.

Dr. Drogin also reviewed a 2003 videotaped interview of Clayton. In that interview, Clayton apparently stated that he and Ross told investigators what they wanted to hear in order to "get back" at their parents. Furthermore, Clayton apparently stated that he had told Ross what to say. According to Dr. Drogin, this

helps explain "Ross' [sic] curious interview performance" and further detracts from Ross's credibility.

8. Affidavit of Ralph Underwager, Ph.D.

Dr. Underwager reviewed the four interviews of the children, an interview of Mr. Schambon, and Clayton's affidavit. Dr. Underwager concluded that the 1989 videotaped interview of Ross was flawed and none of the information obtained from that interview was credible.

9. Trial Court's Order

After reviewing the record and the "new evidence," the trial court entered an order denying the Schambons' motions. In doing so, the court noted that the Schambons' trial counsel thoroughly cross-examined Clayton and raised the issues that Clayton had fabricated part, if not all, of his statement and that Clayton had influenced Ross's statements and testimony. Because the court believed those issues had been litigated, it saw no reason to re-litigate them "nearly two decades later."

The court also noted that the affidavit of Elisa did not contradict her testimony at trial. The court recognized the reports of the two psychologists calling into question the interviewing techniques used with Ross. However, the court also noted that it found Ross's testimony to be credible and, more importantly, that Ross had not filed an affidavit recanting his testimony.

Finally, the court noted the Schambons' argument that the trial took place in a "circus atmosphere;" that there was no physical evidence of abuse; and

that the sexual abuse and animal cruelty charges had been tried together. As to these issues, the court found that they had been previously tried and/or addressed.

Based on the above, the court found that the Schambons' "claims do not justify relief pursuant to CR 60.02 and they are not asserted in a timely manner." The court also denied the Schambons' motions for hearings. Based on the following, we hold that the court should have held a hearing before addressing the merits of the Schambons' CR 60.02 motions.

Initially, we note, as did the trial court, that the Schambons' arguments regarding the atmosphere of the trial and the fact that the animal cruelty and sexual abuse charges were tried together were previously addressed by the Supreme Court of Kentucky. Furthermore, we note that their arguments that Amanda and Elisa have recanted or changed their testimony are, at best, an overstatement. As we noted above, the affidavit from Elisa is consistent with her trial testimony and the affidavit from Amanda does not even address her trial testimony. Therefore, the only possibly direct recantation testimony before the lower court is Clayton's.

At trial, Clayton's testimony was equivocal at best. Because Clayton's testimony was equivocal, the trial court permitted the Commonwealth to question Clayton at length about a report he had written. As noted above, Clayton did not deny writing the report; however, he seemed surprised by the contents of the report and equivocated when asked to verify the truth of its contents.

In his affidavit, Clayton states that no sexual abuse took place and that he fabricated the stories about sexual abuse. These statements by Clayton do not directly contradict his equivocal testimony. However, they do directly contradict the contents of the report, which formed the basis of his testimony. Therefore, we hold that, in this case, Clayton's affidavit sufficiently contradicts his trial testimony and raises an issue of fact that merits an evidentiary hearing. In so holding, we note that Clayton's affidavit does not exist in a vacuum, which might have resulted in a different outcome herein. It is supported by Thompson's affidavit indicating that Clayton advised him of the fabricated stories prior to trial. Furthermore, as noted by the lower court during a hearing on the Schambons' motions and by the Schambons during oral argument, the Commonwealth will not be prejudiced by an evidentiary hearing. The witnesses from the trial are all still living and available, if not willing, to testify.

The preceding is not meant to be a determination as to what the result of the evidentiary hearing should be. The lower court is free to judge the credibility of any witness who testifies at that hearing and to determine, within its discretion, whether to order a new trial.

As to the timelines of the Schambons' motions, CR 60.02 requires that motions for relief must be filed within a reasonable time after a judgment. The Schambons argue that, because of the children's minority and relegation to the control of the Cabinet and foster care, they could not come forward any sooner. The Commonwealth argues that the evidence presented in conjunction with their

CR 60.02 motions was available at the time of trial and their delay in filing cannot be excused. Because of the nature of this case and the nature of the evidence presented by the Schambons in support of their CR 60.02 motions, we hold that the lower court prematurely determined that the motions were not timely. The Schambons should be permitted to present, through testimony at the evidentiary hearing, the reasons for delay. The Commonwealth will be free to cross-examine any witnesses regarding this issue and the court, after hearing that testimony, will be free to determine if the Schambons have adequately explained the reason for the delay. If they have not, the court will be free to dismiss this matter as untimely.

