

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000380-MR

ERNEST BOOKER

APPELLANT

APPEAL FROM BOYD CIRCUIT COURT
v. HONORABLE JOHNNY RAY HARRIS, SPECIAL JUDGE
ACTION NO. 13-CR-00136

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND THOMPSON,
JUDGES.

KRAMER, CHIEF JUDGE: Ernest Booker appeals the Boyd Circuit Court's judgment convicting him of twelve counts of the use of a minor in a sexual performance and one count of third-degree rape. After a careful review of the record, we affirm the judgment in part regarding the denial of Booker's motion to

suppress. However, we reverse the judgment in part concerning the denial of Booker's motion to represent himself, and we remand the case for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Patrolman Lucas Burr of the Ashland Police Department swore out an affidavit for a search warrant that stated:

The affiant Patrolman Lucas Burr[,] a peace officer of Ashland Police Department [b]eing first duly sworn, states that he has and there is reasonable and probable grounds to believe and affiant does believe that there is now on the premises known and numbered as a two[-] story dwelling located at 616 10th Street, Ashland, Boyd County, Kentucky, more fully described below.

And more particularly described as follows: the dwelling is fronted by a red brick porch on the corner of 10th Street and the Midtown Parking Lot.

* * *

The following described personal property, to wit: Cellphones, cameras, video equipment, etc.

Acting on the information received, affiant conducted the following independent investigation:

Upon a complaint by the mother of S.B., a juvenile female, who is 15 years and whose date of birth is June 21, 1997, that she had been subjected to sexual abuse by a[] male adult who is known as Saveon Booker whose address is believed to be 616 10th Street, which is a two[-]story house with a red brick porch, a single[-]dwelling house, and to search the dwelling for any and all cellphones, cameras, videos, and the person of Saveon Booker, and any and all evidence related to any sexual abuse against the above-referenced juvenile.

* * *

Affiant has been an officer in the aforementioned agency for a period of 1 year[] and the information and observations contained herein were received and made in his capacity as an officer thereof.

On the 19[th] day of January 2013, at approximately 8:00 p.m., affiant received information from:

The mother of [S.B.], as set forth above that [S.B.] had been sexually abused by an adult male, aged about 23 years, whose name is believed to be Saveon Booker and whose address is set forth above. The information received revealed that it is the belief of the undersigned officer that the offense has been videotaped or recorded by the offender. This affidavit is made in support of a search warrant to obtain the camera, cellphone or smartphone that recorded the offense.

A search warrant was issued by a judge of the Boyd District Court.

The search warrant provided for a search of

the premises known and numbered as 616 10th Street, Ashland, Boyd County, Kentucky. And more particularly described as follows: A two[-]story dwelling fronted by a red brick porch located at the corner of 10th street and Midtown shopping center.

* * *

And/or on the person or persons or:
Saveon Booker, or the adult black male dwelling [in] the above . . . dwelling.

The following described personal property, to wit:
Person of Saveon Booker.

The search was performed. During the search, videos and photographs were found of S.B. and of another young woman. The counts involving the alleged crimes against S.B. were indicted in case number 13-CR-

00034. An investigation was conducted, and the other young woman was identified as B.G. Regarding his alleged crimes against B.G., Booker was indicted in case number 13-CR-00136 on thirteen counts of possession of matter portraying a sexual performance by a minor; thirty-nine counts of the use of a minor in a sexual performance, under the age of eighteen; one count of the use of a minor in a sexual performance, under the age of 16; and one count of third-degree rape.

Days after the search warrant was signed, both judges of the Boyd District Court recused themselves from the case. Soon thereafter, both judges of the Boyd Circuit Court also recused from the case. A special judge was then assigned to the case.

Booker moved to suppress the results of the search on the basis that the district court judge who signed the search warrant was not neutral and detached, as required by law. Booker alleged that the complainant, upon whose allegations the police officer based his affidavit in support of the search warrant, was the secretary for the judge who signed the search warrant. The complainant was the mother of S.B., and S.B. was the initial alleged victim.

A suppression hearing was held, during which Patrolman Burr testified that he did not list S.B.'s full name, nor her mother's name, on his affidavit for the search warrant,¹ and he did not recall telling the judge the name of either S.B. or her mother. Patrolman Burr attested that although he had worked as a policeman for the Ashland Police Department for a year before seeking to obtain

¹ He testified that S.B. did not want her full name used on the affidavit.

the search warrant in this case, he did not know at that time that S.B.'s mother worked for the judge.

