IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: NOVEMBER 26, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 12-17-08 ElliaGrowitt D.C.

2004-SC-000838-DG

J.D. HAMMONS APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2004-CA-001233-MR
LAUREL CIRCUIT COURT NO. 99-CR-00189

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

VACATING AND REMANDING

Appellant, J.D. Hammons was sentenced to life imprisonment based on the testimony of a seven-year old child ("M.V.") who later recanted and admitted she tells lies about people who make her mad, and who was mad at Appellant for having "switched" her. His conviction and sentence was affirmed by this Court on direct appeal. Appellant, pro-se, filed an RCr 11.42 motion alleging that the child witness was incompetent, and that trial counsel was ineffective for not investigating nor challenging the child's competency. The trial court, applying an incorrect standard for competency, denied the RCr 11.42 motion without an evidentiary hearing. Appellant, assisted by an inmate legal aid, missed the deadline for timely filing an appeal from the trial court's denial of the motion. The Court of Appeals denied Appellant's motion for a

belated appeal. We granted discretionary review to determine whether Appellant is entitled to a belated appeal from the denial of his RCr 11.42 motion.

The record raises a serious question of fact as to competency of the child witness. And in spite of numerous red flags, trial counsel did not challenge competency, which raises a question of ineffective assistance of counsel. Because the issues raised by Appellant in the RCr 11.42 motion cannot be resolved on the face of the record, Appellant was entitled to an evidentiary hearing and the appointment of counsel on the motion. Therefore, under Moore v. Commonwealth and Hawkins v. Commonwealth, 199 S.W.3d 132 (Ky. 2006), he is entitled to a belated appeal.

A review of the record indicates the following. Appellant and his wife Sheila operated the Hammons' Little Rascals Day Care Center in Laurel County, Kentucky. The day care consisted of two trailers, one of which was also J.D. and Sheila's home. M.V. and her younger sister, C.V., stayed at the day care approximately every other weekend and sometimes every weekend, beginning in July, 1999. At this time M.V. was seven years old and C.V. was five. Their mother, Tracy, testified that the children would sometimes ask to go to the day care because they liked Sheila and the activities. Tracy testified the children said they didn't like J.D. because he'd use a big switch and hit them in the back. Prior to M.V.'s attending the day care, Tracy had taken her for counseling because of M.V.'s interest in sex and body parts. The counselor

told Tracy that this was just a stage children go through. M.V. also had a history of urinary tract infections before ever attending the day care.

The last time the children stayed at the day care was the weekend of October 24, 1999. The Monday after, Tracy and the children were at her cousin's house. C.V. had mentioned previously that J.D. had taken a "big switch" and hit the kids on the back. That day, C.V. mentioned the switching again, and M.V. said the same thing. Tracy's cousin started asking M.V. about sleeping arrangements at the day care, when M.V. apparently made an allegation of rape against J.D. Law enforcement became involved, and Appellant was ultimately indicted on five counts of rape, one count of sodomy, and one count of sexual abuse. The indictment charged the five counts of rape as occurring on or about July 31, 1999; August 7, 1999: August 21, 1999; September 4, 1999, and September 25, 1999; the sodomy count occurring on or about September 25, 1999; and the sexual abuse count occurring on or about July 31, 1999.

At trial, the prosecutor used simple examples to show M.V. knew the difference between truth and lie. However, when asked what happens when you tell a lie, she didn't know. Nevertheless, she promised to tell the truth, and questioning resumed without any objection by defense counsel. M.V. testified that when she spent the night at the day care, sometimes she would sleep in "the little bedroom",[1] sometimes she would sleep on the couch in the living

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[1] Apparently referring to the bedroom with the child-size beds, which, on cross-examination, M.V. admitted she slept in a lot.

room, and sometimes she would sleep in J.D.'s bedroom. M.V. said she would sleep beside Sheila, and J.D. would be on the other side of Sheila, and C.V. would be in the crib. M.V. testified that sometimes Sheila wasn't there and that it would just be her and J.D. in the bed. When asked what J.D. did that she didn't like, she said that J.D. stuck his tongue in her "private" and "it hurt real bad." When asked to tell another thing that happened, she testified that J.D. put his "private" in her "private". When asked if this happened once or more than once, she said "more than once." When asked if she knew how many times it happened, she did not know. When asked if it happened on the same weekend or different weekends, she said different weekends. She then said "he does it all the time." When asked if he did anything else that she didn't like, M.V. said that Appellant put his finger in her "private" and that she had a kidney infection because of it.

