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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001861-MR

MARC MILLS

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 05-CR-00044

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, CAPERTON AND KELLER, JUDGES.

ACREE, JUDGE: Appellant, Marc Mills, seeks reversal of his conviction in the Breathitt Circuit Court. Appellant was not advised of his right to conflict-free counsel and was prejudiced by the dual representation he received. Thus, this court reverses and remands for a separate trial.

Marc Mills (Marc) was convicted of trafficking in the first degree for aiding, counseling, or attempting to aide his wife, Rhonda Mills (Rhonda) in selling oxycontin. Rhonda Mills is an admitted drug addict and dealer. Marc, however, did not use oxycontin and while he admits that he knew his wife had a drug problem, alleges that he did not know she was dealing drugs on the night of their arrest.

On November 17, 2004, Rhonda spoke with a man named Paul Isom, a former schoolmate, who asked her if she knew where he could obtain a large quantity of pills. Rhonda then called her supplier in Atlanta. After speaking with Isom several times regarding the quantity and price for the pills Rhonda agreed to meet Isom in Perry County the next day.

During this time, the car Marc and Rhonda owned was in a repair shop and they were driving a loaner auto from that shop. Under the terms of the loaner arrangement, they soon had to return the auto. Because the couple had no credit cards or other means of renting a vehicle, they would be without transportation. Rhonda allegedly told Marc that her friend, Isom, had a relationship with an auto dealership owner in Hazard, Kentucky, and that Isom could arrange a car rental for them without a credit check.

On the afternoon of November 18, 2004, Marc, Rhonda and their two children left Lexington, Kentucky, to meet Isom in Perry County. Marc claims he believed they were traveling to Hazard to pick up the rental car. He admitted he was suspicious of Rhonda's plan and searched her purse before they left Lexington

to assure himself that Rhonda had no drugs. He claimed his suspicions were assuaged when he did not find drugs in her purse. On their way to Hazard, Rhonda said she needed to use the restroom, so they stopped. She used that opportunity to call Isom from a pay phone. Isom told her that he wanted to meet her in the Walmart parking lot in Jackson, Kentucky. Rhonda returned to the car and allegedly told Marc that she spoke to Isom and they were now supposed to meet him at the Jackson Walmart to get the keys to the rental car.

Unbeknownst to Rhonda and Marc, Isom was working with Crandall Hurt, a Kentucky State Police Narcotics Investigator, in exchange for the reduction of charges pending against Isom in Perry County. Isom and Hurt, acting undercover, waited in an unmarked police vehicle in the Walmart parking lot. The car was outfitted with a recording device.

Rhonda and Marc arrived at Walmart and Rhonda got out of the car. She then took a seat in the officer's unmarked vehicle. Rhonda agreed to sell the officer 70 pills for \$3,400. When the officer turned on the overhead light to count the money, Rhonda instructed him to turn it off. She gave the officer the pills and placed the money in her pants.

Portions of the tape of the transaction are inaudible. However, Rhonda can clearly be heard stating, "This is my money I am making on the side." Rhonda can also be heard asking Isom to step out of the vehicle so he can talk to her husband about the rental car – apparently confirming the story Marc says Rhonda told him.

After Rhonda completed the transaction, she stepped out of the officer's vehicle and was arrested. The officer then arrested Marc.

When Rhonda was searched, the officer discovered more pills on her person and in a mint box in her purse. No pills were found on Marc when he was searched. Marc claimed he did not know Rhonda was selling the oxycontin. After they were both taken to the police station, Rhonda was allowed to make a statement. Marc was not permitted to make a statement despite asking to do so. During the police interview with Rhonda she revealed several of her oxycontin connections including her mother. However, she told the officers that Marc did not know she had arranged a drug deal that evening.

