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NOT TO BE PUBLISHED OPINION

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RENDERED: FEBRUARY 23, 2012
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000432-MR

GARY D. WARICK — APPELLANT

V.

ON APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
NO. 09-CR-00070

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant Gary D. Warick appeals as a matter of right from his convictions for two counts of first-degree trafficking in a controlled substance and being a persistent felony offender in the second degree (PFO II). Seeing no reversible error, we affirm.

I. BACKGROUND

The charges against Appellant arose from two controlled drug buys in Floyd County, Kentucky by Kathy Sanchez, a confidential informant working with Detective Tom Underwood of the Kentucky State Police Drug Enforcement Special Investigations Unit (DESI). The first controlled buy began when Appellant called Sanchez to tell her he had methadone for sale. After Sanchez informed Detective Underwood, DESI set up a buy where Sanchez would purchase 30 pills.

Sanchez testified that, before she had paid for the pills, Appellant delivered them to her home on the morning of October 23, 2007, and that this was Appellant's usual practice. Sanchez took the pills to the KSP post, where they were identified as 30, 40-miligram methadone tablets. Sanchez then made a recorded phone call to Appellant, which was played at trial, to arrange to pay for the pills and to purchase 5 more.

Sanchez and Appellant agreed to meet at Appellant's residence at noon. Prior to the meeting, police searched Sanchez and her vehicle, provided her with pre-recorded buy money, and equipped her with audio/video recording equipment. The recording of the transaction was played at trial. Sanchez paid Appellant $1200 for the 30 tablets she had already received, and an additional $200 for 5 more tablets. Sanchez left Appellant's residence at 12:55 pm, and turned over 5, 40-milligram methadone tablets to Detective Underwood.

The second transaction occurred on November 27, 2007. Sanchez placed a phone call to Appellant, and Appellant stated that he had 19, 40-milligram methadone tablets left. Sanchez and Appellant agreed to meet at the Bull Creek Center in Floyd County. Police again searched Sanchez, searched her vehicle, provided her with buy money, and equipped her with recording equipment. The recorded transaction was played at trial. Sanchez drove to the Bull Creek Center parking lot, where she purchased 19, 40-milligram methadone tablets from Appellant for $760.

Appellant was tried by a jury in a two-day trial, at which Appellant elected to act as hybrid counsel with a public advocate as co-counsel.

Appellant conducted his own voir dire and closing argument. In addition, he filed a number of motions and made objections throughout the course of the trial.

The jury convicted Appellant of two counts of first-degree trafficking in a controlled substance. During the sentencing phase of the trial, the jury convicted Appellant of one count of PFO II. It recommended a sentence of 10 years' imprisonment for each trafficking count, with one count enhanced to 20 years by virtue of the PFO II conviction. The jury also recommended that the two sentences run consecutively. Because this sentence exceeded the maximum permitted by KRS 532.110(1)(c), at final sentencing, the trial court ordered that the sentences run concurrently for a total of 20 years' imprisonment. Appellant therefore appeals to this Court as a matter of right. Ky. Const. § 110(2)(b)

II. THE TRIAL COURT DID NOT ERR REGARDING APPELLANT'S COMPETENCY TO STAND TRIAL AND TO ACT AS HYBRID COUNSEL

Appellant argues that the trial court erred in failing to hold a competency hearing. This issue is unpreserved, and Appellant requests review for palpable error. Appellant essentially argues that his (in retrospect, unwise) decision to act as hybrid counsel, and his performance in that capacity, should have caused the trial judge to hold a competency hearing. We disagree.

A trial court must order a competency evaluation if there are reasonable grounds to believe that a defendant lacks the capacity to appreciate the nature and consequences of the proceedings, or to participate rationally in his defense. RCr 8.06; KRS 504.100. On appeal, the standard of review is "[w]hether a

reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." *Mills v. Commonwealth*, 996 S.W.2d 473, 486 (Ky. 1999), *overruled in part on other grounds by Padgett v. Commonwealth*, 312 S.W.3d 336 (Ky. 2010).

Appellant clearly appreciated the nature and consequences of the proceedings. During voir dire and closing argument, Appellant alluded to the seriousness of the charges against him. He demonstrated an understanding of criminal law and legal principles that was at least average for a layperson, often citing specific Rules of Criminal Procedure. He made a number of motions before trial and objections during trial. In addition, although the trial court did not conduct a competency hearing, it did conduct a hearing, pursuant to *Faretta v. California*, 422 U.S. 806 (1975), to determine whether Appellant was competent to act as hybrid counsel. At that hearing, Appellant clearly indicated the specific charges against him. He evidenced a clear understanding of the severity of the charges, and even explained that he was charged with being a persistent felony offender. He accurately explained the possible penalties he faced.

