

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000454-MR

BINTA MARYAM BARAKA

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 01-CR-01080

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER AND SCHRODER, JUDGES; AND MILLER, SENIOR JUDGE.¹
SCHRODER, JUDGE. Binta Baraka appeals her conviction for
manslaughter in the second degree² and for being a persistent
felony offender in the second degree³ for which she received a
ten-year sentence on a conditional plea. Her conditional plea
reserved the right to appeal the trial court's denial of her
motion to preclude an expert medical witness from giving an

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

² KRS 507.040.

³ KRS 532.080.

opinion that this case was one of a "homicide by heart attack". We reject Baraka's claims that the expert testimony did not meet the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), that said testimony would not have assisted the jury, and that it was improper for the expert to consider outside information in arriving at her opinion as to cause of death. Accordingly, the trial court properly ruled that the medical examiner could give an opinion that the victim's altercation with appellant produced the stress which caused the victim's fatal heart attack. Therefore, we affirm.

Prior to trial, Baraka moved for an admissibility hearing regarding the testimony of Dr. Christen Roth, the medical examiner who performed the autopsy on the victim. At said hearing which was held on February 28, 2002, Dr. Roth testified that the decedent was very thin and very frail. She also discovered through the autopsy that the decedent had a number of medical problems, including coronary artery disease and pulmonary emphysema. She observed that his coronary arteries were very small and opined that he would have trouble getting blood to his head. Dr. Roth also observed abrasions and contusions on the decedent's arms and legs plus superficial abrasions and bruises on his face and neck, though his internal organs were not damaged.

Dr. Roth gave the cause of death as cardiovascular disease/heart attack, with contributing factors, the blunt force trauma to the head and extremities, and pulmonary emphysema. She could also say that the superficial injuries occurred around the time of death. She stated that the injuries to the victim's head and extremities alone could not have caused death.

Dr. Roth also testified that the death was a homicide based on her findings from the autopsy together with outside information from police concerning an altercation at the time of death. Dr. Roth stated that she was informed by police that the victim had been in an argument in which physical contact occurred prior to his death. It was at this point that "homicide by heart attack" became an issue. Dr. Roth explained that it was generally accepted in the scientific community that a sudden fatal heart attack can be brought about by the fright or emotional stress of a criminal act of another. In support of this proposition, Dr. Roth cited to an article published in the Journal of Forensic Sciences by Dr. J.H. Davis entitled "Can Sudden Cardiac Death be Murder?" which was admitted as an exhibit in the hearing.⁴ The hearing thereafter proceeded as a hearing pursuant to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), when Baraka's counsel challenged the theory of "homicide by

⁴ The copy of the article in the record does not indicate the year it was published or volume number.

heart attack" relied on by the Commonwealth. The trial court overruled Baraka's objection to Dr. Roth's testimony, recognizing that Dr. Roth was qualified to give such testimony, that the concept of "homicide by heart attack" was generally accepted in the scientific community, and that it is proper for medical experts to testify to cause of death in criminal cases. Baraka now challenges that ruling in this appeal.

Baraka first argues that the expert testimony at issue in this case did not meet the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). See Mitchell v. Commonwealth, Ky., 908 S.W.2d 100 (1995), overruled in part on other grounds, Fugate v. Commonwealth, Ky., 993 S.W.2d 931 (1999)(wherein the standards set out in Daubert were accepted by the Kentucky Supreme Court). In Daubert, the Court held that before expert scientific testimony can be admitted, it must be determined that the testimony is scientific knowledge that will assist the trier of fact to understand a fact in issue. Daubert, 509 U.S. at 592, 113 S. Ct. at 2796. The Daubert Court then set forth certain factors that a court can consider in making its determination of scientific validity of the evidence: whether the theory or technique can be tested; whether it has been subjected to peer review and publication; its known or potential rate of error; the existence and maintenance of standards controlling the

technique's operation; and whether it has gained general acceptance within the relevant scientific community. Daubert, 509 U.S. at 592-95, 113 S. Ct. at 2796-97. In Johnson v. Commonwealth, Ky., 12 S.W.3d 258 (1999), the Court recognized that the factors set out in Daubert are meant to be "helpful, not definitive" and that:

[A] court may consider one or more or all of the factors mentioned in Daubert, or even other relevant factors, in determining the admissibility of expert testimony. The test of reliability is flexible and the Daubert factors neither necessarily nor exclusively apply to all experts in every case.

