

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PA

vs.

**WILLIAM HAYDUK,
Defendant**

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: No. CR-1364-2009

OPINION

This Opinion is written in support of the Court's Order dated October 5, 2011, regarding the competency of the alleged victim in this case and the admissibility of certain statements under the Tender Years statute, 42 Pa.C.S. §5985.1.

By Information filed on March 18, 2010, Defendant was charged with aggravated indecent assault of a child, indecent assault of a child under 13 years of age, endangering welfare of children as a parent and corruption of minors. By Order of Court dated April 28, 2010 upon Motion of the Defendant without objection of the Commonwealth, the aggravated indecent assault charge was dismissed and stricken from the Information.

On January 28, 2011, Defendant filed a Motion in Limine requesting that the Court determine the competency of the alleged victim prior to allowing her to testify. The charges against Defendant arise out of him allegedly assaulting his daughter, M.H. during the year 2009. At the time of the alleged offenses, the child was four years old, being born on November 29, 2004.

Defendant's Motion was granted and the Court directed that a competency hearing would be held the morning of the first day of trial. A jury was subsequently selected and trial was scheduled to begin on October 5, 2011.

Prior to the trial beginning and as directed by the Court, the competency hearing was held on October 5, 2011. Following the competency hearing, the Court determined that the

alleged victim M.H. was not competent to testify at trial. The Defendant then orally moved for the Court to preclude the Commonwealth from introducing any tender year statements that were previously ruled admissible.

The Commonwealth had previously filed Motions to admit certain statements on July 9, 2010 and December 20, 2010. By Orders and Opinions of Court respectively dated December 15, 2010 and January 18, 2011, the Court granted the Commonwealth's Motions and ruled that the statements made by the child were admissible as substantive evidence under the Tender Years statute, 42 Pa. C.S. § 5985.1, assuming that the minor child testified at the trial or was unavailable as a witness.

Following argument, the Court granted Defendant's oral motion to preclude the statements. In light of the Court's ruling on the competency of the child and on the tender years statements, the Commonwealth indicated it would be filing an appeal and as a result, the Court discharged the jury.

Prior to a child witness testifying, he or she must be examined for competency. Commonwealth v. Delbridge, 578 Pa. 641, 855 A.2d 27 (Pa. 2003). "A competency hearing of a minor witness is directed to the mental capacity of that witness to perceive the nature of the events about which he or she is called to testify, to understand questions about that subject matter, to communicate about the subject at issue, to recall information, to distinguish fact from fantasy and to tell the truth." Commonwealth v. Hutchinson, 25 A.3d 277 (Pa. 2011), citing Delbridge, supra. at 45.

At the competency hearing held pre-trial in his matter, the minor child was questioned extensively by the Court, counsel for the Defendant and counsel for the

Commonwealth. The minor child intelligently answered questions relating to her age, her school, her favorite activities, birthday and holidays. She demonstrated basic reading and math skills as well as other problem-solving tasks. She demonstrated adequate intelligence as well as memory to store information. She demonstrated the ability to observe, recall and communicate past recent experiences. She unquestionably demonstrated an awareness of the difference between the truth and a lie, the appreciation of the meaning of promising (an oath) to tell the truth and an understanding of the potential consequences of not telling the truth.

Of significant concern to the Court, however, was the minor child's capacity to perceive the nature of the events about which she was being called to testify or in other words her capacity of remembering what it is that she was to be called to testify about. The child was four years old when the events complained of against her father allegedly occurred.

Significantly, the child could not recall any events that occurred since she was four. As well, she could not recall any details about events that held some importance to her while four. For example, while being questioned by the Court, the child excitedly testified about the upcoming Halloween season and what costume she would be wearing. She remembered in detail the costume she wore last year when she was five. She could not remember anything about Halloween when she was four.

Moreover, and perhaps determinatively, the victim was specifically asked by defense counsel that if her mommy told her to say something that is a lie, would she say what her mommy wanted her to, to make her happy. In response, the victim said "yes" (Transcript, p. 18). As well, in response to a question from the Commonwealth attorney as to whether her mommy or anyone ever told her what happened, she responded "well one time my mom told

me what happened.” (Transcript, p. 20). Further, when she was asked by the Commonwealth attorney as to what happened with her “daddy” and if her mommy told her what happened, she responded “my mom told me what happened.” (Transcript, p. 20).

The Court subsequently asked the minor child if she would tell the truth even if her mother told her to lie, to which the minor child responded yes. (Transcript, p. 22). The minor child indicated that she would tell “the truth” even if her mommy told her “to lie.” (Transcript, p. 23).

This testimony is especially significant in light of the unrebutted testimony of Trisha Hoover who testified following the minor child. Ms. Hoover is employed as an attorney at the Lycoming County Public Defender’s office and during the testimony of the minor child, she was observing the minor child’s mother. She credibly testified that during the minor child’s testimony when the minor child was being asked by defense counsel if she would say something that is a lie if her mommy told her to say such, that the minor child’s mother was staring at her daughter and shaking her head no. (Transcript, pp. 26, 27, 28).

The minor child’s demeanor was such, as observed by the Court, that the Court could easily conclude that she was being truthful and candid. While she was sure of herself and quick to answer questions which were not related to the incident in question, she was somewhat reserved and hesitant in answering questions regarding the incident. Indeed, when she was asked the questions by defense counsel regarding if she would lie for her mother, she first looked at her mother, and then responded.

Based upon the child’s demeanor in answering the questions about her specific recollection of the alleged events (none), it is clear to the Court that she has no such

independent recollection and that in fact if she were permitted to testify she would as she so admitted, testify solely from what her mother told her.

Accordingly, the Court concludes that the child does not have the capacity of remembering what it is that she was called to testify about and could not perceive the nature of the events about which she was called to testify. Accordingly, the child was not competent to testify.

Following the Court's ruling on competency, the parties argued over whether the Commonwealth could, nonetheless, introduce the tender year's testimony. Defense counsel contended that the provisions of the Tender Years Act had not been complied with while the Commonwealth argued that because the Court concluded the child was incompetent because of her age, it could still introduce the tender year's statements.

The tender year's exception to the hearsay rule is set forth in 42 Pa. C.S.A. § 5985.1. As set forth in the Court's prior Orders, the statements, if they meet the other requirements of the statute, are admissible only if the witness testifies at trial or is unavailable.

Contrary to what the Commonwealth argues, however, the definition of what constitutes unavailability does not include incompetency because of age. The statute requires the Court to find that the child will suffer serious emotional distress that would substantially impair the child's ability to reasonably communicate in order for the child to be unavailable. 42 Pa. C.S.A. § 5985.1; Commonwealth v. Kriner, 915 A.2d 653 (Pa. Super. 2007).

In Kriner, supra., the child whose statements were at issue tragically died prior to the trial in a traffic accident. The Superior Court ruled that the child's death did not make the child unavailable under the Tender Year's statute because the language of the statute was

“patently clear” as to when a child is unavailable to qualify as admissible statements under the tender year’s exception.

In this case, there was no evidence within which the Court could conclude that the child was unavailable as defined in the Tender Year’s statute. Accordingly, the Court concluded that the statements were inadmissible under the expressed language of the statute.

BY THE COURT,

Marc F. Lovecchio, Judge

cc: District Attorney (AMK)
Public Defender (WM)
Gary Weber, Esquire (Lycoming Reporter)
Work File