

problems and substance abuse are complex. In the *Berry* trial, the instructions provided to jurors suggested that lack of criminal responsibility can be found when there is voluntary intoxication that is additive to an active mental illness or that exacerbates a latent mental illness, but only when a mentally ill defendant does not know that intoxication will cause the detrimental and consequential behavior. Although five experts opined on the matter of criminal responsibility, given the evidence presented, it is unclear what level of inquiry was pursued about Ms. Berry's knowledge on this matter. Moreover, the prosecution failed to prove her knowledge about her negative reaction to alcohol, which could have altered the jury's deliberations related to her criminal responsibility.

The SJC held that the establishment of an active mental illness at the time of an offense is a critical feature for a defense showing lack of criminal responsibility and one that cannot be overlooked, even if the defendant has also consumed alcohol. In the *Berry* case, all experts diagnosed a major mental illness (bipolar or schizoaffective disorder), and all but one believed that the mental illness was active at the time of the defendant's arrest, separate from the consumption of alcohol at the time. The SJC ruling highlights the importance of clear jury instructions, especially when the crime is of a violent nature, given the complex interplay of substances and mental illness.

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Expert Testimony on Extreme Emotional Disturbance in Criminal Proceedings

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Kentucky Supreme Court's Refusal to Admit Expert Testimony Regarding Extreme Emotional Disturbance (EED) or EED Instruction, When Evidence Was Based Solely on the Defendant's Out-of-Court Statements, Did Not Compel the Defendant's Testimony in Violation of His Fifth Amendment Rights

Mark Padgett was convicted in the Campbell Circuit Court of criminal attempt to commit first-degree manslaughter, second-degree assault, and violation of an emergency protective order. In *Padgett v. Commonwealth of Kentucky*, 312 S.W.3d 336 (Ky. 2010), Mr. Padgett appealed to the Supreme Court of Kentucky, raising five issues, most notably that he was compelled to incriminate himself to raise a defense of extreme emotional disturbance (EED).

Facts of the Case

On June 29, 2007, Mr. Padgett searched for his two teenage sons in Fort Thomas, Kentucky. Unable to locate either by phone, he drove to places they frequented, searching for them. After giving up his search to return home, he noticed a nearby church hosting a festival. He parked his truck and looked for friends. He heard one of his teenage sons call for him. He testified that he observed his son carelessly cross the street in front of oncoming traffic and that he yelled at his son to stop as he watched a car pass in front of him. Mr. Padgett's son told him that his mother, Susan Padgett, was supervising him and that she was across the street in a laundromat. Following their divorce, Ms. Padgett had an emergency protective order issued against Mr. Padgett, requiring him to stay 500 feet away from her.

Intending to avoid violating the protective order, Mr. Padgett returned to his truck to leave. He testified that he then again saw his son cross the street in front of oncoming traffic, causing him to become extremely upset. He testified that his eyes were blinking, he was having trouble breathing, and he could not feel the ground beneath his feet. Apparently, to show Ms. Padgett that her failure to supervise their son was unacceptable, he parked his truck near the laundromat, grabbed a rifle from the back of his truck, and went inside to scare her. Mr. Padgett testified that he left his truck's motor running so that he could easily flee after he had frightened her. Inside the laundromat, a fight ensued between the two that led to a struggle over the gun. Mr. Padgett testified that he never intentionally hit Ms. Padgett but that

she was hit as a result of their mutual struggle over the rifle.

Ms. Padgett testified she felt an impelling force approach her and upon turning around observed a rifle pointed at her head. She testified that he beat her several times with the butt of his rifle as she attempted to deflect the blows and flee. Two witnesses corroborated her testimony. One witness stated that Mr. Padgett entered the laundromat, declared "It's show time," and attempted to fire his rifle. After the gun failed to fire, he beat Ms. Padgett with it.

Ms. Padgett escaped and ran down the street, screaming for help. Fireworks in Mr. Padgett's truck inexplicably exploded, setting his truck on fire and alerting police and additional witnesses to the scene. Witnesses, including a nearby police officer, testified that Mr. Padgett pointed his rifle in a "firing-type" or "ready-fire" pose at Ms. Padgett as she ran down the street. The officer also testified that he saw Mr. Padgett pull the trigger on his rifle, and when it did not fire, adjust its bolt action. Mr. Padgett eventually dropped his rifle and was arrested as he ran. Ms. Padgett was treated for injuries to her head and hand.

During the case, Mr. Padgett claimed he acted under extreme emotional disturbance (EED) triggered by seeing his son carelessly cross the street. To support his theory, he planned to call an expert witness to testify. The trial court ruled the expert's testimony would be inadmissible without further evidence, because his opinion was based solely on Mr. Padgett's out-of-court statements. After the ruling, Mr. Padgett took the stand to testify to the triggering event that gave rise to his EED. The trial court then allowed the expert to testify. The jury convicted him of criminal attempt to commit first-degree manslaughter, second-degree assault, and violation of an emergency protective order, sentencing him to 20 years' imprisonment.

Ruling

In a unanimous decision, the Supreme Court of Kentucky affirmed the trial court's decision and determined that the refusal to admit expert EED testimony or to give an EED instruction with evidence based solely on the defendant's out-of-court statements did not compel Mr. Padgett's testimony in violation of his Fifth Amendment rights.