Johnson, 12 S.W.3d at 264 (citation omitted). The standard of review of a Daubert analysis is "whether in deciding the admissibility of the evidence the trial judge abused his or her discretion." Mitchell, 908 S.W.2d at 102.

As stated above, Dr. Roth discussed an article published in the Journal of Forensic Sciences which supported the theory that emotional stress from being the victim of or a witness to a criminal act can cause a fatal heart attack. Dr. Roth also testified that she had just attended a pathology conference where she heard a lecture on the subject. Dr. Roth stated that it was her understanding that the theory was generally accepted in the forensic pathology community and that she did not know of any of her peers who did not accept it. As to testing of the theory and its potential rate of error, Dr.

Roth explained that it would be clearly unethical to test such a theory since it would involve trying to bring about a fatal heart attack in the subject and that such a theory could only be based on case studies.

In addressing only a sufficiency of evidence question and not a challenge to the expert medical testimony as in the present case, in Graves v. Commonwealth, Ky., 273 S.W.2d 380, 382 (1954), it was held in Kentucky that a conviction can be sustained for a death caused by fright, fear, or terror alone, even though no hostile demonstration or overt act was directed at the person of the deceased, if the act was illegal or essentially dangerous. There are countless cases from other jurisdictions wherein expert medical testimony was admitted to establish the causal link between a fatal heart attack and the emotional stress brought about by a criminal act, although no Daubert challenge was made in any of the cases and no specific mention was made of the theory of "homicide by heart attack". Matter of Anthony M., 63 N.Y.2d 270, 471 N.E.2d 447, 481 N.Y.S.2d 675 (1984); State v. Spates, 176 Conn. 227, 405 A.2d 656 (1978), cert. denied, 440 U.S. 922, 99 S. Ct. 1248, 59 L. Ed. 2d 475 (1979); State v. Dixon, 222 Neb. 787, 387 N.W.2d 682 (1986); State v. Losey, 23 Ohio App. 3d 93, 491 N.E.2d 379 (1985); State v. Luther, 285 N.C. 570, 206 S.E.2d 238 (1974); State v. Edwards, 136 Ariz. 177, 665 P.2d 59 (1983); State v.

Knight, 247 N.C. 754, 102 S.E.2d 259 (1958); Stewart v. State, 65 Md. App. 372, 500 A.2d 676 (1985); State v. Vaughn, 707 S.W.2d 422 (Mo. App. W.D. 1986); Durden v. State, 250 Ga. 325, 297 S.E.2d 237 (1982); People v. Stamp, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969), cert. denied, 400 U.S. 819, 91 S. Ct. 36, 27 L. Ed. 2d 46 (1970). In Matter of Anthony M., 471 N.E.2d at 452, the Court stated, "In neither instance was the testimony of the medical expert that there was a causal link so baseless or riddled with contradiction that it was unworthy of belief as a matter of law."

Pursuant to the factors in Daubert and the other relevant cases and considerations discussed above, we cannot say that the lower court in the instant case abused its discretion in finding that the theory of "homicide by heart attack" was scientifically valid. We next move on to Baraka's claim that Dr. Roth's expert testimony regarding "homicide by heart attack" did not meet the requirement that it assist the trier of fact to understand or determine a fact in issue.

