

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001420-MR

VERNARDO G. BROWN

APPELLANT

v. APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 06-CR-00035

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY, SENIOR
JUDGE.

THOMPSON, JUDGE: Vernardo G. Brown appeals from a judgment of
conviction in the Jessamine Circuit Court for flagrant non-support. For the reasons
stated herein, we affirm.

On March 10, 2006, Brown was indicted for flagrant non-support. At
his arraignment, the trial court asked Brown if he desired appointed counsel.

Brown responded that he did not trust the Jessamine County court system and would represent himself. Despite Brown's request to proceed *pro se*, the trial court appointed him a public advocate who filed an entry of appearance on September 7, 2006.

On April 27, 2007, the trial court conducted a *Faretta*¹ hearing with Brown and, by then, his two appointed counsel. During the hearing, the trial court, Brown, and his two counsel engaged in an extensive discussion of pre-trial and trial proceedings. Specifically, the trial court explained the *voir dire* process, opening statements, the nature of each party's case-in-chief, and closing arguments to Brown. The trial court required Brown to delineate his and his counsel's roles at each stage of the proceedings.

Further, the trial court explained the proper method of conducting cross-examinations and informed Brown that he could not testify while personally conducting cross-examination. The trial court further informed Brown that his self-representation could turn the jury against him if he became too forceful in cross-examining witnesses. Although recognizing that the law required a jury to decide a case based solely on the facts, the trial court informed Brown that jurors might consider other factors beyond its control, particularly, if he represented himself.

The trial court further explained the implications of Brown's testimony either in the narrative or through his trial counsel's direct examination.

¹ *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Although the trial court cautioned him regarding the potential detrimental consequences of his unguided testimony, Brown decided to testify in the narrative with the slight help of his trial counsel to remind him of any omitted facts. Brown then discussed other witnesses and evidence that he wanted to introduce at trial.

At the conclusion of the hearing, the trial court issued a written order, finding that Brown had “knowingly, intelligently, and voluntarily” waived his right to counsel and would serve as co-counsel in his trial. Subsequently, Brown was found guilty of flagrant non-support and was sentenced to five-years’ imprisonment. This sentence was probated for five years after the service of five months in jail. This appeal followed.

Brown first contends that the trial court erred when it failed to conduct an adequate *Faretta* hearing because the trial court did not fulfill its three duties under *Hill v. Commonwealth*, 125 S.W.3d 221, 226 (Ky. 2004). He contends that the trial court’s failure to conduct an adequate *Faretta* hearing deprived him of his right to competent representation and constitutes a “structural error” necessitating the reversal of his conviction. We disagree.

When a defendant requests to make a limited or complete waiver of his Sixth Amendment right to counsel, a trial court must conduct a *Faretta* hearing which requires the completion of three steps. *Hill v. Commonwealth*, 125 S.W.3d 221, 226 (Ky. 2004). “First, the trial court must hold a hearing in which the defendant testifies on the question of whether the waiver is voluntary, knowing, and intelligent.” *Id.* “Second, during the hearing, the trial court must warn the

defendant of the hazards arising from and the benefits relinquished by waiving counsel.” *Id.* The trial court must then make a finding on the record that the waiver was knowingly, intelligently, and voluntarily. *Id.*

From a review of the record, we believe that the trial court conducted an adequate *Faretta* hearing. The videotape record clearly demonstrates that Brown voluntarily made the decision to proceed with limited counsel and that he understood the significance of his choice. The trial court explained to Brown in great detail the requirements of self-representation in criminal trials and the potential negative consequences of the undertaking. Despite these discussions and warnings, Brown decided to serve as co-counsel and committed himself to placing the local court system on trial.

Further, the trial court’s written order, entered on May 1, 2007, provided that it had warned Brown of the hazards of self-representation. The order provided that Brown had insisted on participating in his own defense despite being notified of the potential consequences of such action. The trial court then wrote that it was clear from the hearing that Brown’s “waiver was made knowingly, intelligently, and voluntarily.” Having reviewed the record, we conclude that the trial court’s order was proper.

