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SUPREME COURT GRANTED DISCRETIONARY REVIEW MARCH 14, 2007
(FILE NO. 2006-SC-0937-DG)

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001215-DG

W.D.B., a child — APPELLANT

ON DISCRETIONARY REVIEW FROM HENDERSON CIRCUIT COURT
v. HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 04-XX-00006

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: In May 2004, the juvenile session of the Henderson District Court determined that appellant, W.D.B., had committed the offense of sexual abuse in the first degree and committed him to the Department of Juvenile Justice as a juvenile sexual offender. In upholding that adjudication on appeal, the Henderson Circuit Court rejected W.D.B.'s

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

contentions that the district judge erred: 1) in failing to apply the presumption of incapacity contained in the "infancy defense;" 2) in failing to accept expert testimony that he lacked substantial capacity to appreciate the wrongfulness of his actions; 3) in finding him guilty of the offense solely on the basis of his unsubstantiated confession; 4) in denying him the opportunity to challenge the scientific reliability of the sex offender evaluation; and 5) in refusing to accept an agreed motion to dismiss the matter without prejudice. This Court granted discretionary review to consider the propriety of the circuit court's determinations. We affirm.

The facts which precipitated the juvenile court proceeding are not complex nor in dispute. In August 2003, the then twelve-year-old appellant had been playing at a neighbor's swimming pool when the father of the victim saw W.D.B. go behind one of the back yard buildings with his three-year-old son, A.S., and another eight-year-old boy. After they had remained there for a few minutes, the three-year-old's father went behind the shed to investigate. He discovered his son with his swim trunks pulled down exposing his penis and W.D.B. appearing to have an erection visible through his mesh shorts.

The boy's father took W.D.B. to his home across the street and informed his parents what had transpired. W.D.B.'s father then notified the Henderson Police Department and Officer

Michael Clapp was dispatched to investigate. The officer testified that when he first arrived, W.D.B. appeared to be too distressed to be able to answer questions as he was running around in circles, yelling and cursing. After his parents were able to calm him down, W.D.B. initially denied being at the swimming pool, but subsequently admitted having touched A.S. on the penis. The officer thereafter filed a juvenile complaint charging W.D.B. with the offense of first-degree sexual abuse and disorderly conduct.

Adjudication of W.D.B.'s case was continued to allow him to be mentally assessed. At the adjudication hearing, Dr. Michael Nicholas testified as to his opinion concerning W.D.B.'s competency to stand trial and capacity to commit the alleged offense. After considering that testimony, the district judge ruled W.D.B. competent to stand trial, but deferred a ruling as to capacity.

The eight-year-old who had been present at the time of the events which culminated in the sexual abuse charge was called to testify at the hearing, but he was too distraught to do so and the hearing was continued. At the continued proceeding, Officer Clapp and the father of the three-year-old victim testified before the district judge issued his findings that W.D.B. had the capacity to commit the offense and that he

had in fact committed the offense of sexual abuse in the first degree.

At a subsequent dispositional hearing, the district judge heard the testimony of Susan Mead, an evaluator who conducted a mental health assessment indicating that W.D.B. had a high risk of re-offending. W.D.B. was thereafter committed to the Department of Juvenile Justice (DJJ) as a juvenile sexual offender pursuant to KRS 635.510. An appeal to the Henderson Circuit Court produced the order at issue in this appeal.

The rebuttable presumption of youthful incapacity contained in the so-called "infancy defense" is the focus of W.D.B.'s first allegation of error. The effect of that presumption was explained by Kentucky's highest court in Thomas v. Commonwealth:[2] "The arbitrary age below which a child is incapable of committing crime is seven. Between the ages of seven and fourteen, a presumption of incapacity lies, which, however, may be overcome by evidence." Although more recent caselaw indicates that the presumption continues to be viable in criminal proceedings in the circuit courts of Kentucky,[3] our review of the experience of other jurisdictions which have considered the question convinces us that the infancy defense has no application in proceedings under our juvenile code.

[2] 300 Ky. 480, 483, 189 S.W.2d 686, 687 (Ky. 1945).

[3] Davis v. Commonwealth, 967 S.W.2d 574 (Ky. 1998).

