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NOT TO BE PUBLISHED OPINION

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RENDERED: AUGUST 27, 2009
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2008-SC-000259-MR

DATE 9/17/09 Kelly Mahan D.C.

KEITH STILTZ — APPELLANT

V.

ON APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
NO. 07-CR-00107

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is an appeal from a judgment in which Appellant was convicted of manufacturing methamphetamine, first-degree trafficking in a controlled substance (methamphetamine), third-degree assault, and possession of drug paraphernalia. Appellant argues that the trial court erred in failing to: grant him a continuance; appoint him a new attorney; and direct a verdict on the assault and trafficking charges. We reject all three arguments and thus affirm.

On August 25, 2007, Officer Junior Smith of the City of Burkesville Police Department stopped a GEO Tracker driven by Tina Lauderdale. Officer Smith recognized the car as one that had recently been towed as an abandoned vehicle and which police had been unable to determine its owner and if it was

insured. As Officer Smith approached the vehicle, Lauderdale got out and started walking toward him. Smith told Lauderdale to return to her car and provide her license, registration, and proof of insurance. As he got closer to the car, Smith saw trash strewn about the vehicle, including some coffee filters and other items Smith knew to be used to make methamphetamine. Officer Smith then recognized Appellant, Keith Stiltz, as the passenger in the car. Smith became concerned because Stiltz was moving around a lot in the car.

Officer Lawrence Nettles soon arrived as back-up. The officers noticed that Stiltz was spraying air freshener in the car and was reaching under the seat, despite the fact that Smith had told him to keep his hands in view. The officers approached Stiltz's door and Smith asked what he was doing. Stiltz, who was still fidgeting, pulled out a 2-liter Mountain Dew bottle. Nettles, who was behind Smith, yelled, "that's a meth lab, get back!" The officers ordered Stiltz to put the bottle down and step out of the car. Stiltz got out of the car with the bottle in his hand, exclaiming, "get back, this shit will kill you!" Stiltz then threw the bottle. Officer Nettles grabbed Smith and pulled him towards the back of the car. When the bottle hit the ground some 3-5 feet from Smith, some of its contents splashed up and hit Officer Smith's face and arm and burned him. Smith was decontaminated and treated for the burns at a nearby hospital. Lab tests on the contents of the 2-liter bottle confirmed that it contained methamphetamine.

On September 27, 2007, Stiltz was indicted for manufacturing methamphetamine, first-degree trafficking in methamphetamine, assault in the

third degree, and possession of drug paraphernalia. Pursuant to a jury trial held on February 7, 2008, Stiltz was found guilty of all four offenses and sentenced to twenty-five (25) years imprisonment. This matter of right appeal followed.

REQUEST FOR A NEW ATTORNEY AND CONTINUANCE

On the morning of trial, the parties met in chambers to address defense counsel's motion for a continuance based on Stiltz's dissatisfaction with defense counsel and his request to have a new attorney appointed for him. Defense counsel informed the court that she and Stiltz had personal issues and were not in agreement on how to try his case. Defense counsel maintained that she had attempted to defend him to the best of her ability, but Stiltz insisted that he knew the law better than she did and had asked her to do things that she could not legally or ethically do.

Stiltz told the court that he did not want defense counsel to represent him in the trial because he felt she was working more for the prosecution than the Commonwealth was. In particular, Stiltz complained that defense counsel had not obtained his medical records to show that he was intoxicated at the time of the offense. Defense counsel stated that she did not recall Stiltz asking her to obtain his medical records, but, in any event, she anticipated that Stiltz's intoxicated state would be elicited through the testimony of various witnesses because it was not a disputed fact.

The trial judge explained to Stiltz that he could not fire his appointed counsel and appoint new counsel simply because Stiltz wanted a different

attorney. The court denied Stiltz's motion to appoint a new attorney, reasoning that Stiltz had not given the court any justifiable reason to discharge counsel. The court went on to deny the motion for a continuance because the parties were all aware that the case had been set for trial that day and there was no reason the case should not go forward.

As to Stiltz's contention that he was entitled to new counsel, it has been held that a defendant who is represented by a public defender or appointed counsel does not have a constitutional right to be represented by any particular attorney, and is not entitled to the dismissal of his counsel and the appointment of substitute counsel except for adequate reasons or a clear abuse by counsel. Henderson v. Commonwealth, 636 S.W.2d 648, 651 (Ky. 1982) (citing Baker v. Commonwealth, 574 S.W.2d 325 (Ky.App. 1978) and Fultz v. Commonwealth, 398 S.W.2d 881 (Ky. 1966)). "Adequate and sufficient cause for removal of counsel has been variously defined by the federal courts and includes (1) complete breakdown of communications between counsel and defendant, (2) conflict of interest, and (3) legitimate interests of the defendant are being prejudiced." Baker, 574 S.W.2d at 327. While Stiltz expressed personal dissatisfaction with his counsel, no adequate reasons were demonstrated warranting dismissal of counsel in this case. No conflict of interest, abuse by counsel, or prejudice to the legitimate interests of Stiltz was shown.

