

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001032-MR

DAVID TRAYNER

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 97-CR-2352

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; HUDDLESTON and KNOPF, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a judgment entered by the Jefferson Circuit Court. Appellant, David Trayner, was convicted of two counts of assault in the fourth degree, two counts of criminal mischief in the third degree, and one count of disorderly conduct. He was sentenced to thirty days in the county jail and fined \$1,100. On appeal, appellant contends that the court erred by ordering him to submit to a blood test to determine if he was positive for the human immunodeficiency virus (HIV) and by requiring him to pay the fees for the test. We disagree. Hence, we affirm.

On August 5, 1997, intoxicated with drugs and alcohol, appellant struggled with two police officers and bit one of the officers during the altercation. On September 25, 1997, appellant was charged with two counts of assault in the third degree, two counts of criminal mischief in the third degree, and one count of disorderly conduct.

Prior to trial the Commonwealth filed a motion pursuant to KRS 438.250 to compel appellant to undergo an HIV blood test. The court entered an order after a pretrial hearing directing that appellant submit to the test at his expense and that the results thereof be disclosed only to the court. Further, the court directed that the "[t]est results shall not be used for any other purpose. KRS 438.250(2)." After a jury trial, appellant was found guilty of two counts of assault in the fourth degree, two counts of criminal mischief in the third degree, and one count of disorderly conduct. He was sentenced to thirty days in the county jail and fined \$1,100. This appeal followed.

Appellant first contends that the court erred by ordering him to submit to an HIV blood test and to pay the cost of the test. We disagree.

Most of the arguments advanced on appeal regarding this issue were not presented to the trial court and consequently were not preserved for appellate review. Further, appellant failed at the trial level to notify the attorney general that he was challenging the constitutionality of KRS 438.250; therefore, any contentions in that vein are also not preserved for review. See

Jacobs v. Commonwealth, Ky. App., 947 S.W.2d 416 (1997).

However, appellant did preserve for review an issue as to whether the Commonwealth's attorney lacked standing to seek a blood test. Hence, we will address that issue.

KRS 438.250(1) directs that a person charged with a crime or convicted of a crime "shall be ordered to submit to testing of the blood for human immunodeficiency virus (HIV)" upon a crime victim's or public servant's exposure to that person's blood or body fluids.¹ KRS 438.250(3) states that a circuit or district judge "shall compel the criminal defendant, inmate, parolee, or probationer to undergo the testing required herein if he fails or refuses to do so." Subsection(4) of the statute states that

[t]he costs of the testing shall be borne by the criminal defendant, inmate, parolee, or probationer unless he is determined unable to pay for the test by a court of competent jurisdiction for criminal defendants and probationers and by the Department of Corrections pursuant to their indigency standards for inmates and parolees, in which case the Commonwealth shall pay for the testing.

At the outset, we note that it is clear under the statute that mandatory blood testing can occur only within the context of a criminal prosecution. The Commonwealth's attorney is responsible for the prosecution of all crimes and violations of criminal and penal laws falling within the circuit court's

¹This statute was amended in 1998 to add hepatitis A, B, and C and tuberculosis as diseases or conditions subject to the mandatory testing. 1998 Ky. Acts, ch. 606, § 122.

jurisdiction. KRS 15.725; Commonwealth v. Corey, Ky., 826 S.W.2d 319 (1992). Indeed, only "the Commonwealth has a judicially recognizable interest in the prosecution of criminal cases." Schroering v. McKinney, Ky., 906 S.W.2d 349, 350-51 (1995). In fact, a crime victim cannot participate as a party in the proceeding. Id.

Here, appellant had not undergone a blood test for HIV at the time the Commonwealth made its motion. Moreover, appellant's biting of the police officer falls within the scope of KRS 438.250(1) and thus, a blood test for HIV was required. Given the foregoing, it is clear that the Commonwealth's attorney had standing to make such a motion. To argue otherwise is specious.

Next, appellant contends that the court abused its discretion by assessing a \$40 public defender user fee and a \$750 public defender recoupment fee. Again, we disagree.

An indigent person under suspicion of or charged with a serious crime is entitled to be represented by a public defender. KRS 31.110. KRS 31.120 states in pertinent part as follows:

- (1) The determination of whether a person covered by KRS 31.110 is a needy person shall be deferred no later than his first appearance in court or in a suit for payment or reimbursement under KRS 31.150, whichever occurs earlier. Thereafter, the court concerned shall determine, with respect to each step in the proceedings, whether he is a needy person. However, nothing herein shall prevent appointment of counsel at the earliest necessary proceeding at which the person is entitled to counsel, upon

declaration by the person that he is needy under the terms of this chapter. In that event, the person involved shall be required to make reimbursement for the representation involved if he later is determined not a needy person under the terms of this chapter. At arraignment, the court shall conduct a nonadversarial hearing to determine whether a person who has requested a public defender is able to pay a partial fee.

- (2) . . . In each case, the person . . . subject to the penalties for perjury, shall certify by affidavit of indigency which shall be compiled by the pretrial release officer, as provided under KRS Chapter 431 and Supreme Court Rules or order promulgated pursuant thereto, the material factors relating to his ability to pay in the form the Supreme Court prescribes.

. . . .

- (4) To the extent that a person covered by KRS 31.110 . . . is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court shall order payment in an amount determined by the court and may order that the payment be made in a lump sum or by installment payments. The determination shall be made at each stage of the proceedings.

A nonadversarial hearing is required only at arraignment "to determine whether a person who has requested a public defender is able to pay a partial fee." KRS 31.120(1). Subsequent to arraignment, KRS 31.120(4) states that the court shall determine "at each stage of the proceedings" whether a person represented by a public defender is able to provide for an attorney. Hence, a court's finding that a defendant is entitled

to a public defender is subject to modification throughout the proceedings depending upon a defendant's financial ability to provide for an attorney. The statute clearly recognizes that a defendant's ability to provide for an attorney may change during the criminal proceeding depending upon his or her financial circumstances and employment opportunities at that time.

Here, the record simply fails to support appellant's contention that the court acted arbitrarily by assessing the disputed fees. Indeed, appellant was represented by a privately-retained attorney at his arraignment on October 6, 1997. Thus, the court clearly was not required to conduct a KRS 31.120(1) nonadversarial hearing at arraignment. This attorney subsequently filed a motion in February 1998 seeking permission to withdraw as appellant's counsel because he "has failed to cooperate . . . and has failed to meet his financial obligations in this matter." At that point, even though no affidavit of indigency was filed in the record, a public defender was appointed to represent appellant. Moreover, appellant has never filed an affidavit of indigency as required by KRS 31.120.

Further, although it is true that the court did not conduct a separate hearing, appellant was given the opportunity to adduce evidence as to his financial condition. He indicated that although he lacked the ability to pay any fees at that time, he was planning to work in his parent's business while seeking other employment. In response, the court gave appellant 120 days from the date of judgment in which to remit the fines and public

defender fees assessed. Therefore, appellant has failed to demonstrate that the court's assessment of a \$40 public defender user fee and a \$750 public defender recoupment fee was arbitrary in any respect.

The court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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