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RENDERED: DECEMBER 20, 2007
NOT TO BE PUBLISHED

FINAL
DATE 1-10-08 ELIA Grant, D.C.

Supreme Court of Kentucky

2006-SC-000156-MR

ALGER FERGUSON — APPELLANT

V.

ON APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE DANIEL SPARKS, JUDGE
NO. 03-CR-000062

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND

VACATING AND REMANDING IN PART

Appellant, Alger Ferguson, was convicted of murdering his nephew, Parker Ferguson. He appeals the judgment of the trial court and alleges five errors: that he was denied his right to a speedy trial; that he was improperly allowed to proceed without counsel; that the trial court improperly admonished the jury about his proceeding without counsel; that witnesses were allowed to testify as experts without being qualified; and that he was not given enough jail time credit. Finding no error requiring reversal of the conviction, it is affirmed, though the matter will be remanded for proper calculation of jail time credit.

I. Background

On August 9, 2003, Parker and his sister picked Appellant up at his house, then drove to a nearby town to buy beer and visited Parker's mother on the way back. Later, the sister dropped Appellant and Parker off at Appellant's house and went home.

Appellant and Parker drank beer before and during the trip and continued to drink beer afterward.

Later that night, police were called to Appellant's house where they found Appellant on the porch crying and lying on some broken glass. Several other people, including Appellant's brother, Ralph Ferguson, had arrived before the police. Inside the house, the police found the victim dead in the living room from a gunshot wound just above his mouth and another to the side of his head. A .40 semi-automatic pistol was lying on the floor beside the body. Two empty shells were recovered from the scene. A pocket knife and a loaded magazine for the semi-automatic pistol were found in Appellant's pockets. Appellant, who was crying and upset but cooperative, told the officer that his nephew had shot himself.

Appellant was indicted for the murder of Parker on September 12, 2003. Prior to trial, he raised the issue of competency based on a history of head injuries, irrational behavior, and mental problems. The trial court sent him to KCPC for evaluation and later found him competent to stand trial.

At trial, several witnesses testified about Appellant's behavior the night of the shooting. The sister stated that before leaving to get beer, Appellant mentioned to the victim that he had a book of 101 ways to kill a person, and that Appellant appeared to be frustrated, aggravated, and mad. In response to several defense questions, she testified that the victim drank regularly but had no history of depression and had made no previous suicide attempts. She then recounted a conversation from the night of the shooting in which Appellant asked the victim if he thought people who committed suicide went to heaven, to which he responded that he did not understand why a person would commit suicide, that he loved his life, and that he could never kill himself. The

sister and another witness testified that Appellant had taken out a long knife and began tossing it around while at his mother's house.

The Kentucky State Police Detective who investigated the crime scene also testified, noting that the round shape of the blood spatter droplets on the ceiling above the body and the location of the spent shells in relation to the body were inconsistent with a self-inflicted wound. He also testified that gunshot residue tests on both Appellant and the victim were negative. The county coroner, a retired state police officer, testified based on the blood on the floor and the body that the wound to the victim's temple did not appear to be self-inflicted and that it was inflicted while the body was on the ground. The medical examiner who conducted the autopsy testified that the shot had to be at least 18 to 24 inches away to cause the non-disabling lip wound because there was no stippling or soot from the gunshot around the wound. However, the temple wound would have been immediately incapacitating and was a contact wound.

Near the end of the Commonwealth's proof, Appellant was allowed to proceed pro se. He called and questioned his own witnesses and gave his own closing statement. His attorney remained as stand-by counsel.

Appellant testified in his own defense. He claimed that after Parker's sister left his house, he and the victim continued to drink and smoked marijuana, and that they then rode four-wheelers, drank more beer, and shot beer cans. They returned to Appellant's house, where they talked and drank more until Appellant began dozing off. He claimed that he woke to the sound of Parker pulling back the slide on the gun, that he asked, "What are you doing?", and that Parker pointed the gun at himself and pulled

the trigger. He testified that he ran out to the front porch and heard a second shot. When he returned, the victim was dead.