There is a clear split in recent opinions of other states as to whether the defense of infancy applies in juvenile delinquency proceedings. The jurisdictions which have determined that the defense is available have taken the position that despite the stated purpose of delinquency adjudications, they are in fact merely criminal courts for minors and children charged in those proceedings should be afforded all the protections and defenses available in the regular criminal system.[4] We are convinced, however, that the better-reasoned approach is outlined in opinions emphasizing that the very purpose and principles underlying juvenile code provisions may be adversely impacted by application of adult criminal law defenses, including the infancy defense:

> With the enactment of juvenile justice legislation nationwide, several courts have addressed the issue whether the infancy defense applies to delinquency proceedings. Most have held that, in the absence of legislation codifying or adopting the defense, incapacity is not a defense in delinquency proceedings. See, e.g., *Jennings v. State,* 384 So.2d 104, 106 (Ala.1980); *Gammons v. Berlat,* 144 Ariz. 148, 151-52, 696 P.2d 700 (1985); *State v. D.H.,* 340 So.2d 1163, 1165 (Fla.1976); *In the Matter of Robert M.,* 110 Misc.2d 113, 116, 441 N.Y.S.2d 860 (1981); *In re Michael,* 423 A.2d 1180, 1182 (R.I.1981); *In the Matter of Skinner,* 272 S.C. 135, 137, 249 S.E.2d 746 (1978); see also W. LaFave & A. Scott, supra, § 4.11(c). These courts observe that because a delinquency

[4] Annotation, Defense of Infancy in Juvenile Delinquency Proceedings, 83 ALR4th 1135 (1991).

> adjudication is not a criminal conviction, it is unnecessary to determine whether the juvenile understood the moral implications of his or her behavior. See, e.g., *Gammons v. Berlat,* supra, 144 Ariz. at 151, 696 P.2d 700; *In re Michael,* supra, at 1183. **In addition, some decisions recognize that the defense would frustrate the remedial purposes of juvenile justice legislation.** See, e.g., *Jennings v. State,* supra, at 105-106; *State v. D.H.,* supra.[5]

We find that reasoning persuasive and applicable in construing the legislative purpose contained in Kentucky's Unified Juvenile Code.[6]

As clearly stated in KRS 600.010(d), children of this Commonwealth who are brought before the court under the code's statutes "shall have a right to **treatment** reasonably calculated to bring about an improvement of his or her condition . . . ."[7] Further, the code specifically defines "public offense" as "an action, excluding contempt, brought in the interest of a child who is accused of committing an offense under KRS Chapter 527 or a public offense which, if committed by an adult, would be a crime . . . ."[8] Another example of the disparate treatment afforded juvenile offenders under the code is KRS 610.090 which

[5] In Re Tyvonne, 211 Conn. 151, 161, 558 A.2d 661, 666 (Conn. 1989), emphasis added.

[6] KRS Chapters 600 to 645.

[7] Emphasis added.

[8] KRS 600.020(46).

prohibits using the disposition or evidence offered against him for any purpose:

> Unless the child is proceeded against as an adult in accordance with the law governing crimes as provided in KRS Chapter 635 or 640, the disposition of any child under the provisions of KRS Chapters 600 to 645, or any evidence given in the case, shall not be lawful evidence against the child for any purpose, except in subsequent cases involving the same child under KRS Chapters 600 to 645.

Viewed in the perspective of the rehabilitative goals and philosophy of our juvenile code, we are convinced that the circuit judge did not err in concluding that the infancy defense has been displaced by the enactment of that statutory scheme.

Finally in this regard, we emphasize that it is, after all, W.D.B.'s young age which allows him to avail himself of the treatment and supervision provided by the juvenile code rather than face the accountability inherent in the punitive aspects of adult criminal proceedings. For this reason alone, it appears to this Court that the juvenile code statutes have incorporated the "infancy defense" into the very nature of their proceedings. Thus, W.D.B. has not been deprived of any due process right by the failure to permit him to interject that common law defense into this purely statutory proceeding.

