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RENDERED: JANUARY 24, 2008
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL
DATE 2-14-08 Ella Grant D.C.

2006-SC-000662-MR

JOHN LEE SCHELL — APPELLANT

V.

ON APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
NO. 06-CR-00048

COMMONWEALTH OF KENTUCKY — APPELLEE

## MEMORANDUM OPINION OF THE COURT

## AFFIRMING

John Lee Schell appeals from a judgment following a jury verdict convicting him of first-degree trafficking in a controlled substance and of being a first-degree persistent felony offender (PFO1), and sentencing him to twenty years' imprisonment. He argues for reversal of the judgment because (1) the trial court refused his request for a new lawyer after he complained of a conflict with his appointed lawyer, and (2) testimony by the investigating officer improperly bolstered the credibility of a confidential informant. We affirm the judgment because we do not agree that the trial court erred on either issue.

### I. FACTS.

At trial, the lead detective testified to using two confidential informants to make a controlled buy of illegal Oxycodone tablets from Schell that culminated in this

prosecution. The two confidential informants testified live and the Commonwealth played a recording of the controlled buy. The Commonwealth also presented evidence that the Kentucky State Police Crime Laboratory determined that the tablets contained Oxycodone, a Schedule II narcotic. Rejecting Schell's entrapment defense, the jury convicted Schell of drug trafficking and PFO1; and the trial court entered judgment accordingly. This matter of right appeal followed.[1]

## II. ANALYSIS.

### A. No Error Occurred From Handling of Complaints about Defense Lawyer.

Shortly after Schell's arraignment, the Department of Public Advocacy notified the trial court that it had assigned his case to a lawyer from outside its office because of a conflict. At a pretrial appearance several weeks later, Schell told the trial court that he believed he had a "conflict" with his assigned lawyer and that he did not think his lawyer was representing him properly. The trial court asked him to explain. Schell responded that he had asked his lawyer to subpoena some witnesses and that "[he and his lawyer] kind of had an argument about that." The court then asked him when he had asked his lawyer to subpoena the witnesses. Schell responded, "yesterday"; and Schell reported that his lawyer had told him that he should have notified him about these witnesses two weeks earlier. Schell further reported that he believed the phone number he had for the lawyer was actually a fax number, which he could not call from jail. That is the explanation he offered for not having called his lawyer. He reported that on the last occasion he was in court, the lawyer had not asked him whether he had any witnesses to call. Finally, Schell protested that, generally, the lawyer "is not agreeing" with

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[1] Ky. Const. § 110(2) (b).

anything Schell said. The trial court then responded that to the extent that Schell was moving to disqualify his lawyer, his motion was denied.[2] No further discussion occurred concerning this issue. A clerk's written notation in the record concerning this hearing indicated that the case was then set for trial in slightly less than two months and that the trial court denied a motion to disqualify the defense lawyer. The trial actually began a few weeks later than the date mentioned in the clerk's notation.

Schell contends that his pro se motion for a new lawyer was erroneously denied by the trial court without an adequate hearing, which violated his constitutional rights. We disagree.

A defendant is not entitled to substitution of appointed counsel unless he can show good cause. Good cause we have defined as including (1)(a) a complete breakdown in attorney-client communications *or* (1)(b) a conflict of interest, which results in (2) the defendant's legitimate interests being prejudiced.[3] We have recognized that "[w]hether good cause exists for substitute counsel to be appointed is within the sound discretion of the trial court."[4]

We conclude that the trial court did not abuse its discretion in denying this motion for a new lawyer because Schell did not show good cause to warrant replacing his

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[2] Disqualification is defined as "[s]omething that makes one ineligible; esp., a bias or conflict of interest that prevents a judge or juror from impartially hearing a case, or that prevents a lawyer from representing a party." BLACK'S LAW DICTIONARY (8th ed. 2004). Substitution is defined as "[a] designation of a person or thing to take the place of another person or thing." *Id.* Although to some extent the terms disqualification and substitution are distinct, they are somewhat interchangeable in the context of the present case in which Schell expressed dissatisfaction with his attorney (seeking disqualification of the first attorney) and apparently desired that a new attorney be appointed to represent him instead (seeking substitution of new counsel).