The jury found Appellant guilty of murder, and he was sentenced to life in prison. He now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

A. Speedy Trial

Appellant first claims that his right to a speedy trial was violated by the 27 month delay between indictment and trial. Speedy trial claims are evaluated under a balancing test with four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972); see also McDonald v. Commonwealth, 569 S.W.2d 134, 136 (Ky. 1978) (applying the Barker test).

As to the first factor, the Supreme Court has noted, "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530. Though the crime in this case was a serious one requiring more complex preparation than ordinary street crime, the delay in this case was presumptively prejudicial. See Bratcher v. Commonwealth, 151 S.W.3d 332, 344 (Ky. 2004) (holding an 18 month delay presumptively prejudicial in a murder case). That prejudice, however, is not alone dispositive and must be balanced against the other factors. See Doggett v. United States, 505 U.S. 647, 652 n.1 (1992) ("'[P]resumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker enquiry.")

Much of the delay was caused by Appellant's claim that he was not competent to stand trial. This immediately postpones the proceedings until the issue of capacity is determined (RCr 8.06), which requires that the defendant be evaluated by a psychologist or psychiatrist (KRS 504.100), usually at a state facility like KCPC as allowed by KRS 504.080. Appellant's competency to stand trial was not finally determined until September 10, 2004, and a March 2005 trial date was set at Appellant's attorney's request (even though a December 2004 date was offered).

The remainder of the delay was shared by the Commonwealth and Appellant. The Commonwealth provided evidence in discovery throughout February 2005, which led Appellant's attorney to move for suppression of the evidence or, in the alternative, a continuance. The Commonwealth responded that much of the evidence was duplicative, and that other evidence had just been disclosed by the police. The trial judge chose to continue the trial until June 2005. In May 2005, the Commonwealth requested its first continuance, claiming the unavailability of a witness (who ultimately was not called at trial), and the court entered an agreed order setting the trial for its ultimate date in November 2005.

Though the delays were caused in part by the Commonwealth, they were not "a deliberate attempt to delay the trial in order to hamper the defense . . . ." Barker, 407 U.S. at 531. Instead, the Commonwealth's delays were for either neutral reasons (the police turning over evidence late) or for justifiable reasons (unavailability of a witness). Id. On balance, this factor does not weigh in Appellant's favor.

Appellant did not assert his right to a speedy trial until September 15, 2004, a full year after his indictment, when he filed a pro se motion for a speedy trial. The motion was denied as moot, since a trial date was set at that point. This brought the effective

delay down to only 15 months. Appellant subsequently filed multiple pro se motions for a speedy trial, bond reduction, and dismissal for violation of the speedy trial right, none of which were heard by the trial judge, who found them to be moot because much of the delay was sought by Appellant's attorney. Regardless of the trial judge's characterization of it, "[t]he defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Barker, 407 U.S. at 531-32.

Finally, the Court must consider actual prejudice to Appellant, which "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect . . . ." Id. at 532. Those interests include "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Id. (footnote omitted). While the first two of these factors weigh in favor of Appellant, the latter factor, which is the "most serious," id., does not. Appellant does not allege the sort of prejudice—characterized by loss of evidence, death of witnesses, or faded memories—contemplated under this factor, nor does the record reveal it.

Balancing these factors, with assertion of the right favoring Appellant and the cause of the delay and prejudice favoring the Commonwealth, it is evident that Appellant's speedy trial right was not violated.

B. Request to Proceed Pro Se

Appellant argues that the trial court erred in allowing him to proceed pro se without engaging in the colloquy required by Faretta v. California, 422 U.S. 806 (1975), and without making express findings that Appellant knowingly, intelligently, and voluntarily waived his right to counsel. Faretta requires that a defendant "should be

made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." Id. at 835 (citation and internal quotation marks omitted).

