

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2001-CA-002726-DG

COMMONWEALTH OF KENTUCKY

APPELLANT

ON DISCRETIONARY REVIEW FROM GRAVES CIRCUIT COURT  
v. HONORABLE DAVID H. JERNIGAN, JUDGE  
ACTION NO. 00-XX-00005

PAUL LEAHY

APPELLEE

OPINION  
REVERSING

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BEFORE: GUIDUGLI AND KNOPF, JUDGES; and MILLER, SPECIAL JUDGE.<sup>1</sup>

GUIDUGLI, JUDGE. This matter is before us on discretionary review from a November 20, 2001, decision of the Graves Circuit Court reversing the Graves District Court's judgment convicting Paul Leahy (hereinafter Leahy) of Driving Under the Influence, first offense. We accepted discretionary review in this matter to decide whether the use of a video-conferencing system<sup>2</sup> by the trial court violates the Confrontation Clauses of the United States and the Kentucky Constitutions. Having determined that

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<sup>1</sup> Senior Status John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

<sup>2</sup>Identical video-conferencing systems have also been installed in several Western Kentucky circuits.

the system utilized does not violate the accused's right to face-to-face confrontation, we reverse the circuit court's decision.

Leahy was arrested on July 19, 2000, and charged with DUI, first offense, pursuant to KRS 189A.010<sup>3</sup>. Following a bench trial on November 20, 2000, the trial court entered a guilty verdict under the per se portion of the statute and sentenced Leahy on November 29, 2000. Leahy pursued an appeal to the circuit court, arguing that the district court's decision, over his objections, to admit the testimony of Madisonville Crime lab employee Phil Wilson via a closed circuit television system and telephone violated his right to confront the witnesses against him. Special Judge David H. Jernigan reversed Leahy's conviction in an opinion rendered November 21, 2001, relying upon two prior Kentucky Supreme Court cases dealing with child witnesses and holding that "the use of closed circuit television to present testimony at trial, absent statutory authority, violates the Defendant's constitutional rights." We granted the Commonwealth's motion for discretionary review of the matter, and this appeal followed.

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<sup>3</sup>KRS 189A.010 provides, in part, as follows:

(1) A person shall not operate or be in physical control of a motor vehicle anywhere in this state:

(A) Having an alcohol concentration of 0.08 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle; . . . .

On appeal, the Commonwealth relies upon the Kentucky Supreme Court's decision in Bolen v. Commonwealth, Ky., 31 S.W.3d 907 (2000), arguing that the circuit court's decision in this matter is directly contradictory to a binding opinion. In Bolen, an appeal from McCracken Circuit Court, the Supreme Court noted that the appellant made three additional claims of error, each of which he failed to preserve, including whether the admission of expert testimony through closed circuit television violated the Confrontation Clause. The court stated that A[w]e have carefully reviewed these and conclude that each one is without merit and none deserve to be discussed further.@ Id. at 910.

On the other hand, Leahy continues to rely upon the Kentucky Supreme Court's decisions in Commonwealth v. Willis, Ky., 716 S.W.2d 224 (1986) and George v. Commonwealth, Ky., 885 S.W.2d 224 (1999) to support his proposition that his constitutional rights were violated. Additionally, he argues that the operational failure of the system prejudiced him. Further, he disputes the Commonwealth's reliance upon the Bolen decision, arguing that the precedential value of the *dicta* is limited, if it exists at all. We disagree with Leahy's propositions.

The Supreme Court addressed the standard of review applicable in this matter in English v. Commonwealth, Ky., 993 S.W.2d 941 (1999).

The standard of review is whether there has been an abuse of that discretion. Partin v. Commonwealth, Ky., 918 S.W.2d 219, 222 (1996). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. 5 Am.Jur.2d Appellate Review ' 695 (1995); cf. Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994).

Id. at 945. Therefore, we must reverse the circuit court's decision if we determine that the district court did not abuse its discretion in allowing the testimony of Phil Wilson via closed circuit television system.

The video-conferencing system at issue in this case allows expert witnesses to testify via a closed circuit television system from another location in the state. Through a set of cameras set up at the remote location, at each counsel's table and at the bench, all of the trial participants are able to see and hear each other simultaneously. In this particular case, there was a problem with the audio system in that the remote witness was not able to hear the judge or the attorneys in the courtroom. Therefore, a telephone line was used to correct the audio problem. The trial judge used a speaker phone that allowed the courtroom participants to hear the remote

witness clearly and also allowed them to conduct both direct and cross-examination. We have reviewed the videotaped record of the bench trial, and have determined that the testimony of the remote witness was easily understandable.

We shall now turn to the merits of the appeal. First, the Kentucky Supreme Court's decision in Bolen, supra, is controlling. The court clearly reviewed the issue and determined the argument that the use of the closed circuit television to admit expert testimony violated the Confrontation Clause to be without merit. This language was not purely *dicta* as the court specifically stated that it had reviewed the unpreserved claim of error and did not need to discuss it any further.

