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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: OCTOBER 21, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2003-SC-0236-MR

CHARLES ALLEN SMITH — APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
2000-CR-0652

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Charles Allen Smith, appeals as a matter of right from a judgment of the Fayette Circuit Court. Following a jury trial, Appellant was convicted of murder and sentenced to fifty years' imprisonment. He raises seven issues on appeal. Finding no error, we affirm.

The victim in this case was Pamela Polen. On August 7, 1999, Ms. Polen attended the funeral of her husband, Leonard, who had been murdered four days earlier. Later in the evening, she returned to her apartment with her sister, Brenda Parrent. Ms. Polen was carrying a large amount of money in her purse, given to her by numerous friends and co-workers at her husband's funeral. After escorting Ms. Polen home following the funeral, Mrs. Parrent left her sister's apartment with the understanding that the two would share dinner the following evening. When the next evening passed without any word from her sister, Mrs. Parrent became concerned and

went to the apartment around 10:30 p.m. The front door was locked; Mrs. Parrent and her husband eventually gained entry through a bedroom window. Inside, they found Ms. Polen's lifeless body lying on the couch with a blue pillow over her face. A pair of scissors was imbedded in Ms. Polen's throat. She was unclothed from the waist down. Mrs. Parrent also noted that Ms. Polen's purse and keys, which she had observed the previous evening on an oak table, were missing, as well as a diamond ring that Ms. Polen had worn to her husband's funeral.

Mrs. Parrent summoned Lexington Metro Police to the scene. The investigating officers noted that the television and a lamp were on in the small apartment, and that a candle was burning in the window. Stereo equipment, cassettes, and compact discs appeared to have been pulled out and scattered about the floor of the otherwise neat apartment. The officers also found a large amount of blood at the scene, not only around the victim's body, but spattered on the stereo components, couch, kitchen, and bathroom. Following an investigation of fingerprints found at the crime scene, Appellant was identified as the prime suspect. He was apprehended several months later in Cincinnati, and thereafter charged with murder.

Admissibility of Fingerprint Evidence

Appellant first claims that fingerprint evidence was improperly admitted without proof of the reliability of the electronic method of fingerprint acquisition. Appellant claims that the "Lifescan" method of taking fingerprints is not proven reliable, and the trial court should have ordered a Daubert hearing to determine reliability before admitting the evidence. We find no reversible error.

While investigating the scene of the crime, two fingerprints were found on a Popov vodka bottle and one fingerprint was found on the scissors imbedded in Ms.

Polen's neck. Following his arrest, Appellant's fingerprints were taken by Fayette County Detention Center Corrections Officer Diane Bell, using the Lifescan method. Lifescan is a computer application that takes fingerprints by moistening the fingers with water and rolling them over a computer scanner in order to generate a fingerprint. Appellant's fingerprints were then sent to the Automated Fingerprint Identification System ("AFIS"), maintained by the Kentucky State Police as required by KRS 17.180. When a fingerprint is scanned into the AFIS system, the computer compares the given print with archived fingerprints. AFIS then provides a candidate list of the top fifty fingerprint matches, to be used for comparison purposes. The print retrieved from the vodka bottle returned a list of candidates that included Appellant. (An ink method fingerprint had been obtained from Appellant following a 1990 arrest; that print had been submitted to AFIS prior to this crime.) Stanley Slonina, supervisor of the AFIS system, testified that he conducted the comparison of fingerprints. After the defense challenged the admissibility of the Lifescan fingerprint method, Slonina further testified that he had conducted a comparison not only between the latent print and the Lifescan print, but also between the latent print and the 1990 ink fingerprint card.

Without determining that the trial court erred in admitting testimony concerning the Lifescan fingerprints, we are of the opinion that such error would have been harmless and therefore does not require reversal. RCr 9.24. An error is considered harmless or non-prejudicial when, upon review of the whole case, there is not a "substantial possibility that the result would have been any different" had the error not occurred. Commonwealth v. McIntosh, Ky., 646 S.W.2d 43, 45 (1983). Absent the alleged error of admitting the Lifescan testimony, it is highly unlikely that the result would have been any different in this matter.

