

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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

2001-SC-0251-MR

DATE 1-8-04 E.A. Gravitt, D.C.

DEMARCUS FUQUA

APPELLANT

V.

APPEAL FROM CALDWELL CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
2000-CR-00044-001

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Appellant, DeMarcus Fuqua, was convicted of First-Degree Robbery in the Caldwell Circuit Court and sentenced to twenty years' imprisonment. He appeals to this Court as a matter of right.<sup>1</sup>

On April 11, 2000, an armed bank robbery occurred when two masked individuals driven there by a third suspect entered the bank, fired several shots in the air, and demanded money. The robbers then approached the teller windows and again demanded money. This time the gunman fired his weapon hitting the wall just behind the tellers. The robbers were given cash in excess of \$3000.<sup>2</sup> The robbers then fled by foot through the front door of the bank. An eyewitness and her daughter were across the street at a drugstore. The eyewitness saw the masked individuals enter the bank

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<sup>1</sup> KY. CONST. § 110(2)(B).

<sup>2</sup> Some of the cash was "bait money," which consists of bills with previously circulated numbers.

and upon hearing the gunshots, the eyewitness asked the store attendant to call the police. The day after the robbery Appellant was arrested in Hopkinsville, Kentucky. When Appellant was arrested, he had \$862 in cash and eight of the twenty bills in his possession corresponded to the "bait money" from the bank.

At trial, there was testimony from several witnesses that linked Appellant to the crime. The eyewitness who had been across the street testified that she recognized Appellant as the gunman and Chris Dickson as the other robber because she saw the robbers' faces when they ran from the bank and removed their masks. There was also testimony at trial by Lynn Dixon that Appellant came to her house just following the robbery. She testified that while he was there he changed clothes and left the clothes along with a handgun at her residence. There was testimony that Appellant's mother went to Ms. Dixon's residence and recovered all of these items. Additionally, there was testimony that on the day of the crime Appellant called Mr. and Mrs. Hancock and asked them to pick him up and drive him to Hopkinsville. Appellant's mother testified that about one month after the robbery she led the police to the location where she had attempted to dispose of the handgun. Additional facts will be presented as necessary.

Appellant's first claim is that the trial court committed reversible error when it refused to allow Appellant to participate in his defense by cross-examining two witnesses. He believed that there was a conspiracy by the local police department to convict him of this crime and he wanted to make certain that the jury was aware of this. He sought to conduct the cross-examination of two witnesses at trial because he felt

that his attorney was not making the proper points to the jury. Appellant's requests were made during trial just prior to each cross-examination.

The trial court expressed concern due to the possibility of self-prejudice created by Appellant if he questioned the witnesses. As a remedy, the trial court asked Appellant to write down all of his questions and give them to his counsel. At the conclusion of the cross-examination, the trial court asked Appellant if all of his questions were asked and he answered affirmatively. Appellant expressed that he still felt that his counsel did not make the appropriate emphasis on the important facts. The trial court explained to him that closing argument was the time to make arguments and connect all the points of fact for the jury.

The right to present a defense by being heard in person or with the assistance of counsel is personal to the accused and is guaranteed by the Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution. The United States Supreme Court declared the right to present a defense by being heard in court as "basic in our system of jurisprudence."<sup>3</sup> Additionally, a defendant has the right to waive counsel and represent himself.<sup>4</sup> Under Kentucky law, waiver of counsel should be timely and unequivocal, and such waiver may be entire or in a limited manner.<sup>5</sup>

In Moore v. Commonwealth,<sup>6</sup> we held that the defendant's motion to waive counsel presented to the trial court on the first day of trial was untimely and not unequivocal. The Moore decision reaffirmed that such waiver, whether complete or

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<sup>3</sup> In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 507-08, 92 L. Ed. 682 (1948).

<sup>4</sup> Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

<sup>5</sup> Wake v. Barker, Ky., 514 S.W.2d 692 (1974).

<sup>6</sup> Ky., 634 S.W.2d 426 (1982).

limited, must be a timely and unequivocal request. In the present case, Appellant did not notify the trial court that he wanted to represent himself until after several witnesses had testified. It was then that he advised the trial court that he wished to represent himself in a limited manner. His request was only that he be allowed to cross-examine two specific witnesses for the purpose of extracting particular facts and presenting to the jury his proposed conspiracy theory. We need not completely analyze Appellant's request for it was patently untimely. Moreover, the trial court went to significant lengths to accommodate Appellant's requests with respect to presenting his conspiracy theory. As such, the trial court did not err in refusing Appellant's request to cross-examine witnesses.

