

RENDERED: JANUARY 30, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001426-MR

ROGER WAYNE WHITAKER

APPELLANT

APPEAL FROM HARDIN CIRCUIT COURT
v. HONORABLE KEN M. HOWARD, JUDGE
ACTION NO. 12-CR-00050

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND
REMANDING

*** * * * *

BEFORE: DIXON, JONES, AND VANMETER, JUDGES.

DIXON, JUDGE: Roger Wayne Whitaker, who represented himself at trial, was convicted of receiving stolen property and being a first-degree persistent felony offender (PFO). The Hardin Circuit Court entered a judgment reflecting the jury's verdict and sentencing Whitaker to ten years' imprisonment. Whitaker now appeals, arguing that his conviction should be vacated because the court

improperly denied his request for the assistance of appointed counsel. After careful review, we agree that the court's decision was erroneous; accordingly, we reverse the conviction and remand for further proceedings.

Whitaker was indicted on charges of receiving stolen property and being a first-degree PFO. The Commonwealth alleged that Whitaker had been in possession of stolen copper wire, which he subsequently sold to a scrap yard. On June 5, 2012, the court determined that Whitaker was indigent and appointed the Department of Public Advocacy to represent him; thereafter, Whitaker was arraigned, and the court set a trial date of February 18, 2013. Whitaker's public defender, Susie Hurst, filed an entry of appearance and requested discovery, which the Commonwealth provided on July 19, 2012. From the record, it appears nothing happened in this case for approximately six months; thereafter, the court entered an order *sua sponte* setting the case for a pretrial conference on February 5, 2013. Although Hurst remained counsel of record, Whitaker appeared at the pretrial conference without counsel, stating his public defender had not returned his phone calls. The court asked an unidentified person in the courtroom if the public defender's office was representing Whitaker. The individual responded that the office had closed its file on Whitaker with the notation that he had private counsel. The court then asked Whitaker if he wanted to represent himself. Whitaker stated he could represent himself and asked if his attorney could assist him as co-counsel in conducting the trial. The court ignored Whitaker's request for co-counsel and questioned Whitaker about his ability to represent himself. At

the conclusion of the hearing, the court continued the case for one week, and Whitaker asserted that he would hire an attorney to look at the evidence.

On February 12, 2013, Whitaker advised the court that he wanted to represent himself and proceed with a guilty plea that had been offered to him by the Commonwealth. The court conducted a hearing pursuant to *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), and concluded Whitaker was voluntarily waiving his right to counsel and that he was capable of representing himself. The court then conducted a guilty plea colloquy, based on the Commonwealth's offer of one year, probated for one year (with unsupervised probation recommended), dismissal of the PFO charge, and restitution of \$1,347.70, to be paid by the sentencing date.

On April 2, 2013, Whitaker appeared for sentencing. Whitaker requested additional time to pay restitution, which the Commonwealth did not oppose. The court advised Whitaker that it would require supervised probation if he was unable to pay the full amount of restitution that day. Whitaker stated it was not feasible for him to meet the obligations of supervised probation, explaining that he had been working for a plumbing company in Louisville and would not be able to miss work to report to probation and parole in Hardin County. The court apologized for inconveniencing Whitaker and advised him that it was setting the case for a jury trial on July 1, 2013. The court then told Whitaker that his case was "becoming more complicated" and asked if he wanted to hire an attorney. Whitaker opined that he could not afford to hire an attorney and asked the court to

appoint a public defender to represent him. When the court asked Whitaker about his plumbing job, he explained that he had been working full time for approximately six months, earning \$15.25 per hour. The court then reviewed Whitaker's affidavit of indigency from June 2012, and concluded that, based on Whitaker's current income, he did not qualify for representation by a public defender. The court advised Whitaker that he had the choice to represent himself or hire a private attorney.

The jury trial was held as scheduled, and Whitaker was not represented by counsel. Before the trial began, the court reiterated its prior finding that Whitaker did not qualify for a public defender, and Whitaker acknowledged that he would represent himself during trial. Whitaker was found guilty and sentenced to ten years' imprisonment. This appeal followed.

Whitaker contends the trial court erred by refusing to appoint counsel to represent him at trial. We agree.

RCr 3.05(2) provides, in relevant part:

If the defendant demonstrates that he or she is a needy person as defined in KRS 31.120 and the court so concludes, then the appointment shall continue for all future stages of the criminal proceeding, including appeal. Such appointment may be terminated by the court in which the proceeding is pending at any time upon a showing that defendant is able to employ counsel.

KRS 31.120(2) sets forth a number of factors for the court to consider when determining whether a person is indigent:

(a) Income;

- (b) Source of income;
- (c) Property owned;
- (d) Number of motor vehicles owned and in working condition;
- (e) Other assets;
- (f) Outstanding obligations;
- (g) The number and ages of his or her dependents;
- (h) The poverty level income guidelines compiled and published by the United States Department of Labor;
- (i) Complexity of the case;
- (j) Amount a private attorney charges for similar services;
- (k) Amount of time an attorney would reasonably spend on the case; and
- (l) Payment of money bail, other than a property bond of another, whether deposited by the person or another, to secure the person's release from confinement on the present charge of which he or she stands accused or convicted; and
- (m) Any other circumstances presented to the court relevant to financial status.

In *Tinsley v. Commonwealth*, 185 S.W.3d 668 (Ky. App. 2006), this Court examined the statutory authority regarding the appointment of counsel and concluded that trial courts are obligated “to comply with the mandates of KRS 31.120 in determining indigency.” *Id.* at 674. The Court observed, “[I]f a defendant raises the issue of indigency, a hearing must be held thereon for a determination in accordance with the requirements set forth in KRS Chapter 31, and the court must enter findings at the conclusion thereof. If the findings support indigency, counsel shall be appointed.” *Id.* at 675. *See also, Baker v. Commonwealth*, 185 S.W.3d 668 (Ky. App. 2007).

The record in this case reveals that, in June 2012, Whitaker was indigent and a public defender was appointed. Whitaker’s public defender remained counsel of

record throughout the proceedings, and the court did not take any steps to terminate the appointment of counsel. At the hearing on February 5, 2013, appointed counsel did not appear, and the court questioned Whitaker regarding whether he was prepared to represent himself. The court ultimately conducted a *Farettta* hearing, and Whitaker represented himself during the subsequent guilty plea colloquy. On April 2, 2013, when Whitaker decided he could not go through with the plea agreement, he advised the court he could not afford to hire an attorney and asked for a public defender to represent him at trial. The court reviewed Whitaker's affidavit of indigency from June 2012, which indicated he had a part-time job and owned no real property or other assets. When the court asked about current employment, Whitaker asserted he had been working full time for approximately six months, earning \$15.25 per hour; however, he also opined that a private defense attorney had quoted him a minimum fee of \$5,000.00 to take the case to trial. Despite Whitaker's contention that he could not afford an attorney, the court matter-of-factly announced that, due to his income, he did not qualify for a public defender.

It is clear that the court failed to follow the mandates of KRS 31.120 when assessing Whitaker's indigency. *Tinsley* at 674. The court did not make written findings to support its decision, and it appears the court based its decision solely on the fact that Whitaker had been working full time during the preceding six months. While Whitaker's income was undoubtedly one component of the analysis, the court failed to consider any of the other statutory factors applicable to a

determination of indigency. We conclude the court's decision was erroneous; consequently, Whitaker's conviction must be reversed. We decline to address the remaining issues raised by Whitaker.

For the reasons stated herein, we reverse the judgment of the Hardin Circuit Court and remand this case for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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