RENDERED: SEPTEMBER 16, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000322-MR
and
NO. 2010-CA-001905-MR

VITTORIO ORLANDO MARTIN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 09-CR-00237

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND CAPERTON, JUDGES.

CLAYTON, JUDGE: Vittorio Orlando Martin appeals from orders of the Fayette Circuit Court. First, he appeals from the January 28, 2010, judgment of the court, which found him guilty of burglary in the second degree. As a result of this judgment, Martin received a suspended sentence of eight years of imprisonment

and was placed on probation for five years. As a result of this judgment, Martin claims that his rights were violated when the trial court failed to conduct a *Faretta*[1] hearing, denied his motion to dismiss on double jeopardy grounds, and imposed court costs as a condition of his probation. Second, Martin appeals the trial court's later revocation of his probation following his failure to successfully complete drug court. The two appeals were consolidated. For the reasons stated herein, we affirm in part, reverse in part, and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2008, Martin moved into the Lexington apartment of his girlfriend, Sheila Johnson. Her apartment was adjacent to that of Eric Faber who, on December 5, 2008, discovered that his Bose radio was missing. At the time of this discovery, he also noticed a hole in the ceiling of his bathroom. Coincidentally, on that same day, Martin pawned a Bose radio at The Castle, a Lexington pawn shop, for $120.

Upon the discovery of the missing radio, Faber contacted the police. Shortly thereafter, they obtained consent to search Johnson's apartment, where they detected a hole in the ceiling of a closet in the apartment. Besides the ceiling holes in the two apartments, the police also lifted fingerprints from a briefcase in Faber's apartment. On December 8, 2008, police obtained Martin's fingerprints from a criminal database and positively matched them to those found on Faber's briefcase. Also, on December 8, 2008, police learned that Martin had pawned a

[1] *Faretta v. California*, 422 U.S. 806, 955 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Bose radio three days before. They were able to match the serial number from Faber's shipping receipt to the same radio that Martin had pawned.

Martin was indicted before the Fayette County Grand Jury for second-degree burglary on February 10, 2009. On May 26, 2009, he informed the trial court that he was firing his attorney and requested a new attorney. Thereafter, during the procedural life of the action, Martin filed numerous pro se motions. Some motions were filed pro se, and some were filed listing himself as co-counsel with the attorney whom he originally asked to be fired from the case. Even though the trial court informed Martin that his attorney must file motions for the case, the trial court continued to entertain and rule on the motions filed by Martin pro se or as co-counsel. And, the trial court never held a hearing in reference to the hybrid defense proffered by Martin and his counsel.

Martin's first trial began on August 22, 2009. Before trial, Martin moved in limine to prevent the Commonwealth from bringing evidence of Martin's criminal history. The Commonwealth consented to the motion and the court sustained it. But, during the trial a Lexington detective testified that information about Martin's fingerprints came from a criminal database. Consequently, Martin's counsel objected and moved for a mistrial. The trial court, finding prejudice to Martin in the inference of a criminal history, sustained the motion.

On October 13, 2009, Martin filed a pro se motion to dismiss his second trial because of double jeopardy. The court overruled the motion and noted that Martin's counsel had requested a mistrial, which rendered the double jeopardy

argument meritless. Martin's retrial began on October 29, 2009. Martin was convicted of second-degree burglary and sentenced on January 25, 2010. He was given a sentence of eight years of imprisonment. The sentence, however, was suspended, and he was placed on probation for five years. The trial court also assessed $155 in court costs as a condition of his probation. He appeals from the judgment.

The next day, following sentencing, the trial court referred Martin to the Fayette County Drug Court. He completed an assessment and began participation in the drug court program on January 26, 2010. But, during his participation in the program, the drug court determined that Martin violated the terms and conditions of the program several times. Ultimately, on July 13, 2010, the drug court, after finding that Martin violated the program's conditions when he failed to attend two mandatory meetings, deemed that he had "absconded" from the program.

On July 13, 2010, the trial court ordered Martin terminated from the drug court program. Since a condition of Martin's probation was the completion of the drug court program, the trial court also docketed the case for a probation revocation hearing. Following the probation revocation hearing on September 8, 2010, the trial court entered an order on September 15, 2010, which found that Martin violated a condition of probation when he was terminated from the drug court program. Accordingly, Martin's probation was revoked and the original eight-year sentence imposed. He now appeals from the trial court's order of

revocation. On April 12, 2011, the two appeals were consolidated by an order of our Court.