During the suppression hearing, defense counsel informed the circuit court that he had issued a subpoena that morning, which was supposed to be delivered to the judge who signed the search warrant. However, the judge had his docket at the time of the suppression hearing, so he was not there to testify. The court asked defense counsel if he had a return slip on the subpoena to show it was served on the judge, and defense counsel responded that he did not. The court informed defense counsel that even if the judge had shown up, there was very little the judge could testify to about the case, pursuant to the Code of Judicial Conduct. The court explained that the judge could testify if it was his signature on the search warrant, or he could testify "yes, I did that, [or] no, I [did not] do that," but the judge would be limited to testifying in response to other questions. The circuit court explained that the judge could not testify about his basis for issuing the search warrant, and that if those questions were asked of the judge, the court would have to advise him, according to the Code of Judicial Conduct, "not to answer those questions." Defense counsel stated that if he could examine the judge, he would ask if the judge was told who the victim was and if he was told that she was related to his secretary. The court responded by telling defense counsel that the judge would not have to answer those questions. The circuit court further explained that it would not forbid the judge from answering those questions, but that it would tell the judge that he might want to review the Code of Judicial

Conduct before answering them. The bailiff checked to see if the judge was outside the courtroom and ready to testify, but he was not. Counsel for each side made further arguments concerning the motion to suppress. The circuit court then denied the motion to suppress.

Booker sent a letter to the circuit court asking to be permitted to fire his defense counsel and to represent himself. The circuit court treated Booker's letter as a motion to proceed *pro se*. The court held an *ex parte* hearing on the motion with Booker and one of his attorneys present. Ultimately, the court denied Booker's motion after finding that Booker was not competent to represent himself.

Booker moved to sever the two cases against him. The circuit court granted the motion.^{2, 3}

Following the jury trial in this case, in which B. G. was the victim, Booker was convicted of twelve counts of the use of a minor in a sexual performance and one count of third-degree rape. The remaining charges against him in this case were dismissed. Booker was sentenced to serve ten years of imprisonment for each of his twelve convictions for the use of a minor in a sexual performance, to be served concurrently with each other. He also was sentenced to serve five years of imprisonment for the third-degree rape, and this sentence was ordered to run consecutively to the sentences he received for his twelve

² The Commonwealth moved to amend the indictment in this case to correct the date of the thirteen charges of possession of matter portraying a sexual performance by a minor. The circuit court granted the motion.

³ Booker states in his opening appellate brief that the charges in the other case were ultimately dismissed.

convictions for the use of a minor in a sexual performance that he received in this case.

Booker now appeals, contending that the circuit court: (a) erred in denying him his constitutional right to represent himself at trial; and (b) committed reversible error in failing to suppress the items discovered from the execution of the search warrant, which was not signed by a neutral and detached magistrate.

II. ANALYSIS

A. MOTION TO PROCEED *PRO SE*

Booker first alleges that the circuit court erred in denying his constitutional right to represent himself at trial. Booker sent two letters to the circuit court asking for permission to represent himself at trial. The letters were sent in a timely fashion, *i.e.*, months before the scheduled trial date. A hearing was held concerning the letters, during which the court stated at various times that Booker did not know the law or proper procedures to follow. These were the only substantive reasons the court gave for not allowing him to proceed *pro se*. At one point Booker asked the court to explain what it meant when it told him that if he represented himself, he would harm his own case. The court responded by telling Booker to read the letter Booker had written to the court. Booker replied that this response did not clarify anything for him, and the court then responded that it was not there to give him legal advice and that his counsel was there to advise him. Counsel then explained to him that the court stated Booker did not know what to

do pre-trial as evidenced by his filing “frivolous” motions,⁴ and he likely would not know what to do during the trial. Defense counsel would better understand the trial process and the rules of evidence to follow than he would if he were to represent himself. Booker asked the court at that time whether the court would instruct the jail where he was incarcerated to provide him with adequate resources in terms of case law. The court responded that if the jail did not have a library, he could not force them to provide him with one. The court then denied him the right to represent himself because the court opined that he was not “capable of representing [him]self.”

The Kentucky Supreme Court has held that when a defendant seeks to represent himself at trial, “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.” *Grady v. Commonwealth*, 325 S.W.3d 333, 342 (Ky. 2010) (internal quotation marks and citation omitted). In the present case, the circuit court erred in not warning Booker of the dangers he faced if he were to represent himself.

