

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C),
THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE
CITED OR USED AS BINDING PRECEDENT IN ANY OTHER
CASE IN ANY COURT OF THIS STATE; HOWEVER,
UNPUBLISHED KENTUCKY APPELLATE DECISIONS,
RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR
CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED
OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE
BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION
BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED
DECISION IN THE FILED DOCUMENT AND A COPY OF THE
ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE
DOCUMENT TO THE COURT AND ALL PARTIES TO THE
ACTION.

Supreme Court of Kentucky

2012-SC-000333-MR

TED WILLIS

APPELLANT

V.

ON APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN III, JUDGE
NO. 02-CR-00291-002

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

For the crimes of manufacturing methamphetamine, second offense, and possession of anhydrous ammonia in an improper container with the intent to manufacture methamphetamine, Appellant, Ted Willis, was tried and convicted in the Daviess Circuit Court, and sentenced to sixty-nine years, imprisonment. However, following post-conviction proceedings pursuant to RCr 11.42, the Court of Appeals¹ determined that Appellant was denied effective assistance of counsel during the penalty phase of his trial. Consequently, his sentence was vacated and the case was remanded to the Daviess Circuit Court for a new penalty-phase hearing. At the conclusion of that hearing, the jury returned a verdict fixing Appellant's punishment at life imprisonment. Based upon that verdict, the trial court entered judgment sentencing Appellant to imprisonment

¹ *Willis v. Commonwealth*, No. 2009-CA-002160-MR., 2011 WL 4502059 (Ky. App. Sept. 30, 2011).

for life. Appellant appeals to this Court as a matter of right. Ky. Const. §110(2)(b).

As grounds for relief from the judgment imposing a life sentence following his second penalty-phase hearing, Appellant contends that the trial court erred by (1) denying his motion to allow the jury at that proceeding to hear the entirety of the guilt-phase evidence from the original trial; and (2) denying his motion for a continuance so that he could undergo a mental health evaluation prior to the new penalty-phase proceedings. For the reasons stated below, we affirm.

On the morning of the scheduled retrial of Appellant's penalty-phase hearing, Appellant moved the trial court to permit the jury to hear and view a recording of all of the testimony that had been presented during the guilt-phase of his original trial.² The trial court denied the motion. Significantly, the trial court did not otherwise limit Appellant's, or the Commonwealth's, ability to summarize the evidence presented in the original trial, nor does Appellant claim that it did so.

In denying Appellant's motion, the trial court noted that playing the video recording of trial testimony is not the same as live testimony because, for example, trial exhibits may be unavailable and, therefore, the jury would not get the whole picture concerning the evidence. The trial court further noted that it would take the jury two days to view the guilt-phase testimony, and given the jury's limited task during the penalty-phase, that use of time was not

² Under Appellant's motion, *voir dire* and opening and closing arguments would not be played for the jury.

justified. The trial court further stated that if the jury watched all of the testimony from the guilt-phase, and learned the details of the conduct that led to Appellant's conviction, it might well be inclined to recommend a greater sentence.

Upon commencement of the resentencing trial, the trial court informed the jury that the proceeding involved a criminal case; that Appellant's guilt for the crimes of manufacturing methamphetamine, second offense, and possession of anhydrous ammonia in an unapproved container with the intent to manufacture methamphetamine had been determined at a prior trial; that a jury at the prior trial had sentenced Appellant but the Court of Appeals had reversed that sentence; and that the case was returned to the circuit court for a jury to re-determine Appellant's sentence.

In *Boone v. Commonwealth*, 821 S.W.2d 813 (Ky. 1992), we addressed the issue that Appellant now raises, and comprehensively outlined the matters that "might be pertinent" for consideration by the jury at the retrial of a penalty-phase hearing, including the matters itemized in KRS 532.055(2).³ We

³ KRS 532.055(2) provides that the Commonwealth may present evidence relevant to sentencing including minimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor; the nature of prior offenses for which he was convicted; the date of the commission, date of sentencing, and date of release from confinement or supervision from all prior offenses; the maximum expiration of sentence as determined by the division of probation and parole for all such current and prior offenses; the defendant's status if on probation, parole, post-incarceration supervision, conditional discharge, or any other form of legal release; and juvenile court records of adjudications of guilt of a child for an offense that would be a felony if committed by an adult; and the impact of the crime upon the victim or victims, as defined in KRS 421.500, including a description of the nature and extent of any physical, psychological, or financial harm suffered by the victim or victims. And further provides that "The defendant may introduce evidence in mitigation or in support of leniency[.]".

noted in *Boone* that when a subsequent penalty-phase hearing is necessary because of reversible error committed in that phase of the original trial, “common sense dictates that the second jury must be told something about what transpired during the earlier guilt phase if they indeed are not ‘to sentence in a vacuum without any knowledge of the defendant's past criminal record or other matters that might be pertinent to consider in the assessment of an appropriate penalty.’” *Id.* at 814 (quoting *Commonwealth v. Reneer*, 734 S.W.2d 794, 797 (Ky. 1987)) (emphasis deleted).

