

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001704-MR

DYLAN SCHIMP

APPELLANT

APPEAL FROM TRIGG CIRCUIT COURT
v. HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NOS. 15-CR-00098, 15-CR-00099, 15-CR-00100, 15-CR-00101,
15-CR-00102, 15-CR-00103, 15-CR-00104, AND 15-CR-00105

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GOODWINE, SPALDING, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Dylan Schimp appeals from orders of the Trigg

District Court and Trigg Circuit Court. Appellant argues that he should not have

been transferred from the Trigg District Court, Juvenile Division, to the Trigg

Circuit Court for prosecution as a youthful offender. Appellant also argues that he

was denied a fair competency hearing in the circuit court and that the circuit court

erred in not holding an evidentiary hearing on his motion to withdraw his guilty plea. Having reviewed the record and the arguments, we find no error and affirm.

During relevant parts of this case, Appellant was a co-defendant with Ray Stidham. Stidham has already had an appeal of his case heard in this Court. We will utilize that case's recitation of facts.

In the fall of 2015, Stidham, age 16, [Schimp, age 15, and another juvenile] confessed to breaking into several homes in the Cumberland Shores subdivision in Trigg County, Kentucky. The trio removed some property from the homes. They also set fires in two of them. One fire burned a pillow at 78 Redbird Street. The other fire led to an explosion that destroyed the entire home at 42 Indiana Street.

According to Trigg County Sheriff's Deputy Craig Young, the youths confessed to placing aerosol cans in the oven at 42 Indiana Street and turning it on. The co-defendants evidently sought to destroy fingerprint evidence through this process. Regardless, they were charged with eight second-degree burglary counts and two second-degree arson counts.

Initially, Stidham was prosecuted in the district court's juvenile division. The Commonwealth later filed to transfer the case to circuit court pursuant to Kentucky Revised Statute (KRS) 635.020 and KRS 640.010. The district court held a hearing on the transfer motion on November 10, 2015.

At the hearing's outset, the district court explained that it would engage in the two-step process required under KRS 640.010(2). It would first hold a probable cause hearing to determine if there was sufficient evidence that an offense had been committed and Stidham committed it. If probable cause was found, the

district court would then determine the transfer issue. The only testifying witness during the hearing was Deputy Young.

In addition to providing the foregoing information relating to the explosion at 42 Indiana Street and the general location of the alleged burglaries, Deputy Young also testified that the co-defendants admitted breaking windows to enter the homes and that they abandoned some stolen property in a nearby sinkhole. He further added that one of the burglarized homes was where Stidham lived with his grandfather.

Based on Deputy Young's testimony, the district court found probable cause that Stidham [and Schimp] committed the offenses. It then proceeded to address the transfer issue. The district court applied the eight factors set forth in KRS 640.010(2)(b) to the evidence and found that factors (1), (5), and (6) favored transfer. In its order transferring Stidham as a youthful offender, the district court succinctly stated the following reasons for the transfer: "This is an alleged arson of a home along with numerous burglaries. The seriousness of the offense and the need for protection of the public require transfer." Stidham's [and Schimp's cases were] consequently transferred to the circuit court.

Stidham v. Commonwealth, No. 2017-CA-000156-MR, 2018 WL 6721329, at *1

(Ky. App. Dec. 21, 2018) (footnote and citation omitted).

When Appellant reached the circuit court, he entered a plea of not guilty. His attorney then filed a motion to remand the case back to the juvenile court. The court held a hearing, but ultimately denied the motion. Appellant then entered a guilty plea conditioned on his right to appeal the transfer issue. The plea agreement was for a sentence of 17 years' imprisonment.

After entering the conditional guilty plea, but before he was sentenced, Appellant's mother gave information to the court that Appellant had a history of learning disabilities. Given this information, the court, *sua sponte*, ordered a psychiatric evaluation to determine Appellant's competency to stand trial and to have entered a guilty plea.

A competency hearing was scheduled, and Dr. Robert Sivley was assigned to evaluate Appellant. Dr. Sivley interviewed Appellant, filed a report, and testified at the hearing. Before the hearing occurred, Appellant filed a motion to withdraw his guilty plea. He argued that it was not made knowingly, intelligently, and voluntarily. The motion was to be heard on the same day as the competency hearing.