> In Kentucky, a trial court's Faretta duties manifest themselves in three concrete ways. First, the trial court must hold a hearing in which the defendant testifies on the question of whether the waiver is voluntary, knowing, and intelligent. Second, during the hearing, the trial court must warn the defendant of the hazards arising from and the benefits relinquished by waiving counsel. Third, the trial court must make a finding on the record that the waiver is knowing, intelligent, and voluntary. A waiver of counsel is ineffective unless all three requirements are met.

Hill v. Commonwealth, 125 S.W.3d 221, 226 (Ky. 2004) (footnote and citations omitted); see also Wilson v. Commonwealth, 836 S.W.2d 872, (Ky. 1992), overruled in part on other grounds by St. Clair v. Roark, 10 S.W.3d 482, 487 (Ky. Nov 18, 1999) (approving a defendant's waiver of counsel where the trial court explained the nature and perils of proceeding pro se and engaged in an extensive colloquy about whether the waiver was knowing, intelligent, and voluntary). Because the inquiry on appellate review is fact specific, a detailed recitation of the trial judge's questioning of Appellant about his desire to proceed pro se is necessary.

Appellant first indicated that he wanted to proceed pro se at the end of the Commonwealth's case. After the Commonwealth's last witness, Appellant's attorney, Leo Marcum, asked for a recess and stated, "My client has indicated he wants to represent himself from this point further. That's what I wanted to talk to you about." Shortly thereafter, the judge discussed the matter with the attorneys and Appellant in chambers. Mr. Marcum stated that Appellant had decided to represent himself and had pro se experience from two to three previous occasions. The prosecutor interrupted to explain that he was having chest pains and did not have his heart

medication. The prosecutor was transported to the hospital, and the judge released the jury until the next day.

After the jury left the courtroom, the judge, Mr. Marcum, and Appellant engaged in a lengthy discussion without the prosecutor present. The judge stated that while Appellant had previously represented himself, he had not done so in such a serious case; that the crime with which he was charged carried a possible life sentence; that while he had a constitutional right of self-representation, his attorney would remain as stand-by counsel for consultation about rules of procedure and evidence; and that he had a right not to testify. Appellant indicated that he understood.

Appellant and the judge then engaged in the following exchange:

> BY THE COURT: Now, the thing that has concerned me is this, and I'm going to explain this to you today, and I want to restate it tomorrow. But first I want to ask you, is it your desire to proceed to represent yourself, against the advice of Court?
>
> BY MR. FERGUSON: It is my desire to do that, Your Honor.
>
> BY THE COURT: Okay, I'm going to ask you that again tomorrow, and I'm going to give you this admonition. If you should not take the witness stand, you would not be subject to cross-examination, that's understood, obviously. However, if you choose to represent yourself and do not take the stand and are not subject to cross-examination as to any statements you wish to make to this jury. And if you stand up, if you can do so, and represent yourself and give a closing argument to the jury you will not be permitted, and the Court will stop you every time that you attempt to explain what happened to the jury, in your own words, because that is not in evidence. You understand what I'm saying?
>
> BY MR. FERGUSON: Yeah.
>
> BY THE COURT: Are you sure?
>
> BY MR. FERGUSON: Yeah, I read up on that, Your Honor.
>
> BY THE COURT: Okay, well you better have read up on that because I'll stop you every time and give you an admonition. You will not be permitted to stand up and say, "I wouldn't have done that, this is what happened." You can't do it. It's not in evidence. If you wish to do that, you take the

witness stand and be subject to cross-examination. You will not be permitted to in effect testify without the requirement of being subject to cross-examination by closing argument. Do you understand what I am saying?