As for the denial of the motion for a continuance, it is well established that the granting of a continuance is in the sound discretion of a trial judge,

and unless from a review of the whole record it appears that the trial judge has abused that discretion, this court will not disturb the ruling of the court. Williams v. Commonwealth, 644 S.W.2d 335, 336-37 (Ky. 1982); RCr 9.04. From a review of the whole record in this case, we cannot say that the trial court abused its discretion in refusing Stiltz's motion for a continuance. There was no indication that defense counsel was unprepared to try the case. She appeared to have a full knowledge of the facts and available defenses, and presented a legitimate and vigorous defense, given the facts of the case.

DENIAL OF DIRECTED VERDICT MOTIONS

Stiltz argues that it was error to deny him a directed verdict on the third-degree assault and first-degree trafficking in methamphetamine charges. Our standard of review on a motion for directed verdict is set forth in Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991) as follows:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given....
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

As to the trafficking charge, KRS 218A.1412 provides:

> (1) A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance, that is classified in Schedules I or II which is a narcotic drug; a controlled substance analogue; lysergic acid diethylamide; phencyclidine; a controlled substance

> that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers; gamma hydroxybutyric acid (GHB), including its salts, isomers, salts of isomers, and analogues; or flunitrazepam, including its salts, isomers, and salts of isomers.

A defendant acts "knowingly" when he "is aware that his conduct is of that nature or that the circumstance exists." KRS 218A.015; KRS 501.020(2). Stiltz contends that the Commonwealth failed to prove that he knew the 2-liter bottle he had contained methamphetamine.

Stiltz testified that he was a methamphetamine addict who had been abusing methamphetamine for over 15 years. He testified that he was transporting the bottle to his meth dealer, "Big Country," later that day in exchange for some drugs and $200. Stiltz claimed at trial that he did not know what was in the bottle and or even how to make methamphetamine. According to Stiltz, he threw the bottle because the contents were burning him in the car. Stiltz admitted saying, "get back, this shit will kill you" when he threw the bottle.

Officer Smith testified that Stiltz told him that he knew what was in the bottle. According to Smith, Stiltz stated that he was to put the bottle together in Metcalfe County and then transport it to Willis Barbecue where he would give it to someone named "Country" for $200 and drugs.

From our review of the evidence, there was more than sufficient evidence from which a reasonable juror could believe that Stiltz knew that methamphetamine was in the bottle. Stiltz's actions, his admitted history with methamphetamine, and what he told Officer Smith belied his claim that he did

not know that methamphetamine was being made in the bottle. Hence, the trial court properly denied the motion for directed verdict as to the trafficking charge.

Relative to the assault charge, KRS 508.025 provides in pertinent part:

> (1) A person is guilty of assault in the third degree when the actor: (a) Recklessly, with a deadly weapon or dangerous instrument, or intentionally causes or attempts to cause physical injury to:
>
> 1. A state, county, city, or federal peace officer;

The court did not instruct the jury on an "intentional" theory of the case, but only on the question of whether Stiltz acted "recklessly with a dangerous instrument" when he threw the bottle containing the methamphetamine, causing physical injury to Officer Smith. KRS 501.020 defines "recklessly" as follows:

> (4) "Recklessly"--A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

Stiltz argues that the evidence established that he knew of the substantial risk of the bottle of methamphetamine chemicals by his exclamation "get back, this shit will kill you." Thus, he maintains that his conduct was actually wanton ("aware of and consciously disregards a substantial and unjustifiable risk"), not reckless. KRS 501.020(3).

Officer Smith testified that Stiltz disobeyed his order to set the bottle down and exit the vehicle. Instead, Stiltz tossed the bottle out of the car and it landed three to five feet from the officer. Officer Smith testified that he did not believe that Stiltz was aiming the bottle at him. Rather, it looked to Officer Smith like Stiltz was just trying to get rid of the bottle quickly. While Stiltz may have been aware of the volatility of the methamphetamine chemicals in the bottle, the jury could have believed from the evidence that Stiltz nevertheless failed to appreciate the risk of throwing the bottle out of the car near the officers – that it would hit the ground and the contents would splash up and injure one of the officers.

Appellant argues that his conduct was wanton (second-degree assault), rather than reckless (third-degree assault). Because third-degree assault is a lesser included offense of second-degree assault and Appellant has admitted that his conduct was wanton, he was not entitled to a directed verdict on the third-degree assault charge. Accordingly, there was sufficient evidence to deny a request for a directed verdict on third-degree assault.

For the reasons stated above, the judgment of the Cumberland Circuit Court is hereby affirmed.

All sitting. All concur.

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