On the day of the competency hearing, Appellant's attorney¹ appeared telephonically. Dr. Sivley testified on behalf of the Commonwealth and Appellant's attorney cross-examined him. Dr. Sivley testified that he believed Appellant was competent to stand trial and enter a guilty plea. Appellant did not testify. The trial court found Appellant was competent based on Dr. Sivley's testimony.

The trial court then moved on to the motion to withdraw. Appellant's attorney asked for an *ex parte* hearing on the issue. The basis of the motion, and

¹ We should note that this was Appellant's third attorney since the inception of this case.

the reason behind the request for an *ex parte* hearing, was because Appellant was going to argue that the guilty plea was not made knowingly, intelligently, and voluntarily due to ineffective counsel. Appellant believed his counsel did not prepare a defense or adequately communicate with him; therefore, his plea was not knowing, intelligent, or voluntary. The Commonwealth objected to the *ex parte* hearing. The court declined to grant an *ex parte* hearing.

The trial court then asked if defense counsel wanted Appellant to testify. Counsel indicated that he would first want to prepare Appellant for an adversarial proceeding and asked for a continuance. The Commonwealth objected and argued defense counsel should have been prepared to proceed on that day. The trial court ruled that there would not be another hearing and that he would rule on the motion to withdraw based on the record. A few days later the court entered an order denying the motion.

Appellant was eventually sentenced to 17 years' imprisonment as a youthful offender pursuant to the plea agreement and this appeal followed.

Appellant's first argument on appeal is that the juvenile court erroneously transferred his case to the circuit court because there was a lack of evidence to support it.

Under KRS 635.020(2), a child charged with a capital offense, a Class A felony, or a Class B felony, who was older than 14 at the time he allegedly committed the offense, may be prosecuted as a youthful

offender in accordance with KRS 640.010. The decision to transfer pursuant to KRS 640.010 is reviewed for an abuse of discretion. *Stout v. Commonwealth*, 44 S.W.3d 781, 786 (Ky. App. 2000).

Stidham at *2. Before a child can be transferred to the circuit court, the juvenile court must hold a preliminary hearing pursuant to KRS 640.010(2). KRS 640.010(2) states:

(a) At the preliminary hearing, the court shall determine if there is probable cause to believe that an offense was committed, that the child committed the offense, and that the child is of sufficient age and has the requisite number of prior adjudications, if any, necessary to fall within the purview of KRS 635.020.

(b) If the District Court determines probable cause exists, the court shall consider the following factors before determining whether the child's case shall be transferred to the Circuit Court:

1. The seriousness of the alleged offense;
2. Whether the offense was against persons or property, with greater weight being given to offenses against persons;
3. The maturity of the child as determined by his environment;
4. The child's prior record;
5. The best interest of the child and community;
6. The prospects of adequate protection of the public;

7. The likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system; and

8. Evidence of a child's participation in a gang.

(c) If, following the completion of the preliminary hearing, the District Court finds, after considering the factors enumerated in paragraph (b) of this subsection, that two (2) or more of the factors specified in paragraph (b) of this subsection are determined to favor transfer, the child may be transferred to Circuit Court, and if the child is transferred the District Court shall issue an order transferring the child as a youthful offender and shall state on the record the reasons for the transfer. The child shall then be proceeded against in the Circuit Court as an adult, except as otherwise provided in this chapter.

(d) If, following completion of the preliminary hearing, the District Court is of the opinion, after considering the factors enumerated in paragraph (b) of this subsection, that the child shall not be transferred to the Circuit Court, the case shall be dealt with as provided in KRS Chapter 635.

Here, Appellant argues that Deputy Young's testimony was insufficient proof to meet the eight factors listed in KRS 640.010(2)(b).

“[I]n setting out the reasons for the transfer, the lower court must be specific enough to permit a meaningful review for the purpose of determining whether there has been compliance with the statute.” *Harden v. Commonwealth*, 885 S.W.2d 323, 325 (Ky. App. 1994) (footnote and citations omitted). Also, “the decision must be supported by substantial evidence to pass judicial review[.]” *Stout v. Commonwealth*, 44 S.W.3d 781, 788 (Ky. App. 2000). “[S]ubstantial

evidence’ is ‘[e]vidence that a reasonable mind would accept as adequate to support a conclusion’ and evidence that, when ‘taken alone or in the light of all the evidence, . . . has sufficient probative value to induce conviction in the minds of reasonable men.’” *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnotes omitted).