KRE 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

It should be noted that Baraka does not challenge the qualifications of Dr. Roth, only that her testimony regarding "homicide by heart attack" was not of assistance to the jury. In Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 889-90, (1997), cert. denied, 523 U.S. 1052, 118 S. Ct. 1374, 140 L. Ed. 2d 522 (1998), wherein our state's highest Court abandoned the "ultimate issue" rule, the Court acknowledged:

Generally, expert opinion testimony is admitted when the issue upon which the evidence is offered is one of science and skill, Greer's Adm'r v. Harrell's Adm'r, 306 Ky. 209, 206 S.W.2d 943 (1947), and when the subject matter is outside the common knowledge of jurors. O'Connor & Rague Co. v. Bill, Ky., 474 S.W.2d 344 (1971). . . . [Jurors] usually do need the assistance of a medical expert in determining the cause of a physical condition in order to understand the evidence and determine the ultimate fact in issue. KRE 401; KRE 702.

In the present case, the expert medical testimony at issue was scientific and outside the common knowledge of jurors. Laypersons are generally not qualified to determine cause of death, especially in a case where it is alleged to be the result of a heart attack from the emotional stress of a certain criminal act. Hence, the trial court properly found that Dr. Roth's testimony would assist the jury in determining Baraka's guilt or innocence.

We finally turn to Baraka's assertion that Dr. Roth's testimony should not have been admitted because she had to rely

on outside evidence to come to her conclusion as to cause of death. Dr. Roth testified that she arrived at her cause of death from physical findings gathered during the autopsy together with information given to her by police regarding the circumstances surrounding the victim's death. In particular, she was informed that just prior to his death, the victim had been involved in an altercation with his daughter that involved physical contact.

Baraka argues that Dr. Roth could only testify to her findings based on her examination/autopsy of the body and could not base her opinions on hearsay information from the police which was not subject to cross-examination (that Baraka assaulted the victim just prior to his death).

KRE 703 provides:

(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of

evaluating the validity and probative value of the expert's opinion or inference.

(c) Nothing in this rule is intended to limit the right of an opposing party to cross-examine an expert witness or to test the basis of an expert's opinion or inference. (emphasis added.)

The above rule specifically allows an expert to base his or her opinion on facts from an outside source. See Rabovsky v. Commonwealth, Ky., 973 S.W.2d 6 (1998); Buckler v. Commonwealth, Ky., 541 S.W.2d 935 (1976). However, we believe that KRE 703(c) would entitle the opposing party to cross-examine the expert on those facts forming the basis of his or her opinion.

In Nordmeyer v. Sanzone, 314 F.2d 202, 204 (6th Cir. 1963), the Court stated:

It is settled law that expert medical testimony expressing an opinion as to the cause of death, based on a hypothetical question embracing the material facts supported by the evidence, does not invade the province of the jury, is admissible in evidence on the issue of cause of death, and although not conclusive on said issue, and even though it does not disprove every other possible cause of death, is sufficient to take such issue to the jury and to uphold a verdict in accordance therewith. (citations omitted).

It must be remembered that the expert testimony at issue in the instant case was offered only at a pre-trial hearing and that there was no trial in the case. Had there been

a trial, Baraka would have been able to present her own theory of the case, and in so doing, challenge Dr. Roth's opinion both as to the facts underlying the cause of death and as to the cause of death itself. KRE 703(c). Although Dr. Roth could give her opinion as to cause of death, the cause of death and Baraka's guilt or innocence would ultimately be questions for the jury which could reach a contrary result. See Bowling v. Commonwealth, Ky., 320 S.W.2d 306 (1959).

As to Baraka's objection to Dr. Roth's testimony on hearsay grounds, the lower court stated that it would reserve any hearsay rulings until trial. Again, had Baraka proceeded to trial, she would have been free to raise any hearsay issues regarding the expert testimony. However, we would note the following language from the holding in Buckler, 541 S.W.2d at 940:

[H]ence we adopt as an exception to the hearsay rule in Kentucky that an expert may properly express an opinion based upon information supplied by third parties which is not in evidence, but upon which the expert customarily relies in the practice of his profession. . . . We emphasize that the type of information which can be utilized by the expert in forming his opinion should be only that produced by qualified personnel and on which the expert would customarily rely in the day-to-day decisions attendant to his profession. Such a limitation, we feel, guarantees a relatively high degree of reliability and frees the expert to use for his testimony the tools on which he normally relies in making a diagnosis.

For the reasons stated above, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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