CONCLUSION

For the foregoing reasons, we reverse the trial court's denial of the Schambons' motions for an evidentiary hearing and vacate its order denying their motions for relief under CR 60.02. This matter is remanded to the circuit court with instructions to hold an evidentiary hearing and to then re-visit the merits of the Schambons' motions for relief under CR 60.02.

HARRIS, SENIOR JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

MOORE, JUDGE DISSENTING: Respectfully, I dissent from the majority's opinion. I do agree that the affidavits and/or statements of Elisa and Amanda do not constitute recantations. For purposes of analysis, I will therefore focus primarily on Clayton's affidavit.

Initially, regarding the trial court's decision that the Schambons' CR 60.02 motion was not brought in a reasonable time, "[t]he 'reasonable time' requirement is a factor for the trial court to take into consideration. It may do so based on the record in the case. It is not required to hold a hearing to decide whether the 'reasonable time' restriction should apply." *Gross v. Commonwealth*, 648 S.W.2d 853, 858 (Ky. 1983). This "is a matter that addresses itself to the discretion of the trial court." *Id.* "[T]he fading memories of witnesses" is a consideration that the trial court may take into account in determining whether the passage of time between judgment and a CR 60.02 motion is reasonable. *Stoker v. Commonwealth*, 289 S.W.3d 592, 596 (Ky. App.), *disc. reviewed denied* (2009) (citing *Harris v. Commonwealth*, 296 S.W.2d 700 (Ky. 1956)).

The Schambons were tried and found guilty by a jury in 1990. The individuals who signed the affidavits and/or statements, waited thirteen years after the Schambons were convicted to do so. The Schambons argue that the "reasonable time" clock of CR 60.02 should be judged against a 2006 timeline, when they filed their CR 60.02 motion. Their theory is that the reasonable time standard must be tempered as "[their] children . . . grew up and cleared themselves of the boundaries imposed by the Personnel for the Cabinet for Human Resources and of foster care persons affiliated with them."

There are a number of inherent problems with the Schambons' theory, beginning with the fact that it is not supported by anything stated in the Schambons' children's affidavits or statements. The Court should not condone a

theory that children are prevented from coming forward with the "truth" about allegations they have made just because they are in the care of the Cabinet or foster care. Essentially, that is what the Schambons ask this Court to do. The Schambons have not cited any case law or authority supporting their theory, and my own research did not reveal any. Courts should not look favorably upon this notion, absent some compelling circumstances, which are not present in this case.

Another, and perhaps more, troubling aspect of the Schambons' argument is the fact that Clayton was fifteen when he testified in 1990. So within a few years thereafter, he would have reached the age of majority and been "cleared of the boundaries" which the Schambons maintain kept him from coming forward. Yet, he did not come forward at that time. In his affidavit, notarized in 2003, Clayton states that he was 27; thus, he did not come forward with his affidavit until nearly a decade later. The Schambons do not even attempt to explain this lapse in time, and Clayton offers no explanation as to why he waited thirteen years after his parents' trial and nearly ten years after he reached the age of majority to recant his testimony.

Adding to the flaws of the Schambons' theory that their children could not come forward because they were in the care of the Cabinet and foster care is that according to the affidavit of the Honorable Kelly Thompson, notarized in 2003, Clayton relayed to him before the trial that he manufactured the story against his parents. At that time, Clayton was within the very "boundaries" that the

Schambons claim would not allow him to report that his allegations against them were false.

Additionally, the affidavits supporting the Schambons' CR 60.02 motion were notarized in 2003, yet the Schambons did not file their CR 60.02 motion until 2006. They have not provided any reason for the nearly three-year delay in moving the trial court for relief. Regardless of the circumstances or whether the delay is measured against 1990, a few years later when Clayton reached the age of majority, or 2003 when the affidavits and statements were made, I do not believe that the trial court abused its discretion in finding that the CR 60.02 motion is untimely. On this basis alone, the trial court's decision should be affirmed.

Next, turning to the merits of the trial court's denial of the Schambons' CR 60.02 motion, our Court reviews this determination for an abuse of discretion. *See Barnett v. Commonwealth*, 979 S.W.2d 98, 102 (Ky. 1998); *Brown v. Commonwealth*, 932 S.W.2d 359, 362 (Ky. 1996). We will only reverse under an abuse of discretion standard if the trial court has acted arbitrarily, unreasonably, unfairly or its decision is not supported by sound legal principles. *Clark v. Commonwealth*, 223 S.W.3d 90, 95 (Ky. 2007). We affirm unless the appellant has made a showing of a "flagrant miscarriage of justice." *Gross*, 648 S.W.2d at 858. To justify relief, it is incumbent on the movant to present facts which render the "original trial tantamount to none at all." *Brown*, 932 S.W.2d at 361. I believe the trial court did not abuse its discretion, and I agree with the trial

court that many of the Schambons' arguments have already been scrutinized by a jury.