In the case at hand, the order transferring the case to the circuit court states: “This is an alleged arson of a home along with numerous burglaries. The seriousness of the offenses and the need for protection of the public require transfer.” In addition, the trial court discussed the transfer factors on the record after the transfer hearing concluded. We will address each factor and discuss the court’s statements.

1. Seriousness of the alleged offense: The court stated that arson of a home was a serious offense and included the potential for the loss of life of the firefighters responding to the fire. The court held that this factor supported transfer.
2. Offense against person or property: The alleged offenses were against property only; therefore, this factor did not support transfer.
3. The maturity of the child based on his environment: No evidence was introduced regarding Appellant’s maturity. The court mentioned the fact that Appellant set fire to the home in order to try to cover up their crimes, which suggested maturity, but in considering Appellant’s age, did not believe he was very mature. This factor did not support transfer.
4. The child’s prior record: Appellant’s attorney stated that

Appellant had a prior misdemeanor conviction in Florida. The court took Appellant's counsel at his word and found that this single misdemeanor conviction did not support transfer. 5. The best interests of the child and the community: The court stated that the number of offenses in this case showed that it would be in the best interests of the community to transfer Appellant to circuit court. No evidence was introduced regarding Appellant's best interests although defense counsel generally argued it would be better for Appellant if he remained in juvenile court. 6. Prospects of adequate protection of the public: The court believed these alleged offenses should be addressed to the "fullest extent" and this factor supported transfer. 7. The likelihood of rehabilitation if Appellant remained with the juvenile justice system: No evidence was put on regarding the services offered by the juvenile justice system, but defense counsel generally argued that Appellant would be better off with the Department of Juvenile Justice and the court stated that this factor would favor the defense and not support transfer. 8. Evidence of gang participation: There was no evidence of Appellant having gang affiliation; therefore, this factor would not support transfer.

Once the juvenile court determined that at least two of the factors favored transfer, it then weighed all the factors to determine if transfer to the circuit court was appropriate. Even though the court found more factors supported allowing Appellant's case to remain in juvenile court, the court believed that the

seriousness of the offenses necessitated the transfer to circuit court. It is clear after reviewing the court's order and the transfer hearing that the juvenile court judge considered all the KRS 640.010(2)(b) factors and did not abuse his discretion in transferring Appellant's case to circuit court.

Appellant's next argument on appeal is that trial counsel not being physically present at the competency and withdrawal-of-plea hearing violated his rights. Appellant admits that this issue is not preserved and asks for palpable error review pursuant to Kentucky Rule of Criminal Procedure (RCr) 10.26.

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

RCr 10.26. "[I]f upon consideration of the whole case the reviewing court does not conclude that a substantial possibility exists that the result would have been any different, the error complained of will be held to be nonprejudicial." *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986) (citation omitted).

For an error to be palpable, it must be "easily perceptible, plain, obvious and readily noticeable." A palpable error "must involve prejudice more egregious than that occurring in reversible error[.]" A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings. Thus, what a palpable error analysis "boils down to" is whether the reviewing court believes there is a "substantial possibility" that the result in the case would have been

different without the error. If not, the error cannot be palpable.

Brewer v. Commonwealth, 206 S.W.3d 343, 349 (Ky. 2006) (footnotes omitted).

Appellant argues that the competency and plea hearings were critical stages of the proceedings against him and his counsel should have been physically present. Appellant claims that without being physically present, counsel could not adequately question Dr. Sivley and could not confer with Appellant. We disagree. Due to a scheduling mistake, Appellant's counsel did not appear for the competency hearing. The trial court called counsel and he agreed to appear telephonically. Appellant's counsel was able to cross-examine Dr. Sivley during the hearing. Appellant's counsel did not request to confer with Appellant at any time. Nor did he request to examine Appellant for the competency hearing. Counsel also declined to allow him to testify during the plea withdrawal hearing. There is no evidence what could have occurred differently had counsel been physically present at the hearings. Appellant had the benefit of counsel and there was no violation of his rights or other error.

