

RENDERED: OCTOBER 1, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2003-CA-000333-MR

CHARLES BLAINE DAILEY

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT  
HONORABLE SAMUEL LONG, JUDGE  
ACTION NO. 01-CR-00052-001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

\*\* \*\* \* \* \*

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Charles Dailey appeals from a judgment of the Carter Circuit Court, entered February 5, 2003, convicting him, following a jury trial, of complicity to third-degree assault<sup>1</sup> and attempted first-degree escape.<sup>2</sup> The court sentenced Dailey to concurrent terms of incarceration totaling five years.

---

<sup>1</sup> KRS 508.025 and KRS 502.020.

<sup>2</sup> KRS 520.020 KRS 506.010.

Dailey contends that the trial court erred by denying his request to represent himself, by denying his motions for a directed verdict, and by sending written witness statements to the jury room for the jury's consideration during its deliberation. We agree that the court did not adequately inquire into Dailey's asserted waiver of his right to counsel. Accordingly, we vacate the judgment and remand.

The charges against Dailey stemmed from an incident at the Carter County Detention Center during the early morning of May 1, 2001. Dailey was an inmate at the center. At about 5:00 a.m. his cell mate, John Knipp, called for assistance from the lone guard because Dailey, who had a history of heart problems, was complaining of chest pains. When the guard entered the cell to bring medicine to Dailey, Knipp struck him on the back of the head with a brick he had pried from the wall. Although knocked to one knee and momentarily stunned, the guard weathered the blow, called for help from two deputies who happened to be visiting him, and managed to subdue Knipp, whom he then isolated in a separate cell. Dailey remained on his cot during the assault. Paramedics were summoned to assist him, but they found no evidence of a heart attack. At Dailey's request, however, they transported him to the hospital, where further testing failed to discover any irregularity. He was returned to the detention center that afternoon.

During the investigation of the assault, inmates reported that Dailey and Knipp had plotted to escape by luring the guard to their cell with a false heart-attack alarm and then overpowering him with the dislodged brick. Dailey's failure to join the assault had allegedly elicited from Knipp the comment, "Thanks a lot for the help." Based largely on these statements, the Commonwealth charged Dailey with complicity in the assault and with attempted escape. He was indicted on June 28, 2001, and apparently was promptly appointed a public defender. A public defender appeared with him at his arraignment on August 9, 2001, at which time trial was scheduled for March 12, 2002.

On August 29, 2001, Dailey filed a pro se motion for a speedy trial. The court thereupon rescheduled trial for November 13, 2001. In October, the public defender moved to withdraw because of a conflict, and conflict counsel entered his appearance. In short order, this new counsel moved to withdraw the speedy-trial motion and to continue the trial. The trial court granted the motions and rescheduled trial for June 6, 2002. For reasons that do not appear in the record, in June the matter was again continued and reset for January 7, 2003.

In November 2002, Dailey moved pro se to have the case dismissed because he had been denied his right to a speedy trial. The motion alleged that conflict counsel had been appointed without Dailey's knowledge or consent and that

counsel's motion to withdraw the speedy-trial motion had also been made unbeknownst to Dailey. Dailey asserted that his intention was to proceed pro se. Without any inquiry into Dailey's assertion of his right to waive counsel, the court denied the motion by order entered December 10, 2002. Dailey appealed pro se from that denial.<sup>3</sup>

On the morning of trial, but before jury selection had commenced, Dailey moved to represent himself and to dispense with appointed counsel. The court asked Dailey if he had read the rules of evidence and procedure. When Dailey claimed that he had, the court asked him how many jurors the clerk would initially call forward and what was a peremptory challenge. Dailey did not know, whereupon the court summarily denied his motion. Dailey contends that the denial violated his right to defend himself. We agree.

In Hill v. Commonwealth,<sup>4</sup> our Supreme Court recently had occasion to reiterate that the right to counsel embodied in the Sixth Amendment to the United States Constitution and Section 11 of the Kentucky Constitution is accompanied by a concomitant right to waive counsel and represent oneself. When a defendant unambiguously indicates his desire to exercise this

---

<sup>3</sup> The appeal was dismissed as having been brought from an interlocutory order.

<sup>4</sup> Ky., 125 S.W.3d 221 (2004).

right, the trial court has a duty to establish on the record that the defendant is waiving or limiting his right to counsel voluntarily, knowingly, and intelligently. As the Supreme Court held,

[f]irst, the trial court must hold a hearing in which the defendant testifies on the question of whether the waiver is voluntary, knowing, and intelligent. . . . Second, during the hearing, the trial court must warn the defendant of the hazards arising from and the benefits relinquished by waiving counsel. . . . Third, the trial court must make a finding on the record that the waiver is knowing, intelligent, and voluntary.<sup>5</sup>

The defendant's lack of legal expertise is irrelevant to this inquiry.<sup>6</sup> The defendant must be competent to stand trial<sup>7</sup> and must evince an understanding of the stakes involved and the disadvantages he will face by proceeding on his own.<sup>8</sup>

The right to waive counsel, however, can itself be waived if not timely asserted. The general rule seems to be that a request to proceed pro se is timely if made prior to jury

---

<sup>5</sup> 125 S.W.3d at 226. (citations omitted).

