

RENDERED: DECEMBER 2, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001968-ME

LENELL BOHANNON

APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT
HONORABLE TIMOTHY N. PHILPOT, JUDGE
ACTION NO. 09-D-00360-001

COMMONWEALTH OF KENTUCKY AND
MEGAN ALEXANDRIA MORRIS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE AND STUMBO, JUDGES.

STUMBO, JUDGE: Lenell Wayne Bohannon appeals from an Order of the Fayette Family Court holding him in indirect criminal contempt for failing to complete a 30-day domestic violence program. He argues that the Family Court erred in failing to permit him to hire private counsel and to grant a continuance for a hearing. We find no error and AFFIRM the Order on appeal.

The facts are not in controversy. Lenell Wayne Bohannon (hereinafter “Appellant”) and his former girlfriend, Megan Alexandria Morris, have a minor daughter together referred to in the record as C.M. Appellant has been the subject of a Domestic Violence Order (“DVO”) for several years after verbally and physically assaulting Ms. Morris. Appellant was barred from any contact with Morris or C.M.

Thereafter, Appellant was granted supervised visitation with C.M. During the years that followed, Appellant repeatedly enrolled in, and was dismissed from, various court-ordered domestic violence classes.

Appellant became involved with Damaris Davis, who posted a sexually explicit video online and named Appellant as a participant in the video who performed sexually degrading acts upon her. Davis also possessed various text messages of a violent and degrading nature allegedly from Appellant. The matter resulted in a hearing before the Family Court, whereupon Davis recanted her story and testified that she made everything up in order to hurt Appellant because she was still in love with him. The court ordered Appellant to be reassessed by Advanced Solutions and to complete another round of classes based on their recommendation.

Appellant would later claim that he had difficulty contacting Advanced Solutions, and he offered various reasons for his non-compliance. He failed to appear for his June 10, 2015 court date.

Based on Appellant's failure to appear, authorities executed an arrest warrant. A hearing was conducted on June 17, 2015, where Appellant was represented by an attorney from the Department of Public Advocacy ("DPA"). Appellant was found to be in contempt and was sentenced to 30 days in jail. The sentence was conditionally suspended on Appellant's compliance with court orders. Various additional hearings were conducted in August and September, 2015.

In September 2015, Appellant was arrested on unrelated Assault, Domestic Violence and Criminal Trespass charges, and was taken into custody. During his period of incarceration, Appellant was non-compliant with the court's directive to complete the Advanced Solutions program. On November 2, 2015, the court received a letter from Advanced Solutions which stated that Appellant was discharged from the program for failure to attend classes.

Appellant appeared before the Family Court on November 18, 2015, for a domestic violence status hearing. Evidence was produced that Appellant had been discharged from the court-ordered domestic violence classes for failure to attend. Appellant offered several reasons for his non-compliance, not the least of which was that he was in custody. Upon release from those charges, Appellant stated that he did not want to resume the classes if he were just going back to jail at a later time.

As the hearing progressed, Appellant requested a continuance to hire private counsel to replace his DPA attorney. The request was denied. In support

of the denial, Judge Philpot stated that he was aware of the facts, that Appellant had DPA counsel who had represented Appellant on numerous occasions, and that the incarceration which caused Appellant to miss the court-ordered classes was Appellant's fault and not that of Ms. Morris. The court also stated that it told Appellant to show up with a lawyer, that Appellant did not do so, and so one was appointed for him. The court found Appellant to be in contempt based on Appellant's failure to comply with court-ordered class attendance, and it reinstated the previously-suspended 30-day sentence. This appeal followed.

Appellant now argues that the Family Court committed reversible error in failing to permit him to hire private counsel, and in failing to grant a continuance for a hearing. Appellant, through DPA counsel, argues that while a trial court has nearly unlimited discretion in exercising its contempt powers, that discretion is not completely unlimited. Appellant directs our attention to *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999), holding that the test for abuse of discretion is whether the court's decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." He contends that in not allowing him to hire private counsel and to have a continuance, the Family Court violated each of these principles. Appellant goes on to argue that the right to choose one's own counsel is fundamental to our system of jurisprudence, and that the failure to allow the exercise of this right constitutes a structural error in the proceedings warranting reversal. In sum, Appellant argues that Judge Philpot's failure to permit him to acquire private counsel and a continuance for a hearing constitutes a

denial of his Due Process rights. He seeks an Opinion reversing the Order on appeal, and remanding the matter for a hearing with private counsel.

Appellant acknowledges that the Family Court is vested with nearly unlimited discretion in the exercise of its contempt powers, constrained only by the four factors set out in *English, supra*. The question for our consideration, then, is whether the Family Court abused its discretion by acting in an arbitrary, unreasonable, or unfair manner, or one which is otherwise unsupported by sound legal principles. *Id.* Additionally, the trial court retains broad discretion to grant or deny a continuance in order for a defendant to obtain new counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). In exercising this discretion, a court may legitimately balance the right to counsel against the demands of its calendar and make decisions, which in order to promote the efficient administration of justice, may have the effect of excluding a party's preferred counsel. *Id.* at 152.

The hearing at issue was conducted on November 18, 2015, though Appellant does not characterize it as such. On that date, Appellant appeared before Judge Philpot with appointed counsel. Judge Philpot was made aware of all of the salient facts arising from Appellant's arrest on other charges, Appellant's admitted failure to comply with the terms of the 30-day sentence, and the reasons offered by Appellant to justify his non-compliance. Appellant, counsel and Judge Philpot had a vigorous back-and-forth discussion wherein Appellant asserted he had been compliant with class attendance prior to his latest arrest, and that Judge Philpot

knew this. Judge Philpot responded that Appellant's non-compliance was the fault of Appellant and no one else, in that it was Appellant's choices and behavior that resulted in his arrest and subsequent non-compliance. We conclude from the foregoing that Appellant had a full and fair hearing during which the facts were fully presented and the court was given a complete picture as to the reasons for Appellant's non-compliance.

It is noteworthy that Appellant did not seek private counsel until the day of the hearing. Though not directly on point, the instant facts are somewhat analogous to those of *Page v. Commonwealth*, 2007 WL 1954104 (Ky. App. 2007). In *Page*, the criminal defendant unsuccessfully sought to dismiss his *pro bono* counsel¹ on the day of trial. On appeal, a panel of this Court determined that a criminal defendant's right to choose his counsel is limited by what legal services he can afford. Additionally, the panel determined that Page's assertion on the morning of trial that he could secure private counsel was speculative at best, and it could easily be perceived as an attempt to postpone his trial. It concluded that, "[c]ontrary to Page's vigorous argument, the record fails to demonstrate that the trial court erroneously denied him the right to choose his representative." *Id.* at p. 2.

Similarly in the matter at bar, we cannot conclude that the Family Court erroneously denied Appellant the right to choose his representative.

Appellant *was* represented by DPA counsel, with whom he was very familiar.

¹ Page's public defender left the DPA shortly before trial to enter private practice, but continued representing Page *pro bono*.

Appellant was not employed, and had previously relied on DPA counsel on numerous occasions. About one month after the hearing at issue, on December 15, 2015, Appellant again moved to proceed *in forma pauperis* to prosecute the instant appeal. Because Appellant was afforded a full and fair hearing on the matter with DPA counsel, and as there is no basis for concluding that the outcome of the proceeding would have been different with private counsel, we cannot conclude that the Fayette Family Court abused its broad discretion in denying Appellant's request for a continuance to engage private counsel.

For the foregoing reasons, we AFFIRM the Order of the Fayette Family Court.

ALL CONCUR.

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