Appellant also participated rationally in his own defense. While Appellant's arguments to the jury were at times confusing and inelegant, he nevertheless assisted in his own defense and made arguments as to why he was not guilty. While Appellant's decision to act as hybrid counsel may have

been unwise, it does not create doubt as to his competency to stand trial. The trial court did not err in failing to *sua sponte* order a competency evaluation.

In the alternative, Appellant argues that, even if he was competent to stand trial, the trial court erred in permitting him to act as hybrid counsel. The trial court repeatedly expressed doubt about Appellant's choice to serve as hybrid counsel. The court cited Appellant's performance when he represented himself in an earlier trial before the same judge. After Appellant was convicted of first-degree burglary in that trial, he argued on appeal that he should not have been permitted to represent himself. Appellant agreed that he should not again attempt to represent himself, but stated that he believed he was competent to act as hybrid counsel. In addition, following Appellant's conviction and the jury's recommendation of the maximum sentence in this case, after the jury was dismissed, the trial judge commented, "I am not sure justice prevails in cases like this." Despite the trial court's concerns, following a brief *Faretta* hearing, the court found that Appellant met "the very minimum requirements" to act as hybrid counsel.

Pursuant to Section 11 of the Kentucky Constitution, a defendant has the right to act as "hybrid counsel" by "[making] a limited waiver of counsel, specifying the extent of services he desires, and he then is entitled to counsel whose duty will be confined to rendering the specified kind of services . . . ." *Wake v. Barker*, 514 S.W.2d 692, 696 (Ky. 1974). When such a request is made, "the trial court must conduct a hearing to determine that any such waiver is made knowingly and intelligently." *Major v. Commonwealth*, 275

S.W.3d 706, 718 (Ky. 2009) (citing *Wake*, 514 S.W.2d at 697). This hearing "comports with the requirements and protections afforded" to defendants by *Faretta*. *Major*, 275 S.W.3d at 718-19. Ordinarily, "[u]pon a finding of competence to stand trial, a criminal defendant is deemed to be competent enough to choose to waive any of his constitutional rights," including the right to be represented by counsel. *Id.* at 719 (citing *Godinez v. Moran*, 509 U.S. 389, 398-99 (1993)). However, in the case of a borderline-competent defendant, "the trial court [has] the right to deny the Appellant the right to proceed *pro se* or to structure the role and scope of hybrid counsel employed . . . ." *Major*, 275 S.W.3d at 722.

In this case, Appellant argues that the trial court erred in failing to exercise its discretion to prohibit him from serving as hybrid counsel. As stated previously, Appellant was competent to stand trial; furthermore, there was no evidence to suggest that Appellant was the type of "borderline-competent" defendant discussed in *Major*. For example, the defendant in *Major* "was literally missing the center two-thirds (2/3) of the right side of his brain." *Id.* at 717. Nor was there evidence that Appellant suffered from mental illness. *See id.* at 720 (stating that the U.S. Supreme Court has framed the issue as "a mental-illness-related limitation on the scope of the self-representation right.") (quoting *Indiana v. Edwards*, 554 U.S. 164, 171 (2008)).

In addition, the trial court did, to some extent, "structure the role and scope of hybrid counsel employed . . . ." *Major*, 275 S.W.3d at 722. For example, the trial court directed Appellant's co-counsel to conduct all portions

of the trial that Appellant did not specifically state he wished to conduct. As a result, Appellant conducted voir dire, delivered the closing arguments, and made objections. While the right to a fair trial often clashes with the right of self-representation, under the circumstances of this case, we cannot say that the trial court erred in permitting Appellant to exercise his constitutional right to act as hybrid counsel.

III. PLAYING DRUG BUY VIDEO WITH REFERENCES TO SELLING MARIJUANA WAS NOT AN ABUSE OF DISCRETION

Appellant argues that the trial court erred in failing to redact a portion of the video of the October 23, 2007 drug transaction. While Kathy Sanchez was at Appellant's home purchasing methadone, she brought up the subject of selling marijuana. According to Sanchez's testimony at trial, she claimed to know someone interested in selling marijuana in order to engage Appellant in a conversation about selling it. Appellant and Sanchez discussed marijuana extensively on the October 23 video recording. Appellant discusses different types of marijuana, gives advice on selling it, and demonstrates how to weigh it, among other things. Sanchez and Appellant also discuss Appellant's prior DUI convictions, as well as the fact that he sold drugs to Sanchez's daughter.

