No. 19837 - State of West Virginia v. Denzil Delaney

Neely, J., dissenting:

I agree with the majority that the defendant is a mean and nasty fellow who has committed incredibly reprehensible acts and that the defendant should be locked up and the key to his cell thrown away. However, as I have noted before, when courts decide easy cases such as this one, they often make bad law. See Charlton v. Charlton, __ W. Va.__, 413 S.E.2d 911 (1991) (Neely, J., dissenting). In its holding today, the majority makes two mistakes: it reiterates the error made when Syllabus Point 7 of State v. Edward Charles L. __ W. Va. __, 398 S.E.2d 123 (1990) became law and it compounds that error by not giving the defendant a presumptive right to a psychological examination of the alleged

victim when the prosecution presents evidence of its own examination. Therefore, I must dissent.[1]

In syllabus point 7 of State v. Edward Charles L., __ W. Va. __, 398 S.E.2d 123 (1990), this Court held:

> Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury.

[1] I agree with the majority that the balancing test it presents is appropriate for incredibly intrusive physical examinations, especially when the physical evidence is otherwise available for the defendant's expert to examine.

I disagreed with that decision and joined Justice Miller in his learned and well-reasoned dissent.

The testimony in this case is also similar to that which we sanctioned in State v. McCoy, __ W. Va. __, 366 S.E.2d 731 (1988). Although I do not think we should overrule our decision in McCoy, more and more I have come to understand that now fully too much unfairly prejudicial testimony is admitted under the banner of McCoy. In McCoy, we glossed over the important question of the reliability of this type of testimony. In a footnote we dismissed the use of the Frye test, but then we failed to examine thoroughly the reliability of so-called "expert" testimony. One problem is that the counselors who testify often are "treating" rather than "diagnosing." For instance, the counselor who first sees a child who may have been sexually abused does not inundate that child with difficult questions. Quite properly, the counselor does not want to

intimidate the very child she is seeking to help. As proper as this technique is for therapy, it is not the appropriate avenue for objective diagnosis. Because Edward Charles L. and McCoy are now the law in West Virginia we should at least allow a defendant the opportunity to have his own psychological expert examine the alleged victim if the prosecution is allowed to use any of its "expert" psychological testimony at trial.

The majority treats "expert" psychological testimony about the deeply shrouded recesses of the mind the same way it would treat testimony by medical doctors about broken legs and pulled muscles. Who are they kidding? That is like treating Little League the same as the National League. Examining the two sets of testimony (physical and psychological) offered in this case is instructive.

Dr. Kathryn Grant, a medical doctor with four years of college education, four years of medical school education, and an internship,

testified about her physical examinations of the victims. Dr. Grant testified about specific objective physical findings.

On the other hand, the "expert psychological" testimony was provided by Ms. Pamela Rockwell, a sexual assault counselor with a bachelor's degree. Ms Rockwell testified from her meetings with the victims that their behavior was consistent with having been sexually assaulted. However, she did not inquire into the children's backgrounds concerning other possible causes for their behavior; she did not talk to their teachers; and she did not talk to anyone who knew them before the assaults. She also testified that in her line of work she is basically an advocate for victims. This is ridiculous![2]

---

[2] From reviewing scores of rape and sexual abuse cases, I can aver without the least fear of contradiction that the so-called rape-trauma experts who testify in criminal cases in this State could not be less credible if they wore bones in their noses and prognosticated by throwing colored

stones.

Under the sanction of Edward Charles L., the circuit court admitted testimony by a woman who admits that she is not neutral. Further, she is not a trained psychologist or psychiatrist. And, she did not ask basic questions that one would think any competent person (not just an expert) would ask if that person really were interested in finding the truth instead of advancing a cause.

The majority today exacerbates the blunder of Edward Charles L. by placing its stamp of approval on the testimony by Ms. Rockwell. It appears that we will now allow testimony in court by someone with an entry level degree about complicated subjects that we require people to study for years in school before they can become clinically qualified to practice when the area is controlled by a peer-review licensing board. Although I understand that there are some areas in which people do not

need advanced degrees to be experts,[3] psychology is not one of them. The majority, however, is more enthusiastic about pseudo-science than proven scientific and technical testimony. Consider, for example, the reserved enthusiasm for the testimony by Trooper Miller (with pages of

[3] I suspect that a mechanic could testify as knowledgeably about brake failure in an automobile as could someone with an engineering degree from MIT.

evidence about his expertise in accident reconstruction)[4] in State v. Hose, slip op. 20514 (filed May 28, 1992) compared to the endorsement of Ms.

---

[4] In State v. Hose, slip op. 20514 (filed May 28, 1992) this Court said:

> In the present case, Trooper Miller testified at some length regarding his background and experience in accident reconstruction. He essentially testified that he had had forty hours in basic accident investigation at the West Virginia State Police Academy, that he had had eighty hours of advanced accident investigation at the University of North Florida, that he had had eighty hours of technical accident investigation at Northwestern University, that he had had an eighty-hour accident reconstruction class at the University of North Florida, that he had taken forty hours of accident photography at the West Virginia State Police Academy, and that, in effect, he had had some 320 hours of instruction in areas related to accident investigation. He also testified that he was a member of the Society of Accident Reconstructionists, that he had personally handled over 600 accidents, and that he had worked with the National Transportation Safety Board on accident investigation. He further stated that he had investigated a number of tractor trailer accidents.
>
> Overall, there is substantial evidence indicating that Trooper Miller had been previously involved in accident

Rockwell's testimony in this case. In this case, the only rationale for the prosecution's choosing Ms. Rockwell is that she was not neutral and was prepared to offer testimony favorable to the prosecution.

In some cases the prosecution does offer expert psychological testimony by a credentialed expert. In these cases too, I disagree with the majority. The sciences of the mind are still much less exact than the sciences of the body and therefore any psychological findings must be subjected to rigorous examination. This does not just mean

---

> investigations involving tractor trailers and that he had basic training which would to some degree equip him for accident investigation and reconstruction. Given these circumstances and Trooper Miller's background, this Court cannot say that the trial court's allowing him to testify as an expert witness constituted an abuse of the trial court's sound discretion or that the trial court's decision was clearly wrong in that matter. [Emphasis added]

cross-examination of an expert, but equal time for the defendant's expert. What less could fairness and due process require?

I will not lose any sleep tonight because Mr. Delaney remains in jail, but the test set up by the majority in syllabus point 3 creates the possibility that not only guilty people like Mr. Delaney, but truly innocent people will be convicted by pseudo-science and outright witchcraft masquerading as science.