Both Marc and Rhonda were indicted for trafficking. On the day of the trial the prosecution made an oral motion to consolidate the two cases and the defense made no objection. Ultimately both Rhonda and Marc were convicted. On appeal Marc presents four arguments: (1) the prosecution failed to prove guilt beyond a reasonable doubt, (2) Marc did not knowingly and voluntarily waive his right to conflict free counsel and an actual conflict existed, (3) irrelevant, inadmissible, and unduly prejudicial evidence was improperly admitted, (4) and the evidence supported giving a facilitation instruction.

When determining if a conviction must be reversed for failure to prove guilt beyond a reasonable doubt, we “must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth.” *Brewer v. Commonwealth*, 206 S.W.3d 313, 318 (Ky. 2006) (quoting *Commonwealth v. Benham*, 816 S.W.2d 186,

187-88 (Ky. 1991)). This court must also assume that all the evidence presented by the Commonwealth is true. *Id.* Any questions of credibility must be resolved by the jury. *Id.*

While this court is unable to overturn Marc's conviction for failure to prove guilt beyond a reasonable doubt, it does recognize that this was a close case. However, given that the evidence must be considered in light favorable to the Commonwealth, we believe that a reasonable juror could have believed beyond a reasonable doubt that Marc was aware of the transaction and intended to aid his wife in selling oxycontin. Rhonda admitted her guilt, and as discussed below, Rhonda's extensive involvement in the sale of oxycontin likely made it difficult for the jury to believe that Marc was ignorant of her intentions on the night in question. Nevertheless, the close nature of this case and the fact that evidence regarding one defendant may have led to the conviction of the other defendant, requires that we determine whether Marc was prejudiced by the joint representation he and his wife received.

There is no evidence that Rhonda or Marc waived their right to conflict-free counsel or that they were advised of their right. The only mention, on the record, of the dual representation was made by the Mills' attorney who indicated at their arraignment that she did not believe there was a conflict situation.

It is undisputed that the issue of dual representation was not preserved below. However, this issue may be raised for the first time on appeal. *Brewer*, 206 S.W.3d at 321. It has been so raised and now this court must determine if

there was a violation of Kentucky Rule of Criminal Procedure (RCr) 8.30 and, if so, whether Marc suffered prejudice as a result. *Id.* at 321. In order for Marc's conviction to be reversed, prejudice is required. It is insufficient to show merely that a violation of RCr 8.30 occurred. *Id.* The court must consider violations of RCr 8.30 on a case by case basis and determine if the error was harmless or requires reversal. *Id.* This case by case determination begins with RCr 8.30.

Section (1) of RCr 8.30 states:

(1) If the crime of which the defendant is charged is punishable by a fine of more than \$500, or by confinement, no attorney shall be permitted at any stage of the proceedings to act as counsel for the defendant while at the same time engaged as counsel for another person or persons accused of the same offense or of offenses arising out of the same incident or series of related incidents unless (a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interests on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and (b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant by the court and that the defendant nevertheless desires to be represented by the same attorney.

The record indicates that the procedures set forth under RCr 8.30 were not followed in this case. Indeed, the court did not explain the possibility of a conflict of interest.

The Supreme Court of Kentucky created this rule to ensure that a case by case determination is made. In *Murphy v. Commonwealth*, the Court found that “a

questionable violation which did not result in any prejudice to the defendant, should not mandate automatic reversal.” *Murphy v. Commonwealth*, 50 S.W.3d 173, 183 (Ky. 2001). However, in this case, a clear violation of RCr 8.30 occurred and there is no indication that either defendant was advised of the potential for a conflict of interest.

In *Brewer v. Commonwealth*, the court considered whether a defendant was prejudiced by dual representation. *Brewer*, 206 S.W.3d at 321. Both defendants in *Brewer* signed a waiver of dual representation at both the trial and appellate levels. *Id.* at 321-22. The Court determined that because the defendants had signed a waiver and were fully advised regarding their rights, RCr8.30 was not violated. *Id.* The Court noted that “failure to comply with RCr 8.30 is harmless error when the record does not show even a possibility of prejudice resulting from joint representation.” *Id.* (quoting *Commonwealth v. Holder*, 705 S.W.2d 907, 908 (Ky. 1986)).