Appellant only specifically objected to the discussion of marijuana and otherwise made only a general motion in limine. We therefore limit our review to the portions of the video discussing marijuana. Appellant argues that this evidence was inadmissible pursuant to KRE 404(b), which states that evidence of other crimes, wrongs, or acts is inadmissible "to prove the character of a person in order to show action in conformity therewith."

Here, however, the discussion of marijuana was admissible because it was "inextricably intertwined" with the video evidence of the methadone sale. KRE 404(b)(2). The conversation between Appellant and Sanchez shifted back and forth between the sale of the methadone pills and the possible sale of marijuana. It would therefore have been extremely difficult to redact the portions related to marijuana without rendering the video confusing to the jury.

Nor do we believe that the probative value of this evidence is substantially outweighed by the danger of undue prejudice. KRE 403. There was a great deal of evidence in this case that Appellant sold drugs. This was probative of his intent to sell methadone to Kathy Sanchez. Further, we find it unlikely that a jury viewing the video of Appellant selling a dangerous narcotic like methadone would have been shocked into acting prejudicially by evidence that Appellant also sold marijuana. The trial court did not abuse its discretion, and there was no error.

IV. USE OF INVESTIGATIVE HEARSAY EVIDENCE WAS HARMLESS ERROR

Appellant argues that his rights were prejudiced by the introduction of "investigative hearsay." Detective Underwood, during his testimony, testified to a great deal of hearsay evidence. For example, Detective Underwood testified as to what Sanchez told him Appellant had said about having methadone pills to sell. Detective Underwood also testified to the details of a phone conversation between Appellant and Sanchez. He testified that Appellant told Sanchez she could pay him later for the methadone pills. Detective Underwood

also identified a pill bottle as the bottle that Sanchez had told him she received from Appellant.

These statements by Detective Underwood were hearsay, not admissible under any hearsay exception. *See* KRE 801(c); KRE 802; KRE 803. It is also well established that there is no special exception for so-called "investigative hearsay" by police officers. "The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 294 (Ky. 2008) (quoting *Sanborn v. Commonwealth*, 754 S.W.2d 534, 541 (Ky. 1988)) (emphasis in *Sanborn*). "Such testimony is then admissible not for proving the truth of the matter asserted, but to explain why a police officer took certain actions." *Chestnut*, 250 S.W.3d at 294 (citing *Young v. Commonwealth*, 50 S.W.3d 148, 167 (Ky. 2001)). Here, Detective Underwood's actions were not at issue, and the only purpose for offering this testimony was for the truth of the matter asserted. Therefore, the admission of Detective Underwood's hearsay testimony was error.

However, the error was harmless under the circumstances of this case. "A non-constitutional evidentiary error may be deemed harmless . . . if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009) (citing *Kotteakos v. United States*, 328 U.S. 750 (1946)). Without Detective Underwood's inadmissible hearsay testimony, there was still

substantial evidence of Appellant's guilt, including the audio/video recordings of the drug transactions, which were properly admitted and played for the jury. Without the erroneous testimony, the evidence of Appellant's guilt was still strong, and we can say with fair assurance that the judgment was not substantially swayed by the error.

V. THERE WAS NO ERROR IN THE USE OF APPELLANT'S PRIOR CONVICTION FOR PFO PURPOSES

Appellant argues that the trial court erred in permitting his prior felony conviction to be used as the underlying felony for his PFO conviction. In 1997, Appellant was convicted of first-degree burglary before the same judge as in the present case. In that trial, following an apparent breakdown in communication with his appointed counsel, Appellant decided to proceed *pro se*. Appellant was ultimately convicted, and on appeal, argued that the trial court erred by permitting him to waive his right to the assistance of counsel. The Court of Appeals affirmed Appellant's conviction in an unpublished opinion. *Warick v. Commonwealth*, No. 1997-CA-001709-MR (Ky. App. 1999).

