

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002977-MR

TODD RAY

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 99-CR-00181

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART AND REMANDING IN PART

** ** * * *

BEFORE: DYCHE AND McANULTY, JUDGES; AND POTTER, SPECIAL JUDGE.¹

DYCHE, JUDGE. Todd Ray entered a plea of guilty to third degree rape on April 19, 1999. The Kenton Circuit Court ordered a risk assessment hearing be held prior to sentencing. Ray successfully moved the trial court for expert witness funds, and employed Dr. Eric Droган to prepare an independent report. However, the trial court would not allow the further expense of Droган appearing at

¹ Senior Status Judge John Woods Potter sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

the risk assessment hearing, held on September 16, 1999, for purposes of testifying or aiding counsel in cross-examination. Ray was assessed as a moderate risk offender and sentenced to five years, probated for five years. Ray appeals.

Ray first argues that the trial court erred in ordering that he be subjected to a risk assessment as he did not fit the statutory definition of "sex offender." Kentucky Revised Statute (KRS) 17.550(2). Ray insists that the trial court must make the threshold finding that, not only does a defendant need to commit a sexual crime, but that he also be a sexual offender, viz., that he suffer "from a behavioral abnormality or personality disorder characterized by a pattern of repetitive compulsive behavior that makes the offender a threat to public safety."

We agree with the trial court and the Commonwealth that the statute was never intended to be interpreted in this way. The threshold finding before holding an assessment hearing would be whether the defendant has committed a sexual crime. Otherwise, as the Commonwealth points out, there would be no necessity for the later risk assessment hearing. Rape in the third degree qualifies as a sexual crime, and the trial court correctly ordered the risk assessment hearing.

More troublesome, though, is the issue of expert witness assistance to the defense. Ray successfully moved the

court for expert witness fees. However, the trial court stopped short of authorizing payment for the hired psychologist to be present at the hearing. Moreover, the record indicates that Ray's expert was never provided a copy of the risk assessment evaluation report. And counsel, although permitted to briefly review the contents of the report, was denied his own copy and was thus hampered in his efforts to properly prepare for the hearing. Hyatt v. Commonwealth, Ky., 72 S.W.3d 566 (2000), recognized the right to present an expert witness to "counter the conclusions of the [risk assessment] report." Id. at 573; see also Pendleton v. Commonwealth, Ky., 83 S.W.3d 522, 528 (2002).

Accordingly, we affirm in part and remand in part for proceedings not inconsistent with this opinion.

ALL CONCUR.

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