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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: FEBRUARY 20, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000695-MR

BETTI KERN APPELLANT

V.

ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY JON KALTENBACH, JUDGE
NO. 11-CR-00411

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A McCracken County jury found Appellant, Betti Kern, guilty of intentional murder, and sentenced her to twenty-four years' imprisonment. She now appeals as a matter of right, Ky. Const. §110(2)(b), alleging that: 1) she was denied the right of conflict-free counsel, and 2) the trial court improperly denied her motion for a competency evaluation. For the reasons that follow, we affirm Appellant's conviction and sentence.

I. BACKGROUND

Appellant moved to McCracken County from Michigan in order to pursue her music career. Shortly after relocating to McCracken County, Appellant befriended Cathy Cook and her boyfriend, David Griffin. Cook and Griffin were

involved in a relationship described as "tumultuous, and violent at times", and Griffin eventually moved out of Cook's home into a house with Tim Rudolph.[1]

On the day in question, Appellant arrived at the house which Griffin shared with Rudolph. Rudolph testified that this was the first time he had met Appellant and that the three of them proceeded to walk down the street to the Pay and Pack where they purchased two cases of beer and a pint of Vodka. The three then returned to Griffin's home where the two men drank the beer and Appellant drank the vodka.

Rudolph testified that sometime during that evening he heard Appellant give Griffin permission to use her cell phone. Griffin then took the phone and went to the bathroom. While Griffin was in the bathroom, Rudolph told Appellant that Griffin told him the two of them "used to mess around." Rudolph testified that Appellant did not seem upset, but that she immediately got up and walked back toward the bathroom.

Rudolph said that, shortly thereafter, Appellant walked back into the living room while talking to someone on the cell phone. He reportedly heard her tell someone on the other end "I did it." It was at this point that he walked back to the bathroom and found Griffin dead.

On September 16, 2011, Appellant was indicted by a McCracken County grand jury and charged with one count of murder. After hearing all of the

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[1] Prior to moving in the house with Rudolph, Griffin lived in Kern's garage. It is unclear whether there was any type of romantic relationship between Kern and Griffin, but the facts of the case hint that there may have been a romantic relationship between the two.

evidence, the jury found Appellant guilty of murder and recommended that she be sentenced to twenty-four years' imprisonment. The trial court entered its final judgment and imposed the jury's recommended sentence. This appeal ensued.

II. ANALYSIS

A. Conflict-Free Counsel

Appellant first argues that she was denied the right to conflict-free counsel. Specifically, she alleges that her rights were violated when she was appointed counsel who had previously represented the prosecution's chief witness against her. Appellant admits that this issue was not properly preserved, but argues that authority exists that would permit her to raise this issue for the first time on appeal. However, Appellant's argument is without merit given that the case on which she relies involved the trial court's failure to comply with the requirements of RCr 8.30(1) involving representation of multiple defendants during the same proceeding.[2] *See Donatelli v.*

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[2] RCr 8.30 (1) provides that:

> (1) If the crime of which the defendant is charged is punishable by a fine of more than $500, or by confinement, no attorney shall be permitted at any stage of the proceedings to act as counsel for the defendant while at the same time engaged as counsel for another person or persons accused of the same offense or of offenses arising out of the same incident or series of related incidents unless (a) the judge of the court in which the proceeding is being held explains to the defendant or defendants the possibility of a conflict of interests on the part of the attorney in that what may be or seem to be in the best interests of one client may not be in the best interests of another, and (b) each defendant in the proceeding executes and causes to be entered in the record a statement that the possibility of a conflict of interests on the part of the attorney has been explained to the defendant by the court and that the defendant nevertheless desires to be represented by the same attorney.

Commonwealth, 175 S.W. 3d 103 (Ky. App. 2005) (citing *Commonwealth v. Holder*, 705 S.W.2d 907 (Ky. 1986), overruled on other grounds in *Peyton v. Commonwealth*, 931 S.W.2d 451 (Ky. 1996).

Appellant claims that her trial counsel was ineffective because he operated under a conflict of interest created by his prior representation of Rudolph, one of the key witnesses against her, in an unrelated matter. It is for this reason that Appellant's citation to the aforementioned line of cases is misplaced, as, unlike the case at bar, all of these cases involved concurrent dual representation. Given the fact that the issue was not properly preserved, we will review for palpable error. RCr 10.26, KRE 103; *see Byrd v. Commonwealth*, 825 S.W.2d 272, 277-78 (Ky. 1992) (holding that a claim that appellant's trial counsel had a conflict of interest resulting from his prior representation of a key prosecution witness in an unrelated matter was not properly preserved, could not be raised for the first time on appeal, and thus was subject to palpable error review pursuant to RCr 10.26 and KRE 103) *overruled on other grounds by Shadowen v. Commonwealth*, 82 S.W.3d 896 (Ky. 2002).