In *McGuire v. Commonwealth*, this Court held that "Kentucky trial courts are no longer required to conduct a preliminary hearing into the constitutional underpinnings of a judgment of conviction offered to prove PFO status unless the defendant claims 'a complete denial of counsel in the prior proceeding.'" 885 S.W.2d 931, 937 (Ky. 1994) (quoting *Custis v. United States*, 511 U.S. 485, 489 (1994)). Appellant argues he was "effectively denied counsel" in the prior case, and thus the prior conviction cannot be used as the underlying felony for

a PFO conviction. Appellant was not, however, denied the assistance of counsel in his earlier trial, and the Court of Appeals specifically reached that conclusion. *See Parke v. Raley*, 506 U.S. 20, 29-30 (1992) (discussing the presumption of validity of earlier proceedings in the context of Kentucky's PFO statute). Appellant did not suffer a complete denial of counsel in the prior proceeding. There was no error in the use of that earlier conviction for PFO purposes in the instant case.

VI. THERE WAS NO ERROR IN THE TRIAL COURT'S HANDLING OF APPELLANT'S CONCERNS REGARDING HIS REPRESENTATION

Appellant argues that the trial court erred in failing to conduct a sufficient hearing after he raised concerns about the sufficiency of the representation being provided by his appointed co-counsel. On the morning of trial, the court considered a motion by Appellant, which it treated as a motion to disqualify his appointed co-counsel. The court asked Appellant to be specific about the issues he was having with his co-counsel. Appellant stated that he had only had a few conversations with his attorney, and that she had not advised Appellant about a defense strategy or a jury selection strategy. When the court asked Appellant's attorney to respond, she stated that she could not without Appellant waiving attorney-client privilege. The court then overruled Appellant's motion as "premature at this time."

"When a defendant requests substitution of counsel during trial, 'the defendant must show good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict.'" *Deno v. Commonwealth*, 177 S.W.3d 753, 759

(Ky. 2005) (quoting *Shegog v. Commonwealth*, 142 S.W.3d 101, 105 (Ky. 2004)). "Whether good cause exists for substitute counsel to be appointed is within the sound discretion of the trial court." *Deno*, 177 S.W.3d at 759 (citing *Pillersdorf v. Dep't of Public Advocacy*, 890 S.W.2d 616, 622 (Ky. 1994)).

In this case, we cannot say that the trial court erred in denying Appellant's motion. Appellant made vague assertions about issues with his co-counsel, which, even taken at face value, do not amount to a breakdown of communication or an irreconcilable conflict. Further, if Appellant's co-counsel did fail to put forth a strategy, this is at least partially attributable to Appellant choosing to act as hybrid counsel. It would have been particularly difficult for Appellant's attorney to put forth a cogent jury selection strategy given that Appellant chose to personally conduct voir dire. Under these circumstances, Appellant failed to show good cause for his co-counsel to be disqualified. The trial court did not abuse its discretion.

VII. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS

Appellant argues that the trial court erred in denying his motion to suppress the video recordings of the drug transactions between him and Kathy Sanchez because the recordings were obtained without a warrant. Appellant acknowledges that Kentucky courts have held that no warrant is required when a video recording is made by a third party, and that such recordings do not violate the Fourth Amendment to the United States Constitution or Section 10 of the Kentucky Constitution. *See, e.g., Major*, 177 S.W.3d at 710; *Carrier v.*

Commonwealth, 607 S.W.2d 115 (Ky. App. 1980). Appellant urges us to overrule prior precedent and hold that Section 10 of the Kentucky Constitution requires prior judicial approval for such a recording to be admissible. We decline to do so.

VIII. PENALTY PHASE ERROR IN ANSWERING QUESTIONS FROM THE JURY DID NOT AMOUNT TO PALPABLE ERROR

Appellant argues that the trial court erred by using an improper procedure to consider jury questions. During the course of the trial, the jury sent three written questions to the court. Appellant's argument focuses on the final question. The precise details are unclear, because there is no video record of the court's response to the jury questions. However, the following facts can be ascertained from Appellant's motion for a new trial and from the hearing on that motion.

In this case, as is apparently this circuit court's regular practice, when the jury sent a question to the court, the judge called the parties (including the defendant) to the jury room door to discuss it. After the parties determined whether the question could be answered, and if so, what the answer should be, the judge entered the jury room (either alone or with the court clerk) and answered the question. Appellant claimed at the hearing and in his motion that the judge closed the door behind him upon entering the jury room. Defense counsel and the Commonwealth's Attorney were unable to recall whether the door was open or closed. At the hearing on Appellant's motion, the judge placed his clerk under oath and questioned her about his usual procedure for jury questions. The clerk testified that the judge enters the jury

room only to give the agreed-upon answer to the jury's question, and that she always accompanies him. The court then overruled Appellant's motion.

