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Criminal Law - Evidence - Competency of Minor Witness - Obligation of Oath

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CRIMINAL LAW—EVIDENCE—COMPETENCY OF MINOR WITNESSES—OBLIGATION OF OATH—The Pennsylvania Superior Court has held that in the absence of an understanding and comprehension of an oath, and the Divine punishment it implies, minor witnesses are incompetent to testify.

Commonwealth v. Rimmel, 221 Pa. Super. 84, 289 A.2d 116 (1972).

Defendant, John A. Rimmel, was criminally convicted on two charges of indecent assault. The conviction rested entirely upon the testimony of two girl victims who were eight years old at the time of the trial.[1] Prior to the trial the judge conducted an extensive voir dire examination in chambers to determine the competency of the witnesses to testify. The judge ruled both competent.

On appeal, the Pennsylvania Superior Court reversed[2] stating that neither girl was competent to testify. In its opinion the superior court declared there was no indication that either girl comprehended the difference between truth and falsehood or that they sufficiently comprehended the solemnity of the oath.[3] No appeal was taken to the Pennsylvania Supreme Court for personal reasons expressed by the parents of the female victims.

The court relied on *Rosche v. McCoy.*[4] In that case the court held that competency should be determined in the discretion of the trial judge once the fact of infancy becomes apparent to him. His discretion is not absolute but nevertheless will not be reversed in the absence of abuse.[5] In the present case the court went on to state that this issue is not to be determined merely on the ability of the witness to communicate his thoughts in terms of language. There must be a capacity to understand questions and to frame and express intelligent answers, a capacity to remember what it is one is being called to testify about and a consciousness of the duty to speak the truth.[6]

The court went on to state that the voir dire of the two girls showed no comprehension, on the part of either, of the difference between truth and falsehood. This statement is unfounded, especially in light of the testimony the court footnotes in support of this contention.[7]

1. Commonwealth v. Rimmel, 221 Pa. Super. 84, 85, 289 A.2d 116, 117 (1972).
2. *Id.* at 89, 289 A.2d at 118.
3. *Id.* at 87, 289 A.2d at 118.
4. 397 Pa. 615, 156 A.2d 307 (1959).
5. *Id.* at 620, 156 A.2d at 310.
6. 221 Pa. Super. at 86, 289 A.2d at 117.
7. In support of this conclusion the court cited the following portions of the voir dire examination in the footnotes to their opinion:

More importantly the court concluded that neither girl showed ". . . sufficient indication of a comprehension of the solemnity of the oath so that a citizen of our Commonwealth may be sentenced or convicted as a result of the testimony thereunder given."[8] This belief was based on the fact that the girls answered that they would be "beaten," as one girl stated, or "hollered at" or "punished," as the other stated, in answer to the question of what would happen to them if they told a lie.[9]

The court in its opinion quoted with approval a passage from Wigmore's treatise, *On Evidence*, which explains the reason why a witness is required to swear an oath before being allowed to testify.[10] Wigmore explains[11] that the earlier theory of the oath was an objective test in which the witness summoned Divine vengeance for lying, whereby when the witness is seen standing unharmed all present know that the Divine judgment has pronounced the witness to be a truth-teller.[12] Today, Wigmore explains, the oath is believed to be a method of reminding the witness strongly of the Divine punishment somewhere in store for lying, and thus of putting the witness in a frame of mind calculated to speak only the truth as the witness believes it to be.[13]

In regard to comprehension of truth and falsehood, Cynthya McNamara stated, "THE COURT: All right. Do you know that you are supposed to tell the truth? CINDY MCNAMARA: Yes. THE COURT: Do you tell the truth all the time? CINDY MCNAMARA: Yes." and Linda McNamara stated, "THE COURT: Linda, do you know that you are supposed to tell the truth all the time? LINDA MCNAMARA: Yes. THE COURT: Do you try to tell the truth all the time? LINDA MCNAMARA: Yes."

Id. at 86 n.1, 289 A.2d at 117 n.1.

8. *Id.* at 87, 289 A.2d at 118.