Four issues are raised in the consolidated appeals: whether the trial court erred when it failed to hold a *Faretta* hearing (*Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)); whether the trial court erred in failing to sustain a motion to dismiss on double jeopardy grounds; whether the trial court erred in assessing court costs to Martin; and whether the trial court erred when it revoked Martin's probation. We will address the issues in this order.

ANALYSIS

1. Failure to hold a *Faretta* hearing

Martin first contends that the trial court erred when it failed to hold a *Faretta* hearing. During the pendency of the action, Martin was allowed to file numerous pro se motions before, during, and after both trials. Moreover, the trial court ruled on the motions. But the trial court never held a *Faretta* hearing, which is considered a structural error and subject to reversal. *Hill v. Commonwealth,* 125 S.W.3d. 221, 228 (Ky. 2004)(*abrogated on other grounds)*. In contrast, the Commonwealth argues that Martin never made a clear and unequivocal request to proceed pro se or as hybrid counsel and, therefore, a *Faretta* hearing was not necessary.

Whether the court had an affirmative duty to hold a *Faretta* hearing is a question of law. Questions of law are to be reviewed de novo. *Arterburn v. First Community Bank,* 299 S.W.3d. 595, 598 (Ky. App. 2009). Although the court has

a duty to inform a defendant who decides to proceed pro se about the dangers of doing so, a defendant must voluntarily and intelligently elect to do so. *Faretta,* 422 U.S. at 806, 95 S. Ct. at 2527. Martin maintains that by sending a letter to the trial court that he had fired his trial counsel, requesting new counsel, filing numerous motions himself, plus calling himself "co-counsel," he waived counsel and acted either pro se or in a hybrid relationship with counsel. Therefore, Martin asserts that the trial court had a duty to hold a *Faretta* hearing in order to advise him of the dangers and disadvantages associated with self-representation and then to determine whether his waiver of counsel was made knowingly, voluntarily, and intelligently.

Furthermore, Martin proffers that when a defendant opts to act as hybrid or co-counsel, this decision constitutes a qualified or partial waiver of counsel. *Wake v. Barker,* 514 S.W.2d 692 (Ky. 1974). "[A]ccused may make a limited waiver of counsel, specifying the extent of services he desires, and he then is entitled to counsel whose duty will be confined to rendering the specified kind of services[.]" *Id.* at 696. And, Martin rightfully points out that a trial court's *Faretta* duties are triggered when a defendant acts as co-counsel in a hybrid manner. *St. Clair v. Commonwealth*, 319 S.W.3d 300, 310 (Ky. 2010).

Although in the instant case Martin only filed motions and did not act as counsel in any other manner, he did not lose the benefit of counsel for any strategic trial defense capacities. Clearly, counsel may continue with the other aspects of defense and make other motions. *Winstead v. Commonwealth,* 283

S.W.3d 678, (Ky. 2009). Yet, unlike the court in the *Winstead* case, the court in the case sub judice did not ignore Martin's pro se motions or advise him to stop filing the motions. The trial court actually ruled on Martin's pre-trial and post-trial motions. Nor did the trial court at any time make an inquiry as to whether Martin was proceeding with a hybrid defense or conduct a hearing pursuant to *Faretta*.

We believe that this case is similar to the situation in *Deno v. Commonwealth,* 177 S.W.3d 753 (Ky. 2005). There, on the first day of trial the defendant made a pro se motion in limine for substitute counsel or, alternatively, to be designated as co-counsel. The judge denied both motions but still conducted a hearing in chambers with the defendant and his counsel regarding Deno's dissatisfaction with counsel and his desire to represent himself. The court below, sub judice, likewise should have made an inquiry as to whether Martin was waiving his right to counsel and seeking to represent himself.

We are not persuaded by the Commonwealth's contentions that Martin did not make a clear and unequivocal request to proceed pro se or as a hybrid counsel. When the trial court ruled upon the motions of the defendant, it was treating the defendant as if he were acting pro se, at least to some limited extent. Since the court treated Martin as a pro se litigant, the court should have conducted a hearing, given the warnings required pursuant to *Faretta*, and made a finding that his waiver was voluntary and intelligently made. The court's failure to do so is reversible error. Upon remand, if Martin makes an unequivocal request to proceed pro se or with hybrid representation—in other words, to make either a full

or a limited waiver of his right to counsel—under our precedent, a *Faretta* hearing is required. Having found cause for reversal, we will consider such other issues as may call for dismissal or are capable of repetition on remand.

2. Motion to dismiss on the basis of double jeopardy

Martin next contends that the trial court erred when it failed to sustain a motion to dismiss on double jeopardy grounds. This issue is preserved by Martin's motions to dismiss on double jeopardy grounds. Generally speaking, whether to grant a mistrial is within the sound discretion of the trial court, and "such a ruling will not be disturbed absent . . . an abuse of that discretion." *Woodard v. Commonwealth,* 147 S.W.3d 63, 68 (Ky. 2004).