The jury question at issue, signed by the foreperson, asked, "For Example, if we give 5 yrs on first offense and 10 yrs for persistent felony served consecutively, would he be eligible for parole in 3 yrs or 1-3 yrs? Same scenario in concurrent, when would he be eligible for parole?" The question is marked, "Cannot give specific answer. Referred them to exhibits."

There is no question that the trial court's procedure for answering jury questions was erroneous. RCr 9.74 provides, "No information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court in the presence of the defendant . . . and the entire jury, and in the presence of or after reasonable notice to counsel for the parties." Pursuant to RCr 9.74, jury questions are to be addressed *on the record* in open court. In addition, the best practice is for *all discussions* of jury questions to occur on the record in open court as well.

However, Appellant presented his objection in the form of a motion for a new trial, which was insufficient to preserve the issue for appellate review. The record indicates that Appellant, despite being present with his defense counsel, made no objection at the time the judge entered the jury room. In *Smith v. Commonwealth*, the trial judge entered the jury room and instructed the jury to continue deliberating. 321 S.W.2d 786, 789 (Ky. 1959). He did this in the presence of defense counsel and the prosecutor. *Id.* Defense counsel objected to this for the first time in a motion for a new trial. *Id.* Our predecessor Court

held that defense counsel should have objected before the trial judge entered the jury room or immediately thereafter, but objecting in a motion for a new trial was too late to preserve the error. *Id.*

Nor can we say that the trial judge's improper conduct rose to the level of palpable error pursuant to RCr 10.26. For an error to justify relief as a palpable error, it must affect the substantial rights of a party, i.e. be "more likely than ordinary error to have affected the judgment." *Miller v. Commonwealth*, 283 S.W.3d 690, 695 (Ky. 2009) (citing *Ernst v. Commonwealth*, 160 S.W.3d 744, 762 (Ky. 2005)). In addition, "an unpreserved error that is both palpable and prejudicial, still does not justify relief unless . . . the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be 'shocking or jurisprudentially intolerable.'" *Miller*, 283 S.W.3d at 695 (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)). During the hearing on Appellant's motion for a new trial, the uncontroverted evidence showed that the judge entered the jury room only to give the jury the answer upon which the parties had agreed. There was no indication that the judge did anything to improperly influence the jury. The trial judge's conduct, while improper, simply does not rise to the level of palpable error.

Interwoven with the above argument is Appellant's argument that the trial judge should have recused himself from hearing the motion for a new trial. This argument was never presented to the trial court, and no motion for recusal was ever made.

IX. CONCLUSION

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

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Schroder, J., concurs in part and dissents in part by separate opinion.

SCHRODER, J., CONCURRING IN PART AND DISSENTING IN PART: I fully concur with the majority opinion in this case, except with respect to Part VIII. I believe that the trial judge's highly improper conduct with respect to entering the jury room requires reversal of the penalty phase.

First, at the hearing on Appellant's motion for a new trial, Appellant indicated that, when the judge entered the jury room, he tried to enter with the judge but his court-appointed defense attorney stopped him. Because Appellant was acting as hybrid counsel, his attempt to enter the jury room with the judge arguably amounts to an objection. But even if Appellant failed to preserve the issue, I believe the judge's actions amount to palpable error.

The jury's question dealt with sentencing and parole. A short time after the judge answered the jury's question outside the presence of the defendant and the attorneys, the jury returned, found Appellant guilty of PFO II, and recommended sentences of 10 years' imprisonment for each count with one count enhanced to 20 years by virtue of Appellant's PFO status. The jury also recommended that the sentences run consecutively for a total of 30 years' imprisonment. Thus, the jury recommended the *maximum possible sentence* under the jury instructions.

We cannot speculate as to what might have transpired inside the jury room, because there is no record. The lack of a record is attributable entirely to the judge's use of an improper procedure for answering jury questions. With regard to a judge entering the jury room during deliberations, Kentucky cases

> seem to stand for the proposition that prejudice will be assumed in the absence of a showing that there could not have been any prejudice. Those decisions also say that this court will not stop to weigh probabilities or try to discover whether there was in fact a prejudicial effect.

Goodman v. Commonwealth, 423 S.W.2d 905, 906-07 (Ky. 1968).

Because the lack of a record is attributable to the trial judge's actions, I believe we must presume prejudice. I would reverse Appellant's PFO II conviction, vacate his sentence, and remand for a new penalty phase.

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