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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000882-MR

ROBERT DAVIS — APPELLANT

v.

APPEAL FROM NELSON CIRCUIT COURT
HONORABLE CHARLES C. SIMMS III, JUDGE
ACTION NO. 04-CR-00283

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; TAYLOR AND VANMETER, JUDGES.

VANMETER, JUDGE: Robert G. Davis appeals from a Nelson Circuit Court order revoking his conditional discharge for failure to pay child support. We reverse and remand for further findings.

In 2004, Davis entered a plea of guilty to one count of flagrant non-support. His arrearage at that time stood at $10,396.50. Under the terms of his plea agreement, he received a sentence of five years discharged on the condition

that he pay $400 per month towards support and the arrearage. He was also required to show good behavior and commit "no substantial violations of the law."

A Rule was entered on October 2, 2009, notifying Davis of a hearing at which he would be required to show cause why his conditional discharge should not be revoked for failure to pay child support. At that time, he owed an arrearage of over $25,000. Initially, Davis could not be located, and the trial court issued a bench warrant for his arrest. He was eventually returned from Texas, where he had been incarcerated. In his defense, Davis argued that he had spent all but seven months of the time since he entered his guilty plea imprisoned in Kentucky and in Texas. He claimed that he had gone to Texas to find his birth mother in order to get a valid social security number which he needed to get a job. The trial court entered a revocation order after finding that Davis had been out of prison for seven months and had failed to pay child support during that time. This appeal followed.

Davis raises two arguments on appeal: first, that his due process rights were violated because the Commonwealth failed to prove that he willfully refused to pay child support, and because the trial court failed to inquire into the reasons for his failure to pay or to consider alternatives to incarceration; and second, that the trial court committed reversible error by failing to hold a *Faretta*[1] hearing after Davis stated that he would prefer not to have an attorney.

In *Bearden v. Georgia*, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983), the United States Supreme Court held that minimum due process

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

requirements must be met before a defendant's probation is revoked for failure to pay restitution. Recently, the Kentucky Supreme Court held that payment of past due child support constitutes restitution and that therefore the *Bearden* due process requirements must be observed in revocation proceedings, even when (as in Davis's case) the defendant has agreed to pay child support under the terms of his plea agreement. It held that the trial court must consider:

> (1) whether the probationer made sufficient bona fide attempts to make payments but been unable to do so through no fault of his own and, if so, (2) whether alternatives to imprisonment might suffice to serve interests in punishment and deterrence.

Commonwealth v. Marshall, 345 S.W.3d 822, 828 (Ky. 2011) (citation omitted).

The court in *Marshall* further stated that

> [t]he trial court must specifically identify the evidence it relies upon in making these determinations on the record, as well as the specific reason(s) for revoking probation on the record. Although . . . such findings do not necessarily have to be in writing, we hold that the trial court must make such findings specifically on the record. It is not enough that an appellate court might find some evidence in the record to support a reason for revoking probation by reviewing the whole record. Stating "general conclusory reasons" for revoking probation is not enough[.]

Id. at 833-34.

In this case, the trial court made oral findings that Davis had been out of prison for a total of seven months since the entry of his plea but had made no child support payments during that time. The trial court further stated that it was not the court's responsibility to take care of Davis's problems with getting a valid

social security number. The trial court's written findings state: "Failure to pay child support. Defendant was out of prison for 7 months. He failed to pay any child support." These findings constitute the type of "general conclusory reasons" that do not meet the standard outlined in *Marshall*. The matter is therefore remanded for the trial court to make findings on the record regarding whether Davis had made sufficient bona fide attempts to make payments but had been unable to do so through no fault of his own and, if so, whether alternatives to imprisonment might suffice to serve interests in punishment and deterrence.

Davis argues that the Commonwealth bears the burden of proof of showing that his failure to pay child support was willful. According to *Marshall*, however,

> [t]he Commonwealth has the burden of proving a probation violation by a preponderance of the evidence. But if the Commonwealth has shown that payment conditions were violated by the defendant's failure to make the required payments, the probationer bears the burden of persuading the trial court that he made bona fide efforts to comply with payment conditions but was unable to do so through no fault of his own.

Id. at 834 (citation omitted).

In this case, no dispute exists that the Commonwealth met its burden of proving a violation of the terms of Davis's discharge. Davis therefore bears the burden of persuading the trial court that he was unable to comply with the discharge conditions through no fault of his own.

Davis also argues that the trial court committed reversible error in failing to allow him to represent himself and to hold a *Faretta* hearing. While we believe this issue is moot since we are reversing and remanding, we will briefly address this issue since it may arise again on remand. *See Riley v. Gibson*, 338 S.W.3d 230, 233 (Ky. 2011) (stating that "'[c]apable of repetition, yet evading review' is a well-recognized exception to the mootness doctrine, although one to be used sparingly.").

In *Grady v. Commonwealth*, 325 S.W.3d 333, 341 (Ky. 2010), the Kentucky Supreme Court summarized the current state of Sixth Amendment jurisprudence that had transpired since the rendering of *Faretta* in 1975.