Appellant's second claim of error is that the Commonwealth did not properly authenticate a letter written by him containing information about his defense, and containing a proposal that the recipient and Appellant continue to follow their plan. The Commonwealth attempted to ask Appellant about the letter during cross-examination and Appellant's counsel objected based on lack of foundation. The Commonwealth then called Curtis Dillard, the person accused of being the driver for the armed robbery, to testify during rebuttal. Dillard testified that the letter was written by Appellant and given to him by a jail guard. Dillard also testified that he and Appellant discussed the contents of the letter through the jail vents the night he received it. Appellant did not object during Dillard's testimony. For this reason, the issue is not preserved for appellate review.

Under the Rules of Criminal Procedure, a party must make a timely objection.<sup>7</sup> Appellant had a duty to object at the time of the alleged error to provide the trial court with notice, opportunity to remedy the alleged error, and to preserve the alleged error for appellate review.<sup>8</sup> Without such an objection, this claim is not preserved.

Even so, the witness testified that he recognized the letter. He also testified as to how it came to be in his possession and that he discussed the letter with Appellant the night it was passed to him. This letter was properly identified by the witness and if Appellant had any question as to Dillard's recognition of Appellant's handwriting he should have inquired or objected at trial. The letter was not admitted to show that there was a deal between the witnesses. Rather it was introduced as circumstantial evidence that Appellant had committed an offense. For these reasons, this claim fails to meet the standard required by RCr 10.26.

Appellant's final claim is that the admission of testimony during the sentencing phase regarding his prior juvenile adjudications was in error. He contends that under D.R. v. Commonwealth<sup>9</sup> a plea of guilty to a juvenile adjudication without the assistance of counsel should be rejected as void ab initio. He admits that this issue is unpreserved for appellate review, although we will review it under RCr 10.26.

KRS 610.320(4) allows the admission of juvenile records where the offense committed by the juvenile is one that would be a felony if committed by an adult. A prior juvenile adjudication can be admitted as evidence against the defendant

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<sup>7</sup> RCr 9.22.

<sup>8</sup> West v. Commonwealth, Ky., 780 S.W.2d 600 (1989).

<sup>9</sup> Ky., 64 S.W.3d 292 (2001).

during the penalty phase of a trial.<sup>10</sup> Appellant does not contend that a juvenile adjudication cannot be admitted during the sentencing phase. Rather he argues that the guilty plea he entered, without counsel, to his juvenile adjudication is not valid and therefore the record cannot be used against him.

In D.R. v. Commonwealth,<sup>11</sup> the Court of Appeals reversed the judgment against the appellant because the guilty plea to the juvenile adjudication was improper. Therein, it was specifically claimed that the trial court did not observe the requirements of Boykin v. Alabama<sup>12</sup> and that the appellant's admission of guilt was not knowingly or intelligently made. The Court of Appeals reviewed the proceedings of the lower court and determined that D.R. was not adequately informed of the consequences of his admission of guilt, and as such his admission was not made knowingly or intelligently.<sup>13</sup> The court also held that in that particular case where the purported waiver of counsel was prior to the appointment of counsel, such waiver was "ineffectual and contrary to KRS 610.060(1)."<sup>14</sup>

A valid guilty plea must be made voluntarily and intelligently.<sup>15</sup> The validity of a plea of guilt is determined by the totality of the circumstances surrounding the plea.<sup>16</sup> For these reasons, a guilty plea cannot be void ab initio because judgments are presumed valid, and there is a procedural process designed to evaluate and

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<sup>10</sup> Neal v. Commonwealth, Ky., 95 S.W.3d 843 (2003); Manns v. Commonwealth, Ky., 80 S.W.3d 439 (2002).

<sup>11</sup> supra.

<sup>12</sup> 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

<sup>13</sup> D.R. v. Commonwealth, 64 S.W.3d at 295-96.

<sup>14</sup> Id. at 297.

<sup>15</sup> Bronk v. Commonwealth, Ky., 58 S.W.3d 482, 486 (2001).

<sup>16</sup> Kotas v. Commonwealth, Ky., 565 S.W.2d 445, 447 (1978) (*citing* Brady v. United States, 397 U.S. 742, 749, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)).

determine whether there was a defect. In the present case, Appellant did not object or offer evidence of the circumstances surrounding his guilty plea to the prior juvenile adjudication. Without a trial court record this Court cannot review the validity of his plea of guilt, and we must affirm.

For the foregoing reasons, the judgment of the Caldwell Circuit Court is affirmed.

Lambert, C.J., and Cooper, Graves, Johnstone, Stumbo, and Wintersheimer, JJ., concur. Keller, J., dissents and would reverse for a new trial because the trial court committed structural error by failing to conduct a hearing with respect to Appellant's unequivocal limited waiver of his right to counsel, which was "timely" in that it was voiced at a stage in the proceedings when the trial court could have inquired into whether Appellant's waiver was knowing and voluntary and then granted Appellant's request to cross-examine two (2) witnesses without substantially delaying the proceedings. See Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Wake v. Barker, Ky., 514 S.W.2d 692 (1974).



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