

RENDERED: AUGUST 17, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001258-MR

DALE HARMON

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 15-CR-00051

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: DIXON, JOHNSON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Dale Harmon brings this appeal from a judgment and sentence of imprisonment entered in the Breathitt Circuit Court on July 26, 2016, upon a jury verdict finding him guilty of cultivation of marijuana, five or more plants (Kentucky Revised Statutes (KRS) 218A.1423) and sentencing Harmon to two-years' imprisonment. We reverse and remand.

Harmon was indicted by a Breathitt County Grand Jury upon one count of cultivating marijuana, five or more plants. Harmon entered a plea of not

guilty, and the case proceeded to a jury trial on June 20, 2016. The jury found Harmon guilty of the charged offense, and sentenced him to two-years' imprisonment. This appeal follows.

Harmon contends the circuit court denied him due process of law by compelling him to appear before the jury wearing identifiable jail clothing. For the following reasons, we agree.

On the evening before Harmon's jury trial was scheduled to begin, trial counsel delivered Harmon's military dress uniform and shoes to the jail. Counsel informed jail personnel that Harmon's trial was scheduled to begin the following morning and that Harmon would need to be permitted to change into his military dress uniform before being transported to court. When Harmon arrived for trial the next morning, he was wearing his jail-issued shirt, jail-issued pants, and jail-issued flip-flops. Counsel informed the trial court of the situation and expressed her concern that Harmon would suffer prejudice if the jury saw him in the jail-issued clothing. The trial judge replied that he had allowed Harmon to borrow a white button-down dress shirt and that Harmon's wife could retrieve the military dress uniform and shoes from the jail.

Rather than wait for Harmon's wife to return with his military dress uniform and shoes, the court proceeded with the trial as scheduled. *Voir dire* of the jury began at approximately 9:00 a.m. Harmon was present in the courtroom

wearing the jail-issued pants and flip-flops with the white dress shirt provided by the judge. At approximately 11:30 a.m., trial counsel informed the court that Harmon's wife had returned with the military uniform and shoes. The trial court permitted Harmon to be excused to change into his military uniform.

It is well-established that an accused criminal defendant should never be compelled to stand trial before a jury wearing identifiable prison or jail clothing. Kentucky Rules of Criminal Procedure (RCr) 8.28(5); *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); 9 Leslie W. Abramson, *Kentucky Practice – Criminal Practice & Procedure* § 24.54 (5th ed. 2017). In *Estelle*, the United States Supreme Court held that an accused cannot, consistent with the Fourteenth Amendment, be compelled to stand trial before a jury wearing “identifiable prison clothes.” *Estelle*, 425 U.S. at 512. However, the Court explained that failure to object to being tried in identifiable prison clothes “is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.” *Id.* at 513.

The Kentucky Supreme Court adopted the reasoning of *Estelle* in *Scrivener v. Commonwealth*, 539 S.W.2d 291 (Ky. 1976). In *Scrivener*, the Supreme Court recognized that compelling an accused criminal defendant to appear before a jury in identifiable prison or jail clothing violated the defendant's constitutional rights under the Fourteenth Amendment. *Id.* The Supreme Court

further stated that compelling an accused to appear before a jury in prison or jail clothes is unacceptable due to the possible impairment of the presumption of innocence that is so very basic to our adversary system.¹ *Id.*

In the case *sub judice*, Harmon was compelled, over counsel's objection, to appear before the jury wearing his jail-issued pants and flip-flops along with a white button-down shirt the judge provided. Although Harmon was eventually permitted to change into his military dress uniform, the jury had already observed Harmon in the jail-issued clothing, and we must presume that he was prejudiced thereby. The jury was also permitted to observe Harmon leave the courtroom in jail-issued pants, jail-issued flip-flops and a white shirt and then return in his military uniform. Furthermore, there was an obvious delay in the trial proceedings while Harmon changed into his military uniform. This waiting period further highlighted the fact that after Harmon left the courtroom he returned in his military uniform. Under these facts, we conclude the presumption of innocence that is so basic to our adversary system was violated. Therefore, we are compelled

¹ The Court in *Scrivener v. Commonwealth*, 539 S.W.2d 291, 292 (Ky. 1976), likewise, pointed out:

Similarly troubling is the fact that compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial. Persons who can secure release are not subjected to this condition. To impose the condition on one category of defendants, over objection, would be repugnant to the concept of equal justice embodied in the Fourteenth Amendment. *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956).

to reverse Harmon's conviction consistent with the dictates of *Estelle*, 425 U.S. at 512 and *Scrivener*, 539 S.W.2d at 292.

In sum, we hold that compelling Harmon to appear before the jury, over the objection of counsel, in identifiable prison or jail clothing, was prejudicial and violative of the Fourteenth Amendment. Therefore, we reverse Harmon's conviction upon the charge of cultivating marijuana, five or more plants, and remand for proceedings consistent with this Opinion.

Any other issues raised by Harmon in this appeal are rendered moot.

For the foregoing reasons, the order of the Breathitt Circuit Court is reversed and remanded for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Shannon Dupree
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEES:

Andy Beshear
Attorney General of Kentucky
Frankfort, Kentucky

M. Brandon Roberts
Assistant Attorney General
Frankfort, Kentucky