

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA * **NO. 2002-KA-0744**
VERSUS * **COURT OF APPEAL**
RICKEY CAMPBELL, JR. * **FOURTH CIRCUIT**
* **STATE OF LOUISIANA**
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 390-535, SECTION "C"
Honorable Sharon K. Hunter, Judge
* * * * *
Judge Terri F. Love
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(Court composed of Chief Judge William H. Byrnes III, Judge Terri F. Love,
Judge Max N. Tobias, Jr.)

Harry F. Connick
District Attorney
Julie C. Tizzard
Assistant District Attorney
619 South White Street
New Orleans, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

Sherry Watters
LOUISIANA APPELLATE PROJECT

P. O. BOX 58769
New Orleans, LA 701588769

COUNSEL FOR DEFENDANT/APPELLANT

REVERSED AND REMANDED

Defendant, Rickey Campbell, Jr., was charged with burglary and was convicted of attempted burglary. In defendant's appeal, the following errors by the trial court during the evidentiary hearing are alleged: (1) trial court erred by participating in the hearing on the issue of jury waiver; (2) the hearing was held when defendant was not represented by counsel and defendant had not waived the attorney-client privilege to allow his former attorney to testify; and (3) trial court incorrectly applied the criteria needed for a valid jury waiver and erred by relying on "standard procedure" to find defendant made a knowing and informed jury waiver. Defendant also raised the issue of excessive sentencing delays and alternatively reserved his right to appeal the assignments of error raised in the original appeal. For the reasons explained below, this Court sets aside defendant's conviction and remands the case for a new trial because of two errors regarding jury waiver.

STATEMENT OF CASE

On July 3, 1997, Rickey Campbell was charged by bill of information with attempted simple burglary of an inhabited dwelling, a violation of La.

R.S. 14:(27)62.2. On July 9, 1997, Campbell pleaded not guilty and, through counsel, filed motions to suppress evidence and identification. On August 8, 1997, the trial court found probable cause and denied the motions to suppress.

On March 17, 1998, the State amended the bill of information charging him with simple burglary of an inhabited dwelling, a violation of La. R.S. 14:62.2. Following a bench trial of Campbell and co-defendant Eugene Booker on that date, the court found Campbell guilty of attempted burglary of an inhabited dwelling. On March 25, 1998, the court sentenced Campbell to one year in the Department of Corrections without benefit of parole, probation or suspension of sentence, but suspended imposition of the sentence for defense counsel to submit legal argument regarding sentencing without benefits.

On May 8, 1998, the State filed a multiple bill information under La. R.S. 15:529.1, charging Campbell as a fourth felony offender. On August 4, 1998, a hearing on the multiple bill commenced with “Officer Raymond Luke Moore” testifying as an expert fingerprint witness. The August 4th hearing, however, addressed only co-defendant Booker. The next day, the hearing continued with “Officer McFlorine” testifying he fingerprinted Campbell the previous day, compared Campbell’s fingerprints to those

offered by the State as the person with the three prior felonies, and determined the fingerprints matched. The trial court ordered memoranda, and the matter was set for ruling and sentencing on August 26, 1998. On August 26, 1998, the trial court granted a motion to quash the multiple bill, and no further action was taken to sentence Campbell until this Court granted a writ application by Campbell and ordered the trial court to sentence him within thirty days.

On February 26, 1999, the trial court adjudged Campbell a second felony offender, vacated his one-year sentence, and sentenced him pursuant to La. R.S. 15:529.1 to five years at hard labor, with credit for time served. Campbell objected to the sentence and filed a Motion to Reconsider. On February 26, 1999, his Motion to Appeal was granted. In November 1999, this Court ordered production of transcripts necessary to perfect Campbell's appeal, and when no transcript of the jury waiver could be located, this Court remanded the case for an evidentiary hearing on the jury waiver issue. State v. Campbell, unpub., 99-2469 (La.App. 4 Cir. 10/31/00). Five months later, on March 6, 2001, the trial court acknowledged the order for an evidentiary hearing, and six months after that, on September 7, 2001, the trial court conducted the evidentiary hearing.