First, the Lifescan fingerprint was not the only source of identification in this case. Slonina testified that he had conducted the fingerprint comparison using both the Lifescan print and the 1990 ink fingerprint card; both methods identified Appellant. Thus, even if the Lifescan fingerprint evidence were never admitted, the jury would have nonetheless heard the results of the ink fingerprint comparison. The reliability of fingerprint identification and comparison conducted with ink cards has long been established in this state. Shelton v. Commonwealth, 280 Ky. 733, 134 S.W.2d 653, 657 (1939); see also Johnson v. Commonwealth, Ky., 12 S.W.3d 258, 262 (1999). Second, Appellant overstates the importance of the fingerprint identification to the Commonwealth's case. Though denying involvement in the murder, Appellant had already admitted to Detective Richmond that he brought the Popov vodka bottle into Ms. Polen's apartment and that he had picked up the scissors in question at one point. These statements were admitted at trial. Therefore, the revelation that Appellant's fingerprints were found on the vodka bottle and on the scissors was hardly pivotal to the prosecution's case. For these reasons, we are not persuaded that the absence of the alleged error would have resulted in a different result in this case and thus reversal is not warranted.

Introduction of Evidence of Appellant's Prior Crimes

Appellant raises a companion issue regarding the fingerprint testimony; Appellant claims that the 1990 fingerprint card should not have been admitted into evidence as it suggested to the jury that he had prior convictions and/or arrests. He argues that the archived fingerprint card amounts to KRE 404(b) evidence and should have been excluded. We find no error.

KRE 404(b) prohibits the introduction of evidence of other crimes, wrongs or acts "to prove the character of a person in order to show action in conformity therewith." Such evidence is admissible, however, to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." KRE 404(b)(1). The burden rests on the Commonwealth to establish a proper basis before admitting evidence of collateral criminal activity, including a need for such evidence, and that its probative value outweighs its prejudicial effect. Bell v. Commonwealth, Ky., 875 S.W.2d 882, 889 (1994). "A ruling based on a proper balancing of prejudice against probative value will not be disturbed unless it is determined that a trial court has abused its discretion." Id. at 890.

We find no abuse of discretion. The 1990 fingerprint card was not introduced to prove Appellant's character; rather, it was necessary to rebut defense counsel's argument that the Lifescan fingerprint was unreliable and to establish identity. Furthermore, the trial court abrogated the potential for prejudice by disallowing any testimony concerning the circumstances surrounding the 1990 fingerprint card. It is also important to note that any possible prejudice that resulted from the introduction of the 1990 fingerprint card was rendered harmless due to Appellant's cross-examination of Detective Richmond, which occurred earlier in the trial. The Appellant introduced a copy of the criminal complaint against him and required Detective Richmond to read it to the jury; the criminal complaint included reference to two previous charges. Thus, the trial court did not abuse its discretion in concluding that the probative value of the 1990 fingerprint card outweighed any potential prejudice to Appellant.

Introduction of Appellant's Statements to Police

Appellant's third claim of error concerns the trial court's denial of his motion to suppress statements given to police following his arrest. Appellant contends that the Miranda warnings provided to him were constitutionally defective, as they did not adequately inform him that he could consult with an attorney prior to police questioning. Appellant concedes that he was informed of his right to have an attorney present during questioning, but argues that the warnings did not sufficiently advise him that he could consult with an attorney prior to questioning. Upon review, we conclude that the requirements of Miranda were fulfilled and, therefore, the trial court did not err in admitting Appellant's recorded statements.

The standard for appellate review of a trial court's decision on a suppression motion following a hearing is twofold. First, we must determine whether the factual findings of the trial court are supported by substantial evidence. If so, we must then determine if the trial court violated the rule of law in applying it to the established facts. Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998); RCr 9.78.

Here, the trial court entered a factual finding determining that Appellant had been read his Miranda rights. Detective Richmond testified that, prior to questioning, he informed Appellant of his Miranda rights. When a tape recorder was started to memorialize Appellant's statement, Detective Richmond again informed Appellant of his Miranda rights. On the tape, Detective Richmond informs Appellant:

> You know that I am a police officer. You have got a right to remain silent. Anything you tell me can be used against you in a court of law. You have got a right to have an attorney present here during questioning. If you cannot afford one, one will be appointed for you by the court. Ok, now, if you decide you want to talk to me right now, and at some point you don't want to talk anymore, just tell me and I'll not get upset or anything like that, we will just end the interview. Ok, you understand all that?

Detective Richmond further testified at the suppression hearing that Appellant appeared to understand his rights, and that at no time did Appellant indicate a desire to end the interrogation. We thus conclude that the trial court's finding that Appellant was advised of his Miranda rights prior to questioning was based on substantial evidence.