Following the prosecutor's direct examination of M.V., the trial court expressed concern as to the "private in the private" issue, because M.V.'s response of "more than once", could be interpreted as that it only happened twice.[2] Therefore, the prosecutor re-asked M.V. about how many times it happened. He asked M.V. if it happened five times, more than five times, or less. M.V. said "more than five." When asked to count to five, however, M.V. was silent. When asked if she could hold up five fingers, the camera was off of M.V., so it is not clear what she did. Appellant's assertion in his RCr 11.42 motion was that she did nothing. The prosecutor asked again if it happened

[2] The indictment charged five counts of rape.

five times or less than five times. M.V. said "more than five." When asked if she was sure it didn't just happen two times, M.V. was silent. When asked if she thought it happened ten times or less than ten times M.V. was silent. When the prosecutor asked if it happened 10,000 times, M.V. was silent. The camera was off of M.V., so it is unclear if she even gestured. No objection by defense counsel was raised as to competency. On cross-examination, when asked if she had talked to anybody about what she was going to say today before she came in, she said "John", apparently referring to the prosecutor, John Forgy. Defense counsel did not explore with the M.V. the consequences of lying, nor whether she knew the difference between five times, ten, or ten thousand, all issues relating to competency which were put in question on direct examination.

Sheila Hammons testified that, according to her records, there was only one time, October 9, when J.D. would have been alone at night in the trailer with M.V. and C.V. Sheila explained that this was because there were more overnight children at the day care than usual and she had to stay in the other trailer with other children. Sheila testified that the last time she checked on them that evening, at about 10:00 p.m., M.V. was asleep on the couch and C.V. in the crib. She said that M.V. and C.V. were still asleep, in the same places, when she got them up for breakfast in the morning. She testified that the September 25 charges in the indictment could not have happened, as the day care was closed that weekend because she and J.D. had gone to Dollywood in Tennessee. The Dollywood receipt was entered into evidence. Sheila testified

that, according to her records, M.V. and C.V. also did not attend the day care the weekend of September 4.[3]

J.D. Hammons testified in his own defense and denied all of the allegations. He said that he would hit the kids on the legs with a little stick if they got to "fussin' and fightin'".

Appellant was convicted of three counts of first-degree rape (allegedly occurring on July 31, August 7, and August 21), along with the sodomy charge (allegedly occurring on September 25) and sexual abuse charge (allegedly occurring on July 31). He was found not guilty of the rape charges allegedly occurring on September 4 and September 25. He was sentenced to life imprisonment. His conviction was affirmed on direct appeal to this Court.[4]

On August 5, 2002, M.V.'s grandmother, Brenda, who then had guardianship of M.V., called the Commonwealth Attorney's office to report that M.V. had told her she had lied about Appellant raping her. Brenda was told to contact Appellant's attorney, which she did. On August 6, Appellant's counsel[5] came to Brenda's home and took a taped statement from M.V., who was now ten years old. She admitted that none of the things she said in court that J.D. did were true. M.V. said that she had lied about J.D. because he had switched her on the back and her mom wanted to get him locked up. M.V.'s explanation as to why she was telling the truth now was that it was wrong for J.D. to be

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[3] Another of the five counts of rape charged in the indictment was alleged to have occurred on or about September 4.

[4] 2000-SC-0574-MR

[5] Subsequent counsel, as trial counsel had apparently passed away by this time.

locked up for the rest of his life for something her mother put her up to doing. When asked if she would be willing to say this in court, M.V. said "no", because she was afraid she would be sent to "juvenile" for having lied about J.D.[6] When M.V. was asked if she would say this in court if they worked it out so she wouldn't go to juvenile, M.V. agreed she would. M.V. also said that her mother had raped her, with her fingers.