At the evidentiary hearing, Campbell was present, as were two

assistant district attorneys and Arthur Laugand, who is listed as the attorney for the defendant on the transcript cover sheet. Mr. Sauviac was also present and testified that he was defense counsel at Campbell's trial. The trial judge swore in Mr. Sauviac as a witness and proceeded to question him. As the trial judge tendered Mr. Sauviac to Campbell for questioning, Mr. Sauviac cautioned Campbell that there had been no waiver of attorney-client privilege as a result of the questioning to that point. Campbell questioned Mr. Sauviac about their conversations, and Mr. Sauviac testified that he did not have any specific recollection of a conversation with Campbell regarding waiver of his right to a jury trial in this matter. The trial court and Mr. Sauviac both relied extensively on the docket sheets as the "record" of the proceedings in this case. Campbell provided legal argument after questioning Mr. Sauviac. Mr. Laugand did not make an appearance on the record. It was Mr. Sauviac who offered Campbell the only counsel on the record at the hearing: to object to the trial court's ruling instead of continuing to argue at the conclusion of the hearing.

STATEMENT OF FACT

We pretermit discussion of the facts, as they are not pertinent to the issues before the Court.

DISCUSSION

ASSIGNMENT OF ERROR NUMBER 1

Campbell alleges three errors by the trial court resulting from the evidentiary hearing. First, he argues that the trial court erred in participating in the evidentiary hearing on the jury waiver issue as the prosecutor, witness, and trier of fact. It should first be noted that neither Campbell nor counsel objected to the procedure utilized by the trial court for the evidentiary hearing. Campbell did, however, object to the trial court's ruling.

The purpose of the evidentiary hearing was to determine, through testimony of the relevant participants in Campbell's jury trial, if Campbell made a knowing and voluntary waiver of his right to a jury trial. Under Louisiana Code of Evidence Article 614, a judge may question witnesses. Generally, a trial judge, in order to maintain the impartiality which proper trial technique demands, should be careful not only as to the number and type of questions posed by her to witnesses, but also as to the manner in which they are posed. La.C.Cr.P. art. 772; *see State v. Nicholas*, 359 So.2d 965 (La.1978) and *State v. Williams*, 375 So.2d 1379 (La.1979). Comment (c) to the Louisiana Code Evidence article 614, however, states that "the power of the court to question witnesses, moreover, does not authorize a court to exercise that power in the same manner as adversary counsel." In other words, the trial judge, while asking a witness questions from the

bench, must remain impartial and must not become an "advocate" for one side or the other. A trial judge's questioning of a witness is subject to the harmless error test. State v. Sims, 426 So.2d 148, 154 (La. 1983).

In the instant case, Judge Hunter's questioning crossed the line between clarification and advocacy in her attempt to clarify whether Campbell knowingly and voluntarily waived his right to a jury trial. The setting, however, was an evidentiary hearing, and the absence of a jury renders the error harmless. Accordingly, this assignment has no merit.

Second, Campbell argues that the trial court erred in holding the evidentiary hearing when Campbell was not represented by counsel and had not waived the attorney-client privilege to allow his former attorney to testify about communications between them. The right to counsel is such a fundamental right that it is not subject to the harmless error analysis, and a defendant's total lack of representation is reversible error. State v. Crawford, 93-2304 (La.App. 4 Cir. 8/23/95), 660 so. 2d 950.

The minute entry indicates that Campbell was present and attended by counsel, Mr. A. Laugand, Esq. The transcript cover sheet indicates that Arthur Laugand, Esq. entered an appearance as the attorney for the defendant. The substance of the transcript, however, does not include Mr. Laugand, or any other attorney, actually entering an appearance as Mr.

Campbell's counsel for purposes of the evidentiary hearing. At only one point in the record does an attorney advise Campbell, and that attorney was Mr. Sauviac. Before Mr. Sauviac testified, there was no waiver of the attorney-client privilege on the record. Campbell, for a reason not disclosed on the face of the transcript, did not have actual representation by counsel at the hearing. Therefore, this assignment has merit.