Therefore, we must next determine if Detective Richmond's warnings to Appellant were sufficient to satisfy the requirements of Miranda. In determining whether an adequate warning was delivered prior to interrogation, it must be restated that Miranda warnings may be given in various forms, and that "no talismanic incantation [is] required to satisfy its strictures." California v. Prysock, 453 U.S. 355, 359, 101 S. Ct. 2806, 2809, 69 L. Ed. 2d 696, 701 (1981) (per curiam). Rather, the relevant inquiry upon appellate review is not whether the Miranda warnings were given according to a precise formulation, but whether the warnings reasonably conveyed to the suspect his constitutional rights. Duckworth v. Egan, 492 U.S. 195, 202, 109 S. Ct. 2875, 2879, 106 L. Ed. 2d 166 (1989).

Here, we conclude that the warnings given by Detective Richmond to Appellant prior to questioning sufficiently apprised Appellant of his constitutional rights. Appellant was read his rights twice before the interrogation began, and both times indicated that he understood them. Appellant was specifically informed of his right to have an attorney appointed and present during the questioning; Detective Richmond also expressly informed Appellant of his right to halt the interrogation at any time. We believe that these two warnings, given simultaneously, essentially informed Appellant that he could consult with an attorney at any time, even before questioning. The warnings provided an adequate and understandable appraisal of Appellant's rights, and did not materially mislead Appellant in any way. See United States v. Caldwell, 954

F.2d 496, 504 (8th Cir. 1991). There is no indication that Appellant was coerced or that his statements were made involuntarily. Therefore, Appellant's motion to suppress was properly rejected.

Appellant's Waiver of Counsel

Appellant next challenges the validity of his waiver of counsel. At a pre-trial hearing, Appellant moved to dismiss his counsel and represent himself. A lengthy colloquy followed, and Appellant's motions were ultimately granted. Appellant now argues that the trial court did not sufficiently question him regarding his waiver of counsel, thereby rendering the waiver invalid. We disagree.

The fundamental right to counsel provided by the Sixth Amendment implies the right to represent oneself. Faretta v. California, 422 U.S. 806, 821, 95 S. Ct. 2525, 2534, 45 L. Ed. 2d 562, 574 (1975). To be valid, the waiver must be entered knowingly and intelligently. Id. The Kentucky Constitution extends somewhat further than the United States Constitution, by explicitly guaranteeing the criminal defendant the right to be heard "by himself and counsel." Ky. Const. § 11. In Kentucky, a waiver of counsel is ineffective unless the trial court has fulfilled a three-part duty: (1) the trial court must hold a hearing at which the defendant testifies regarding whether the waiver is knowing, voluntary, and intelligent; (2) the defendant must be warned by the trial court of the "hazards arising from and the benefits relinquished" by the waiver of counsel; and (3) the trial court must enter a finding on the record that the waiver is knowing, voluntary, and intelligent. Hill v. Commonwealth, Ky., 125 S.W.3d 221, 226 (2004). These duties remain in place even in situations where, as here, stand-by counsel is retained. Id.

Here, the trial court fulfilled the three-pronged requirement set forth in Hill. First, a hearing was held on Appellant's motion to dismiss his counsel and proceed pro se, at

which Appellant testified under oath. The record of this hearing overwhelmingly supports the conclusion that Appellant's waiver of counsel was knowing, voluntary, and intelligent. At the outset, it should be noted that Appellant prepared in advance a written motion to dismiss counsel and proceed pro se. On no less than six occasions during the hearing, Appellant unequivocally stated his desire to waive counsel and to represent himself. Appellant was questioned extensively about his education, his familiarity with the procedural aspects of a trial, his understanding of criminal law, and his ability to effectively conduct a defense. The trial court inquired specifically as to Appellant's understanding of subpoenas, various types of motions, suppression rules, mistrials, jury instructions, and the voir dire process. Appellant replied to each question without even the slightest hint of hesitation or doubt, repeatedly expressing his desire to represent himself, and even noting his intention to appeal to this Court should the motion be denied.

Appellant asserts that his waiver was not voluntary, arguing that he was presented with a "Hobson's choice": that is, to represent himself or to be represented by incompetent counsel. According to Appellant, his understanding of the situation as a "Hobson's choice" and the trial court's failure to question his underlying motivation for the waiver renders it involuntary and thus constitutionally infirm. We do not agree. In the twenty-two month period between Appellant's arraignment and the Faretta hearing, Appellant was appointed eight different attorneys by the trial court. All but one were dismissed at Appellant's request, who apparently was convinced that each attorney was either colluding with the Commonwealth, incompetent, or unwilling to follow his orders. There is nothing in the record to support any of these allegations aside from Appellant's own bare accusations. Nonetheless, it is clear that Appellant conducted a relentless

campaign in the trial court against every attorney appointed to him based on the firmly held, though unfounded, belief that each was a "liar." We are not persuaded that Appellant's waiver was involuntary simply because it was based on this seemingly irrational conviction. The only conclusion supported by the record is that Appellant made a deliberate and voluntary decision borne out of his persistent refusal to accept any appointed attorney. We find no error in the trial court's identical conclusion.