A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action. *Skaggs v. Commonwealth*, 694 S.W.2d 672, 678 (Ky. 1985). Further, the error "must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way [except by grant of a mistrial]." *Gould v. Charlton Co., Inc.,* 929 S.W.2d 734, 738 (Ky. 1996).

In light of the trial court's order of a mistrial, Martin maintains that double jeopardy attached. The protection provided by the double jeopardy clause is extraordinary but not without exception. "Once jeopardy attaches, prosecution of a defendant before a jury other than the original jury or contemporaneously-impaneled alternates is barred unless 1) there is a 'manifest necessity' for a mistrial

or 2) the defendant either requests or consents to a mistrial." *Commonwealth v. Ray*, 982 S.W.2d 671, 673 (Ky. App. 1998).

At Martin's first trial, the police witness violated the court's ruling to sustain Martin's motion in limine, which prevented the Commonwealth from bringing evidence of Martin's previous criminal history, when he inadvertently testified that Martin's fingerprints had been found in a criminal database. The Commonwealth requested an admonition, but Martin's counsel moved for a mistrial. The trial court found the testimony to be prejudicial to Martin and, thus, sustained Martin's motion for a mistrial.

Then, prior to his second trial, Martin filed this pro se motion to dismiss because of double jeopardy grounds. It is somewhat disingenuous for Martin to now argue that the detective's unintentional statement regarding Martin's criminal history was not clearly prejudicial. Undoubtedly, the actions of the trial judge in ordering a mistrial were to ensure that Martin was afforded a fair and impartial trial. In fact, Martin's counsel not only consented but also requested a mistrial. As noted above, an exception to the application of double jeopardy occurs both when a mistrial is ordered because of a manifest necessity for the declaration of a mistrial and also when the defendant requests a mistrial.

Moreover, we are not persuaded by Martin's reference to other cases in which the admission of prejudicial evidence of prior convictions was cured by an admonition to the jury. *Riley v. Commonwealth*, 120 S.W.3d 622 (Ky. 2003); *Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003). Martin's analysis does

not undermine the wide discretion that is to be given to the trial court to ascertain whether a manifest necessity exists. In fact, in the case at bar, the Commonwealth requested an admonishment but the defense counsel moved for a mistrial.

A trial judge is in the best position to decide whether to grant a mistrial based upon possible prejudice. Only in the trial court is a judge able to witness the subtleties of a jury's reaction – e.g., nonverbal communications – to the presentation of inadmissible evidence. Courts have long held that all circumstances are to be taken into account when determining whether a trial should be terminated. *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949).

The trial judge specifically noted that, in his opinion, an inference of criminal history would be prejudicial to the defense, and that an admonishment would likely not have been sufficient to provide Martin with an impartial trial. Given the trial judge's participation in the trial and the reasons that the judge declared a mistrial, we are confident that the trial judge did not abuse the court's discretion in declaring a mistrial. Based on these factors and the aforementioned caselaw, we hold that the trial court did not abuse its discretion in finding there was a manifest necessity for a mistrial.

But finally, we again highlight that Martin, through counsel, requested a mistrial. Although Martin contends that he, as a defendant, did not consent to a mistrial and that he, as a defendant, must personally consent to a mistrial, caselaw indicates otherwise. "In the absence of exceptional circumstances, a defendant is bound by the trial strategy adopted by his counsel even if made without prior

consultation with the defendant." *Salisbury v. Commonwealth*, 556 S.W.2d 922, 927 (Ky. App. 1977).

No Kentucky case has directly addressed whether the decision to request a mistrial is a matter of trial strategy, although unpublished cases have noted that it may be sound trial strategy for counsel not to move for a mistrial. *Moseley v. Commonwealth,* 2004 WL 1232550 (Ky. App. 2004)(2003-CA-000930-MR). (Not to be published.) Still, federal courts have long held that a defendant is not afforded the right to grant or deny consent to a mistrial. *U.S. v. Chapman*, 593 F.3d 365, 368 (4th Cir. 2010). "[D]ecisions regarding a mistrial are tactical decisions entrusted to the sound judgment of counsel, not the client." *Id*.

Furthermore, federal courts have also elucidated the narrow areas where a defendant does have ultimate control. These are limited "to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal[.]" *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312, 77 L. Ed. 2d 987 (1983), affirmed by *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 560, 160 L. Ed. 2d 565 (2004). Clearly, defense counsel does have a duty to consult a defendant where these important decisions are concerned, but counsel does not have a duty to consult a defendant over every tactical matter. *Id*.

