

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001952-MR

JAMES D. SMITH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 17-CR-001024

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, KRAMER, AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: This is James D. Smith's direct appeal from a judgment of conviction for flagrant nonsupport¹ following a jury trial. He was sentenced to five years' imprisonment. After carefully reviewing the record, we affirm.

Smith has two children, L.L., born in 1998, and K.L., born in 2001.

¹ Kentucky Revised Statutes (KRS) 530.050(2), a Class D felony.

Both were born to Keisha LeBlanc. On July 19, 2002, a child support order was entered requiring Smith to pay \$174.29 per month in current child support and \$10.00 per month to apply to his arrearages. In 2003, he was charged with flagrant nonsupport, which was amended down to nonsupport.² Smith made no payments between April 12, 2012 and November 21, 2016. During that time period, his monthly child support responsibility was \$622.70 and his arrearages amounted to \$34,456.07.

On April 12, 2017, Smith was indicted for flagrant nonsupport. At his arraignment on April 17, 2017, Smith entered a plea of not guilty and informed the court of his desire to represent himself in this case. On May 2, 2017, the court held a hearing as required by *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L. Ed. 2d 562 (1975). The court permitted Smith to proceed *pro se* and represent himself at trial. Following a jury trial, Smith was found guilty of flagrant nonsupport, and he was sentenced to five years' imprisonment. This appeal now follows.

On appeal, Smith raises three issues stemming from the jury trial: (1) the trial court committed reversible error when it allowed Smith to represent himself at trial; (2) the trial court erred when it did not allow Smith to be recalled

² KRS 530.050(1), a Class A misdemeanor.

to the witness stand; and (3) the trial court erred when it did not allow Smith to present mitigating evidence during the penalty phase of the trial.

As to the first claim on appeal, Smith and the Commonwealth agree that it has not been preserved but debate which standard of review governs this type of claim. Smith contends that *Hill v. Commonwealth*, 125 S.W.3d 221 (Ky. 2004), mandates “structural error” review. The Commonwealth, on the other hand, states that palpable error analysis is required for this unpreserved claim pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.26; Smith has also requested palpable error review in the alternative.

Structural error exists in only a few types of cases. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999).³ The Supreme Court of Kentucky has stated that failure to hold a *Faretta* hearing after the defendant invokes his right to proceed *pro se* constitutes structural error. *Swan v. Commonwealth*, 384 S.W.3d 77, 93 (Ky. 2012) (citations omitted). When a trial court does not follow the proper due process principles espoused in *Faretta* when a defendant requests to represent himself, the error is structural and therefore fatal as

³ The United States Supreme Court has identified the following types of claims that may contain structural errors: (1) complete denial of counsel; (2) biased trial judge; (3) racial discrimination in grand jury selection; (4) denial of self-representation; (5) denial of public trial; (6) defective reasonable-doubt jury instruction; and (7) erroneous deprivation of the right to counsel of choice. *Id.*; *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S. Ct. 2557, 165 L. Ed. 2d 509 (2006).

affecting “the framework within which the trial proceeds[.]” *Hill*, 125 S.W.3d at 228-29 (citation omitted). In the case before us, there is no dispute that the trial court conducted a *Faretta* hearing after Smith requested to proceed *pro se*. Accordingly, this case does not need to be reviewed for structural error, and instead, we review for palpable error.

A proper request to proceed without counsel “must be: (1) timely; (2) unequivocal; and (3) knowing, intelligent, and voluntary.” *King v. Commonwealth*, 374 S.W.3d 281, 290 (Ky. 2012). The requirements that the request be timely and unequivocal are conditions precedent to the *Faretta* hearing. Smith satisfied both of those prerequisites, evidenced by the fact that he specifically requested to proceed *pro se* at his arraignment and that the trial court immediately scheduled a *Faretta* hearing. We, then, turn to the final requirement: that the defendant’s decision to proceed without representation is made knowingly, intelligently, and voluntarily.

It has long been established that when faced with a defendant desiring to represent himself, a trial court must make the defendant “aware of the dangers and disadvantages of self-representation” so that his decision is “made with eyes open.” *Faretta*, 422 U.S. at 835, 95 S.Ct. 2541 (internal quotations and citations omitted). But the decision to waive counsel does not “require an appreciably higher level of mental functioning than the decision to waive other constitutional

rights.” *Godinez v. Moran*, 509 U.S. 389, 390, 113 S. Ct. 2680, 2682, 125 L. Ed. 2d 321 (1993). In *Commonwealth v. Terry*, 295 S.W.3d 819, 822 (Ky. 2009), our Supreme Court suggested certain questions be asked in order to comply with *Faretta*, and the colloquy here was substantially similar to the suggested line of questioning offered in *Terry*.

