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NOT TO BE PUBLISHED OPINION

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RENDERED: APRIL 24, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2005-SC-000419-MR

NATHANIEL BARKLEY BROWN — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
NOS. 95-CR-002192 AND 96-CR-000114

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This case is on appeal from the Jefferson Circuit Court where Appellant, Nathaniel Barkley Brown, was convicted of murder and attempted murder. At his first trial, Appellant received concurrent sentences of thirty years and ten years, respectively. Those convictions were reversed and on remand, Appellant entered a conditional guilty plea and was sentenced to a life sentence for murder and twenty years for attempted murder.

Appellant raises five claims of error: (1) that his ex-wife, Diane Brown was going to be called as a witness at his new trial; (2) that the trial court failed to do an in-camera review of Ms. Brown's psychiatric records; (3) that there was no hearing or ruling on Appellant's motion to suppress and thus no record; (4) that he should have been sentenced to the minimum penalty under law; and (5) that the trial court improperly

imposed a harsher penalty than the jury in his prior trial. The fourth and fifth claims of error are related and will be addressed accordingly.

I. Background

Appellant was first tried for the intentional murder of his former wife, Cynthia Brown, and the attempted murder of Greg Barker in November and December of 1996. Appellant appealed to this Court, which reversed his convictions in an Opinion dated January 21, 1999. See Brown v. Commonwealth, 983 S.W.2d 513, 514 (Ky. 1999). This appeal concerns what has taken place since Appellant's case was remanded.

Appellant requested to enter a conditional Alford plea on February 22, 2005. The trial court held a hearing on May 2, 2005 to determine Appellant's sentence. The Commonwealth requested the maximum penalty available. Appellant argued that the trial court was obliged to sentence him to the minimum penalty. Subsequently, the trial court sentenced Appellant to concurrent terms of life in prison for the murder of Cynthia Brown and twenty years for the attempted murder of Barker.

II. Analysis

A. Spousal Privilege

At the time of the first trial, Appellant was married to Diane Brown who was an eyewitness to the crimes. The Commonwealth, therefore, stipulated that KRE 504 allowed both Appellant and Brown to assert the spousal testimony privilege to prevent her from testifying. Under the rule, a witness-spouse cannot be made to testify against a party-spouse. The rule states in relevant part that (a): "The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage." Based on this,

Ms. Brown did not testify. Appellant now argues that the Commonwealth should not be permitted to benefit from its errors in the first trial by being allowed to call Ms. Brown as a witness in the new trial, and that he was unable to effectively cross-examine Brown because she had given no prior testimony.

Appellee's view is that Diane Brown can now be properly called as a witness because the parties are divorced. The trial court agreed with this position and would have allowed her to testify at a second trial. Appellant appears to now agree with that position, and this Court finds that it is correct. The spousal privilege rule developed historically to support the institution of marriage by promoting marital harmony, which would obviously be damaged by requiring one spouse to testify against the other. Robert G. Lawson, Kentucky Evidence Law Handbook, § 5.10(3) at 366, (4th ed. 2003). The Kentucky version of this rule, unlike that of most other states, allows either the testifying spouse or the party-spouse to invoke the privilege. Obviously, if a spouse chooses to testify, marital harmony is not a goal of that spouse, and the privilege serves no purpose. However, since the rule does extend the privilege to the party-spouse, Appellant properly invoked it in the first trial. By the time of the second approaching trial, the parties were divorced and the purpose of the privilege was gone. The plain language of the rule provides that the privilege can only be invoked by a *spouse*, which neither Appellant nor Diane Brown was at that time. Consequently, there was no spousal privilege to bar calling her as a witness.

Nonetheless, Appellant insists that there are fairness grounds stemming out of the invocation of the privilege in the first trial that should have prohibited the Commonwealth from ever calling Diane Brown as a witness: that a new trial giving Ms. Brown the opportunity to testify could occur only because the Commonwealth made a

mistake in the first trial; she may now be inclined to shade her testimony in favor of the Commonwealth; and since she is a new witness, Appellant does not have the benefit of her prior testimony to prepare for cross-examination as he does for the other witnesses.

