

Commonwealth Of Kentucky

Court of Appeals

NO. 1999-CA-002112-MR

CARL ENGLE

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2001-SC-0095-D

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE JOHN R. MORGAN, JUDGE
ACTION NO. 99-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

AND NO. 1999-CA-002290-MR

KEVIN COMBS

APPELLANT

v. APPEAL FROM KNOTT CIRCUIT COURT
HONORABLE JOHN R. MORGAN, JUDGE
ACTION NO. 99-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND PAISLEY, JUDGES.

BARBER, JUDGE: This case comes to the Court of Appeals on remand for consideration in light of Kirkland v. Commonwealth, Ky., 53 S.W.3d 71 (2001). We will consider whether there is a

presumed conflict of interest when the trial court fails to execute an RCr 8.30 waiver when two defendants are represented by separate individual attorneys, but both attorneys work for the public defender's office.

When this case was first presented to us the established rule of law held that "noncompliance with the provisions of RCr 8.30 is presumptively prejudicial, and warrants reversal." Peyton v. Commonwealth, Ky., 931 S.W.2d 451, 453 (1996). Since the Appellants were only required to show that the trial court failed to execute a waiver, this court reversed the lower court's ruling.

While that decision was pending review by the Kentucky Supreme Court, the rule of law governing this issue was changed. In Kirkland v. Commonwealth, our Supreme Court decided that the "bright line" rule set forth in Peyton "defies logic and ignores the principles of judicial economy." Kirkland, 53 S.W.3d at 75. Kirkland reinstated the rationale of Smith v. Commonwealth, Ky., 669 S.W.2d 527 (1984) and Conn v. Commonwealth, Ky., 791 S.W.2d 723 (1990) which allows reviewing courts to apply a non-prejudicial harmless error analysis in cases where two defendants are individually represented by two public defenders and where no conflict or prejudice is claimed. Kirkland, 53 S.W.3d at 75. This ruling requires the defendants to show a

prejudicial conflict of interest in order assert an effective appeal. Id.

The failure to comply with RCr 8.03 no longer warrants an automatic reversal. Id. In Kirkland, a case where two co-defendants were facing murder and robbery charges, the Supreme Court found that each attorney "represented the client's interest in a very vigorous and professional manner" and "no antagonistic defenses were compromised." Id. The lower court's decision was affirmed. Id. Similarly, in Conn, where two co-defendants were facing charges for unlawful taking, the court found nothing in the record that showed the defendant would have plead differently if he had retained different counsel, and the court refused to reverse his conviction on appeal. 791, S.W. 2d 723 at 724.

In the present case, appellant Combs argues that the violation of RCr 8.30 constituted a denial of his Sixth and Fourteenth Amendment right to effective assistance of counsel. Combs bases this claim on the fact that his counsel worked in cooperation with counsel for co-defendant Engle, failed to make a separate opening statement, or file a separate and distinct motion in limine. If the actions of Combs' counsel had a prejudicial effect on the outcome of his case then he is certainly entitled to a new hearing. However, the record indicates that Combs' counsel did fairly represent his client's

interest. There is no indication that a new trial would secure Combs a different outcome for his case. The jury verdict reflects the overwhelming amount of evidence against Combs. The trial court's failure to execute a waiver was a harmless error.

A review of Appellant Engle's case also shows that his attorney vigorously defended his client. The record does not indicate that the judgment against him was caused by a prejudicial conflict of interest. In both cases, the failure of the trial court to secure a waiver did not result in any actual prejudice. The ruling of the trial court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT, COMBS:

Katherine A. Kingren
Louisville, Kentucky

BRIEF FOR APPELLANT, ENGLE:

Kim Brooks
Covington, Kentucky

BRIEF FOR APPELLEE, IN 1999-
CA-002290-MR:

Albert B. Chandler, III
Attorney General of Kentucky
Frankfort, Kentucky

Elizabeth A. Heilman
Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE: IN 1999-
CA-002112-MR

Albert B. Chandler, III
Attorney General of Kentucky
Frankfort, Kentucky

John E. Zak
Assistant Attorney General
Frankfort, Kentucky