[3] Deno v. Commonwealth, 177 S.W.3d 753, 759 (Ky. 2005), *citing* Baker v. Commonwealth, 574 S.W.2d 325, 326 (Ky.App. 1978).

[4] *Id., citing* Pillersdorf v. Department of Public Advocacy, 890 S.W.2d 616, 622 (Ky. 1994).

lawyer with another one. Schell did not indicate that a complete breakdown in communications had occurred. Although he noted that he and his lawyer had disagreed, he did not indicate that they were no longer able to communicate. In fact, although he admittedly had not tried to call his lawyer earlier because of his belief that he would be unable to make the call from the jail, his statements to the trial court indicated that he had, nonetheless, brought his concerns to his lawyer's attention at an in-person meeting and that the two of them had discussed his concerns, albeit with some apparent friction. Despite the friction, Schell and his attorney were obviously still communicating. At the time of the hearing, the trial was still several weeks away; and it would have been reasonable to conclude that Schell and his attorney would be able to cooperate to prepare a proper defense.

Although Schell claimed to have some unspecified "conflict" (a term that we construe as some sort of dispute) with his lawyer, there is no suggestion in the record that the lawyer had a conflict of interest in continuing to represent Schell. Nor was there really any indication at the time of the hearing that Schell's legitimate interests were being prejudiced. Essentially, the trial court heard from Schell that he and his lawyer had recently argued because Schell wanted to subpoena certain witnesses, and his attorney said that he should have provided that information sooner. Schell did not definitively indicate whether his lawyer refused to call the witnesses or whether the lawyer had simply expressed frustration at not being told earlier of Schell's desire to call more witnesses. The trial court may have reasonably concluded that Schell and his lawyer would be able to resolve their witness issues in the several weeks preceding trial

in light of effective trial strategy and other considerations. Our conclusion is supported by the absence of further pretrial complaints by Schell about his lawyer.

We conclude that under the circumstances of this case, the hearing provided by the trial court on the pro se motion for substitute counsel was adequate. In Baker v. Commonwealth,[5] the Court of Appeals stated it was unaware of any precedent requiring any type of formal hearing on a motion for substitute appointed counsel.[6] Years later, however, this Court indicated in Deno that the trial court had "followed the correct procedure" in conducting an extensive hearing on a pro se motion for substitute appointed counsel.[7] As Schell notes, the trial court in Deno allowed the defendant to state his objections with the attorney and solicited responses from the lawyer. Because the trial court did not question defense counsel in the instant case, Schell argues that he did not receive an adequate hearing under the holding in Deno.

Our finding that the trial court followed the "correct procedure" in Deno does not mandate the identical procedure for the instant case. A key distinction between the two cases is that the substitution motion in Deno was made on the first day of trial.[8] In the case at hand, the substitution motion was made several weeks before the originally scheduled trial date and, ultimately, over three months before the trial actually began. Although the trial court in the instant case allowed Schell to make his complaints on the

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5 Baker, *supra*, has been cited by this Court in cases involving motions for substitute appointed counsel such as Deno, *supra*.

6 Baker, 574 S.W.2d at 327.

7 Deno, 177 S.W.3d at 760. Ultimately, the trial court in Deno determined there was no good cause for substitution of counsel after being told of what largely amounted to disputes over trial strategy (such as whether to call an expert witness and whether and in what manner to try to discredit the victim). *Id.* at 759-60.

8 *Id.* at 756.

record, it did not ask the lawyer for a response. Since trial was still weeks or months away, perhaps the trial court reasonably determined that good cause for substitution had not been shown at that time based on Schell's allegations alone. The trial court might also have surmised that Schell and his attorney were still in the process of developing their trial strategy, which could have been revealed to the Commonwealth to Schell's prejudice if his lawyer had been compelled to respond to Schell's allegations at that time.