None of these grounds has merit. A new trial is exactly that. While there may indeed be some benefit to both sides from having previously heard testimony of the witnesses, and while the witnesses' prior testimony can be used to impeach them, it is what they say on the stand in front of a new jury that will be the basis of acquittal or conviction. A new trial, sought by the defendant, is not a windfall to the Commonwealth. Often its case is weakened by the exclusion of evidence on retrial. As to the former spouse possibly giving testimony biased toward the Commonwealth, such is subject to cross-examination and impeachment. While Ms. Brown would be a new witness in a second trial, she is no different in that regard than any new witness who may have come forward, and would not be excluded on that ground alone. In short, since the marital privilege does not apply if the witness is no longer a spouse at the time of testimony, there was no bar to calling Ms. Brown in a subsequent trial.

B. Psychiatric Records

Appellant filed a motion for access to Ms. Brown's psychiatric records, arguing that he had known her for eight years and that he believed she had "some problems," specifically that she was suffering from post traumatic stress disorder and had not been able to work for a couple of months after the murder. Counsel assisting Appellant argued that mental problems were significant for impeachment purposes and asked the court to do an in-camera review of Ms. Brown's records to determine whether they contained any exculpatory or impeachment evidence. The trial court took the matter under submission, ultimately denying Appellant's motion.

A patient has the right to refuse to disclose psychiatric records. KRE 507(b). However, if a court finds that the substance of the records is relevant to an essential issue in the case, that there are no alternate means of obtaining the information and that the need for the information outweighs the interest protected by the privilege, then a court may order any substantive communication to be disclosed. KRE 506(d)(2).

This Court once held the view that a defendant only needed to show "articulable evidence that raises a reasonable inquiry of a witness's mental health history," to obtain the records. Eldred v. Commonwealth, 906 S.W.2d 694, 702 (Ky. 1994). However, it subsequently concluded that a more restrictive test was necessary to prevent defendants from attempting to obtain access to privileged records in an attempt to discover unspecified information. Commonwealth v. Barroso, 122 S.W.3d 554, 563 (Ky. 2003). This Court recognizes that to subject every witness to an in-camera review would be an invasion of privacy which is what the privilege is intended to prevent. Id. at 563.

Thus, "an in camera review of a witness's psychotherapy records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence." Id. If the in-camera inspection reveals exculpatory evidence favorable to the accused or relevant for impeachment purposes, then that evidence must be disclosed. Eldred, quoted in, Commonwealth v. Barroso, 122 S.W.3d 554, 563 (Ky. 2003).

Appellant claimed that his concerns about Ms. Brown were enough to warrant an in-camera review. However, the information provided was vague and essentially an assertion that the information in Ms. Brown's records *might* affect her credibility. Furthermore, Appellant failed to demonstrate how anything in the records would affect

Ms. Brown's ability "to recall, comprehend and accurately relate the subject matter of her testimony." Peak v. Commonwealth, 197 S.W.3d 536, 546 (Ky. 2006).

There was no abuse of discretion in the trial court's decision to deny Appellant's motion and therefore, no error.

C. Motion to Suppress

Counsel assisting Appellant filed a motion to suppress statements Appellant made to police officers that were ultimately a confession that he had shot Cynthia Brown. Appellant contends that upon review, he could not find a record of the hearing held on the motion. However, the record does contain an Order stating that the matter came before the trial court on December 11, 2001 and was continued by agreement to April 9, 2002.

Appellant's request to have the record supplemented was initially denied, however, a motion to reconsider was granted on October 14, 2005. This Court's Order, entered on November 2, 2005, required the Jefferson Circuit Court Clerk to "certify and transmit to the Clerk of the Supreme Court videotapes of numerous pre-trial proceedings omitted from the record." While the clerk certified additional video material, it did not include any video from December 11, 2001. Appellant is now contending that he is warranted relief under RCr 9.78, which provides that when a defendant makes a motion to suppress, findings resolving the essential issues of fact shall be entered into the record.

It is Appellant's burden to ensure that a record of the December 11, 2001 hearing is included in the appellate record. Davis v. Commonwealth, 795 S.W.2d 942, 949 (Ky. 1990). CR 75.13 addresses the issue of proceedings where there is no stenographic or electronic record by allowing Appellant to make a narrative statement of what occurred.

Under the rule, only Appellant may provide this statement. Appellant clearly took steps to ensure that the video record would be included and this Court ordered that this be done. It appears that the clerk supplemented the record with what was available. However, for reasons unknown to this Court, any record of the December 11 hearing was not among them.