Brown next contends that the trial court erred when it failed to grant him a directed verdict of acquittal on the charge of flagrant non-support. Specifically, he contends the Commonwealth failed to prove that he could reasonably provide child support because it failed to refute his allegation that his

illiteracy prevented him from obtaining sufficient employment to provide for his child. We disagree.

Our review of the denial of a motion for directed verdict is governed by the standard set forth in *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991):

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Id. at 187.

After reviewing the evidence, we conclude that it was not clearly unreasonable for the jury to find Brown guilty of flagrant non-support. While Brown testified that he was unemployed during the two-year period listed in the indictment and that he was illiterate, the Commonwealth presented evidence that Brown was a high school graduate with no mental or physical limitations which would prevent him from obtaining employment. Accordingly, the jury was presented with sufficient evidence to conclude that Brown's failure to support his daughter was a voluntary decision.

Brown next contends that the Commonwealth's improper introduction of his two prior convictions during the penalty phase of the trial was prejudicial. He contends that the Commonwealth repeatedly informed the jury that he had been convicted of third-degree burglary although he pled guilty to the amended offense of first-degree criminal trespass. Brown further contends that his harassment conviction should have been precluded because he was denied a jury trial. Thus, he contends that the trial court should have excluded the conviction absent the Commonwealth's introduction of evidence to refute his constitutional violation claim. After reviewing these unpreserved errors, we disagree.

Under Kentucky Rules of Criminal Procedure (RCr) 10.26, an appellate court may review unpreserved errors for palpable error. *Bell v. Commonwealth*, 245 S.W.3d 738, 741 (Ky. 2008). Palpable errors are errors which affect the substantial rights of a defendant. *Id.* An error is not palpable unless it is so easily perceptible and obvious that a "manifest injustice" will result if appropriate relief is not granted. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003). Palpable error analysis boils down to whether or not there is a substantial possibility that the defendant's case would have resulted differently absent the error. *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006).

During the penalty phase, the Commonwealth introduced a certified copy of Brown's Fayette Circuit Court judgment of conviction for first-degree criminal trespass. On the certification page of the judgment, it provided that Brown had been indicted for third-degree burglary. While the Commonwealth

should have redacted any reference to the burglary, Brown's counsel informed the jury that the charge had been amended down to a misdemeanor and the judgment of conviction confirmed this statement. Accordingly, the Commonwealth's misstatement created no substantial possibility of prejudice because the jury was put on notice of the misstatement.

Likewise, Brown's contention that the introduction of his harassment conviction was palpable error must fail. Even if we assume that the prior conviction was improperly admitted, a harassment conviction is not a felony or an otherwise violent crime which would with reasonable probability incite a jury to take unjust retributive action against a defendant. Although the jury recommended a five-year sentence, Brown's conduct during the trial, including his harsh cross-examination of his child's mother, the introduction of his total arrears beyond the amount listed in the indictment, and his unorthodox manner of trying a case was likely the contributing factor of the jury's recommendation.

Brown next contends that the Commonwealth failed to provide timely discovery of the convictions that it intended to introduce against him during the penalty phase of the trial. He contends that the Commonwealth's untimely disclosure of his prior convictions prevented him from adequately preparing a defense to mitigate their effect. Although conceding that this error was not preserved by a contemporaneous objection, he contends that the Commonwealth's failure to timely disclose his prior convictions was palpable error. We disagree.

The record does not disclose if there was a discovery violation due to either Brown’s unanswered discovery request or the Commonwealth’s failed pledge to provide copies of his prior convictions. Even if there was a discovery violation, the reversal of a conviction is unwarranted unless there is a “reasonable probability” that the discovery violation altered the result of the trial. *Weaver v. Commonwealth*, 955 S.W.2d 722, 725 (Ky. 1997). In this case, Brown has not produced any evidence that would support a reasonable probability that the outcome of his trial would have been different even with timely discovery. Therefore, even if there was a discovery violation, the error would not be palpable.

For the foregoing reasons, the judgment of conviction of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gene Lewter
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Heather M. Fryman
Assistant Attorney General
Frankfort, Kentucky