On August 22, 2002, Appellant, through counsel, filed in the Laurel Circuit Court a "Motion for New Trial Based on the Complaining Witness in this Case Admitting That She Lied About Being Sexually Abused", pursuant to CR 60.02. Subsequently, M.V. was interviewed by a Kentucky State Police detective, accompanied by a social worker, regarding the recantation. M.V. said she "told all those lies on" J.D. and said he raped her because she was mad at him because he switched her on the back. Asked why she would say that, M.V. said it was because she got mad at him. The detective asked how a seven year old would know to say "rape" and what rape means. M.V. said her mama said its when somebody hurts you. M.V. said that sometimes when she gets mad at someone "I go off, tell certain lies and people believe me and stuff." When asked if anyone told her to lie on J.D., she said her mama did. The detective told M.V. that she did not believe that M.V. was telling the truth now, and that she thought that things had happened between her and J.D. M.V. then said her grandmother said J.D. hadn't done those things, and was worried that her grandmother would get mad if she said he had. The detective told

[6] M.V. had been sent to a juvenile facility several months earlier for stealing.

M.V. that she wanted her to tell the truth, and her grandmother wouldn't be mad. M.V. then agreed with the detective that J.D. had done the things she had said before. The detective and social worker told M.V. she wasn't in trouble, and they were proud of M.V. for telling the truth. M.V. explained she had been afraid of going to "juvie" after talking to J.D.'s lawyer. The detective had repeatedly told M.V. that she needed to know who told her to say it didn't happen, and M.V. finally said her grandmother, because her grandmother thought M.V. was lying about it. When the detective told M.V., that, because of her testimony against J.D. no other children would get hurt, M.V. said that wasn't true because she (M.V.) had raped her nine year old cousin. The detective, a bit stunned, again asked M.V. what "rape" means. M.V. responded that it was when somebody hurts somebody else. No further explanation of the meaning of rape was elicited and M.V. was told they weren't there about the cousin. When the detective asked M.V. if her mother had hurt her with her fingers, M.V. said no. When asked why she had said it, M.V. said her grandmother said it. When asked again, she said nobody told her to say that. When asked again, M.V. said her grandmother said that her mom did it, and that she "went along with her." The social worker told M.V. they believed her (M.V.) in the beginning (first interview about J.D.) and she believes her now. The detective told M.V. that she was not in trouble and that she was proud of her for telling the truth. The social worker also told M.V. she was not in trouble. The social worker asked M.V. if she doesn't feel better for telling the truth? M.V. said "no". The social worker added, it's a big load off your

shoulders, isn't it? The detective answered she thought it was, and the social worker said again she was very proud. M.V.'s reaction – "I feel like telling lies . . . I'm kidding!" M.V., laughing, said she tells lies on her boyfriend. A brief discussion ensued about her boyfriend, when the conversation turned to M.V.'s parents. Asked about her father's whereabouts, M.V. at first said she didn't know, but then said he was with the drug dealers. When asked where her mother was, she said with the drug dealers.

The trial court held a hearing on the CR 60.02 motion on December 3, 2002. At the hearing, M.V.'s grandmother, Brenda, vehemently denied ever telling M.V. to recant or that her mother had raped her. Her version of the recantation was as follows. M.V. and C.V. had been staying with Brenda because their mother could not take care of them at the time. M.V. was outside playing with C.V., when C.V. was observed with her clothes down, apparently masturbating. C.V. told Brenda that M.V. had done it to her. Brenda brought M.V. inside and told her that just because she had been hurt by J.D., she could not go around and hurt other children. At that time, M.V. allegedly told Brenda that J.D. didn't really do anything to her, that she made it up. When Brenda asked M.V. why she would say such a thing if were not true, M.V. told her that she was mad at J.D. for having switched her and did not want to go back there, so she said he raped her. That was the first inclination Brenda had that M.V. had not been abused by J.D. After Brenda expressed concern that J.D. was in prison for something he did not do, and said she was going to call the authorities, M.V. got worried that she was going

to go to juvenile for having lied about J.D. M.V. also told Brenda that her mother had raped her.