The correct procedure in this case was not identical to the correct procedure followed in the Deno case because of differing factual circumstances. A true "breakdown in communications" was alleged in Deno with the defendant accusing his lawyer of lying to him and not keeping him informed about his case.[9] Here, all that was alleged was some disagreement and apparent friction but not a total breakdown in communications.

We stop short of declaring that no formal hearing is ever needed when a defendant makes a pro se motion for substitution of counsel, despite Baker's statement that no precedent at the time of its rendition then required it. In fact, although the hearing in the case before us was not as extensive as Schell wanted, he did receive from the trial court a hearing on his dissatisfaction with his lawyer. The hearing does not always need to be as extensive as that provided in Deno, in which the trial court properly exercised its discretion to question both the lawyer and defendant about serious allegations of a "breakdown in communications." So long as the trial court allows the defendant to state on the record the reasons why he seeks substitution of

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[9] *Id.* at 759.

counsel, the trial court may exercise discretion to determine how extensive the hearing needs to be in light of the factual circumstances of the individual case. In particular, where the defendant's allegations, even if assumed to be true, would not establish good cause for substitution of counsel, we would not mandate a procedure requiring the trial court to delve further by questioning defense counsel. This is especially true where doing so might expose defense strategy.[10]

In addition to the arguments about switching lawyers, Schell also raises an ineffective assistance of counsel claim. He notes that although he expressed to the trial court at the early pretrial hearing his desire to subpoena several trial witnesses, the defense, ultimately, called only one trial witness. The lone defense witness was one of the confidential informants. Schell also complains that he felt rushed to trial and suffered from not always having the same attorney with him during pretrial procedures. But we cannot determine the merits of these contentions based on the lack of a record on that issue before us. And it would be premature for us to consider any ineffective assistance questions at this time because there is no record made before the trial court on this issue.[11]

In his reply brief, Schell essentially contends that he made an ineffective assistance of counsel claim before the trial court for which he should have received a

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[10] *See* Henderson v. Commonwealth, 636 S.W.2d 648, 650-51 (Ky. 1982) (affirming the trial court's denial of a pro se motion for substitute counsel, noting that the trial court had heard and evaluated the defendant's claims that his attorney did not tell him anything without any explicit indication that the trial court had questioned the attorney about his client's allegations).

[11] Humphrey v. Commonwealth, 962 S.W.2d 870, 872 (Ky. 1998) ("As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts.").

hearing, quoting Monroe v. U.S.[12] Even if he made such a claim of ineffective assistance of counsel at that time, however, the trial court did not rule on such a claim; the trial court simply denied what it perceived as a motion to "disqualify" counsel. Again, in the absence of the trial court ruling on ineffective assistance of counsel, it would be premature for us to decide such a matter on direct appeal.

Schell cites two federal appellate opinions holding that a thorough evidentiary hearing is necessary to determine indigent defendants' claims that their counsel are rendering inadequate representation. Those opinions are inapposite because they both involved collateral appeals.[13]

### B. No Palpable Error in Admission of Detective's Testimony Bolstering "Best" Confidential Informant's Credibility.

Although admitting that the issue was not preserved for review by objection, Schell argues that palpable error occurred when the lead detective's testimony improperly bolstered the credibility of one of the confidential informants who testified for the Commonwealth. We disagree.

On direct examination by the Commonwealth, the detective described the informant's past experience, how long she had worked as an informant, and which law enforcement agencies she had aided. The Commonwealth elicited on direct examination no testimony about the informant's reputation or character.

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[12] 389 A.2d 811, 819-20 (D.C. 1978) ("A trial court's primary duty under the Sixth Amendment when confronted with a pretrial claim of inadequate preparation and consultation by counsel is to decide whether counsel has consulted with the defendant and prepared his case in a proper manner . . . . The trial court has a constitutional duty to conduct an inquiry sufficient to determine the truth and scope of the defendant's allegations.").

[13] *See* Sawicki v. Johnson, 475 F.2d 183, 184 (6th Cir. 1973); Wilson v. Mintzes, 733 F.2d 424, 428 (6th Cir. 1984), *vacated by* Mintzes v. Wilson, 469 U.S. 926, 105 S.Ct. 317, 83 L.Ed.2d 255 (1984).

