RENDERED: JUNE 13, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001267-MR

RICHARD HOSKINS — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 11-CR-00317

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND MAZE, JUDGES.

JONES, JUDGE: This case arises out of Appellant's conviction for manufacturing methamphetamine. On appeal, we consider whether the circuit court erred by not conducting a *Faretta* hearing and by denying Appellant's motion for directed verdict. For the reasons explained below, we AFFIRM.

I. Background

Following a jury trial, Appellant, Richard Hoskins, was convicted of Manufacturing Methamphetamine, First Offense, and sentenced to fifteen (15) years imprisonment on June 26, 2012. Several witnesses testified at the trial. The key evidence is summarized below.

Ron Roser testified that he was awakened by his dog barking on September 26, 2011. Upon investigation, Mr. Roser surmised that his dog was barking at a car near his home. Mr. Roser did not recognize the car. After quieting the dog, Mr. Roser returned to sleep only to be awakened again a short time later by the same car. He observed the car driving down the road without using headlights. After hearing the car for a third time, Mr. Roser saw the car stop in a neighbor's driveway. A person got out of the car and disappeared from view after walking behind the house. Mr. Roser then decided to call the police since he did not recognize the car. Mr. Roser testified that he waited outside of his house until the police came and he did not see anyone approach the car during that time.

Sergeant Matthew Moore and Officer Brian Lawson of the London City Police Department responded to the call. Sgt. Moore testified that he observed an old beat-up car that was out of place in the neighborhood upon his arrival. A woman at the residence escorted Sgt. Moore to a bedroom where Appellant was asleep. After waking, Appellant admitted that the car was his and consented to a search of the car.

During the search of the car, which was not actually registered in Appellant's name, the officers observed Coleman fuel and coffee filters sticking out of a duffel bag behind the backseat. After searching the bag, the officers also found four lithium batteries, plastic spoons and bowls, plastic tubing, plastic bags, measuring cups, ice compresses, a knife, pliers, a pack of coffee filters, and plastic bottles with liquids. The officers also found a metal container in the front seat, which contained wet coffee filters with a substance inside. This substance was eventually tested and confirmed to be methamphetamine. Sgt. Moore also ran a "methcheck" on Appellant and found that he had purchased "methamphetamine precursors" four times during the month of September, though this amount was within the legal limits.[1]

Albert Hale, the Emergency Management Director for Laurel County, also testified during Appellant's trial. He testified that he pH tested the bottles finding that one bottle contained a "strong acid" and one contained a "very strong acid." Mr. Hale also testified that acids are used in the final processes of manufacturing methamphetamine. He testified that, in his experience, the fact that the coffee filters were still wet was suggestive of methamphetamine having been recently manufactured.

However, Appellant adduced evidence at trial that he argued proves the items in his car were not for the purpose of manufacturing methamphetamine:

[1] A "methcheck" is conducted by searching a statewide database containing a list of persons who have purchased medicines containing pseudoephedrine, such as certain types of cold medicine.

1) the lithium batteries the police found in the car were not peeled and batteries used to manufacture methamphetamine usually have been peeled *i.e.* had their casings removed; 2) the caps on the bottles found in the car were not "modified" and modified caps are typically found on bottles used to manufacture methamphetamine because modification is necessary so that they can accommodate the tubing necessary for making the drug; and 3) the police did not find any pseudoephedrine cold or sinus medicines in the car and pseudoephedrine is the "key ingredient" needed to manufacture methamphetamine.

Following the presentation of all the evidence, the Appellant moved for a directed verdict on the basis that the Commonwealth had failed to adduce sufficient proof from which the jury could conclude that he had manufactured methamphetamine. The trial court denied the motion and submitted the case to the jury for a verdict. After deliberating, the jury rendered a guilty verdict on the charge of Manufacturing Methamphetamine, First Offense. Appellant was sentenced to fifteen years' imprisonment.

This appeal followed.

