

IN THE COURT OF APPEALS OF IOWA

No. 9-300 / 88-1854

IN THE INTEREST OF S.W., A Child

Appellant.

FILED

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CLERK SUPREME COURT

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Appeal from the Iowa District Court for Polk County
(Juvenile) (J 7335), Vincent Hanrahan, Judge.

The juvenile court adjudicated a child to be in need of assistance on the ground of inadequate supervision but declined to rely on the additional ground of sexual abuse. In so doing, the juvenile court found the evidence did not establish that the child had been sexually abused by the father. The State and the child's appointed attorney have both appealed from the juvenile court's order. They challenge the juvenile court's refusal to rely on sexual abuse as an additional ground for a CHINA adjudication.

REVERSED.

Thomas J., McCann of Peddicord, Wharton, Thune, Foxhoven & Spencer, Des Moines, for the appellant child.

William F. Denman, Des Moines, for the appellee parents.

Thomas J. Miller, Attorney General; Charles K. Phillips, Assistant Attorney General; and Ray M. Blase, Assistant County Attorney, for the appellant State.

Considered by Donielson, P.J., and Schlegel and Sackett,
JJ.

DONIELSON, P.J.

The child in question is a girl (S.W.) born in March 1981. She is described as mildly retarded.

On November 11, 1987, S.W. was examined by Dr. Shah in the pediatric clinic at Broadlawns Medical Center. Dr. Shah observed that S.W. had an enlarged hymen. On November 20, 1987, Broadlawns referred this matter to the Department of Human Services. Patty Burke, a child protective investigator, was assigned to investigate the case. On November 23, Burke attempted to interview S.W. at Smouse Elementary School where S.W. was enrolled in a class for the moderately mentally retarded. Mrs. Fiddler, the vice-principal at Smouse, had advised Burke that S.W. often had negative behavioral reactions upon meeting strangers and in fact Burke was unable to interview S.W. on the 23rd because she began screaming and crouched away from Burke.

On November 24, 1987, Burke met with Dr. Shah and was informed that a colposcopic exam would be needed to determine if S.W.'s enlarged hymen was due to masturbation or actual sexual abuse. On December 1, 1987, Burke met with S.W.'s mother to discuss the allegations of sexual abuse. Ms. Burke's reports reveal that she asked the mother to consult with the father about having a colposcopic exam performed on S.W. On approximately December 7, 1987, the parents informed her that they did not believe their daughter had been abused and they would not consent to the exam at that time.

S.W. had transferred from Moore School to Smouse School on November 16, 1987. Her teacher, Ms. Reese, had become aware of S.W.'s frequent need to go to the bathroom and found that her visits to the restroom would sometimes number fifteen or sixteen times a day. Ms. Reese also noticed a strong odor from S.W. and was concerned that she might have a bladder infection. Ms. Reese contacted the school nurse, Ms. Birch, about these problems. On December 11, 1987, Ms. Birch contacted Ms. Burke and asked her to have the child examined by a doctor because of her frequent urination and its odor. Ms. Burke informed Ms. Birch that she did not have the authority to do that and that Ms. Birch should contact S.W.'s parents.

Apparently S.W.'s mother and Ms. Birch took S.W. to Broadlawns where Dr. Shah examined her and concluded that sexual abuse had occurred. In response to questioning by Dr. Shah, S.W. indicated that a person named "Pete" had touched her. S.W.'s mother was aware of the results of this exam on the 11th, yet as of December 14th when she spoke with Ms. Burke, she had still not informed her husband of Dr. Shah's finding that S.W. had been sexually abused.

On December 15, 1987, S.W. initiated a conversation with her teacher Ms. Reese, and Ms. Reese's assistant Ms. Gollobit. S.W. had been absent from school prior to the 15th and she approached her teacher and said her body was better now and that it didn't hurt anymore. When asked if

someone had hurt her body she said "dad." When given a doll to demonstrate how "dad" hurt her, S.W. would pull the doll's pants down and point to the genital area. She indicated to her teacher that something had been in her.

Ms. Reese testified that she was careful not to put words into S.W.'s mouth and that she tried to get S.W. to illustrate (by gesturing or pointing) that which she was verbally trying to communicate. Ms. Reese tried to specifically draw from S.W. what her dad had done to her body to verify that it was not merely a case in which a child was hurt by a spanking or other form of discipline. To ensure that S.W. did not call all men "dad," Ms. Reese had the male principal enter the room to see if S.W. would call him "dad."

Ms. Reese reported her conversation with S.W. to the school nurse, Ms. Birch. Ms. Birch contacted Ms. Burke, and on December 16, 1987, Ms. Reese, Ms. Burke, Ms. Gollobit and Barb Dennis of the Des Moines Police Department interviewed S.W. at Smouse Elementary School. A tape recording was made of this interview. Ms. Burke testified that when S.W. was questioned as to who hurt her she stated "[d]addy hurt my body." When asked where her body was hurt she pointed to the genital area of a doll. When asked how daddy had hurt her body, S.W. demonstrated the act by putting her finger in the genital area of the anatomically-correct doll. When questioned as to what daddy hurt her body with, she touched

the penis on the adult male doll. When asked if anyone sleeps with her S.W. said that daddy did.