On cross-examination by the defense, the detective's testimony extolled the virtues of this confidential informant. With allusion to Kentucky Rules of Evidence (KRE) 403, Schell contends that bolstering of the informant's credibility amounted to a "needless presentation of cumulative evidence that proved to be far more prejudicial than probative."

When viewed in the context of the trial, the detective's testimony was not improper bolstering because it mostly arose in response to cross-examination by the defense. For instance, the detective stated that the informant simply had the desire to help fix the local drug abuse problem when asked whether she or other informants entered into written agreements in exchange for less jail time for offenses they committed. He explained that this informant was not under such an agreement for reduced jail time but was simply a paid informant while acknowledging that the other informant involved in this case was under indictment herself and cooperating partly to receive less jail time. Also, he reiterated how long he had worked with the informant when directly asked whether they had worked together since a certain date. He stated he had not known her to sell drugs when directly asked if she sold drugs. When asked whether the name she used in court was her real name, he responded that it was but that she used different names and disguises when making drug buys. When asked how much money she made working for him, he stated that he did not know but, when pressed for an estimate, stated an approximate number of cases she worked on with him. When asked whether she knew the people she dealt with as an informant, he stated that she usually did not know them but accomplished drug transactions despite their distrust of unfamiliar people because she had the "gift of gab" and could overcome

their suspicions. When asked which ones she knew and which ones she did not know, the officer said they had worked on so many cases together that it would be impossible for him to state which ones she knew and which she did not. At one point, the detective did volunteer his opinion that she was the most effective and reliable informant and the one he most sought to use.

The defense at least implicitly attacked the informant's credibility by asking the detective whether he had done a background check on her and what her criminal history was (with the detective replying that he could not reveal that and acknowledging that confidential informants were generally not "Sunday school teachers") and asking whether she reported her informant income on her tax return (with him responding they would have to ask her). So, to the extent that the confidential informant's credibility had been attacked in the course of the defense's cross-examination of the detective, the detective's bolstering would have been proper under KRE 608(a), which allows opinion testimony as to a witness's "truthful character" to be presented "only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." And although the detective testified before this confidential informant took the stand, defense counsel at least implicitly attacked the credibility of the confidential informant while cross-examining the detective, thus, "opening the door" to his defense of her.

Schell contends that the trial court should have interceded without prompting to put an end to the bolstering testimony and admonished jurors to disregard the responses that allegedly amounted to improper bolstering by instructing them that they should satisfy themselves concerning the credibility of the confidential informant. But

such active and unsolicited intervention into the presentation of the evidence is not the role of the trial judge. And our precedent recognizes that an admonition is often not requested as a matter of trial strategy to avoid drawing further attention to the testimony at issue; therefore, a trial court's failure to give an admonition on its own motion is not necessarily a reversible error.[14]

Without a timely objection to the detective's opinions concerning the confidential informant, we may reverse only upon a finding of palpable error affecting Schell's "substantial rights" and causing "manifest injustice."[15] We find no such palpable error in the present case, especially because the defense "opened the door" to this bolstering. Since any claims of ineffective assistance are premature because of the lack of trial court rulings on this issue,[16] we must assume that objections were not made and admonitions not requested as a matter of trial strategy to avoid drawing further attention to the detective's praise for the informant. We also note that despite the detective's praise for the informant, defense counsel was able effectively to cross-examine her by inquiring as to her lack of other gainful employment or income and her failure to report her informant income as taxable income. Finally, in light of the other strong evidence of guilt, such as the recording of the controlled buy played for the jury, the trial court's allowance of the detective's praise for the informant was harmless error,[17] if it was error at all.

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[14] Caudill v. Commonwealth, 120 S.W.3d 635, 659 (Ky. 2003).

[15] KRE 103(e); RCr 10.26.

[16] Humphrey, *supra*.

[17] RCr 9.24.

## III. CONCLUSION.

For the reasons discussed in this opinion, the judgment is affirmed.

All sitting. All concur.

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