

RENDERED: March 7, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 1999-CA-003070-MR

ANNA FAYE ALLEN

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
INDICTMENT NO. 97-CR-00170

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING IN PART AND REMANDING IN PART

** ** * * *

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

DYCHE, JUDGE. On February 12, 1998, Anna Faye Allen, aged thirty, entered a plea of guilty to the amended charge of third degree rape for having sexual intercourse with her then

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.

thirteen-year-old neighbor. As per the plea agreement, Allen was sentenced to two and a half years' imprisonment.

Prior to her release in 1999 the trial court ordered a sexual offender risk assessment and hearing. Allen requested that she be allowed to proceed in forma pauperis. A public defender was appointed to represent Allen at the hearing. Allen waived her appearance. The trial court found Allen to be at moderate risk for repeating a sexual offense, and Allen appeals.

Allen first argues that her procedural due process rights were violated because she was unable to cross-examine the person who filed the risk assessment report. We agree with Allen that she has this right. See Hyatt v. Commonwealth, Ky., 72 S.W.2d 566 (2000), and the later case of Pendleton v. Commonwealth, Ky., 83 S.W.3d 522 (2002). Hyatt specifically states, at 72 S.W.3d 573, that "we believe the case should be remanded for the failure of Dr. Wagner [who had prepared the report in Hyatt's case] to attend the hearing." The trial court erred in holding the hearing without this essential witness.

Allen secondly asserts that the risk assessment report and its recommendation was suspect, as it was based on an instrument for assessing male, not female, offenders. Therefore, Allen continues, the assessment was not based on scientifically reliable methodology and should not have been used as the basis for her classification as a moderate risk

offender. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Hyatt, supra at 575, expressly considered and rejected a Daubert argument, and we decline to address it further here, other than to state that appropriate considerations were made in relation to Allen's gender.

Allen finally contends that application to her of the Sex Offender Risk Assessment violates constitutional ex post facto protections. Again the similarly situated appellant in Hyatt was found to suffer no ex post facto violation. Id. at 571-573. This argument must also fail.

The order of the Laurel Circuit Court is affirmed in part and remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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