Additionally, “a defendant’s ‘technical legal knowledge’ or skill is not relevant in determining whether he may waive counsel.” *Hummel v. Commonwealth*, 306 S.W.3d 48, 52 (Ky. 2010) (quoting *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). Consequently, the circuit

⁴ It appears that the “frivolous” motions to which the court was referring were Booker’s two letters to the court asking to be permitted to represent himself at trial.

court erred in denying Booker's request to represent himself at trial based on his lack of legal knowledge and proper trial procedure.

Moreover, the Commonwealth concedes that the circuit court erred in denying Booker's request to represent himself. As the Commonwealth correctly states, this is a structural error. *See Grady*, 325 S.W.3d at 342. Consequently, we must reverse based upon this claim.

B. MOTION TO SUPPRESS

Booker also contends that the circuit court committed reversible error in failing to suppress the items discovered from the execution of the search warrant, which he claims was not signed by a neutral and detached magistrate.⁵ As previously mentioned, the complainant upon whose statements Patrolman Burr based his affidavit in support of the search warrant was the secretary of the judge who issued the search warrant. The complainant was the mother of S.B., and S.B. was the initial alleged victim. During the search that was conducted pursuant to the search warrant, evidence was found regarding possible crimes by Booker against S.B., but also against the victim in this case, B.G. According to Booker's opening appellate brief, the charges against him in the initial case, in which S.B. was the alleged victim, were ultimately dismissed. However, the charges in the present case ultimately resulted in his convictions, which are now at issue. Booker

⁵ The Commonwealth notes in its brief that Booker moved to represent himself after the court had already ruled on the motion to suppress that is at issue in this appeal. Therefore, the circuit court's error in denying Booker his right to represent himself had no bearing on the circuit court's denial of his motion to suppress. Consequently, the denial of the motion to suppress is an independent issue to consider.

contends that the evidence found during the search should have been suppressed as fruits of an unconstitutional search because the search was conducted pursuant to a warrant that was not signed by a neutral and detached magistrate.

The Kentucky Supreme Court has stated:

When reviewing an order denying a motion to suppress, we consider the trial court's findings of fact "conclusive" if they are "supported by substantial evidence." RCr^[6] 9.78. Using those facts [if supported], the reviewing court then conducts a *de novo* review of the trial court's application of law to those facts to determine whether the decision is correct as a matter of law.

King v. Commonwealth, 374 S.W.3d 281, 286 (Ky. 2012) (internal quotation marks and citation omitted).

"Section 10 of the Kentucky Constitution and the Fourth Amendment to the United States Constitution prohibit unreasonable searches and seizure. One of the fundamental elements of these constitutional protections is that a detached and neutral magistrate must find probable cause for a search before a warrant is issued." *Dixon v. Commonwealth*, 890 S.W.2d 629, 631 (Ky. App. 1994). Thus, in order to protect citizens from unreasonable searches and seizures, "the determination of probable cause to search is to be made by a neutral issuing authority rather than by the law enforcement officers responsible for its execution." *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 832 (Ky. 2003).

Judges are

governed by a code of ethics[,] . . . [known as] the Code of Judicial Conduct (Code) codified at Supreme Court

⁶ Kentucky Rule of Criminal Procedure.

Rule (SCR) 4.300. Canon 2 of the Code states, “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” Canon 3E(1) requires that a judge disqualify himself when his impartiality “might reasonably be questioned.”

Brandenburg, 114 S.W.3d at 832. The Kentucky Supreme Court held in *Brandenburg* that “there need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns.” *Brandenburg*, 114 S.W.3d at 834. Additionally, the Court noted that although

there is little difference in the language of Section 10 of the Kentucky Constitution and the Fourth Amendment to the U.S. Constitution, . . . [the Kentucky Supreme Court] has at no time denied itself the right to enhance the protections afforded the citizens of this Commonwealth by the Kentucky Constitution. The need for such enhanced protection is particularly evident when the nature of the error goes to the accused’s right to have a probable cause determination made by a neutral and detached judicial officer. An error of this magnitude taints the entire judicial process. The error can only be cured by suppression of any evidence obtained pursuant to the tainted search, regardless of the good faith of all the parties.

Brandenburg, 114 S.W.3d at 835 (citations omitted).