During the colloquy, the court informed Smith of the current charges against him and the accompanying penalty range. The court then told Smith that it would not offer assistance or advice on how to represent himself and how to comply with the procedural rules. The court also inquired as to Smith’s previous experience with self-representation, to which Smith stated he had represented himself in a prior case.

The court advised Smith against representing himself, but ultimately concluded that he could do so. “A trial court may not prevent a defendant from exercising his right to proceed *pro se* just because it disapproves of the defendant’s motives[.]” *King*, 374 S.W.3d at 295. Although Smith represented that he believed the court system to be a corporation and any defense counsel would be working with the prosecutors and the judge, the court did not prevent him from representing himself.

Specifically, Smith argues on appeal that he was incompetent to make the decision as to whether to proceed *pro se*, as evidenced by his confusing, false,

and illogical statements throughout these proceedings.⁴ The court, however, asked if Smith had ever been found incompetent to stand trial, and Smith responded in the negative. The court then stated that Smith seemed aware of what he was doing and the decision he was making. As explained in *Commonwealth v. Berry*, the inquiry involved with a *Faretta* hearing is whether Smith “competently waived his right, not whether he was competent to represent himself.” 184 S.W.3d 63, 68 (Ky. 2005) (citation omitted). The colloquy involved here satisfies such an inquiry. Furthermore, Smith’s interactions with the court and those involved in these proceedings demonstrate that he is competent, and any deviation from the procedural rules was due to a lack of knowledge and an unwillingness to conform, rather than incompetence.

In sum, the court verified repeatedly that Smith did not want to hire counsel or have counsel appointed for him and confirmed that his decision to represent himself was voluntary. The court satisfied its responsibility under *Faretta*, and we discern no error in allowing Smith to proceed without counsel.

Smith claims next that the trial court erred in not permitting him to recall himself to the witness stand. At trial, Smith called himself to testify and he

⁴ It should be noted that it appears that Smith espoused “sovereign citizen” philosophies and arguments throughout these proceedings. The footnote in *Cubar v. Town & Country Bank and Trust Company*, 473 S.W.3d 91, 93 n.1 (Ky. App. 2015), is instructive in understanding the positions of this anti-government group.

informed the jury of his medical issues, which he argued at trial prevented him from paying his child support obligations. The following day Smith wished to set forth additional testimony after retrieving medical documents that he did not have previously. The trial court denied this request.

We review the trial court's decision involving the examination of witnesses for abuse of discretion. *Mullikan v. Commonwealth*, 341 S.W.3d 99, 104 (Ky. 2011). The standard for abuse of discretion is “whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

“[T]he trial court has inherent authority to control the trial proceedings and specific authority under [Kentucky Rules of Evidence (KRE)] 611(a) to control the mode of interrogation of witnesses.” *Mullikan*, 341 S.W.3d at 104. This includes “avoid[ing] needless consumption of time” and “mak[ing] the interrogation and presentation effective for the ascertainment of the truth[.]” KRE 611(a).

The court did not allow Smith to retake the stand because there was no indication that he was going to offer any more evidence that would further the ascertainment of the truth and to do so would unnecessarily consume valuable time, given that he had already testified on his own behalf regarding his medical

problems. Additionally, Smith's fiancée provided lay witness testimony on his medical problems. Thus, we conclude that the court's decision was not an abuse of discretion.

Last, Smith contends that the trial court erred in barring him from presenting mitigating evidence during the penalty phase. This assertion is at odds with the record, which demonstrates that Smith was allowed to present mitigating evidence, including testimony regarding his medical issues. He was simply not permitted to present evidence, such as medical records, without an expert witness and authentication, of which the court informed him on numerous occasions. KRE 702; KRE 901.

It is not apparent how Smith was prejudiced by the court's decision to bar some of the evidence he wished to present. Smith was able to present testimony on his medical condition, and any further evidence of the same variety was unlikely to change the outcome of the trial. Thus, the trial court did not err regarding the penalty phase evidence.

For the foregoing reasons, the Jefferson Circuit Court order is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Karen Shuff Maurer
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Joseph A. Beckett
Assistant Attorney General
Frankfort, Kentucky