Reasoning

Quoting *Holland v. Commonwealth*, 114 S.W.3d 792, 807 (Ky. 2003), the court noted that an EED

instruction must be supported by "some definite, non-speculative evidence." Furthermore, the court cited the previously affirmed case, *Talbott v. Commonwealth*, 968 S.W.2d 76 (Ky. 1998), in which the defendant attempted to prove the presence of her extreme emotional disturbance with expert testimony based primarily on her out-of-court statements, but the trial court refused to permit the expert testimony, and without any other evidence, refused to instruct the jury on EED. In the *Padgett* case, the Supreme Court of Kentucky found that the trial court's statements were clear that it did not require Mr. Padgett to testify, but was excluding inadmissible evidence, as in *Talbott*, because such testimony would be supported only by out-of-court statements.

The court ruled that the trial court properly refused to let the attempt to substantiate EED be submitted into evidence, since to permit the expert's testimony would have improperly allowed the defendant to testify by proxy. In addition, the court found that Mr. Padgett's right to avoid self-incrimination was not implicated by the trial court's ruling as the trial court did not require him to testify but asked that he produce "some" admissible evidence to support the EED instruction. Citing *Hilbert v. Commonwealth*, 162 S.W.3d 921,925 (Ky. 2005), the court applied the reasoning that the choice between self-incrimination and presenting a defense was not considered an "invasion of the privilege" found in the Fifth Amendment.

Discussion

Previous cases have established the requirement that admissible evidence to substantiate a defendant's out-of-court statements regarding EED be "definite, non-speculative evidence." This case confirmed that a defendant's decision to testify to substantiate his argument was not required of an EED defense, but that the defense must provide definite evidence to allow an expert to testify about the defendant's out-of-court statements in regard to said defense. The court required the defendant to provide some admissible evidence to support the EED instruction. That the defendant may have been able to support this instruction only by testifying did not implicate the Fifth Amendment.

To the forensic expert, this case signifies the necessity of incorporating collateral information into an opinion regarding EED as the defendant's out-of-court report alone would be considered inadmissible

and insufficient to support the defense. Collateral information could include witness statements regarding observed behaviors, official police accounts, victim interviews, and medical or mental health records that document emotional disturbance. Several sources of collateral information were potentially available to the forensic expert in this case. Since the evidence must show that some triggering event caused the defendant to have EED, testimony from the son P.J. might have confirmed the alleged triggering event; however, P.J. testified that he looked both ways and did not cross in front of oncoming traffic. If attendees of the festival had observed P.J. carelessly walking in front of traffic or had heard Mr. Padgett yell at his son from his truck, their observations might have provided enough supporting evidence to allow the expert to testify about Mr. Padgett's alleged EED without Mr. Padgett's testifying. Moreover, witness observations of Mr. Padgett's reaction following the episode in which P.J. allegedly carelessly crossed the street may have revealed Mr. Padgett's emotional response to the event as enraged, inflamed, or disturbed. Other potential witnesses who may have observed his emotional reaction may have included officers who arrived at the scene and subsequently interviewed him and witnesses who may have observed his repetitive blinking and difficulty breathing. The court's statement that only some evidence must be present to support a claim of EED to allow an expert to testify about the triggering event and emotional disturbance seems to indicate that the threshold is relatively low for allowing the expert to testify, but may indeed prove difficult, such as in this case, when the defendant does not testify.

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Mandatory Admission of Guilt in Sex Offender Programs

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Pennsylvania's Statute Requiring Sex Offenders to Participate in a Sex Offender Program, Including Admission of Guilt to Gain Parole Eligibility, Is Upheld by the U.S. Third Circuit Court of Appeals

In 2000, the Pennsylvania General Assembly enacted 42 Pa. Cons. Stat. Ann. § 9718.1 (2001). The statute provides that sex offenders' eligibility for parole is contingent on attending and participating in a Department of Corrections sex offender program. In *Newman v. Beard*, 617 F.3d 775 (3rd Cir. 2010), the U.S. Court of Appeals for the Third Circuit affirmed a judgment in favor of the defendants: the Pennsylvania Department of Corrections, the Probation and Parole Board of Pennsylvania, and the Sexual Offenders Assessment Board. The court held that the program's requirement for sex offenders to admit guilt to attend did not violate either Mr. Newman's First Amendment and due process rights or the Ex Post Facto Clause of the Constitution.

Facts of the Case

In 1987, Clifford T. Newman was convicted of two rapes and related sexual offenses by a Pennsylvania jury. He was subsequently sentenced to 20 to 40 years of imprisonment. He persistently claimed that he was innocent of the crimes and exhausted his direct and postconviction appeals. In 2000, the Pennsylvania General Assembly enacted 42 Pa. Cons. Stat. Ann. § 9718.1, restricting sex offenders' eligibility for parole by requiring attendance and participation in a Department of Corrections sex offender program. The only program available in Mr. Newman's facility required that inmates admit guilt to attend. Mr. Newman, who continued to maintain his innocence, did not attend the program because of this requirement.

In 2007, Mr. Newman went before the parole board and was denied parole for reasons that included his failure to complete the sex offender treatment program. He filed a *pro se* civil action complaint, alleging that the parole board violated his First Amendment right, his right to due process, and the Ex Post Facto Clause of the