Appellant also asks for palpable error review regarding events at the competency hearing. Appellant takes issue with the fact that there was no evidence that Dr. Sivley was specialized in assessing juvenile defendants. Appellant also argues that the court did not consider Appellant's age in

determining competency. Finally, Appellant argues that there was no determination that Appellant was competent during his transfer hearing.

We believe these arguments are without merit and do not rise to the level of palpable error. First, there is no evidence that Dr. Sivley was not qualified to examine Appellant. This would have been an appropriate question for cross-examination, but it was not brought up. Also, Dr. Sivley considered Appellant's age and education level and this was part of his report and testimony. The trial court specifically stated he was considering Dr. Sivley's report and testimony. Finally, Appellant did not request a competency evaluation for the date of the transfer hearing and does not suggest how Appellant's competency could have been different on that date. There was no error, let alone palpable error, as to these issues.

Appellant's final argument on appeal is that he was denied an evidentiary hearing on the motion to withdraw his plea. As previously stated, Appellant's trial counsel filed a motion seeking to withdraw Appellant's guilty plea. Appellant alleged that his plea was not made knowingly, intelligently, or voluntarily. The written motion did not expand on this allegation. The motion was to be heard the same day as the competency hearing. At the conclusion of the competency hearing, the court moved on to the motion-to-withdraw issue. Appellant's counsel requested an *ex parte* hearing because his motion was based

on the lack of communication between Appellant and his previous counsel. Appellant's then-current counsel believed issues of attorney-client privilege would be implicated and that was why he requested the *ex parte* hearing. The Commonwealth objected. The court denied the request to have the hearing *ex parte*.

Appellant's counsel then asked for a continuance in order to speak to his client and prepare Appellant for cross-examination. Again, the Commonwealth objected. The Commonwealth believed counsel should have been prepared for the hearing that day. The trial court ruled that it would rely on the record, the plea colloquy, and the testimony presented by Dr. Sivley in determining if Appellant's plea was made knowingly, intelligently, and voluntarily. The court went on to say that if after reviewing the evidence, it still had questions, then it would schedule another hearing.

If, prior to sentencing, a defendant files a motion requesting to withdraw his or her guilty plea and claims that the plea was made involuntarily, he or she is entitled to a hearing on the motion. *Carrigan v. Commonwealth*, 414 S.W.3d 16, 21 (Ky. App. 2013). Appellant claims that he was denied an evidentiary hearing; therefore, the case must be returned to the circuit court for a hearing. The Commonwealth argues that this claim was not properly preserved

because the motion was not specific as to why Appellant believed his plea was not made knowingly, intelligently, and voluntarily.

We believe this claim was sufficiently preserved and will examine it. Appellant's claim that he was denied an evidentiary hearing is without merit. The motion to withdraw the guilty plea was heard by the court and the court gave Appellant the option to testify. Unfortunately, trial counsel was unprepared once it was determined the hearing would not be *ex parte*. Appellant's counsel then declined to let Appellant testify.

Counsel also requested a continuance in order to prepare Appellant for cross-examination; however, the trial court declined at that time to hold another hearing. "As a general rule, trial judges have broad discretion to grant or deny a continuance. Consequently, we do not interfere with the exercise of that discretion unless it is clearly abused." *N.L. v. Commonwealth*, 323 S.W.3d 732, 737 (Ky. App. 2009) (citations omitted). Here, the trial court gave Appellant the opportunity to testify, but Appellant's counsel was unprepared to proceed with the hearing once it was ruled it would not be *ex parte*. The court then indicated it would review the record and decide if another hearing was necessary. Ultimately, the court ruled that another hearing should not occur, and it ruled based on the record. The court found that based on the 30-minute plea colloquy, Appellant's age, and the testimony of Dr. Sivley, the guilty plea was made knowingly,

intelligently, and voluntarily. The court did not abuse its discretion in not continuing the plea withdrawal hearing.

Based on the foregoing, we affirm the judgment of the circuit court.

ALL CONCUR.

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