BY MR. FERGUSON: Yes, Your Honor, I'm not dumb. I'm not representing myself so I can get out of testifying. I'm representing myself because these witnesses up here have made statements and made other statements on paper that they made that is contradicting what they have already made and they've made up their testimony farther than it was when they took, or gave statement to the—

BY THE COURT: (Inaudible) compilation of (inaudible) testimony that has to be done by cross-examination of the witnesses while they are on the stand. You can recall witnesses if you desire—

BY MR. FERGUSON: Yeah—

BY THE COURT: —to elicit further testimony. You understand that would be the case. There's no objection made on your part I think your counsel is clear in stating that counsel you are anticipating representing yourself, or making objections about doing that for some time before this day. Now, having completed the presentation of all the evidence that the Commonwealth wants to put on, you can't get up and argue that these witnesses have fabricated, enhanced or buffered their testimony to the jury without them being here to be able to respond to the accusations you've made against them. Just the same as if you'd come up and testify as your closing arguments. So, I'm not trying to preclude chances you may have, but you can't invent something on the spur of the moment and get up and argue that before the jury without giving those witnesses a chance to explain their testimony in light of any contradiction that you may feel they may have said. You're held to the same standards as far as rules of procedure and what is required in regard to hearsay, in regard to proper impeachment, in regard to introduction of evidence outside the scope of those matters which has been brought before the Court, same as if you were a practicing attorney, licensed to do so in Kentucky. So, understand I'm not trying to put you in a hard place, I'm just trying to tell you that there is a place that you have to remain in, and I can't let you go elsewhere.

BY MR. FERGUSON: I can't recall witnesses?

BY THE COURT: If they are available. They have been dismissed, and good luck getting them. And you can have subpoenas issued through the Court and we will do our best to serve them for you, sir. This case will resume at nine o'clock in the morning. Court will stand in recess.

When court resumed the next day, the following exchange took place in the judge's chambers:

> BY THE COURT: Let's go on the record here and, again, this is 03-CR-000062. The Court will state for the record that there was a moderate to more than moderate amount of confusion at the conclusion as it turned out at yesterday's proceedings. After the Commonwealth had announced its intention to rest the presentation of its case in-chief the Defendant, Mr. Alger Ferguson, expressed his desire to represent himself. And before I go anything further in regard to that, do you have . . . I don't know the situation and exactly how it is. Why do you wish to replace Mr. Marcum and act as your own attorney? Are you dissatisfied with the advice and services he's provided for you? Are you dissatisfied with the way he's represented you?
>
> BY MR. FERGUSON: He has just not been able to get out the contradictions and the things that went on in there. I mean, quite frankly, there was a lot of lies in there and it will be brought out . . . I mean, and once it's proved that they're lying then what does it leave?
>
> BY THE COURT: Have you conferred during the proceedings and the testimony of those persons that you feel are not being truthful with Mr. Marcum to get those questions asked on cross-examination?
>
> BY MR. FERGUSON: Yes. He didn't seem to—
>
> BY MR. MARCUM: We just have a difference of opinion about this, Judge.
>
> BY MR. FERGUSON: You need to agree with my opinion, though.
>
> BY THE COURT: Well, okay. Let me get to a point here that I really shouldn't do but I'm going to anyway because I want to preserve the record in this case if I possibly can and that is that there is normally at this point in time at the conclusion of the evidence-in-chief by the Commonwealth a motion or motions to be made. And I don't know, Mr. Marcum . . . you are going to have Mr. Marcum sitting beside you as second anyway, Mr. Ferguson, in case, as I mentioned to you yesterday that there are objectionable questions by you or objectionable statements by you or you object and your objection is denied, there will be an opportunity confer with an attorney who knows the rules of procedure and what is admissible and what is not. But, I don't know at this point whether you wish to make the motions that are usually made at the conclusion of the evidence of the Commonwealth.

(Ellipsises in original.) Following this discussion are approximately twenty pages of transcript detailing a motion for directed verdict and a conversation about the testimony that Appellant intended to elicit to impeach various prosecution witnesses and that he claimed his attorney could not or would not bring out.