9. In support of this the court cited the following portion of the voir dire examination in the footnotes to their opinion:

In regard to understanding of the obligation of an oath, Cynthya McNamara stated: "THE COURT: Do you know [what] it means to take an oath, to raise your hand to God. Do you know what that means? CINDY MCNAMARA: No. THE COURT: Okay. Well, that means that you are asking God to witness that you are telling the truth. You are asking God to be the one who sees that you tell the truth. Do you understand that? CINDY MCNAMARA: Yes." and Linda McNamara stated: "THE COURT: Now, do you know what happens if you tell a lie? LINDA MCNAMARA: Yes. THE COURT: Okay. What happens? LINDA MCNAMARA: You get beaten. THE COURT: Okay. You mean your mother or your teacher gives you a beating? LINDA MCNAMARA: Yes. THE COURT: Do you know it is wrong to tell a lie? LINDA MCNAMARA: No. THE COURT: Well, you don't? Do you tell lies? Do you understand my question? That's all right, you are among friends. We are all friends. I told you I have a girl like you. Do you try to tell the truth all the time? LINDA MCNAMARA: Yes."

Id. at 86-87 n.2, 289 A.2d at 117-18 n.2.

10. *Id.* at 87-88, 289 A.2d at 118.

11. 6 J. WIGMORE, ON EVIDENCE § 1816 (3d ed. 1940).

12. Wigmore in a footnote cites a number of seventeenth century English cases in support of this history. *Id.* § 1816, at 285 n.1.

13. *See* note 11 *supra*.

As long ago as 1905, in *Commonwealth v. Furman*[14] the Pennsylvania Supreme Court declared that a minor witness need not know of the existence of some Divine punishment awaiting him for false swearing. In that case the lower court allowed, over the objections of the defendants, an eight-year-old boy to testify in a murder prosecution after it appeared to the satisfaction of the court that the witness was competent.[15] On appeal, the supreme court stated that in this enlightened age courts should discard the notion that a child must know about theoretical concepts of Divine punishment before being allowed to testify. A witness need only know that he is expected to tell the truth and that some punishment will follow a violation.[16] Additionally, it was in *Furman* that the court first espoused a test of competency which was to be followed in all future cases and to which the superior court in *Rimmel* gave lip service. The witness must clearly *comprehend the difference between truth and falsehood,* and his duty to tell the truth.[17]

The Pennsylvania Supreme Court next considered the question of the competency of a minor to testify in *Piepke v. Philadelphia & Reading Ry.*[18] where the court reversed and remanded[19] a lower court determination of incompetency of a minor witness to testify about a train accident in which the witness' playmate was seriously injured by a train backing up. The court, noting that there was no controlling statute in Pennsylvania disqualifying witnesses because of infancy, stated that the witness need only demonstrate a capacity to recall the incident he is to testify to, to understand the question put to him and give rational answers to these questions, and *to know that he ought to speak the*

14. 211 Pa. 549, 60 A. 1089 (1905).
15. The voir dire examination cited in the opinion of the court with regard to competency was as follows:
Q. Do you know what it is to tell the truth? A. Yes.
Q. Suppose you don't tell it, what will become of you? Do they tell you in Sunday school? What do they say, if you tell lies? Where will you go to? Do you know? A. No.
Q. Do you know whether you must tell the truth or not? A. Yes.
Id. at 549, 60 A. at 1089.
16. *Id.* at 550, 60 A. at 1090.
17. 221 Pa. Super. at 86, 289 A.2d at 117 (emphasis added).
The substantial test of the competency of an infant witness is his intelligence, and his comprehension of an obligation to tell the truth. The truth is what the law, under the rules of evidence, is seeking, and if a full and present understanding of the obligation to tell it is shown by the witness, the nature of his conception of the obligation is of secondary importance.
211 Pa. at 550, 60 A. at 1089.
18. 242 Pa. 321, 89 A. 124 (1913).
19. *Id.* at 329, 89 A. at 126.

truth.[20] For the latter qualification the court cited the test enunciated in *Furman* as controlling.[21]

In the Delaware County case of *Sherkus v. Radbill*[22] the judge relied on the *Furman* and *Piepke* opinions in holding two boys, ages eight and ten, competent to testify about a collision involving a playmate and a passing truck. The case is interesting because of facts quite similar to the present case concerning the witnesses' answers to questions asked to determine competency. The older boy stated that he was punished for lying.[23] The younger boy while knowing nothing of the nature of the oath knew that he was expected to tell the truth, but could not explain what telling the truth meant or what would happen to a boy who did not tell the truth. He knew, however, what always happened to him when he told a lie, stating that his parents would "whip" him.[24]