In these circumstances, it would have been appropriate for Appellant to provide a narrative statement and it is unclear why Appellant did not avail himself of this opportunity. A fair conclusion would be that no hearing was held and no ruling given, thus Appellant could not supplement or he chose not to do so. If the hearing and the ruling did not occur, it was the duty of Appellant to notify the trial court and request a ruling if he desired one. Bell v. Commonwealth, 473 S.W.2d 820 (Ky. 1971), cited in, Brown v. Commonwealth, 890 S.W.2d 286, 290 (Ky. 1994). Either by failing to raise the issue below or by intentionally not filing the narrative statement, Appellant has waived his right to raise this issue. This conclusion is buttressed by the fact that he preserved the right to appeal all pre-trial rulings and failed to raise the issue of a lack of ruling on the suppression motion. Due to clear waiver, there is no reversible error.

D. Sentencing

On February 22, 2005, the Commonwealth offered Appellant the same sentence he had received from the jury at his first trial, a total sentence of thirty years. This offer was initially presented to Appellant's stand-by counsel. During discussion of the offer, Appellant stated his belief that if he was not represented by counsel when he pleaded, and made no agreement with the Commonwealth, the trial court was required under RCr 9.84 to give him the minimum sentence for his crimes. The trial court advised Appellant that it would consider the full range of penalties available if he entered an

open plea. The trial court recessed to allow Appellant to consult with his stand-by counsel. Appellant did not object. Appellant ultimately chose to reject the Commonwealth's offer and enter an open plea. He was sentenced to the maximum penalty requested by the Commonwealth, concurrent sentences of life imprisonment for the murder of Cynthia Brown and twenty years for the attempted murder of Barker. Appellant now maintains that he pleaded guilty without the assistance of counsel and without an agreement with the Commonwealth with regard to his sentence, thereby requiring the trial court to impose the minimum authorized sentence.

The plain language of RCr 9.84 does not comport with Appellant's view of the sentencing requirements: "(2) When the defendant enters a plea of guilty, the court may fix the penalty...." The authority he cites, Parsley v. Commonwealth, 272 S.W.2d 326 (Ky. 1954), references statutory provisions that no longer exist, and specifically refers only to the "opportunity" to have advice of counsel. There is no question Appellant had such an opportunity here, but chose not to take advantage of it. He was acting as his own counsel, with stand-by counsel. To the extent that Parsley may be viewed to limit a judge's ability to consider the entire penalty range, it is expressly overruled.

There is simply no authority for the proposition that a defendant is free to have counsel available, fire counsel, yet have stand-by counsel, act as his own attorney and claim he is unrepresented. It is clear from the record that Appellant made verbal attempts to convince the trial court that he was proceeding without representation. Acting as his own counsel, this behavior was nothing more than Appellant's attempt to persuade the trial court to sentence him to the minimum penalty.

Appellant also claims that he felt as if he was acting without assistance of counsel and was, therefore, not assisted. However, Appellant's subjective feelings on

the matter do not mandate a conclusion that he was without assistance of counsel. If Appellant was not satisfied with his representation, he has other remedies.

Finally, in his reply brief, Appellant raises an issue not initially raised, i.e., that he did not have a hearing pursuant to Faretta v. California, 422 U.S. 806, 819-20 (1975), and therefore, did not make an intelligent and voluntary waiver of counsel.

A defendant may make a limited waiver of counsel, "specifying the extent of services he desires, and he is then entitled to counsel whose duty will be confined to rendering the specified kind of services (within, of course, the normal scope of counsel services)." Wake v. Barker, 514 S.W.2d 692, 696 (Ky. 1974). This right is "accompanied by the right to be informed by the trial court of the dangers inherent in that decision." Hill v. Commonwealth, 125 S.W.3d 221, 226 (Ky. 2004). The trial court has an affirmative duty to make the defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that the defendant understands his choice and knows what he is doing." Id.

When a criminal defendant requests to proceed pro se or for hybrid representation, the principles of Faretta become applicable. In Kentucky, Hill requires that: 1) the trial court must hold a hearing in which the defendant testifies on the question of whether the waiver is voluntary, knowing and intelligent, 2) during the hearing, the trial court must warn the defendant of the hazards arising from and the benefits relinquished by waiving counsel, and 3) the trial court must make a finding on the record that the waiver is knowing, intelligent and voluntary. 422 U.S. at 819-20.