S.W. was removed from her parents' home on December 16, 1987. The State filed a petition asking that the child be declared a child in need of assistance. The State alleged two statutory grounds for such an adjudication: subsection 232.2(6)(d) (sexual abuse), and subsection 232.2(6)(c)(2) (child has suffered harm due to inadequate supervision). After a hearing, the juvenile court found the child to be in need of assistance under subsection 232.2(6)(c)(2) because her parents had failed to exercise a reasonable degree of care in supervising the child upon being shown that she had been sexually abused. The court declined to find the child in need of assistance due to sexual abuse. The juvenile court concluded it could not find by clear and convincing evidence that the child had been sexually abused by the father. The juvenile court noted that the child had had vaginal and urinary infections and that the father admitted applying a prescription ointment to the vaginal area. The court expressed the view that in light of the child's tender age and mental limitations, she might not be able to distinguish such treatment from sexual abuse.

The State and the child's appointed attorney have both appealed from the juvenile court's ruling. The appellants challenge the juvenile court's refusal to rely on sexual abuse as a ground for a CHINA adjudication. The appellants

argue the evidence establishes sexual abuse by the father; they assert that the medical evidence indicated penetration of the vagina rather than mere application of ointment, and they also assert that the child gave her teacher a description of her father's conduct which was not consistent with the mere application of ointment.

The principles controlling our review are well established, and are not in dispute. Appellate review of CHINA proceedings is de novo; accordingly, we review the facts and the law and adjudicate rights anew where the issues have been properly preserved and presented. Our paramount concern is the welfare and best interest of the child. In re D.L., 401 N.W.2d 201, 202 (Iowa App. 1986). In resolving the issues presented in this appeal, our ultimate task is to review the record and determine whether the State has met its burden of presenting clear and convincing evidence that S.W. was sexually abused by her father.

The juvenile court judge relied on three bases for his decision. He concluded that S.W. was "severely and profoundly retarded" and apparently this characterization of S.W. dissuaded the judge from relying too heavily on the statements S.W. made to her teacher and the other interviewers. S.W. was in a class for the moderately mentally retarded and her teacher testified that she had an IQ in the mid-nineties. A review of the tape recorded

interview reveals that S.W. can express her wishes and communicate her thoughts to those around her.

S.W.'s father admitted that he had applied an ointment to her genital area for treatment of various rashes and urinary problems she had had. The juvenile judge concluded that S.W. would have been unable to distinguish between her father's application of this prescription medication and actual sexual abuse. This view disregards the fact that during the December 16 interview S.W. was asked what daddy hurt her with and she addressed the male doll and touched the penis.

The final reservation of the juvenile court had to do with S.W.'s response of "Pete" when Dr. Shah asked her who had touched her. An investigation revealed that no one named "Pete" was involved in S.W.'s school or home life. S.W.'s father used the terms "peed" and "peeing" during his testimony. It is possible that S.W.'s use of the word "Pete" might be S.W.'s attempt to use a word to describe what had touched her, rather than who had touched her. Regardless, this court finds this statement to be a minor aberration in light of S.W.'s later repeated statements implicating her father.

Upon a complete review of the record, this court determines that clear and convincing evidence existed to conclude that S.W.'s father had sexually abused her. Despite her parents' doubts as to the accuracy of the

medical technology applied in this case, it seems to be a certainty that S.W. was in fact sexually abused. Her parents testified that with the exception of her attendance at school, she was always with them. On December 15, 1987, S.W. initiated a conversation with her teacher, Ms. Reese, and she informed Ms. Reese that her daddy had hurt her body. Ms. Reese gave S.W. a doll and asked her to show her what daddy did to her body. S.W. then pulled the doll's pants down and pointed to the genital area. Likewise on December 16, 1987, when S.W. was interviewed by Reese, Burke, Dennis and Gollobit she stated that daddy hurt her body and she demonstrated how daddy had hurt her body by using anatomically correct dolls. This court has reviewed the tape recording of S.W.'s interview on the 16th and the reports prepared by those in attendance. While S.W. is retarded and can become easily distracted, she did state on two consecutive days (first to her teacher and later during the tape-recorded interview) that daddy had hurt her body. A tape recording does not provide the court with the opportunity to view the conduct and gestures of S.W. that occurred during the interview. The court must rely on the accounts of those present to fully ascertain how S.W. was responding to the questions posed to her and how she used the dolls to answer those questions. The circumstances of this case: her parents' initial refusal to have a colposcopic exam performed when the possibility of sexual

abuse was first raised; her parents' continued denial that S.W. was ever sexually abused; S.W.'s statements to her teacher on December 15; and S.W.'s statements and conduct during her tape-recorded interview on the 16th are sufficient to warrant this court to find by clear and convincing evidence that S.W. was sexually abused by her father.

REVERSED.

Schlegel, J., concurs; Sackett, J., dissents.

I respectfully dissent.

This is a difficult case. The trial court heard the evidence. I would affirm.