

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

FINAL

2002-SC-0760-TG

DATE 10-9-03 ELI A. Grawitt, D.C.

JONATHAN LEE CUNNINGHAM

APPELLANT

V.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
99-CR-00023

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a judgment based on a jury verdict, which convicted Cunningham of first-degree trafficking in a controlled substance and being a second-degree persistent felony offender. He was sentenced to a total of twenty years in prison.

The sole question presented by Cunningham is whether reversible error occurred when the trial judge allegedly failed to grant a hearing or relief pursuant to his pro se motion to dismiss and motion for default judgment.

On June 8, 1999, the grand jury indicted Cunningham for first-degree trafficking in a controlled substance and for being a second-degree persistent felony offender. The charges stemmed from a controlled drug buy made by a confidential informant.

On March 7, 2001, Cunningham filed a pro se motion for dismissal of action. Citing CR 77.02, he moved for dismissal on the ground of failure to prosecute. On April

4, 2001, Cunningham filed a pro se motion for default judgment. Within the notice portion of that motion, he stated that the foregoing “shall be Heard with the Defendant Present in Open Court . . .” The trial judge held a hearing on the said motions on April 10, 2001. Noting that the defendant cited several civil rules that did not apply, the trial judge overruled both motions.

Cunningham was tried on May 21, 2001. The jury convicted him of first-degree trafficking in a controlled substance and being a second-degree persistent felony offender. He was sentenced to ten years in prison for the trafficking charge, which was enhanced to twenty years because of the PFO charge. Upon transfer from the Court of Appeals, this appeal followed.

Cunningham argues that reversible error occurred when the trial judge failed to grant a hearing or relief pursuant to his pro se motion to dismiss and motion for default judgment. He contends that citation to the rules of civil procedure does not defeat the motions and that his presence at the hearing was required by law.

The issue raised by Cunningham is totally without merit. Preliminarily, we question whether Cunningham was entitled to a hearing or even a ruling on his pro se motions. At that time, Cunningham was represented by counsel and never made an unequivocal request to proceed pro se or an unequivocal request to limit the role of counsel. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Moore v. Commonwealth, Ky., 634 S.W.2d 426 (1982).

Nevertheless, the trial judge held a hearing and, although Cunningham was not present, he was represented by counsel. Cunningham’s presence was not required because this was not a critical stage of his trial. See RCr 8.28(1). In any event, it is not reversible error to conduct legal arguments between court and counsel outside the

presence of the defendant. Tamme v. Commonwealth, Ky., 973 S.W.2d 13 (1998).

Cunningham was in no way prejudiced.

Even if we interpret the March 7, 2001 pro se motion for dismissal of action as a motion for a speedy trial, Cunningham was tried within 180 days of that motion. See KRS 500.110. Accordingly, he is not entitled to any relief on that ground.

We fully recognize that the rules of civil procedure are applicable in criminal proceedings to the extent they are not superseded by or inconsistent with the criminal rules. RCr 13.04. The motion for a default judgment, however, was precluded by CR 55.04.

The trial judge did not err in overruling the two pro se motions. Cunningham was not denied any of his Federal or State constitutional rights.

Therefore, the judgment of conviction is affirmed.

All concur.

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