The judge then returned again to whether it was a good idea for Appellant to proceed pro se:

> BY THE COURT: You, Mr. Ferguson, are . . . and I want to emphasize this again to you. You're making a huge mistake by trying to represent yourself. What you are stating to the Court is being . . . and I hope that you can attempt to make the points that you want to make in an orderly way. I will give you some leeway as much as I can in asking questions. But if they are totally improper and objected to I will have to make rulings in accordance with the Rules of Evidence as to what's admissible.
>
> You need the assistance of counsel to ask the questions in the proper way. If you insist on representing yourself, you have every right to do so. We have gone through half the trial and I think your representation has been capable. I don't see any problem with the representation that's been afforded to you. The cross-examination of the witnesses, though it has been limited, has been pretty much to the point of any difficulties that can be revealed through the testimony as I heard it but I'm going to . . . but you're not going to be able to . . . I'm going to tell you, I'm going to try to limit the examination. I don't want to get on here and just have a he said, she said, you said, and I said kind of situation back and forth for a long, long period of time. I want you to make your points that you want to make. You need to study what you want to do. I assume you have and ask those questions that you feel like are important to be asked of those witnesses.
>
> You cannot ask someone as if on cross-examination without giving them whatever statement you say that you have in your possession or statements they have made and let them see those statements and review those while you ask them if they gave that statement. First, you must ask them if they gave that statement and then you must ask them, did you not say on the witness stand something different from what's in your statement and this is what I understood you to say. And let them have a chance to explain it. Now, do you understand that?
>
> BY MR. FERGUSON: Yes.
>
> BY THE COURT: Now, once more you're admonished that . . . I strongly suggest that you not represent yourself but you will be permitted to do so. Mr. Marcum will be your second. I will have to advise the jury that you

> have terminated the services of your attorney and wish to continue representation by yourself. I will advise them that I will give you as much leeway as I possibly can but that we have certain rules that we have to follow.

(Ellipsises in original.) They then discussed closing arguments. The judge said he would give Appellant "the benefit of the doubt and . . . extra time." (Ellipsis added.) When the prosecutor asked for twenty minutes, the judge gave Appellant thirty minutes. They then turned to jury instructions. When asked whether he had any objections to the instructions, Appellant quipped, "It seems to me they're alright. I am just a cave man." The judge then asked Appellant's attorney, who responded, "They appear to be correct, Your Honor."

The judge then instructed Appellant about limitations on his impeachment and questioning of witnesses about prior inconsistent statements. The judge then told Appellant:

> Now, keep in mind again against the advice I have . . . I will permit you to go forward and represent yourself and ask your own questions. Mr. Marcum will be sitting beside you to give you any assistance that may be needed and the jury will be instructed as to what has occurred and then we'll proceed from there.

(Ellipsises in original.)

As to the required scope of the Faretta colloquy, the United States Supreme Court has stated, "we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial." Patterson v. Illinois, 487 U.S. 285, 298 (1988). Though that Court has not stated the specific required content of the colloquy, the federal lower courts have produced a model list of questions as part of the Bench Book for District Judges and several of those courts require the use of the list as

a prophylactic measure when a defendant seeks self-representation. See, e.g., United States v. McDowell, 814 F.2d 245, 249-50 (6th Cir. 1987).

The state of the law on this subject is slightly different in Kentucky, however. While adherence to a list like that in McDowell certainly creates the cleanest record of a defendant's knowing, intelligent, and voluntary waiver of the right to counsel, this Court has never required a specific set of questions to be asked. Rather, such waivers and their attendant judge-defendant colloquy have been addressed on a case-by-case basis. Obviously, the complete failure to conduct a hearing in which the judge engages the defendant in a discussion of the perils and procedural requirements has been rejected. Hill, 125 S.W.3d at 226. Also, lengthy discussions akin to those approved in McDowell have been held to be sufficient to show a proper waiver. See Commonwealth v. Berry, 184 S.W.3d 63, 65-68 (Ky. 2005); Wilson v. Commonwealth, 836 S.W.2d 872, 880-84 (Ky. 1992). This Court's cases have not addressed those discussions that fall in the range between no discussion or hearing at all and the extensive questioning found in McDowell (though it is interesting to note that McDowell affirmed the use of a significantly shorter exchange than it required to be used in the future).

