No. 30018 -- State of West Virginia v. Samuel Aubrey Leep

FILED
July 26, 2002
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OF WEST VIRGINIA

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Starcher, Justice, concurring in part, and dissenting in part:

I concur in reversing the defendant's conviction. I disagree with the majority's ruling on the issue of EIA test results, and I would not permit the re-trial of the defendant.

In the instant case, the State argues that the results of the EIA test for chlamydia were admissible -- even though the State's brief concedes that the EIA test is "not recommended" for use in cases of suspected sexual assault.

But the disingenuous phrase "not recommended" grossly understates the legal obstacles to using EIA test results in a criminal case. *Both the U.S. Center for Disease Control ("CDC") and the pharmaceutical company that manufactures the EIA test have affirmatively and explicitly said that EIA test results are not reliable enough to be used as evidence in suspected sexual abuse cases.*

In 1993, the CDC issued a strong warning that "only cell culture isolation using the standard methods should be used to detect chlamydia . . . infection in the investigation of possible sexual abuse." In 1998, the CDC again cautioned that because of "false positives" for the EIA test, "only standard culture for isolation of chlamydia . . . should be used in evaluation of sexual assault or abuse in children. . . . EIA technology [and another test called DFA] are *not acceptable alternatives*." (emphasis added). The company that manufactures the EIA test

states in a package insert that "*[o]nly* chlamydia cell culture isolation should be used when testing for medico-legal purposes such as the evaluation of suspected sexual abuse."(emphasis added).

To repeat: these warnings are not "recommendations," as the State's brief erroneously characterizes them. They are explicit statements from the highest independent authorities in this area that the results of EIA testing are, because of *reliability* concerns, **"**not acceptable" in cases of suspected abuse, and that cell culture tests are the "only" acceptable scientific tests for medical-legal purposes.

The results of a scientific test can be admitted into evidence in a criminal trial only if the test is *reliable and relevant to the task at hand*. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786 (1993); *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993). "The task at hand" at Mr. Leep's trial was to determine in a criminal case whether Samantha Leep was sexually abused. *All* of the scientific literature explicitly warns that EIA test results are not reliable enough to be used for that task.

It was therefore clearly error for the trial court to admit the EIA test results. I dissent to the majority's holding on this issue.

Additionally, the improper admission of the EIA test results in the instant case caused the defendant substantial prejudice -- in two principal ways.

First, the EIA test results evidence was the only evidence of penetration. At trial, the prosecutor affirmatively stated to the jury that the element of penetration that is required for the crime of sexual assault (as opposed to the crime of sexual abuse, which does not

require penetration) could not be established without the EIA test results. In his closing argument, the prosecutor said:

> Based on her evidence alone, you can find the defendant guilty of sexual abuse in the first degree. *You do need to couple some with Dr. Brown's testimony [based on the EIA test] to get the first degree sexual assault because of the issue of penetration.* Clearly that evidence was there. Between those two, Dr. Brown's testimony and Samantha Leep's, is sufficient in and of itself to find out. [emphasis added].

Because the State put on no evidence of penetration other than the unreliable EIA test results, the defendant's conviction for sexual assault should be set aside on the grounds of insufficient evidence.

Second, the EIA evidence profoundly affected the jury's view of the complainant's credibility with regard to *all* of her allegations, not just the claim of penetration. The prosecutor in fact argued to the jury that it was the EIA test results themselves that proved that the complainant's testimony was credible. Without the EIA test results, the jury would have seen this as a case about a child who told several substantially conflicting versions of events, none of which had any objective corroboration. With the EIA test results, the jury was presented with "scientific proof" that the child must be telling the truth. It is difficult to imagine greater prejudice from the admission of the unreliable test results.

This defendant has been tried twice on these charges, both times without a valid conviction. The EIA test evidence is clearly unreliable, and should not come before a jury. The strong impression made by the record in this case is that the State's evidence, even viewed in the best possible light, cannot establish the defendant's guilt beyond a reasonable doubt.

Under such circumstances, the proper result is to reverse the defendant's conviction, not to reverse and remand for a possible third trial. If there is a third trial, the defendant should again make a full and vigorous record opposing the EIA evidence. Perhaps, if there is a next time on this issue, this Court will get it right.

I am authorized to state that Justice Albright joins in this separate opinion.