At the hearing, M.V. was told she would not get into trouble for whatever she says, and they wanted her to tell the truth. M.V. had just started living with her mother again at the time of the hearing, and said she wanted to live with her mom. M.V. testified that her recantation wasn't true, and that J.D. had done the things she said before. When asked about her previous accusation that her mother had raped her with her fingers, she said that was not true. When asked why she had said her mother raped her, M.V. said she didn't know. M.V. admitted that she tells lies about people when she gets mad at them. M.V. said that she was pretty sure J.D. had switched her and C.V. on the back because they had red marks. When M.V. was reminded that she had previously said her mother put her up to lying about J.D. to get him locked up, M.V. denied this and said her grandmother had said that her mom was trying to get money off of J.D.

Following the hearing, the trial court denied the CR 60.02 motion. Appellant, through counsel, appealed the denial. Appellant subsequently fired his counsel to proceed pro-se, and requested the appeal from the CR 60.02 filed by counsel be, and it was, dismissed.

Appellant, pro-se, filed the RCr 11.42 motion which is the subject of this appeal. Therein, Appellant raised the issue that M.V. was not competent to testify, and ineffective assistance of trial counsel for counsel's not having investigated and discovered M.V. had fabricated the story and for not

challenging M.V.'s competency at trial. The motion also alleged counsel's terminal illness had affected his performance.[7] The trial court denied the RCr 11.42 motion without an evidentiary hearing. Appellant, uneducated and relying on an inmate legal aid for assistance, missed the filing deadline for appealing the trial court's denial of the RCr 11.42 motion. The Court of Appeals denied Appellant's motion for a belated appeal, citing its opinion in Merrick v. Commonwealth, 132 S.W.3d 220 (Ky.App. 2004). In Merrick, the Court of Appeals opined, in dictum, that the belated appeal procedure was not available in collateral proceedings. Appellant's motion for discretionary review was held in abeyance pending this Court's decision in the consolidated cases of Moore v. Commonwealth and Hawkins v. Commonwealth, 199 S.W.3d 132 (Ky. 2006). After the decision was rendered in Moore and Hawkins, we accepted discretionary review, and appointed appellate counsel, to decide whether, under the standard set forth in Moore and Hawkins, Appellant is entitled to a belated appeal from the denial of his RCr 11.42 motion.

In Moore and Hawkins we rejected the dictum in Merrick, and held that a belated appeal is permitted from the denial of a collateral attack, if the necessity for the belated appeal is the result of ineffective assistance of counsel. We held that an individual proceeding pro-se is entitled to a belated appeal from the denial of a collateral attack, if he was erroneously denied the assistance of counsel in the collateral proceeding. Id.

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[7] Trial counsel apparently passed away from cancer a year after the trial.

Hawkins and Moore each filed a pro-se RCr 11.42 motion to vacate his judgment and sentence. In Hawkins' case, the trial court held an evidentiary hearing on the motion, and appointed the Department of Public Advocacy to represent Hawkins. The trial court ultimately denied Hawkins' RCr 11.42 motion. Hawkins directed his counsel to appeal the denial, but counsel missed the filing deadline due to a mailing error. We recognized that missing a filing deadline is per se ineffective assistance. Because Hawkins was entitled to effective assistance of counsel in the RCr 11.42 proceedings, we held that his belated appeal should be granted. Moore, 199 S.W.3d at 139.

In Moore's case, the trial court did not hold an evidentiary hearing on the RCr 11.42 motion, and no counsel was appointed for Moore. The trial court ultimately denied the motion. Moore proceeding pro-se, filed his notice of appeal more than two months late. We held that if Moore had been erroneously denied the appointment of counsel on his RCr 11.42 motion, then he would be entitled to a belated appeal. Therefore, in Moore's case, we looked to see if he had been entitled to counsel in the RCr 11.42 proceeding. We held that because the allegations raised in his RCr 11.42 action could be determined on the face of the record without an evidentiary hearing, Moore was not entitled to appointment of counsel. Because he therefore had no right to effective assistance of counsel in the RCr 11.42 proceedings, we concluded that, while he was entitled to appeal, it was his obligation to exercise that right properly. Accordingly, we held Moore was not entitled to a belated appeal. Id. at 140.