First, as only Clayton's affidavit comes close to being a recantation, I will delve into the inherent problems in relying on it. I certainly do not intend to be harsh toward Clayton or his motives for coming forward at the age of 27. Even under the best light, from his trial testimony and his affidavit, his childhood appears to have been a difficult one. Nonetheless, the starting point in reviewing his recanting affidavit is that well-established law from all levels of the judiciary hold that recantations are inherently unreliable, untrustworthy and viewed with suspicion. *See Herrera v. Collins*, 506 U.S. 390, 423, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (O'Connor, J., concurring) (Affidavits "produced . . . at the 11th hour with no reasonable explanation for the nearly decade-long delay" are "suspect."); *Taylor v. Commonwealth*, 175 S.W.3d 68, 71 (Ky. 2005) (Where a recantation came eleven years after a conviction, "[t]he truism that recanted testimony is not reliable and should therefore be given little weight is even more relevant to this case . . . .") ; *Commonwealth v. Spaulding*, 991 S.W.2d 651, 656-57 (Ky. 1999) (quoting *Anderson v. Buchanan*, 292 Ky. 810, 168 S.W.2d 53-54 (1943)) ("[I]t is not enough [to warrant a new trial] to merely show that a prosecuting witness has subsequently made contradictory statements or that he is willing to swear that his testimony upon the trial was false, for his later oath is not more binding than his former one."); *Thacker v. Commonwealth*, 453 S.W.2d 566, 568 (Ky. 1970) ("The general rules are that recanting testimony is viewed with suspicion; mere

recantation of testimony does not alone require the granting of a new trial . . . .");

*Hensley v. Commonwealth*, 488 S.W.2d 338, 339 (Ky. 1972) ("Affidavits in which witnesses recant their testimony are quite naturally regarded with great distrust and usually given very little weight."). And, when the recantations are from children who suffered sexual abuse, the Eight Circuit in *United States v. Provost*, 969 F.2d 617, 621 (8th Cir. 1992) has specifically spoken, stating that

> the skepticism about recantations is especially applicable in cases of child sexual abuse where recantation is a recurring phenomenon. *See, e.g., Myatt v. Hannigan*, 910 F.2d 680, 685 n. 2 (10th Cir. 1990) (noting that child recanting in sexual abuse case not atypical); *State v. Cain*, 427 N.W.2d 5, 8 (Minn. Ct. App. 1988) (noting recantation is "frequent characteristic of child abuse victims"); *State v. Gallagher*, 150 Vt. 341, 350, 554 A.2d 221, 225 (1988) ("observing the high probability of a child victim recanting a statement about being sexually abused"); *see also Summit, Child Abuse Accommodation Syndrome*, 7 Child Abuse & Neglect 177, 188 (1973) ("whatever a child says about sexual abuse, she is likely to reverse it."). Recantation is particularly common when family members are involved and the child has feelings of guilt or the family members seek to influence the child to change her story. *See State v. Tharp*, 372 N.W.2d 280, 282 (Iowa Ct. App. 1985) (upholding denial of new trial request based on 14 year old victim's recantation and noting that "where families are torn apart, there is great pressure on the child to make things right."); Cacciola, *The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases*, 34 U.C.L.A. L.Rev. 175, 184-88 (1986) (noting susceptibility of child victim to family pressure and to recant the testimony to return things to "normal"). The Ninth Circuit very recently affirmed a district court's finding that a recantation by a child sex abuse victim was not credible and, therefore, was insufficient to support a Rule 33 new trial motion where the victim was subject to the influence of members of her immediate family including her mother. *United States v. Leroy George*, 960 F.2d 97, 101 (9th Cir. 1992).

From any vantage point it is apparent that despite whatever reasons or motives that Clayton may now have, little credence, credibility, or weight should be given to his recanting affidavit. And, as the Eighth Circuit so diligently pointed out, this is especially true in cases dealing with children who were sexually abused. Accordingly, binding authority instructs that relying on Clayton's affidavit for grounds for granting CR 60.02 relief should be given very little weight.

Nonetheless, the Schambons argue that they have "pled specific new evidence or changes in testimony warranting proof of actual innocence sufficient to change the results of their trial." The instruction of the Court in *Thacker*, 453 S.W.2d 566 compels me to conclude otherwise. In *Thacker*, the Court stated that

> [t]he appellant seeks to apply the rule that a new trial will be granted on newly discovered evidence if it is apparent that a different result would have been reached at the trial had the new evidence then been available. **However, we think it is clear that the foregoing rule does not apply to the situation of recanted testimony of principal witnesses.** If it did, the accused always would get a new trial where the prosecuting witness recanted her testimony, because it would be apparent that with the new testimony, that the accused was not guilty, the result of the trial would be different.