II. ANALYSIS

"*Faretta*" Hearing

Both the Sixth Amendment to the United States Constitution, which applies to the states via the Fourteenth Amendment, and Section Eleven of the Kentucky Constitution guarantee a defendant the right to assistance of counsel. *See Commonwealth v. Martin*, 410 S.W.3d 119, 122 (Ky. 2013); *King v. Commonwealth*, 374 S.W.3d 281, 290 (Ky. 2012). However, there is a concomitant right to waive counsel and proceed without representation. *See Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Depp v. Commonwealth*, 278 S.W.3d 615, 617 (Ky. 2009). Additionally, the Kentucky Constitution, unlike the Constitution of the United States, affords criminal defendants the right to hybrid representation. *Wake v. Barker*, 514 S.W.2d 692, 696 (Ky.1974). Kentucky courts view hybrid representation as "a limited waiver of counsel whereby [the defendant] acts as co-counsel with a licensed attorney." *Allen v. Commonwealth*, 410 S.W.3d 125, 139 (Ky. 2013) (citing *Stone v. Commonwealth*, 217 S.W.3d 233, 236 n. 1 (Ky. 2007)).

If a defendant requests either to represent himself entirely or partially, the trial court must conduct an inquiry to make certain that the defendant understands his right to counsel and the advantages and disadvantages of proceeding *pro se* or with limited counsel. The Kentucky Supreme Court recently explained:

> *Faretta* requires that a defendant seeking self-representation be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." Because the colloquy between a defendant and the trial court need not follow a script, a determination of whether the eyes of a defendant who seeks to represent himself were sufficiently opened is a determination that must be made on a case-by-case basis. At a minimum, however, "before a defendant may be allowed to proceed pro se, he must be warned specifically of the hazards ahead." Or, as we recently explained, "the [*Tovar*] Court clarified as to the Sixth Amendment that the constitutional minimum for determining whether a waiver was 'knowing and intelligent' is that the accused be made sufficiently aware of his right to have counsel present and of the possible consequences of a decision to forgo the aid of counsel."

Commonwealth v. Terry, 295 S.W.3d 819, 822 (Ky. 2009) (internal citations omitted).

Before a trial court is obligated to instruct and warn the defendant, however, he must make a timely and unequivocal request to proceed without counsel (or with limited counsel). *Major v. Commonwealth*, 275 S.W.3d 706, 719 (Ky. 2009). The trial court's duty is only "triggered if the requests are unequivocal and timely made." *Id.*

At a pretrial hearing on December 19, 2011, defense counsel informed the court that Appellant requested to represent himself based on information counsel had received during a jailhouse visit the previous day. The court then asked Appellant, "surely you do not want to do that, do you?" Appellant then immediately responded that he was actually requesting new counsel. He also

stated that he wished to be let out on bond in order to go and hire a new attorney, if possible. The court then asked Appellant why he wanted new counsel and he responded "just because." When pressed, Appellant stated that he did not wish to say why he wanted new counsel. Thereafter, the trial court denied Appellant's oral motion for new counsel.

Sometime later, but prior to his trial, Appellant wrote a letter to the court again requesting that the court appoint him new counsel. During a March 14, 2012, pretrial hearing, Appellant addressed the court and again asserted that he wanted a new attorney. This time he explained to the court that he wanted new counsel because he believed that his current counsel thought he was "stupid" and did not understand him. Appellant indicated that he thought part of the problem was that he is mostly illiterate, and therefore, his opinion "didn't mean anything" to his counsel. The court again directly asked Appellant if he wanted new counsel and Appellant responded in the affirmative. The court then explained to Appellant that those were not sufficient grounds to change attorneys and denied the motion, to which Appellant replied "okay." At no time during the hearing or immediately before during historical, did Appellant or his attorney mention that Appellant wished to represent himself.

On appeal, Appellant argues that since he made a request to counsel during a private jailhouse conference to represent himself, which was then repeated by counsel to the court, he was entitled to a *Faretta* hearing. He asserts that the

trial court's failure to conduct a *Faretta* hearing under these circumstances is reversible error.