Satisfying the second prong of the Hill requirements, the trial court then discussed with Appellant the dangers of representing oneself, particularly in a criminal proceeding, the effect his naiveté of the law might have on future grounds for appeal, and the potential consequences of choosing to dismiss experienced counsel. Furthermore, Appellant's own appointed counsel addressed the complexity of a murder trial, and the immeasurable advantage to be gained by trained representation. In response to questions or statements made by Appellant, the trial court clarified various points of law and warned Appellant that the trial court had no duty to "guide" him through the trial.

Finally, the trial court entered specific findings of fact on the record, concluding that Appellant was competent to represent himself and that his waiver of counsel was valid. Upon review of the record, we conclude that the trial court fulfilled its duties as set forth in Faretta and Hill, and that Appellant's waiver of counsel was knowing, voluntary, and intelligent.

Recusal of Trial Judge

In his fifth claim of error, Appellant argues that he was denied the right to an unbiased decision-maker when the trial judge refused to recuse himself. Appellant filed a motion to recuse that was denied following a hearing on the matter, the trial court

finding no reason to require recusal. Appellant thereafter filed a petition with this Court seeking disqualification of the trial judge. That petition was denied as it failed to establish adequate grounds for the appointment of a special judge. Appellant now argues that the trial court abused its discretion in denying the motion for recusal. We disagree.

In his written motion seeking recusal, Appellant acknowledges his own "contemptuously loud and disrespectful" behavior, the "angry tirades" he delivered in court, and the "ill-will" he directed towards the trial judge. The underlying reason for this conduct seems to be Appellant's continual dissatisfaction with each of the eight attorneys appointed to defend him, and Appellant's firmly held belief that everyone - from the Commonwealth to the police and trial judge - was involved in a conspiracy against him. (It should be noted again that no substantiating evidence of misconduct was presented to the court.) As evidence of actual bias pursuant to KRS 26A.015(2)(a), the Appellant points primarily to the trial court's apparent frustration with Appellant's behavior and to an instance when the trial judge had him forcibly removed from a pre-trial hearing following one of these rants. Additionally, as grounds for disqualification pursuant to KRS 26A.015(2)(e), Appellant surmises that, due to his own offensive behavior in court, it would be impossible for anyone to believe that the trial judge could proceed fairly and impartially.

"The burden of proof required for recusal of a trial judge is an onerous one." Stopher v. Commonwealth, Ky., 57 S.W.3d 787, 794 (2001). "A party's mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds to require recusal." Webb v. Commonwealth, Ky., 904 S.W.2d 226, 230 (1995). The person seeking recusal must point to facts demonstrating bias or other reasons for

disqualification of a trial judge. Foster v. Commonwealth, Ky., 348 S.W.2d 759, 760 (1961), cert. denied, 368 U.S. 993, 82 S. Ct. 613, 7 L. Ed. 2d 530 (1962). Appellant has failed to meet the requisite burden. What Appellant cites as facts showing legal bias is, in actuality, merely speculation that his own disruptive and aggressive conduct made it impossible for the trial court to adjudicate impartially. That the trial court eventually tired of these rants and refused to allow Appellant to repeatedly impugn the integrity of the court and the attorneys is not evidence of actual bias. Rather, it is evidence of a trial judge attempting to maintain order and respect in his courtroom. This type of conjecture is insufficient to warrant recusal, and the trial court did not abuse its discretion in denying the motion.

Testimony of Rebecca Coots

Appellant's sixth claim of error is that the testimony of Rebecca Coots contained inadmissible character evidence that prejudicially smeared his character. Prior to trial, Ms. Coots had prepared a statement. Before she took the stand at trial, Appellant approached the bench and argued that her statement contained inadmissible character evidence. The Commonwealth agreed and informed the court that Ms. Coots had been informed of the inadmissible portions of her statement and had been instructed to eliminate them from her testimony. The statement itself was not introduced.