435 S.W.2d at 568 (emphasis added).

Despite my belief that Clayton's affidavit is untimely for purposes of CR 60.02 and cannot form the foundation for a new trial pursuant to *Thacker*, there are other problems with Clayton's affidavit. I am greatly troubled by the fact that Clayton in his affidavit attempts to repudiate Ross's trial testimony. Many years after the trial and after Ross was put through testifying against his parents, Clayton renounces Ross's testimony. The trial court reviewed the transcript of Ross's

testimony and found it to be detailed and credible. I too have reviewed Ross's testimony, which the jury apparently accepted, and agree with the trial court that it is greatly detailed. I may question how some of the acts were physically possible given Ross's tender age, but this was a matter for the jury to decide.

Moreover, in light of the detailed testimony of Ross, I find *Thacker* instructive again: "The age of the [child] was such that it would have been difficult for [him] to be coachable to adhere faithfully to an untrue story." *Id*. at 569. Ross's testimony at points was so incredibly and graphically descriptive for a six-year old, it is difficult to conceive that Clayton could have coached him on so many details that Ross could have recalled them all and testified to them.

Clayton's affidavit is even more suspect in light of some of the statements he made when compared with his trial testimony. In particular Clayton states in regard to his earlier allegations against his parents, that at that time he "hated and despised [his] parents for the mess they created in [their] home and in [their] lives." He wanted "revenge." But, when he was exhibiting difficulty with his trial testimony thirteen years earlier, he stated that he "just [didn't] want to hurt [his] parents."

Regarding Clayton's statement to the Honorable Kelly Thompson, who was the GAL for the children, at best it can be summarized as the Court in *Wallace v. Commonwealth*, 327 S.W.2d 17, 18 (Ky. App. 1959) stated: "the newly discovered facts only involved a statement made by a witness prior to the trial

which was inconsistent with [his] testimony under oath." The *Wallace* Court found such to be wholly insufficient for the purposes of CR 60.02. *Id.*

I also agree with the trial court that the Schambons seek to relitigate issues that have been previously litigated. This is improper under our rules of Civil Procedure. *Stoker*, 289 S.W.3d at 597. From a reading of the transcript in regard to Ross and Clayton's testimony, it is evident that the defense was arguing that Clayton coached or influenced Ross's testimony against their parents. For example, at a bench conference, the Commonwealth argued that "[t]hroughout all the questioning with the witnesses, they have made a big deal over the fact that Clayton and Ross were together making this up at the Bright residence. . . ." Ross was cross-examined and asked whether Clayton told him things about women and their "private parts." Ross answered in the negative. And asked if Clayton told him to make up anything, Ross answered "no." Ross was asked if what he told the jury was true, and he stated it was. Further, on direct appeal, the Kentucky Supreme Court noted that the Schambons "had attempted to show that . . . [Clayton] had 'planted' the vivid sexual contact allegations in . . . [Ross's] mind. . . ." Accordingly, the theory that Clayton influenced Ross to falsely testify was brought out for the jury to determine, and it did. Now, thirteen years later, the Schambons seek to take another bite at that same apple.

As to the Schambons' reliance on their performance on lie-detector tests, this is absolutely insufficient to serve as any basis for their CR 60.02 motion. Our Supreme Court has held that polygraphs tests are unreliable. *Morton v.*

*Commonwealth*, 817 S.W.2d 218, 222 (Ky. 1991). The Schambons have not cited any authority that a polygraph tests should be relied upon for CR 60.02 relief, and given the Supreme Court's pronouncement as polygraph tests as unreliable, I do not believe they should.

Regarding the letter from Eric Y. Drogin, J.D., Ph.D., ABPP, and the affidavit of Ralph Underwager, Ph.D., I do not believe these qualify under CR 60.02 as a basis for a new trial. Moreover, the Schambons have not shown how these documents dated in 2003 are timely under CR 60.02.

In reviewing the trial court's decision to deny the Schambons' CR 60.02 motion and an evidentiary hearing, we are bound by the abuse of discretion standard. I find no abuse of discretion on the part of the trial court in either denying the CR 60.02 motion or the evidentiary hearing. The trial court reviewed the affidavits, statements and other documents submitted, as well as the trial transcript and came to a very wise decision. The Schambons have not simply moved for an evidentiary hearing and CR 60.02 relief in regard to the counts involving Clayton, the only recanting witness, but as to all counts against them involving Ross. From my viewpoint, one witness should not be permitted to renounce another witness's testimony in the absent of some other compelling evidence, and there is no such evidence in this case. Thus, I would affirm.

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