In 1948 the Pennsylvania Superior Court held a six-year-old female victim of sexual assault competent to testify, citing the *Furman* and *Piepke* tests.[25] In that case the witness comprehended her duty to tell the truth knowing that she was punished for not doing so.[26]

In the following year the court decided *Commonwealth v. Carnes*[27] in which a seven-year-old was considered competent to testify as a witness to an automobile accident, utilizing the same test of competency that the courts of this Commonwealth have been using since 1905 when *Furman* was decided.[28] In *Carnes* the question of competency in the trial was not raised until cross-examination of the witness at which time the objection of plaintiff's counsel to the untimely questioning was sustained.[29] On appeal, the superior court stated that while there was not specific questioning on the witness' ability to distinguish between truth and falsity and his obligation to tell the truth the trial judge's conclusion of competency will not be disturbed since much must be left to his discretion.[30] The trial judge had made his

20. *Id.* at 328, 89 A. at 125 (emphasis added).
21. *Id.* at 329, 89 A. at 126.
22. 19 Del. Co. 620 (Pa. C.P. 1929).
23. *Id.* at 621.
24. *Id.*
25. Commonwealth v. Allabaugh, 162 Pa. Super. 490, 58 A.2d 184 (1948).
26. *Id.* at 492, 58 A.2d at 185-86.
27. 165 Pa. Super. 53, 67 A.2d 675 (1949).
28. 211 Pa. 549, 60 A. 1089 (1905).
29. 165 Pa. Super. 53, 59, 67 A.2d 675, 678 (1949).
30. *Id.* at 59, 67 A.2d at 678.

decision of competency based on having heard generally the questions asked of the witness and the answers given by him.

The Pennsylvania Supreme Court thoroughly summarized the law concerning minor witnesses in *Rosche v. McCoy*,[31] which, as mentioned previously, was the sole precedent relied on by the court in the present case. In *Rosche* the court synthesized and refined the decisions in *Furman* and *Piepke*, stating three requirements the trial judge should apply in exercising his discretionary power to rule on the competency of minor witnesses to testify. A child of tender years should possess:

> (1) such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers, (2) a mental capacity to observe the occurrence itself and the capacity of remembering what it is the witness is called to testify about, and (3) *a consciousness of the duty to speak the truth.*[32]

The case dealt with the competency of a seven-year-old girl to testify about an accident she had witnessed when she was four years old. It was the first case in Pennsylvania in which a minor witness was asked to testify to events which happened years earlier. As a result, the court on appeal reversed the trial judge's determination of competency stating that the witness failed to qualify on the first and second criteria for determining competency.[33] Nowhere in *Rosche* was the third criterion, a consciousness of the duty to speak the truth, equated with the requirement that the witness be "aware of the responsibilities of taking an oath" or that the witness show "sufficient indication of a comprehension of the solemnity of the oath" as was required by the superior court of the two minor witnesses in *Rimmel*.[34] To the contrary, the court in *Rosche* implied that the modern trend has demonstrated a lessening of the importance of the oath in the case of infant witnesses.[35]

31. 397 Pa. 615, 156 A.2d 307 (1959).
32. *Id.* at 620-21, 156 A.2d at 319 (emphasis added).
33. The court stated:
It is obvious that had [the witness] been called . . . at the time of *this* occurrence, when she was but 4 years of age, she would have been incompetent. Carolyn's *memory* of the event and its details did not, indeed it could not, improve as time went on. The only thing that did improve was her capacity to communicate in terms of words. But that capacity is meaningless unless supported by the capacity to note the occurrence at the time it happened and the ability to remember it.
Id. at 621-22, 156 A.2d at 310.
34. 221 Pa. Super. at 87, 289 A.2d at 118.
35. 397 Pa. at 620, 156 A.2d at 310.

The *Rimmel* court read something into the *Rosche* decision which simply was not there.

It is suggested that the decision in *Rimmel* represents a return by the superior court, in contravention to all precedent since 1905, to a long discarded requirement that a minor witness know the nature, importance, and solemnity of the oath. Failing qualification under this test, the witness is incompetent to testify according to the superior court's holding.