Under Moore and Hawkins, if Appellant was entitled to the appointment of counsel on his RCr 11.42 motion, then this total deficiency of representation would justify a belated appeal. A movant is entitled to appointment of counsel on an RCr 11.42 motion if he is entitled to an evidentiary hearing thereon. An evidentiary hearing is required if the RCr 11.42 motion raises an issue of material fact which cannot be conclusively resolved on the face of the record. RCr 11.42(5); Commonwealth v. Stamps, 672 S.W.2d 336 (Ky. 1984); Fraser v. Commonwealth, 59 S.W.3d 448, 452 (Ky. 2001); Mills v. Commonwealth, 170 S.W.3d 310, 338 (Ky. 2005). We have taken pains to recite pertinent parts of the record to graphically show the need for a hearing. There is clearly an issue of material fact (which cannot be resolved from the record) as to M.V.'s competency.

KRE 601(b)(2) requires that a witness have the capacity to recollect facts. A witness who does not know if something happened ten times or ten thousand times raises a serious KRE 601(b)(2) question. Yet, counsel did not object, nor cross-examine on M.V.'s ability to recall. And, a child who would agree that something happened "more than five" times, but cannot count to five, certainly raises a question. The record does not demonstrate M.V. knew how many "five" was. When asked, the camera was not on her. She made no sounds. Did she hold up five fingers? A material fact that the record does not explain. If M.V. did not even hold up five fingers, as Appellant claims, and counsel did not object, which he did not, there was ineffective assistance.

KRE 601(b)(4) requires that a witness understand the obligation to tell the truth. Competency is an ongoing determination for a trial court. Kentucky v. Stincer, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). The trial court recognized that it was required to consider the record developed in the CR 60.02 proceedings, in reviewing M.V.'s competency for purposes of the RCr 11.42 motion.[8] But then it applied the wrong standard, concluding that just knowing the "difference between a lie and the truth" sufficed. This is only half of what KRE 601(b)(4) requires. Competency requires more than just knowing what "truth" means, it requires a witness understand the obligation to tell it.

An appellate court may consider a trial court's competency determination from a review of the entire record. Stincer, 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631. What is M.V.'s concept of the obligation to tell the truth? The question was never asked and answered. The record doesn't answer this for us, but only raises disturbing questions. The record gives evidence of the following. When M.V. is mad at someone, she "lies on them". She changes her stories with impunity. At trial, M.V. didn't know what happens if you tell a lie. Throughout this case, it was conveyed to M.V. (by the detective, social worker, defense counsel, the mother, the prosecutor) that if she told the truth "now" she would not get into trouble for past lies. But what is M.V.'s concept of the obligation to tell the truth? Even after being told by the detective and social

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[8] Finding no problem with M.V.'s competency to testify as a witness, the trial court concluded there could be no ineffective assistance of counsel for counsel's not having challenged it.

worker that they were proud of her for going back to the "truth", M.V. joked that she had just lied, before saying she was just kidding. Her statements that she raped her cousin were dismissed. Her statements that her mother had raped her were not resolved. And it was perfectly alright to end their interview laughing about the lies M.V. tells on her boyfriend.

Clearly, there is an issue as to M.V.'s understanding of the obligation to tell the truth, which is not resolved on the face of the record. Thus there is a question of ineffective assistance of trial counsel, because counsel did not even question M.V.'s competency. Because Appellant's RCr 11.42 motion raises issues of material fact which cannot be resolved from the face of the record, he was entitled to an evidentiary hearing and the appointment of counsel on the motion. Accordingly, under Moore and Hawkins, he is entitled to a belated appeal of the trial court's denial of his RCr 11.42 motion. Therefore, we must vacate and remand to the Court of Appeals with instructions to grant the belated appeal. Inherent in our decision that Appellant was entitled to a belated appeal is the conclusion that he was erroneously denied an evidentiary hearing on the RCr 11.42 motion in the trial court. Therefore the Court of Appeals will need to vacate the trial court's denial of the RCr 11.42 motion and remand the matter back to the trial court for an evidentiary hearing on the ineffective assistance of trial counsel for not challenging competency.

For the aforementioned reasons, the order of the Court of Appeals denying the belated appeal is vacated and the matter remanded for further proceedings consistent with this opinion.

All sitting. All concur.

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