In devising these procedures, we noted that “we must be mindful not only of legalities, but also of practicalities.” *Id.* We further noted that from a practicality standpoint, for example, “if the original guilt phase of a trial extended over a two-week period, the free-standing punishment phase would last even longer if we were to require a complete reading to the jury of a verbatim transcript or the projection of a videotaped record of the guilt phase. This would rarely, if ever, be practical or justifiable, notwithstanding the fact that it would be the most comprehensive.” *Id.*

We then held that “it would suffice, in most cases, for the jury to have read to it (a) the charges from the indictment of which the defendant was found guilty; (b) any charge of which the defendant was found guilty which was a lesser-included offense to a charge set out in the indictment; (c) the jury instructions given by the trial court at the guilt phase; and (d) the jury's verdict.” *Id.* In addition to these matters, we further held that “should both sides agree, each could read a concise summary of the evidence which it

offered and which was admitted at the guilt phase of the earlier trial. Similarly, the closing arguments of both sides from the guilt phase could be read or projected if both agreed.” *Id.* at 814-15. In the event that the parties could not agree as to the summaries of the evidence, we held that “then each could submit its proposed summary to the opposing party and the court, who could then determine what the summaries would contain after hearing any objections and argument from the opposing party.” *Id.* at 815. See also *St. Clair v. Commonwealth*, 319 S.W.3d 300 (Ky. 2010); *Thompson v. Commonwealth*, 147 S.W.3d 22 (Ky. 2004);⁴ and *Neal v. Commonwealth*, 95 S.W.3d 843 (Ky. 2003). The fulfillment of the *Boone* procedures within any particular case falls within the discretion of the trial court. *Davis v. Commonwealth*, 365 S.W.3d 920, 924 (Ky. 2012).

Appellant asserts *no error* other than his claim that the trial court erred by failing to play the two-day guilt-phase evidence from the original trial. He does not allege any other deficiency in the trial court’s explanation of the original trial to the jury, nor does he complain that he was in any way denied the opportunity to otherwise summarize the evidence to the jury. The trial court in this case articulated sound reasons, as set forth above, for denying Appellant’s request, and, in light of *Boone*’s explicit admonition for observation “of [the] practicalities” of replaying lengthy trial testimony during resentencing proceedings, we are constrained to conclude that the trial court did not abuse

⁴ Superseded by statute on other grounds as stated in *Jackson v. Commonwealth*, 363 S.W.3d 11 (Ky. 2012).

its discretion in denying Appellant's motion to do so. Accordingly, we can grant Appellant no relief on this issue.

Appellant's second contention in this appeal is that the trial court improperly denied his request for a continuance of the resentencing trial. On the morning of the penalty-phase retrial, without advance notice, Appellant moved for a continuance so that he could be evaluated by KCPC⁵ for a possible mental deficiency.

In support of this request, defense counsel stated that Appellant had given her information regarding "stressors and anxiety," and that a mental health evaluation would be relevant to both Appellant's competency, and possible disclosure of mitigation evidence. Counsel also argued that the presentencing report from the original trial indicated a number of diagnoses for mental illness, including bipolar disorder, anxiety attacks, as well as prescriptions for Prozac (for depression) and Trazadone (for anxiety). Counsel further noted that she had personally observed indications of Appellant's mental illness during recent contact with him in preparation for resentencing. In addition, Appellant himself indicated to the trial court that he suffered from severe stress and anxiety.

The trial court responded by noting that it was too late in the process to be requesting a mental health evaluation, and that from its own observations Appellant seemed polite, intelligent, understanding, not in need of a mental health evaluation, and that it would be different if Appellant presented any

⁵ Kentucky Correctional Psychiatric Center.

indication of not knowing what was going on. The trial court accordingly denied the motion for a continuance for a mental health evaluation.

Nevertheless, after resentencing, Appellant renewed his motion for a mental health evaluation, and the trial court granted it. Appellant was examined by a KCPC psychologist and a competency hearing was held. The psychologist testified that Appellant was, and at all relevant times had been, competent to stand trial, and that he was discharged with a new prescription for Zoloft for anxiety and depression. The trial court found Appellant to be competent.

Appellant does not challenge the trial court's finding that Appellant was competent to stand trial for the resentencing; his argument is that the trial court erred in failing to grant the continuance so that Appellant could obtain a mental health evaluation *before the hearing* and thereby obtain mitigating evidence for use during the resentencing trial.

RCr 9.04 provides that the trial court may, "upon motion and sufficient cause shown by either party . . . grant a postponement of the hearing or trial." The trial court's broad discretion under this rule does not provide grounds for reversing a conviction "unless that discretion has been plainly abused and manifest injustice has resulted." *Hudson v. Commonwealth*, 202 S.W.3d 17, 22 (Ky. 2006) (quoting *Taylor v. Commonwealth*, 545 S.W.2d 76, 77 (Ky. 1976)). Whether a continuance is warranted in a particular case depends on the totality of the circumstances, *Snodgrass v. Commonwealth*, 814 S.W.2d 579,

581 (Ky. 1991),⁶ but often important are the following factors to be considered by the trial court:

length of delay; previous continuances; inconvenience to litigants, witnesses, counsel and the court; whether the delay is purposeful or is caused by the accused; availability of other competent counsel; complexity of the case; and whether denying the continuance will lead to identifiable prejudice.

Id. at 581.

Application of the *Snodgrass* factors discloses no abuse. In particular, because the motion was not made until the morning of the scheduled resentencing trial, a continuance would have resulted in inconvenience to the witnesses, counsel for the Commonwealth, the prospective jurors, and the court and court personnel. The alleged need for the continuance was entirely within the control of Appellant and could have been avoided had he not waited until the trial date to request the KCPC evaluation. In addition, the case was of minimal complexity so as to warrant a continuance; and finally, and most importantly, beyond speculation and conjecture, Appellant has failed to show that the trial court's denial of a continuance resulted in any identifiable prejudice.

In summary, the trial court did not abuse its discretion by denying Appellant's motion for a continuance. For the foregoing reasons, the judgment of the Daviess Circuit Court is affirmed.

All sitting. All concur.

⁶ Overruled on other grounds by *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001).

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