The ramifications of this decision are numerous, especially in criminal cases. It would seem that defense counsel will enjoy the benefits of this decision almost exclusively. It is seriously doubted that there exist many potential witnesses of tender age that have any idea of the significance of the oath. Many children who would otherwise qualify as competent because they know that they should be predisposed to truth-telling will be prohibited from rendering intelligent testimony of what they witnessed. This will preclude not only those minors who visually perceive the occurrence to which they are testifying, but also all the unfortunate victims of crimes which are perpetrated against them, as in *Rimmel*.

In the Allegheny County Common Pleas Court, Criminal Division, a case, which remains unreported, was recently concluded where the judge, using the *Rimmel* test, held that a twelve-year-old was incompetent to testify in a murder case in which he witnessed the crime.[36] Fortunately, the prosecution secured a conviction without the aid of the minor witness' testimony but the result will not always be the same in the future.

In Pennsylvania a minor is presumed incompetent to testify until the age of fourteen.[37] It is suggested that it may be only a matter of time before an otherwise intelligent and competent fourteen-year-old will be adjudged incompetent for failing to understand the significance of the oath according to the *Rimmel* standard.

The *Rimmel* standard represents a return to an archaic idea that witnesses must know the significance of an oath. One objective of the American system of justice through the trial of a case in an adversary proceeding is the ascertainment of truth. It should be sufficient that minor witnesses be predisposed to truth-telling to allow their testimony to be given.

36. Commonwealth v. Bundy, Criminal Nos. 3060-61 (Pa. C.P. Alleg. Co., July 21, 1972) (argued before Judge Clark in the Allegheny County Court of Common Pleas).
37. Rosche v. McCoy, 397 Pa. 615, 621, 156 A.2d 307, 310 (1959).

The *Rimmel* case should be overruled so that the courts can return to the state's traditional common sense standard to adjudge competency of minor witnesses to testify.

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CONSTITUTIONAL LAW—DUE PROCESS AND EQUAL PROTECTION—COMMITMENT OF INCOMPETENT DEFENDANT—The Supreme Court of the United States has held that Indiana's commitment of an incompetent defendant solely on the basis of his incapacity to stand trial violated the defendant's rights of equal protection and due process.

Jackson v. Indiana, 406 U.S. 715 (1972).

Jackson, a twenty-seven-year-old illiterate deaf mute with the mental capacity of a pre-school child, was arrested and charged with robbery. Before trial he was committed to the Indiana Department of Mental Health as incompetent to stand trial.[1] Jackson's counsel filed a motion for a new trial, arguing that commitment until Jackson was competent to stand trial[2] amounted to a life sentence[3] without his ever having been convicted of a crime. Jackson's counsel contended that this violated Jackson's rights of due process and equal protection.[4] The trial court denied the motion.[5] On appeal the Supreme Court of Indiana affirmed.[6]

1. IND. CODE §§ 35-5-3-2 (1971) provides:
When at any time before the trial of any criminal cause . . . the court . . . has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity . . . . If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the trial shall be delayed or continued on the alleged insanity of the defendant . . . . [T]he court shall order the defendant committed . . . . Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order . . . directing the sheriff to return the defendant . . . . Upon the return to court of any defendant so committed he or she shall then be placed upon trial . . . .

2. Although IND. CODE § 35-5-3-2 (1971) refers to the defendant's "sanity," the term is not defined. The Court read the word as if it were synonomous with competence to stand trial.

3. One examining doctor testified at the hearing that it was very unlikely that Jackson could ever learn to read and write or develop proficiency in sign language. He testified that Jackson's prognosis was dim. The other examining doctor testified that even if Jackson were not a deaf-mute, he would be incompetent to stand trial. He doubted that Jackson could ever develop the necessary communication skills. An interpreter from a state school for the deaf testified that Indiana had no facilities to teach Jackson the necessary communication skills. 406 U.S. at 718.

4. Jackson's counsel also contended that the commitment violated Jackson's eighth amendment rights. However, the Court did not decide on this issue. *Id.* at 739.

5. *Id.* at 719.

6. 253 Ind. 487, 255 N.E.2d 515 (1970).