Next, W.D.B. argues that the juvenile court erred in refusing to accept the uncontradicted testimony of Dr. Nicholas

that he lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law. As noted by the circuit judge, the district court as finder of fact concluded that Dr. Nicholas's testimony was inconclusive. Like the circuit judge, we are convinced that the record contains substantial evidence supporting that conclusion.

A fair reading of Dr. Nicholas's testimony and report confirms the existence of a great deal of ambivalence in his expert testimony. Although he stated that it was his opinion that W.D.B. "most probably" lacked the capacity to distinguish right from wrong at the time he committed the offence, he thereafter retreated somewhat from that assessment by stating that several factors could have impacted W.D.B.'s capacity and that he could not state whether any of these factors were present at the time of the offense. The most Dr. Nicholas could infer, not having observed W.D.B. at the time of the event, was that he may have lacked capacity or suffered from diminished capacity to distinguish right from wrong when he committed the offense.

In his written report, Dr. Nicholas observed that it was difficult to assess W.D.B.'s capacity given "the fluctuating mood stability that appears is a part of his history." He concluded that it was possible that if W.D.B. was having a manic or hypomanic episode at the time of the offense, he may not have

been capable of appreciating the wrongfulness of his actions or of avoiding commission of the act. On this state of the evidence, we cannot say that the district judge's conclusion as to W.D.B.'s capacity was clearly erroneous. To be sure, W.D.B. demonstrates a significant history of mental health issues for a person of his very young age. Nevertheless, his previous mental health problems were not shown to have prevented him from discerning right from wrong or disabling him from conforming his conduct in light of that knowledge. Accordingly, the district judge did not clearly err in finding W.D.B. possessed the capacity to commit the crime charged.

W.D.B.'s third allegation of error centers upon his contention that the juvenile court violated RCr 9.60 in finding guilt solely on the basis of his uncorroborated confession. The fallacy in this argument lies in the fact that the confession was properly corroborated by the testimony of the victim's father. As noted by the circuit judge, corroborating evidence may be circumstantial and need not be absolutely conclusive of guilt. Here, the victim's father testified that when he went to investigate why his child was remaining behind the shed with W.D.B., he found him with his swimming trunks down and his penis exposed and W.D.B. standing nearby with what appeared to be an erection. As explained by the Supreme Court in Blades v.

Commonwealth,[9] the confession and the corroborating evidence are to be considered together in determining the existence of proof sufficient to satisfy RCr 9.60:

> [E]ven if the circumstantial evidence in this case standing alone would not suffice to prove guilt beyond a reasonable doubt, it sufficed to corroborate Appellant's confession; and the circumstantial evidence and the confession considered together constituted sufficient proof to take the case to the jury.

We are convinced that the testimony of the victim's father satisfies that criterion.

W.D.B. also insists that the district judge erred in denying him an opportunity to challenge in a Daubert-type[10] proceeding the scientific reliability of the sex offender evaluation. We agree with the circuit judge that this issue has been laid to rest by the opinions of our Supreme Court in Hyatt v. Commonwealth[11] and Douglas v. Commonwealth.[12] As the decisions in both these cases make clear, a full Daubert hearing is not required in every situation, particularly where the evidence is to be used in a dispositional rather than an adjudicatory context. The report in question was to be used by the court in determining appropriate placement for W.D.B. and the evaluator

[9] 957 S.W.2d 246, 250 (Ky. 1997).

[10] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[11] 72 S.W.3d 566 (Ky. 2002).

[12] 83 S.W.3d 462 (Ky. 2001).

who conducted the assessment was subject to cross-examination. Under these circumstances, we are convinced that no Daubert hearing was required.

W.D.B.'s final contention is that the district judge erred in refusing to dismiss the case for an informal adjustment as agreed by the parties. In refusing to dismiss the proceeding, the trial court noted that it appeared that the victim's family had not been consulted about the dismissal as is required by statute. Equally important from our perspective is the fact that KRS 600.020(31) plainly requires court-approval for informal adjustments. We have little doubt that any number of reasons might justify the withholding of such approval, not the least of which are the child's and the community's best interests. Because the juvenile court judge is in the best position to make such an assessment, appellate courts should be reluctant to overturn his or her decision.

Accordingly, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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