

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001212-MR

EDWARD AKERS

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 96-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART
REVERSING IN PART
AND REMANDING

** **

BEFORE: BARBER, KNOFF, AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellant, Edward Akers (Akers), appeals, Pro Se, the Pike Circuit Court's denial of his motion for relief filed pursuant to RCr 11.42 without consideration of the merits, as a successive motion. We reverse the circuit court's ruling, and find that issues were contained in the motion requiring review. The case is remanded with instructions that such review take place.

Akers was convicted of two counts of unlawful transaction with a minor and sentenced to serve twenty years. The charges stem from claims that Akers' female co-defendant had sex with minor children, and that Akers facilitated that conduct. Akers was initially charged with six counts of unlawful transaction with a minor, but it was later discovered that the evidence provided by the minor witness to the social worker was incorrect, and that two of the children named in the indictment were not actually present at the time of the alleged wrongdoing. A jury trial was held on the charges relevant to the other four minors. The jury found Akers not-guilty with regard to the charges against two of the minors. The co-defendant admitted to sexual contact between she and one of the two older boys and received a probated sentence of three years. Akers was convicted of unlawful transaction with a minor with regard to those two teenagers.

Akers filed a direct appeal of his conviction. The conviction was affirmed on appeal. Akers then filed an initial motion under RCr 11.42 in January, 2000. This motion was denied by the circuit court, and that denial was affirmed on appeal. In May, 2004 Akers filed the motion underlying this action. The court denied that motion as pertaining to matters which should have been raised in the earlier RCr 11.42 motion. The court did

not address the merits of the underlying motion. Akers appeals the denial of his motion without consideration of the merits.

The Commonwealth asserts that the present case is a successive motion and was properly denied because it raised issues which should have been raised earlier in his direct appeal or in his initial RCr 11.42 motion. Akers claims that the motion underlying this appeal raised a new issue which could not have been raised earlier in the proceedings. He argues that his appeal is based on the Kentucky Supreme Court's decision in Jordan v. Commonwealth, 74 S.W.3d 263 (Ky. 2002), holding that social worker reports and testimony cannot be used to show credibility of a witness or prove the guilt of the accused. That case was decided after the final determination was made on Akers' earlier post-conviction motions.

We find that Akers is correct in asserting that there was a change and clarification in the law with regard to the admissibility of social worker testimony with the determination made in Jordan v. Commonwealth, 74 S.W.3d 263 (Ky. 2002). The ruling in that case was a proper basis upon which Akers could base his new motion under RCr 11.42. We are not persuaded by the Commonwealth's assertion that Jordan was merely a continuation of earlier caselaw, and therefore could not be considered a "new" ruling. Although the Jordan court cited the Prater v. Cabinet For Human Resources, 954 S.W.2d 954 (Ky. 1997)

case, it made its ruling based both on a body of caselaw, and on the circumstances before it. The Court was clear in reversing Jordan's conviction due to the fact that the case was a "swearing match" between the complaining witness and the defendant, and the fact that the social worker's testimony improperly bolstered witness credibility. 74 S.W.3d at 269. Similar circumstances are present here. The case does form a basis upon which Akers could make his new motion. Denial of the motion without review as a successive motion was in error.

Akers asserts that improper social worker testimony was admitted at trial. He claims that this evidence was admitted in violation of Kentucky law, as detailed in Jordan, supra. Where the testimony of a social worker is used to bolster a witness' credibility, introduction of that testimony may be found reversible error. Prater v. Cabinet for Human Resources, 954 S.W.2d 954 (Ky. 1997). The record contains discovery responses indicating that Harris, the social worker, told police that Akers thought it was humorous that his teenaged sons had sex with the co-defendant, as well as other opinion evidence of the social worker.

The social worker's report made part of the record in the case contains a statement that a minor child, cousin to the teenagers at issue, claimed that the minor witness asserted that he and six other children all had sex with the co-defendant, and

stated that the child's statement was "a very credible story" and that the child "has no reason to lie because he is already in a relative placement." In fact, review of the record shows that the child's story was in fact, false and incorrect, in that several of the children he listed as having had contact with the co-defendant were not even in the home on the weekend in question. The record also contains other evidence which conflicts with the version of the case given by the child to the social worker. In addition, the record shows that the child has a significant speech impediment such that the social worker could not understand him. The social worker required the child's foster parent to "translate" for him, further compromising the version of the facts allegedly provided by the child.

In Jordan v. Commonwealth, 74 S.W.3d 263 (Ky. 2002), relied upon by Akers as showing that the evidence in this case constitutes reversible error, the Kentucky Supreme Court held that admission of a social worker's statement indicating that the defendant was guilty of the charges was reversible error. Id., 74 S.W.3d at 268. A social worker's reports are hearsay evidence and may not be used to substantiate the factual findings or the witness' testimony. 74 S.W.2d at 269. The records of interviews by a social worker are inadmissible where those records contain recorded opinions of the social worker.

Prater v. Cabinet for Human Resources, 954 S.W.2d 954, 958, n. 11 (Ky. 1997). This Court has held that social worker testimony and statements allegedly made by a witness to that social worker cannot be used to bolster the witness' testimony at trial. Commonwealth v. M.G., 75 S.W.3d 714, 722 (Ky.App. 2002). This case extends that portion of the law which provides that a social worker cannot vouch for the credibility of a witness. See: Hellstrom v. Commonwealth, 825 S.W.2d 612, 614 (Ky. 1992).

In the present case, the social worker's record and evidence admitted at trial may have improperly bolstered the witness' credibility. Under such circumstances the trial court's denial of the motion, without making any finding of fact or review of the record, was in error and must be reversed and remanded for further proceedings consistent with this opinion.

Akers contends that the instructions given to the jury were erroneous in that they required the jury to find him guilty if they found that his co-defendant had sexual contact with either or both of his older sons. This issue was clearly one which could have and should have been raised in earlier proceedings before the appellate courts. Such successive appeals are properly denied where no new issues are raised. McQueen v. Commonwealth, 948 S.W.2d 415 (Ky. 1997). For this reason, the issue raised does not constitute reversible error or grounds for review. We affirm that portion of the trial court's

ruling which found this issue to be successive, and not appropriate for review.

SCHRODER, JUDGE, CONCURS.

KNOFF, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

KNOFF, JUDGE, DISSENTING: Respectfully, I dissent from the majority opinion because I agree with the trial court that Akers's RCr 11.42 motion is successive. The majority holds that the motion is not barred because the Kentucky Supreme Court's opinion in Jordan v. Commonwealth,¹ constituted a change and clarification of the law which Akers could not have anticipated when he filed his first RCr 11.42 motion. However, the relevant holding in Jordan merely applies the holding of Prater v. Cabinet for Human Resources.² In Prater, as in Jordan, the Kentucky Supreme Court held that "the recorded opinions and conclusions of social workers are not admissible,"³ and a social worker's "professional determination" that an allegation of abuse is "substantiated" is nothing more than improper opinion testimony.⁴ While the holding in Jordan re-emphasizes and perhaps clarifies the holding of Prater, it does not represent a

¹ 74 S.W.2d 263 (Ky. 2002).

² 954 S.W.2d 954 (Ky. 1997).

³ Id. at 958.

⁴ Jordan, *supra* at 269.

significant change in the standard set out in Prater. Akers presents no reason why he could not have raised this issue in his earlier RCr 11.42 motion. Consequently, I would hold that the trial court properly dismissed this motion as successive.

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