<sup>6</sup> Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975).

<sup>7</sup> Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680, 125 L. Ed. 2d 321 (1993).

<sup>8</sup> Faretta v. California, *supra*.

selection or meaningful trial proceedings.<sup>9</sup> Even a timely request may be denied, moreover, if it appears to have been made not in good faith but merely as a tactic to delay the trial.<sup>10</sup>

The trial court in this case did not address any of these factors and did not determine on the record either that Dailey's waiver of counsel was involuntary or was asserted for the sake of delay. We sympathize with the court's concern that Dailey's lack of expertise would likely render him a poor advocate for his cause, but the right of self representation is not limited to those who can represent themselves well. The court's denial of Dailey's motion to proceed pro se was therefore erroneous. Accordingly, we must vacate Dailey's judgment of conviction and remand this matter for a hearing as described in Hill v. Commonwealth. If Dailey's waiver of counsel is found to be knowing, voluntary, and intelligent and not asserted for the sake of delay, he will be entitled to represent himself at a new trial. If his asserted waiver does not meet the standards discussed above, however, the court's February 5, 2003, judgment shall be reinstated.

---

<sup>9</sup> Robards v. Rees, 789 F.2d 379 (6<sup>th</sup> Cir. 1986); United States v. McKenna, 327 F.3d 830 (9<sup>th</sup> Cir. 2003); United States v. Young, 287 F.3d 1352 (11<sup>th</sup> Cir. 2002).

<sup>10</sup> Robards v. Rees, *supra*; Fritz v. Spalding, 682 F.2d 782 (9<sup>th</sup> Cir. 1982).

As this ruling indicates, we are not persuaded that the trial court erred by denying Dailey's motions for a directed verdict. We review the denial of a directed verdict motion by asking whether "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt."<sup>11</sup> If not, then the denial of the motion is to be upheld.

Here, the Commonwealth's proof that Dailey knew of and participated in the assault and attempted escape included the suspicious coincidence of his heart pains and Knipp's arming himself with the brick when a lone guard was on duty; the medical tests indicating that Dailey's heart was normal; the guard's testimony that immediately after the blow, when he was knocked to his knee, Dailey began to rise from the cot, but lay down again when the guard recovered and called for help; and an inmate's testimony that his former statement, in which he claimed that Dailey had talked about feigning a heart attack so he could escape, and that Knipp had made the "thanks for the help" remark, was the truth. Although there was also testimony from that inmate and another inmate that their former statements had been based on rumors circulating in the detention center after the assault and not on direct knowledge, and although Knipp testified that Dailey had not been involved, a juror could

---

<sup>11</sup> Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991).

reasonably conclude that Dailey and Knipp attempted to escape by orchestrating an assault on the guard.

Nor is Dailey entitled to relief because written statements by the two inmate witnesses were sent to the jury room. We agree with Dailey that this was an error. Our Supreme Court has explained that testimonial exhibits are not to be sent to the jury room because of the risk that such exhibits will be given undue weight.<sup>12</sup> As Dailey admits, however, the error was not preserved. As it was submitting the case to the jury, the trial court announced that all of the exhibits would accompany the jury to the jury room. Dailey did not object. Generally, of course, unpreserved errors do not provide grounds for relief.<sup>13</sup>

An exception to this rule exists under RCr 10.26 for palpable errors. As Dailey notes, palpable errors may be reviewed even though unpreserved. Our Supreme Court has described a palpable error as

one that affects the substantial rights of a party and will result in manifest injustice if not considered by the court, and what it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial

---

<sup>12</sup> Berrier v. Bizer, Ky., 57 S.W.3d 271 (2001).

<sup>13</sup> CR 9.22; Grundy v. Commonwealth, Ky., 25 S.W.3d 76 (2000) (citing McDonald v. Commonwealth, Ky., 554 S.W.2d 84 (1977)); Commonwealth v. Preece, Ky., 844 S.W.2d 385 (1992).



possibility that the result would have been any different, the irregularity will be held nonprejudicial.<sup>14</sup>

The error of sending the two short witness statements to the jury room does not meet this standard. The error was not one of admissibility but only one of possibly overemphasizing the inmates' written statements. The trial was short, however, and the inmates' live testimony was still fresh. Dailey's counsel, moreover, emphasized the live testimony during his closing argument. There is not a substantial possibility that the verdict would have been different had the written statements not been sent to the jury room.

Dailey, therefore, is not entitled to have his conviction reversed. He is entitled, however, to a hearing on his motion to represent himself. He will be entitled to a new trial if the court finds that he validly waived his right to counsel. Accordingly, we vacate the February 5, 2003, judgment of the Carter Circuit Court and remand for additional proceedings consistent with this opinion.

ALL CONCUR.

---

<sup>14</sup> Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 836 (2003).

BRIEFS FOR APPELLANT:

Richard Hoffman  
Assistant Public Advocate  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Perry T. Ryan  
Assistant Attorney General  
Frankfort, Kentucky