> The Sixth Amendment of the United States Constitution and Section Eleven of the Kentucky Constitution provide a defendant with the right to counsel. However, this Court and our federal counterpart have recognized that neither constitution prohibits the defendant from waiving this right. *See [Iowa v.] Tovar*, 541 U.S. 77, 124 S.Ct. 1379 [(2004)]; *Faretta*, 422 U.S. 806, 95 S.Ct. 2525; *Depp [v. Commonwealth]*, 278 S.W.3d 615 [(Ky. 2009)]; *[Commonwealth v.]* Terry, 295 S.W.3d 819 [(Ky. 2009)]. However, when a defendant exercises his right to waive the assistance of counsel, *Faretta* advisory obligations are triggered and a trial court must ensure that the defendant makes his waiver knowingly, intelligently, and voluntarily. *Depp*, 278 S.W.3d at 617 (*citing Hill v. Commonwealth*, 125 S.W.3d 221 (Ky.2004)). The *Faretta* advisory obligations are likewise activated when a defendant invokes his right to hybrid counsel. *Wake v. Barker*, 514 S.W.2d 692, 697 (Ky.1974). In circumstances involving sole or hybrid pro se representation, the right to be warned of the general dangers that one will face when choosing to proceed pro se is a separate and independent right that accompanies the right to represent oneself in front of his jury in any

manner. *See Depp*, 278 S.W.3d at 618 (where we recognized "that [the right to self-representation is] accompanied by the right to be informed by the trial court of the dangers inherent in doing so."); *[s]ee also Wake*, 514 S.W.2d at 697 (where we recognized a defendant's right to limited assistance of counsel per Section Eleven of the Kentucky Constitution). Thus, a trial court may honor a defendant's right to self-representation, but may then violate the defendant's right to be informed of the general dangers by failing to take the requisite steps mandated by *Tovar*, *Faretta*, and *Depp*.

The actions required of a trial court addressing a defendant's waiver of counsel, however, are not rigidly defined. In fact, as a result of the United States Supreme Court's holding in *Tovar*, 541 U.S. at 90, 124 S.Ct. 1379, this Court abandoned the brightline approach we embraced in *Hill*, reasoning that its strict requirements were antithetical to judicial economy and common sense. *Depp*, 278 S.W.3d at 618–19. Indeed, we supplanted *Hill*'s inflexible requirements with a pragmatic approach whereby we simply question on appeal, in light of the entire record and on a case-by-case basis, whether the defendant's waiver of counsel was done knowingly, intelligently, and voluntarily. *Terry*, 295 S.W.3d at 820. Notwithstanding our abrogation of *Hill*'s rigid approach, we have maintained and recognized that there are certain minimal determinations required of a court that faces an invocation of *Faretta*. *See Depp*, 278 S.W.3d at 619 (where we acknowledged that the United States Supreme Court requires constitutional minimums for determining whether a waiver is knowing and intelligent).

In particular, we noted in *Terry* that the trial court must ensure that the defendant is proceeding with "eyes open," and to do so "he must be warned *specifically* of the hazards ahead" and of the possible consequences of a decision to forgo the aid of counsel. *See Terry*, 295 S.W.3d at 822 (*quoting Tovar*, 541 U.S. at 88, 124 S.Ct. 1379) (emphasis added). Implicit in this determination of whether a defendant is proceeding with eyes open is the requirement that the court hold a *Faretta* hearing, as such

> a determination can rarely be made in passing or without consideration of case-specific factors such as the defendant's education, experiences, sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding. *Depp*, 278 S.W.3d at 617 (*quoting Tovar*, 541 U.S. at 88, 124 S.Ct. 1379). To do less will result in structural error and will merit appellate correction. *See Hill*, 125 S.W.3d at 229 (*citing Faretta*, *supra*). *See also McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). More importantly, a finding that the defendant is proceeding with eyes open cannot be made without sufficiently advising him of the dangerous grounds he asks to tread. Only when the defendant has been warned may a court determine that he proceeds with knowledge, intelligence, and of his own volition. But, again, we reiterate that a *Faretta* hearing, while required when a defendant invokes his *Faretta* rights, does not mandate that a court follow a script or employ magic words, but it does necessitate a finding that the defendant is proceeding with "eyes open"—that he gets a general warning of the dangers.

Grady, 325 S.W.3d at 341-42.

In this case, and at his first appearance in court upon his return from Texas, Davis informed the trial court that he would prefer not to have an attorney, and then immediately stated that he had been in prison and that "my request would be to be released so I can pay [the arrears]." The trial court told him that he would need an attorney to track down his records because the fact that he had been in jail was "certainly a defense." Davis apparently acquiesced and never raised the issue of representing himself again. Davis's comment was made in the context of explaining to the court that an attorney was unnecessary because he was requesting release in order to work and pay his child support. We question, therefore, whether

Davis invoked his right to defend himself. This issue, however, is not required to be resolved in light of our remand for findings as required by *Marshall v. Commonwealth*.

The order revoking Davis's conditional discharge is reversed and the matter is remanded in order for the trial court to make findings in accordance with the requirements set forth in *Marshall*.

ALL CONCUR.

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