

RENDERED: July 16, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 1997-CA-002395-MR
NO. 1998-CA-000717-MR

JAMES W. STEADMAN, SR.

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
INDICTMENT NO. 96-CR-00107

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * * * *

BEFORE: GARDNER, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge. These are consolidated appeals by James W. Steadman, Sr., from his conviction for bail jumping and from the denial of his motion to vacate his sentence pursuant to Ky. R. Crim. Proc. (RCr) 11.42.

In 1993, Steadman was indicted and arraigned on a charge of theft by failure to make required disposition of property over \$300.00, a class D felony.¹ Subsequently, Steadman posted a \$5,500.00 cash bond and was released from custody.

¹ This charge was later dismissed.

At a pre-trial conference on September 28, 1993, Steadman's attorney, William Radigan, explained to the court that Steadman was not present because he was in the intensive care unit at Jewish Hospital recovering from a stroke. Steadman appeared at a subsequent court hearing on October 12, 1993. Radigan explained to the court that Steadman at that time had no recollection of the events concerning the offense of which he was charged and did not even know who the complainant was in the case. A video record of that hearing indicates Steadman appeared weak and disoriented at that time. The pre-trial conference was continued until November 23, 1993. On that date, Radigan did not appear because he was recovering from surgery. Steadman's wife, who appeared at the November hearing, answered most of the questions directed to Steadman. She explained to the court that her husband "still had trouble understanding things." The pre-trial conference was continued until January 25, 1994. Both Steadman and Radigan attended the January 25, 1994, pre-trial conference. Radigan again advised the court that his client had lost his memory of the events in question and was unable to assist counsel in preparing for trial. Radigan requested open discovery to compensate for his client's incapacity. The judge stated that he would take the motion for open discovery under submission. A trial date was set for May 26, 1994.

On February 19, 1994, Radigan filed a motion with the court to withdraw as Steadman's attorney, and the court granted the motion. Steadman did not appear for trial on May 26, 1994.

In 1996, the Hardin County Grand Jury indicted Steadman for first-degree bail jumping, a violation of Ky. Rev. Stat. (KRS) 520.070. In January 1997, Steadman pleaded not guilty to the charge. Trial on the bail jumping charge was delayed several times by the Commonwealth, but was finally set for August 25, 1997. On July 3, 1997, the Commonwealth moved to have Steadman examined to determine his competence to stand trial. On August 12, 1997, during the competency hearing, Steadman informed the court that he was competent at that time and saw no reason to delay the trial. The court determined that Steadman was indeed competent and denied the Commonwealth's motion for evaluation.² The case proceeded to trial.

Steadman was represented by a court-appointed attorney, R. Craig Maffet. This was Maffet's first felony trial. After the jury was impanelled, Steadman was granted permission by the court to serve as his own co-counsel. After a one-day trial, the jury found Steadman guilty of first-degree bail jumping. In September 1994, the trial court sentenced Steadman in accord with the jury's recommendation to two years' imprisonment.

Steadman appealed the conviction to this Court, and while his appeal was pending, filed in the circuit court a RCr 11.42 motion collaterally attacking the judgment of conviction. The motion to vacate raised an issue of ineffective assistance of trial counsel. The motion was denied without an evidentiary hearing, and

² Although there was a more pressing need to do so, no one requested a competency hearing for Steadman prior to his trial date of May 26, 1994.

this, too, was appealed to this Court. The two appeals were consolidated.

On direct appeal, Steadman argues that the trial court erred in denying his request, pursuant to KRS 520.070(2), to instruct the jury that it should find him not guilty if it believed that his failure to appear at trial was unavoidable.³ See 1 Cooper, Kentucky Instructions to Juries (Criminal) § 7.34 (4th ed. 1993). The trial court, in denying Steadman's request, agreed with the Commonwealth that Steadman had not presented at trial evidence to justify giving such an instruction.

At trial, three witnesses were called for the defense. Each, testifying as to Steadman's physical condition for the eight month period after his stroke, described his infirmities. The witnesses testified that Steadman was not working, needed assistance in climbing stairs and getting in and out of a car, and walked with a cane. One witness, Rodney Powell, stated that Steadman's physical condition during that time, "wasn't good. He had a stroke and wasn't getting around good."

The testimony of these three witnesses taken as a whole was sufficient to raise a factual question as to whether Steadman's failure to appear at trial was unavoidable. Thus, an instruction to that effect should have been given. Beasley v. Commonwealth, Ky. App., 618 S.W.2d 179, 181 (1981). "Instructions must be based

³ Ky. Rev. Stat. (KRS) 520.070(2) provides that: "In any prosecution for bail jumping, the defendant may prove in exculpation that his failure to appear was unavoidable and due to circumstances beyond his control."

upon the evidence and they must properly and intelligently state the law.” Howard v. Commonwealth, Ky., 618 S.W.2d 177, 178 (1981) (citations omitted). “Where the accused relies upon facts and circumstances amounting to an avoidance of the crime, or having the effect of exonerating him of criminal intent, he is entitled to a concrete instruction on his excuse or theory of the case.” Monson v. Commonwealth, Ky., 294 S.W.2d 78, 81 (1956). We conclude that the failure to instruct on the only defense available to Steadman denied him a fair trial.

Because we reverse the conviction for the aforementioned reason, we need not address Steadman’s other allegations of error.

The judgment is reversed and this case is remanded to Hardin Circuit Court for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Steadman, Sr., pro se
Lexington, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Joseph R. Johnson
Assistant Attorney General
Frankfort, Kentucky