Having reviewed the record, we cannot agree that the trial court was under any obligation to conduct a *Faretta* hearing. When Appellant's attorney advised the court that Appellant told him during their conference that he wished to represent himself, the trial court explicitly asked Appellant if he wanted to proceed without counsel. Appellant stated clearly on the record that this was not his wish; he wished the court to appoint him *new counsel* or release him on bond so that he could obtain counsel himself.

Appellant did not make an unequivocal request for self-representation to the trial court; he requested new counsel. We conclude that trial court did not err in its assessment that Appellant wanted different counsel and did not wish to represent himself. *See Deno v. Commonwealth*, 177 S.W.3d 753, 757-78 (Ky. 2005).

Appellant next argues that the trial court's statement "surely, you don't want to do that" was coercive and stifled his ability to exercise his right to proceed without counsel. Having reviewed the statement in the context of the entire record, we do not believe that the trial court coerced Appellant or impaired his ability to exercise his rights in any manner. If anything, the trial court's statement was a prelude to a full warning regarding the risks associated with representing oneself in a criminal trial. In response to the trial court's inquiry, the Appellant explained very coherently his desire to terminate his counsel and his

plan to obtain a new counsel of his own choosing, if released on bond. Appellant had formulated a clear plan of action for obtaining new counsel, a course of action he explained on the spot to the trial court. Such a response is inconsistent with the trial court having coerced Appellant to abandon a previous decision to proceed without the assistance of any counsel.

In sum, we conclude that the trial court appropriately questioned Appellant after his attorney advised the court that Appellant told him that he wanted to proceed without counsel. Upon questioning, Appellant disclaimed to the trial court that he wanted to proceed without the assistance of counsel. Instead, he told the trial court that he wanted new counsel, a request he subsequently renewed. Appellant's statements are inconsistent with an unequivocal request to proceed without counsel. As such, we conclude that the trial court did not err in failing to conduct a *Faretta* hearing.

Motion for Direct Verdict

Appellant's second assignment of error is that the circuit court failed to direct a verdict of acquittal. Upon a motion for directed verdict, "the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given." *Commonwealth v. Benham*, 816 S.W. 2d 186, 187 (Ky. 1991). A trial court may only "direct a verdict for the defendant if the prosecution produces no more than a scintilla of evidence. Obviously there must be evidence

of substance." *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). Therefore, on appellate review, "the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a direct verdict of acquittal." *Id.*

Appellant argues that there was insufficient evidence for the jury to believe that he was guilty beyond a reasonable doubt because the evidence found in his car indicates only a mere possibility of wrongdoing, not the actual crime of manufacturing methamphetamine. Appellant specifically points out that the lithium batteries were not stripped, the caps was not modified, and there were no pseudoephedrines found in the car – all of which he argued were necessary to manufacture methamphetamine.

Appellant was charged with a violation under KRS 218A.1432, which states that: "(1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully: (a) Manufactures methamphetamine; or (b) With intent to manufacture methamphetamine possesses two (2) or more chemicals or *two (2) or more items of equipment for the manufacture of methamphetamine*." (emphasis added).

The Commonwealth produced evidence during its case-in-chief that several items used to manufacture methamphetamine were located in Appellant's car. Furthermore, the Commonwealth introduced testimony that actual methamphetamine was present on the damp coffee filters and that Appellant had

purchased pseudoephedrine, a key ingredient of methamphetamine, in the prior month.

The Commonwealth produced far more than a "scintilla" of evidence. *See Chavies v. Commonwealth*, 354 S.W.3d 103 (Ky. 2011) (upholding trial court's denial of directed verdict after detective testified at trial that he found rock salt, plastic tubing, a measuring cup, a spoon, a funnel, and lighter fluid in the vehicle). As such, after review of the record, we conclude that because there was sufficient evidence to induce a reasonable juror to believe beyond a reasonable doubt that the defendant was guilty the trial court did not err in denying Appellant's motion for a directed verdict.

III. CONCLUSION

Having reviewed both of Appellant's assignments of error and finding no clear error by the circuit court, we AFFIRM Appellant's conviction.

ALL CONCUR.

BRIEF FOR APPELLANT:

Erin Hoffman Yang
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Todd D. Ferguson
Assistant Attorney General
Frankfort, Kentucky