In summary, there was no error in the instant case in overruling Martin's motions to dismiss because of double jeopardy. It was not an abuse of the trial court judge's discretion in finding that a mistrial was a manifest necessity. Moreover, the defense counsel requested a mistrial. For these reasons, we hold

that the trial court's decision to overrule the motion for dismissal on double jeopardy grounds was proper.

3. Imposition of court costs

Next, Martin contends that the trial court improperly imposed court costs of $155 upon him, an indigent defendant, and that this order should be vacated. Although this issue was not preserved for appellate review, Martin requests palpable error review under Kentucky Rules of Criminal Procedure (RCr) 10.26.

For purposes of the trial and his appeal, Martin was found to be indigent. Martin claims that because the trial court found him to be indigent under Kentucky Revised Statutes (KRS) Chapter 31 and appointed him an attorney, it should not have ordered him to pay $155 in court costs. In particular, Martin is challenging the probation costs imposed. "[C]ourt costs [may not] be levied upon defendants found to be indigent." *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010). Nonetheless, in this situation, we determine that *Travis* is distinguishable.

Although KRS 23A.205(2) mandates that court costs may not be charged if a defendant is found to be indigent, KRS 533.030(2) permits a court in general to impose costs as a condition of probation. Furthermore, the court makes a determination of indigency at each stage of a proceeding. At this stage of the proceeding, when the trial court imposed $155 in court costs, Martin was being probated. Notably, throughout the record, Martin filed numerous motions that he

be released from custody in order to maintain employment and to support his family. Therefore, upon his probation, Martin would be able to work and, thus, be no longer indigent. Hence, we do not find the trial court erred when it imposed these court costs upon him. Since Martin, when the court costs were imposed, was no longer to be incarcerated and courts may impose costs as a condition of probation, we conclude that the imposition of $155 in court costs was not a manifest injustice in this case and do not vacate the order imposing these costs.

4. Revocation of probation

On appeal, Martin contends that the trial court abused its discretion when it revoked his probation because its rationale was arbitrary, unreasonable, and unfair. The Commonwealth counters that the trial court properly exercised its discretion in revoking Martin's probation because he violated the terms of probation.

The appellate standard of review of a decision to revoke a defendant's probation is whether the trial court abused its discretion. *Commonwealth v. Lopez*, 292 S.W.3d 878, 881 (Ky. 2009). And, the Commonwealth must establish "by a preponderance of the evidence that a probationer has violated the terms of probation." *Id*. (citing *Rasdon v. Com.*, 701 S.W.2d 716, 719 (Ky. App. 1986)). Moreover, KRS 533.050(2) provides that "the court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification."

In the instant case, in accordance with KRS 533.050(2), the trial court gave notice of and conducted a probation revocation hearing on September 8, 2010, at which Martin and his counsel were present and were afforded an opportunity to be heard and cross-examine any witnesses. As noted by Martin, in general, a trial court's decision revoking probation is not an abuse of discretion if there is evidence to support at least one probation violation. *Messer v. Commonwealth*, 754 S.W.2d 872, 873 (Ky. App. 1988).

Clearly, Martin violated a condition of probation when he failed to complete drug court, which he admitted during the hearing. Therefore, Martin violated a condition of probation and had a probation revocation hearing that comported with statutory requirements. The public policy considerations discussed by Martin in his brief are not relevant to this action. These issues are to be addressed to the legislature.

Thus, the trial court had sufficient grounds to revoke Martin's probation and did not abuse its discretion in doing so.

CONCLUSION

In closing, the trial court erred when it failed to conduct a *Faretta* hearing. With regard to other matters, however, we hold that the trial court did not err when it overruled Martin's motions for dismissal on double jeopardy grounds, assessed court costs when Martin received probation, and ultimately revoked Martin's probation. Thus, we affirm in part, reverse in part, and remand for a new trial.

LAMBERT, SENIOR JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, CONCURS IN PART, DISSENTS IN PART.

TAYLOR, CHIEF JUDGE, CONCURRING IN PART, DISSENTING IN PART. I concur totally with the majority's opinion except as concerns the imposition of court costs, to which I must respectfully dissent. I cannot distinguish the imposition of court costs against an indigent defendant sentenced to probation as opposed to an indigent tried and sentenced to serve time. I do not believe *Travis v. Commonwealth*, 327 S.W.3d 456 (Ky. 2010), is distinguishable from the facts of this case as determined by the majority and believe it is otherwise controlling on this issue.

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