We further hold that the use of the closed circuit television system did not violate the protection of the Confrontation Clause. The 6<sup>th</sup> Amendment of the United States Constitution provides, in relevant part, that A[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .@ Similarly, ' 11 of the Kentucky Constitution provides that A[i]n all criminal prosecutions the accused has the right . . . to meet the witnesses face to face.@ The video-conferencing system afforded Leahy the right to confront the witnesses against him face-to-face. Leahy was able to see and hear Wilson as he testified

remotely from the Madisonville Crime lab, and Wilson was able to see and hear Leahy, as well as the attorneys and the trial judge, throughout his testimony. This holding is also in keeping with RCr 1.04, which states that [t]he Rules of Criminal Procedure are intended to provide for a just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.@ Allowing expert witnesses, such as Phil Wilson, to testify remotely from their places of employment serves the purpose of eliminating unjustifiable expense and delay in requiring them to travel throughout the Commonwealth in order to testify.

The cases Leahy relies upon are distinguishable from the matter before this Court. In Willis, supra, the Kentucky Supreme Court held that the provisions of KRS 421.350 regarding testimony by a child abuse victim did not violate the Confrontation Clause. Provisions of that statute allow for the use of testimony of a child abuse victim by videotape prior to trial by closed circuit television during trial or for in-court screening of the defendant from the sight and hearing of the witness. In George, supra, the Supreme Court held that the provisions of the same statute did not apply to a witness who was not also the victim when the Commonwealth failed to establish a compelling need to obtain the child's testimony by

that method rather than in court. Both of these cases dealt with the witnesses being screened from viewing or hearing the defendant. Therefore, the face-to-face aspect is missing in both of these instances, meaning that the Commonwealth had to proceed under some other statutory authority to overcome the protection afforded by the Confrontation Clause.

In conclusion, we believe that the trial court did not abuse its discretion in overruling Leahy's objections to the admission of expert testimony via the video-conferencing system. Although the system was not functioning properly, an appropriate remedy corrected the problem with the audio portion of the testimony. Additionally, the trial judge always had the discretion to order the remote witness into the courtroom had the problem not been resolved. Further, the system does not violate a defendant's right to a face-to-face confrontation with witnesses testifying against him. Therefore, the circuit court erred in holding that the use of the closed-circuit television to present expert witness testimony in this matter violated Leahy's constitutional rights and improperly reversed Leahy's conviction.

For the foregoing reasons, the circuit court's decision is reversed and the conviction is reinstated.

KNOFF, JUDGE, CONCURS IN RESULT AND FILES SEPARATE  
OPINION.

MILLER, SPECIAL JUDGE, DISSENTS.

KNOPF, JUDGE, CONCURRING IN RESULT: I agree with much of the reasoning in Judge Guidugli's opinion, as well as the result. However, I take exception to his assertion that we are bound by certain language in Bolen v. Commonwealth, Ky., 31 S.W.3d 907 (2000), which purportedly upheld that use of the video-conferencing system as constitutional. It is well-established that statements made in an opinion that are not necessary to the decision of the question under consideration by the court are dicta, and such dicta is not authoritative or binding on a reviewing court. See Williams v. West, Ky. 258 S.W.2d 468, 471 (1953); Cawood v. Hensley, Ky., 247 S.W.2d 27, 29 (1952); Stone v. City of Providence, 236 Ky. 775, 778, 34 S.W.2d 244, 245 (1930); Swiss Oil Corporation v. Shanks, 208 Ky. 64, 270 S.W. 478, 479 (1925). The cited language in Bolen clearly meets this definition.

In Bolen, the Supreme Court addressed all of the appellant's preserved grounds of error at length. The Court then noted that the appellant had raised three additional claims of error, each of which he had failed to preserve. One of these additional issues involved the use of the video-conferencing system to present expert witness testimony. Although the Court made a cursory statement concluding that each of the unpreserved issues were "without merit", it declined to address the merits

of the issues even under a palpable error standard. Bolen, 31 S.W.3d at 910. Given these circumstances, I do not believe that this brief reference to and disposal of the issue was necessary to the questions considered by the Bolen court. Furthermore, after considering the significant constitutional questions raised by the use of the use of the video-conferencing system, I find it difficult to accept that our Supreme Court intended to bind all subsequent reviewing courts to a holding based upon such a conclusory analysis. Accordingly, I would hold that the cited language in Bolen must be considered as dicta and is not binding on this Court.

Nevertheless, I agree with the conclusion that the use of the video-conferencing system did not violate Leahy's right to confront the witnesses against him. As correctly analyzed in Judge Guidugli's opinion, the video-conferencing system did not unduly inhibit Leahy's right to view and hear the witness against him, and he was afforded a full opportunity to cross-examine the expert witness. However, I would add that the use of this system should be addressed on a case-by-case basis. The right to confrontation must be applied in such a way as to produce a fair result and enhance the truth-determining process. While allowing an expert witness to testify remotely from his or her place of employment clearly saves time and travel expenses, the primary considerations must be to protect the defendant's

right to a fair trial and to ensure fairness in the administration of justice. See RCr 1.04.

To this end, it is the responsibility of the trial court to ensure that new technology is implemented in a manner which is consistent with a defendant's rights. If the video equipment fails to operate satisfactorily, a trial court would be within its discretion to require a witness to appear in person. Furthermore, the video-conferencing system should not be used merely because the Commonwealth (or the defendant) believes that an expert witness might make a better impression on the jury when testifying remotely rather than in person. Such determinations are committed to the sound discretion of the trial judge, who is the best gauge to determine the fairness of a proceeding. Commonwealth v. Willis, Ky., 716 S.W.2d 224, 231 (1986). Because I agree that the trial court did not abuse its discretion in this case, I concur with the decision to uphold Leahy's conviction.

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