Booker contends that, pursuant to *Dixon* and *Brandenburg*, his motion to suppress should have been granted because the judge who signed the search warrant in this case was not a neutral and detached magistrate. However, in both *Dixon* and *Brandenburg*, the people who signed the search warrants were aware of the potential conflict of interest before they signed the warrants. In the present

case, Patrolman Burr's affidavit did not list the victim by name, nor the victim's mother (*i.e.*, the complainant) by name. Patrolman Burr testified that he also did not recall telling the judge the name of either S.B. or her mother when he went to the judge's home at 1:00 a.m. to obtain the search warrant. Further, no evidence was produced to show that the judge was aware of the full name of either S.B. or her mother at the time that he signed the search warrant.⁷ Therefore, this case is distinguishable from *Dixon* and *Brandenburg*. Those cases concerned whether the people who signed the search warrants should have recused before doing so because they knew of the potential conflicts of interest at the time that the warrants were signed.

Rather, this case is more akin to the situation discussed in *Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467 (Ky. 2010). In *Petzold*, the Kentucky Supreme Court discussed retroactive recusal, *i.e.*, what should occur in a case when a judge has already presided over proceedings in that case during which, unbeknownst to the judge at the time, he or she had a conflict of interest. The Court in *Petzold* examined the United States Supreme Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), in which "the United States Supreme Court considered the federal judicial disqualification statute, [28 U.S.C. §455(a), which is] similar to

⁷ We pause to note that the question of whether the circuit court would have allowed the judge to testify, or whether the judge would have answered any questions about his knowledge of the identities of the complainant or the victim, is a moot point because no evidence was produced to show that the judge was even served with the subpoena requiring him to appear for the suppression hearing.

KRS^[8] 26A.015,⁹ i.e., Kentucky’s judicial disqualification statute. *Petzold*, 303 S.W.3d at 471-72. In *Petzold*, the Court held “that the same standard [as discussed in *Liljeberg*] should guide Kentucky courts in determining whether a judgment should be vacated as a result of a violation of SCR 4.300 E(1) or KRS 26A.015.” *Petzold*, 303 S.W.3d at 474.

The *Petzold* Court stated that “the relevant inquiry is whether a reasonable person with knowledge of all of the relevant circumstances relating to the unknown conflict would expect the judge to have actual knowledge of the claimed conflicting interest or bias.” *Petzold*, 303 S.W.3d at 473. In the present case, a reasonable person would not expect the judge to have known that the person whose initials were S.B. was the daughter of his secretary, or that his secretary was the complainant in the case, when the complainant’s name was not stated on the affidavit in support of the search warrant.

Moreover, “[e]ven where an actual disqualifying condition is discovered after entry of judgment, it does not follow automatically that the judgment must be vacated.” *Petzold*, 303 S.W.3d at 473. As discussed *supra*, the Kentucky Supreme Court in *Petzold* held that the same standard should be used in

⁸ Kentucky Revised Statute.

⁹ KRS 26A.015(2)(a) pertains to the present case. It states:

Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:

- (a) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding[.]

Kentucky courts for “determining whether a judgment should be vacated as a result of a violation of SCR 4.300 E(1) or KRS 26A.015” as was used by the United States Supreme Court in *Liljeberg. Petzold*, 303 S.W.3d at 474. In *Liljeberg*, the United States Supreme Court stated as follows concerning violations of the federal judicial disqualification statute, 28 U.S.C. §455(a):

We conclude that in determining whether a judgment should be vacated for a violation of §455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public’s confidence in the judicial process. We must continuously bear in mind that “to perform its high function in the best way justice must satisfy the appearance of justice.”

Petzold, 303 S.W.3d at 473 (quoting *Liljeberg*, 486 U.S. at 864, 108 S.Ct. 2194).

Applying the standards set forth in *Liljeberg* and adopted in *Petzold* to the facts of this case, there is no reason to vacate the judgment. First, there is no evidence that the judge knew that the complainant was his secretary, or that the victim was his secretary’s daughter, so there is no risk of injustice to Booker. Second, there is no risk that the denial of relief in this case will produce injustice in other cases because the facts of this case are unique to this case. Finally, there is no risk of undermining the public’s confidence in the judicial process because, as we explained *supra*, a reasonable person would not expect the judge to have known that the person whose initials were S.B. was the daughter of his secretary, or that his secretary was the complainant in the case, given that the complainant’s name was not stated on the affidavit in support of the search warrant.

Consequently, the circuit court did not err when it denied Booker's motion to suppress.

Accordingly, the judgment of the Boyd Circuit Court is affirmed in part regarding the denial of Booker's motion to suppress. However, the judgment is reversed in part regarding the denial of Booker's motion to represent himself, and the case is remanded for further proceedings.

ALL CONCUR.

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