Third, Campbell argues that the trial court erred by incorrectly applying the criteria needed for a valid jury waiver and erred in relying on "standard procedure" to find that Campbell had made a knowing and informed jury waiver in this particular case. As outlined by this Court in its order remanding this matter to the trial court for an evidentiary hearing, a defendant must be informed by the court at the time of his arraignment of his right to a jury trial, and then a defendant may knowingly and intelligently decide to waive a jury trial by filing a pretrial motion for such within fifteen days after arraignment or at any time prior to commencement of the trial with the permission of the court. La. C.Cr.P. art. 780; La. C.Cr. P. art. 521. It is also permissible for a waiver to be made by defense counsel in cases where the defendant was present in court and failed to object when defense counsel made the waiver.

In the present case, there was no indication in the record that counsel

actually waived Campbell's right to trial by jury or that Campbell was present if defense counsel did actually waive the right to trial by jury on behalf of his client. At the evidentiary hearing, no one testified that Campbell was present in chambers when the alleged waiver of trial by jury occurred. In fact, Mr. Sauviac testified that he had no recollection of having a conversation with Campbell regarding the jury waiver issue and had no recollection of specifically waiving Campbell's right to a jury trial. Campbell, on the other hand, testified that he never waived his right to a jury trial and that he was not present in chambers when Mr. Sauviac allegedly waived on his behalf.

In addition, Campbell was correct that the trial court mischaracterized the nature of Mr. Sauviac's testimony in its ruling that Campbell waived his right to a jury trial through Mr. Sauviac. As noted by Campbell in his objection to the trial court's ruling, Mr. Sauviac testified that he had no recollection of having a conversation with Campbell about waiving his right to a jury trial. The trial court, nevertheless, found that defendant relayed to the court through counsel that he waived the jury and the jury was dismissed.

The record after the evidentiary hearing remains devoid of evidence that such a waiver by defense counsel actually happened in this particular

case. The trial court imputed to this particular case the procedure that Mr. Sauviac testified he typically followed to find that Campbell actually waived his right to a jury trial. The facts of this case do not meet the criteria for a valid waiver of the right to a jury trial. *See State v. Moses*, 2001-0909, p. 4 (La. App. 4 Cir. 12/27/01), 806 So.2d 83, 86, *State v. Comeaux*, 2000-0054, p. 4-5 (La. App. 4 Cir. 11/21/00), 774 So.2d 322, 324, and *State v. Wolfe*, 98-0345, p. 6-7 (La. App. 4 Cir. 4/21/99), 738 So.2d 1093, 1096. Therefore, this assignment has merit.

ASSIGNMENT OF ERROR NUMBER 2

Campbell framed his next argument as follows: that he is entitled to immediate discharge under the La. C.C.P. art. 874 due to the excessive sentencing delays caused by the district court that consequently deprived the court of jurisdiction to sentence him. Campbell was convicted on March 17, 1998 and was initially sentenced eight days later on March 25, 1998 to one year in the Department of Corrections. The trial court, however, immediately suspended imposition of the one-year sentence, and Campbell was re-sentenced nearly a year later on February 26, 1999 as a second felony offender. The delays in sentencing occurred solely through the acts and omissions of the trial court. The record is devoid of any factors or circumstances that would justify the delay in sentencing. However, relief

would be available to Campbell only if the evidence shows that he was prejudiced by the delay in sentencing. State v. Stewart, 98-0346, p. 5 (La. App. 4 Cir. 3/10/99), 732 So.2d 74, 76.

Campbell faced a minimum sentence of six months to a maximum sentence of six years at hard labor for attempted simple burglary of an inhabited dwelling, a violation of La. R.S. 14:(27)62.2. Once a multiple bill was filed, the minimum sentence for a second or subsequent offender under La. R.S. 14:(27)62.2 and La. R.S. 15:529.1 was half the maximum sentence of twelve years (i.e. six years) at hard labor. The trial court ultimately, after all delays, sentenced Campbell to five years at hard labor. Thus, Campbell knew that he could not have expected a less severe sentence upon re-sentencing as a habitual felony offender and he was not prejudiced by the delays. This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER 3

Alternatively, Campbell reserved his right to appeal the original assignments of error that were pretermitted in the original appeal when the case was remanded for evidentiary hearing. In light of our remand, we pretermitted discussion of the original assignments of error.

CONCLUSION

We set aside the defendant's conviction and remand this matter for a

new trial because the facts were insufficient to meet the criteria necessary for the trial court to find Campbell knowingly and intelligently waived his right to a jury trial.

REVERSED AND REMANDED