This case is distinguished from *Brewer*. Marc did not receive any advice from the court regarding dual representation. While this fact is not dispositive when determining if reversal is required, it must still be considered because the conflict of interest in this case required compliance with RCr 8.30.

The two defendants in this case had opposite positions. One took the blame and the other claimed ignorance. At trial, Rhonda essentially pleaded guilty to the charges. Rhonda made a statement to the police and her criminal act was caught on tape. Marc claimed innocence. While this court will not opine as to whether

Marc was aware of the transaction, it is clear that he was not in the car when the transaction occurred, nor did he appear to play any role in Rhonda's procurement of the drugs sold therein.

At first glance it appears that while their positions were opposite, the overall theme of the case allowed them to work hand in hand. Rhonda admitted to selling drugs to support her habit and Marc acknowledged that he was aware of his wife's addiction. Both agreed that Rhonda lied about the transaction that occurred in the Walmart parking lot. However, it was the manner in which this theme was carried out that resulted in prejudice.

When looking at the case as a whole, it is clear that Marc was prejudiced as a result of the court's failure to advise him of the potential for conflicts and the actual conflict that existed in the representation between Marc and Rhonda. The very nature of this case required Marc to take a position that incriminated Rhonda and labeled her a liar, yet at the same time asked the jury to believe her when she took the stand and said Marc knew nothing.

The constitution entitles a defendant to "undivided loyalty" of counsel. 8 Leslie W. Abramson, *Kentucky Practice, Criminal Practice and Procedure* § 5:63 (4th ed. 2003). "The defendant does not receive the full benefit of the adversary process when defense counsel's decisions are influenced by obligations owed to persons other than the defendant." *Id.* The defense approach sought to elicit sympathy from the jury for both defendants. However, it was in Marc's interest to portray his wife as a villain and a liar. Instead, they were

portrayed as a unit. While Marc did assert that Rhonda lied, he could not have received the full benefit of this defense when the counsel asserting it also owed a duty to Rhonda.

Instead of independent counsel that put Marc's interests above Rhonda's during trial, he received dual representation and a defense that threw both him and his wife together upon the mercies of the jury. While this would have been acceptable had Marc been advised of his right to conflict free counsel,¹ he was not. As a result, Marc missed the opportunity to have counsel who would assert a defense that was only intended to promote his interest, without also considering Rhonda's.

The Commonwealth argues that this court's holding in *Donetelli v. Commonwealth*, 175 S.W.3d 103 (Ky.App. 2005), prohibits a finding of prejudice in this case. In *Donetelli*, this court found that a conflict did not exist when counsel represented three defendants. *Donetelli*, 175 S.W.3d at 104-05. One of the defendants pleaded guilty and testified that the other two simply observed, but did not participate in the crime. *Id.* at 105. One of the two who was supposed to have benefited by that testimony argued he was prejudiced by the conflict of interest between himself and the defendant who pleaded guilty. *Id.* However, the court determined that reversal was not necessary. *Id.*

¹ This court also points out that had the court even attempted to comply with RCr 8.30 a violation of the right to conflict free counsel may not have occurred. However, the motion to consolidate was made on the day of the trial and no attempt was made to advise Marc of his rights.

There is a critical distinction between this case and *Donetelli*. In *Donetelli*, the appellant did not advance any arguments demonstrating he was prejudiced by the dual representation. *Id.* at 106. Thus, the court did not consider whether prejudice occurred. *Id.* In this case, Marc did not fail to allege prejudice.

In considering this case as a whole, it is clear that Marc was prejudiced by dual representation. The court never advised him of his right to separate counsel or the possible implications of dual representation. Thus, the court never brought to Marc's attention the possibility that the theme and strategy offered by his counsel might ultimately prejudice him. In this case, prejudice did result. Thus, a new trial is required and Marc's remaining arguments are moot.

For these reasons we reverse and remand for a separate trial.

ALL CONCUR.

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