Though the judge's inquiries in this case were not as searching as those in Berry and Wilson, they were nevertheless significant. Throughout these discussions, the trial judge recognized that Appellant had previously represented himself, but nevertheless repeatedly encouraged Appellant not to proceed pro se because he was facing a serious charge with a possible life sentence. The judge also repeatedly informed Appellant that he would be required to follow all the rules of procedure and evidence, would be held to the same standards as a practicing lawyer, and gave guidance on how to comply with the various rules. The judge also inquired as to why Appellant wanted to

proceed pro se, discovering that it was over a disagreement about how to question witnesses and the manner in which to proceed in defense against the charges. Throughout these discussions, Appellant acknowledged the dangers and requirements of proceeding pro se but still insisted on defending himself. The discussions between the judge and Appellant in the record demonstrate that Appellant knew he had a right to counsel and was aware of the dangers involved, yet that he nonetheless "elected to proceed with his eyes wide open." Wilson, 836 S.W.2d at 884. Therefore, the trial judge sufficiently fulfilled the Faretta duties described in Hill v. Commonwealth and there was no error in allowing Appellant to proceed pro se.

C. Unpreserved Errors

Appellant also claims that the trial court erred in its admonishment to the jury about why Appellant was proceeding pro se (including the judge's opinion that it was a bad idea) and in allowing the KSP detective and coroner to give what amounted to expert testimony about the blood at the scene of the crime. Appellant admits that neither alleged error was preserved by objection at trial and asks that they be reviewed for palpable error.

Because these alleged errors were not preserved for appellate review, the Court will reverse only if they constitute palpable error under RCr 10.26. A palpable error is one that "affects the substantial rights of a party" and will result in "manifest injustice" if not considered by the court. Schoenbachler v. Commonwealth, 95 S.W.3d 830 (Ky. 2003) (citing RCr 10.26). Recently this Court clarified that the key emphasis in defining such a palpable error under RCr 10.26 is the concept of "manifest injustice." Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). "[T]he required showing is probability of a different result or error so fundamental as to threaten a defendant's entitlement to due

process of law." Id. Having reviewed Appellant's arguments, the Court concludes that there was no manifest injustice. Neither alleged error "was shocking or jurisprudentially intolerable." Id. at 4. Therefore, they cannot be considered palpable and are not grounds for reversal.

D. Jail Time Credit

Finally, Appellant asks the Court to remand this matter for a recalculation of the jail time credit he was entitled to at final sentencing. At the sentencing hearing, Appellant raised the issue, noting that the pre-sentence investigation report stated he had served only 809 days, whereas he had actually served 852 based on the date of his arrest. The judge said, "I'll ask that Probation and Parole recalculate based on the date of arrest as stated . . . if it's incorrect I'll ask them to tender to the Court an amendment on the days credit you're entitled to." In his oral sentencing order, the judge stated that Appellant would "be given credit for all time served to this point in time toward the possibility of parole eligibility." The final sentencing judgment gave Appellant credit for only 809 days. In a rare move, the Commonwealth concedes on appeal that Appellant was entitled to credit for 852 days and asks this Court to "remand the case for proper calculation in accord with the law and the intent of the trial court."

Correcting the number of days credit in a criminal sentencing judgment is correction of a mistake, not an error of law, and therefore is ordinarily properly brought by way of a motion in the trial court pursuant to CR 60.02. See Duncan v. Commonwealth, 614 S.W.2d 701 (Ky. App. 1980). However, because the Commonwealth concedes the point and asks for remand, it shall be granted.

For the foregoing reasons, Appellant's conviction is affirmed, but the matter is remanded to the trial court for proper calculation of the jail time credit and amendment of the judgment if necessary in light of the recalculation.

All sitting. Lambert, C.J.; Cunningham, Minton, Noble, Scott and Schroder, JJ., concur. Abramson, J., concurs in result only.

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