In an order dated June 11, 2002, Appellant was granted leave to proceed pro se with limited assistance of counsel. A paragraph ordering a hearing on this matter to determine whether the waiver was being made knowingly, intelligently and voluntarily

was crossed out. Presumably, the trial court felt that further hearing was not necessary based on the motions and accompanying affidavit that Appellant provided. In Appellant's motion to proceed pro se, dated June 3, 2002, he stated that:

1) he had a "college education" and was literate, fully fluent in English with no physical or psychological disabilities;

2) he was "unequivocally, voluntarily, and knowingly" making a limited waiver of counsel, and;

3) he was "aware of the dangers and disadvantages of self-representation, including such areas as possible exclusion of evidence, self-incrimination and waiver of potential defenses."

He further stated in his affidavit that:

1) he was trained and certified as an Inmate Legal Aide by the Kentucky Department of Public Advocacy in 1997;

2) he was aware of all possible penalties and that they could be ordered to run concurrent or consecutively;

3) he was familiar with the Kentucky Rules of Evidence and the Kentucky Rules of Criminal Procedure, and;

4) although he was "aware that in the opinion of most, he would be far better defended by a trained lawyer than he can be defended by himself, that most think it unwise of him to try and defend himself...," that it was still his desire to proceed pro se.

In this case, it is clear from the record that the trial court complied with any duties it had with respect to Appellant's representation. The trial court did in fact conduct a "hearing" when it considered Appellant's motion to proceed pro se. While no oral testimony was taken, none was necessary because of the nature of the testimony in

Appellant's affidavit. Had the Appellant merely stated a general waiver, the trial court would have had to flesh out his actual knowledge and voluntariness. However, no express warnings from the trial court were necessary here because before the court could give them, Appellant explicitly asserted in his affidavit that he knew the dangers of self-representation, including "possible exclusion of evidence, self-incrimination and waiver of potential defenses." He asserted that he was aware of "all potential penalities" and how they could run; he knew the Rules of Evidence and Criminal Procedure; and was a trained Inmate Legal Aid. By granting Appellant's motion after expressly urging him to reconsider, it is clear the trial court believed Appellant had made a voluntary and knowing waiver. To reverse this case for the lack of a specific statement to that effect is to elevate form over substance to an insupportable degree.

Appellant's assertion that he didn't understand the ramifications of proceeding without counsel are wholly without merit given the other arguments in his brief. Clearly, Appellant understood how having counsel helped or harmed his case, given his rather duplicitous request to "proceed without counsel" while being assisted by counsel, in the hope that he could take advantage of a rule that would work to his benefit.

Appellant alternatively argues that vindictiveness must play no part in increased penalties when defendants have successfully appealed the prior conviction, see North Carolina v. Pearce, 395 U.S. 711 (1969), and claims that this presumption of vindictiveness applies to his situation due to his opinion that he was a difficult person to deal with.

Supreme Court rulings following Pearce demonstrate that "vindictiveness of a sentencing judge is the evil the Court sought to prevent rather than simply enlarged sentences after a new trial." Texas v. McCullough, 475 U.S. 134, 138 (1986). The

rationale of Pearce simply does not apply when "the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction." Chaffin v. Stynchcombe, 412 U.S. 17 (1973). These decisions recognize that a different sentencing judge, "unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication." Id. Given the fact that Appellant's two sentencings did not involve the same judge, Pearce is not appropriate authority for Appellant to rely upon.

Appellant further argues that the trial judge called his acts "terroristic" and that this is evidence that the judge was vindictive. However, this Court does not find it unreasonable that a trial judge described a murder as terroristic. If this Court were to assume vindictiveness on the part of any trial judge who gave his or her opinion on the gravity of a defendant's crime, it would be forced to overturn almost every sentence given. The record reveals a rather detailed explanation from the trial court regarding Appellant's sentence and this Court finds that explanation reasonable. There was no error regarding Appellant's sentencing.

III. Conclusion

For the reasons set forth herein, the judgment and sentence of the Jefferson Circuit Court is affirmed.