Specifically, Appellant objects to four statements made by Ms. Coots during cross-examination: (1) Ms. Coots stated that after learning of the murder, she saw Appellant at a gas station and that he left and "didn't pay for it"; (2) after answering a question concerning her statement to investigators, Ms. Coots called Appellant "evil and conniving"; (3) when asked if she was on drugs at the time of her statement, Ms. Coots replied that she had smoked crack and that Appellant should be aware of that, as he

had gotten her "hooked on crack"; and (4) in answering a question concerning a day when Appellant was at her apartment washing clothing, Ms. Coots interjected that Appellant had "gave [her] crabs."

Certainly, Ms. Coots' commentary was not responsive to any questions posed by Appellant, who conducted the cross-examination. However, notwithstanding the trial court's prohibition on these types of statements prior to Ms. Coots' testimony, no contemporaneous objection was entered to any of these statements nor did Appellant request an admonition. This issue is therefore unpreserved, as Appellant failed to make known to the trial court his objection or to request some form of relief. RCr 9.22; see also Renfro v. Commonwealth, Ky., 893 S.W.2d 795, 796 (1995) (where trial court had ruled at a pre-trial hearing that lay testimony concerning the estimated speed of a vehicle would be inadmissible but the witness at trial estimated the speed at 80 mph, such error was unpreserved as no contemporaneous objection was entered). This Court may review unpreserved errors and grant appropriate relief where manifest injustice resulted from the error. RCr 10.26. We do not believe the error complained of rises to the level of palpable error to warrant reversal. Considering the weight of the evidence presented against Appellant, particularly the compelling physical evidence, we find these minor errors to be harmless. RCr 9.24.

Appellant's Motion to Dismiss the Indictment

Appellant's final claim of error is that false testimony submitted to the grand jury regarding material facts required dismissal of the indictment. Appellant points to three pieces of allegedly false evidence. First, Detective Richmond testified to the grand jury that Appellant's fingerprints were found on the Popov vodka bottle, the scissors found in Ms. Polen's neck, and a CD case found on the floor of her apartment. At the

subsequent suppression hearing before the trial court, Detective Richmond acknowledged that he was mistaken concerning the fingerprint found on the CD case and that Appellant's print was not found on the case. Second, before the grand jury, Detective Richmond testified that the keys to Ms. Polen's apartment were never located, despite the fact that he had stated in his case synopsis that the keys were in Ms. Polen's purse that was later found. A parallel argument is asserted with respect to some cash that was also located in Ms. Polen's purse. Third, Appellant maintains that the transcript of his statement was inaccurate because portions designated "unintelligible" had been later filled in with words that Appellant maintains he did not say. Appellant argues that the indictment is invalid because it was based, in part, on this allegedly false information presented to the grand jury.

A judgment of conviction may not be reversed on the grounds that there was not sufficient evidence before the grand jury to support the indictment. RCr 5.10. Moreover, "courts should not attempt to scrutinize the quality or sufficiency of the evidence presented to the grand jury." Commonwealth v. Baker, Ky., 11 S.W.3d 585, 588 (2000). Only when a defendant is able to demonstrate a "flagrant abuse of the grand jury process that resulted in both actual prejudice and deprived the grand jury of autonomous and unbiased judgment" should an indictment be dismissed. Id.

Appellant has failed to meet this heavy burden. Detective Richmond testified at the suppression hearing that he was mistaken concerning the fingerprint found on the CD case, and only later discovered the mistake when he received a latent print report from AFIS. With respect to Ms. Polen's keys and the approximately $600 in cash located in her purse, this assertion is of no consequence: though Detective Richmond was mistaken when he wrote in his case synopsis that these items had been found, the

case synopsis was never read or entered into evidence at the grand jury proceedings. Furthermore, Detective Richmond actually testified at the grand jury proceedings that the keys and money were not found. Neither of these claims demonstrate the requisite flagrant abuse of the grand jury process, nor do we believe that the grand jury was deprived of its autonomous judgment.

Finally, a determination with respect to Appellant's claim that the transcript of his statements to police contained errors is complicated because it is not clear from the record whether the grand jury was shown the transcript. Regardless, even if the allegedly erroneous transcript was presented to the grand jury, dismissal of the indictment would not be warranted. The fact that the evidence in a case may have been contrary to the facts alleged in the indictment does not render the indictment defective; once an indictment has been returned, the sufficiency of the evidence is to be determined at trial. Russell v. Commonwealth, Ky. App., 992 S.W.2d 871, 874 (1999). Therefore, the trial court properly denied Appellant's motion to dismiss the indictment.

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

All concur.

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