Lambert, C.J.; Abramson, Cunningham, Noble, Schroder and Scott, JJ., concur. Minton, J., dissents by separate opinion.

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RENDERED: APRIL 24, 2008
NOT TO BE PUBLISHED

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COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE MINTON

In Hill v. Commonwealth, 125 S.W.3d 221 (Ky. 2004), we set forth a clear, bright-line path for trial courts to follow when criminal defendants seek to waive their constitutional right to counsel. Today, the majority needlessly and inexplicably permits trial courts to wander from Hill's well-worn path, thereby turning clarity into uncertainty. Thus, I respectfully dissent.

In Hill, we held that a trial court had three clear duties to perform in situations in which a defendant seeks to waive his or her constitutional right to counsel. First, a trial court "must hold a hearing in which the defendant testifies on the question of whether the waiver [of counsel] is voluntary, knowing, and intelligent." *Id.* at 226. In the case at hand, at no time did the trial court bring Brown and the Commonwealth before it in open court so that Brown could testify, under oath, about his desire to waive his right to counsel. The majority comes to

the novel conclusion that Brown's submission of an affidavit constituted a hearing. Tellingly, the majority does not cite any authority to support its conclusion. I cannot agree that the submission of a verified document constitutes a hearing.

Under Hill, the second requirement is that "during the hearing, the trial court must warn the defendant of the hazards arising from and the benefits relinquished by waiving counsel." *Id.* It is obvious that this requirement was not remotely complied with in this case because the trial court simply accepted at face value the contents of Brown's motion and affidavit. As the United States Supreme Court has held, "[t]he fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility." Von Moltke v. Gillies, 332 U.S. 708, 724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (1948). Rather, because of the enormous consequences of a waiver of the right to counsel, "[a] judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." *Id. See also* State v. Klessig, 564 N.W.2d 716, 721 (Wis. 1997) ("[W]e mandate the use of a colloquy in every case where a defendant seeks to proceed pro se to prove knowing and voluntary waiver of the right to counsel. Conducting such an examination of the defendant is the clearest and most efficient means of [e]nsuring that the defendant has validly waived his right to the assistance of counsel, and of preserving and documenting that valid waiver for purposes of appeal and postconviction motions. Thus, a

properly conducted colloquy serves the dual purposes of ensuring that a defendant is not deprived of his constitutional rights and of efficiently guarding our scarce judicial resources.").

The third requirement in Hill is that a trial court "must make a finding on the record that the waiver is knowing, intelligent, and voluntary." Hill, 125 S.W.3d at 226. Although it refuses to reverse Brown's conviction, the majority admits that this requirement was not met. ("By granting Appellant's motion after expressly urging him to reconsider, it is clear the trial court believed Appellant had made a voluntary and knowing waiver. To reverse this case for the lack of a specific statement to that effect is to elevate form over substance to an insupportable degree.")

So this case involves a trial court's failure to comply with any of the three mandatory duties set forth in Hill. And the majority had two options: it could have followed Hill and reversed Brown's convictions or it could have overruled Hill. Surprisingly, the majority has chosen a third path. The majority cites Hill but does not follow it. Neither, however, does the majority explicitly overrule Hill. Such a result leaves the bench and bar of the Commonwealth in the dark as to when, if ever, Hill must be followed. *See* Hein v. Freedom From Religion Foundation, Inc., ___ U.S.___, 127 S.Ct. 2553, 2584, 168 L.Ed.2d 424 (2007) (Scalia, J., concurring) (castigating majority for "beating [precedent] to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive.").

Zealous protection of constitutional rights, especially in cases like the one at hand involving serious felony offenses, is not merely elevating form over substance. Rather, it is a recognition that the basic constitutional rights of a defendant trump a trial court's understandable need to save time and scarce judicial resources. After all, in all probability, the hearing required by Hill would likely have taken ten minutes or less in this case. But because such hearings are vital to ensure that a defendant does not waive counsel without knowing the full ramifications of that waiver, the failure to conduct such a hearing cannot be dismissed as harmless error. *See, e.g.,* Hill, 125 S.W.3d at 228-29 (holding that a failure to conduct a proper hearing when a defendant chooses to waive his right to counsel is a structural error, which is not subject to harmless error analysis.). Therefore, I respectfully dissent.