"A finding of palpable error must involve prejudice more egregious than that occurring in reversible error, . . . and the error must have resulted in 'manifest injustice.'" *Ernst v. Commonwealth*, 160 S.W.3d 744, 758 (Ky. 2005) (*citing Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997)). "[P]alpable error . . . [is] composed of two elements: obviousness and seriousness, the latter of which is present when a failure to notice and correct such an error would

seriously affect the fairness, integrity, and public reputation of the judicial proceeding." *Id.* (internal citations and quotation marks omitted).

On the first day of trial Rudolph testified that he first met Appellant on August 3, 2011, the day she shot Griffin. He then proceeded to give a detailed account of the events of that day. On cross-examination, Appellant's court appointed counsel, Del Pruitt, said that since he and Rudolph had known each other "for a while," he asked Rudolph if he could just call him Tim. The government's first question upon re-direct of Rudolph was regarding the nature of his relationship with Pruitt. Rudolph then testified that Pruitt had been his defense lawyer in a prior unrelated matter.

In *Cuyler v. Sullivan*, the United States Supreme Court held that, when there is no objection by a defendant being represented by counsel that also represented a co-defendant, the defendant has the burden of demonstrating that "a conflict of interest actually affected the adequacy of [counsel's] representation." 446 U.S. 335, 348-49 (1980). Both Appellant and Appellee rely on this holding in their briefs, however that reliance is misplaced.

In the present case the issue does not involve joint representation of co-defendants, but successive representation[3] of Appellant and a prosecution witness. For a criminal defendant to prove a violation of her Sixth Amendment right to conflict-free counsel in a case involving successive representation, she

[3] "Successive representation occurs where defense counsel has previously represented a co-defendant or trial witness." *Moss v. United States*, 323 F.3d 445, 459 (6th Cir. 2003). This differs from joint representation, which "occurs where a single attorney represents two or more co-defendants in the same proceeding." *Id.*

must demonstrate that: "1) counsel's 'representation fell below an objective standard of reasonableness'" and 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Steward v. Commonwealth*, 397 S.W.3d 881, 883 (Ky. 2013) (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)); *see also Lordi v. Ishee*, 384 F.3d 189, 193 (6th Cir. 2004) (holding that *Strickland* applies to cases involving successive representation).

Appellant's entire argument is based upon her speculation that, during his representation of Rudolph, Pruitt could have learned of privileged information which he would not be able to use to cross-examine or impeach Rudolph. However, a review of the record demonstrates that: 1) Pruitt thoroughly and effectively cross-examined Rudolph regarding his level of intoxication on the night in question; 2) Pruitt pointed to several inconsistencies in Rudolph's prior statements; and 3) the jury was aware of Rudolph's criminal history, his struggle with substance abuse, and last but not least, Rudolph testified in prison garb.

In fact, Appellant failed to identify any specific confidential information that could have been used in the cross-examination of Rudolph. The record indicates that Pruitt sufficiently cross-examined and impeached Rudolph based upon the scope of his direct examination. Therefore, this Court finds that Appellant failed to establish that Pruitt's "representation fell below an objective standard of reasonableness." *Steward*, 397 S.W.3d at 883. Given that Appellant failed to establish that Pruitt's representation fell below an objective

standard of reasonableness, we find no occasion to address whether she suffered any demonstrable prejudice. *Id.*

Furthermore, in an area such as McCracken County, where there are only ten public advocates available to represent a population of 65,549 residents, it is probable that a situation such as this would arise on more than one occasion. We simply cannot conclude that because court-appointed counsel has represented a witness in a prior unrelated matter that an automatic conflict of interest is created or prejudice is suffered. So long as counsel provides adequate representation for his current client, this Court finds no grounds for a conflict of interest claim.

Even if a conflict of interest did exist, the error did not rise to the level of manifest injustice required for a finding of palpable error. *Ernst,* 160 S.W.3d 744, at 758. Given that Pruitt thoroughly cross-examined and impeached Rudolph, the fact that the jury was well aware of Rudolph's crimal record and history of alcohol abuse, and the weight of the evidence presented against Appellant, the alleged error did not "seriously affect the fairness, integrity, and public reputation of the judicial proceeding." *Id.*

Appellant also argues that she did not effectively waive her right to conflict-free counsel, but given that we find no actual conflict existed, no waiver of her right was necessary, and thus we do not find it necessary to address this argument.

B. Competency Evaluation

Appellant next argues that the trial court improperly denied her motion for a competency evaluation. Specifically, Appellant alleges that information obtained from a competency evaluation could have been used in her defense. We hold that "[i]t is within the trial court's discretion to determine whether there are 'reasonable grounds' to believe a defendant may be incompetent to stand trial." *Gray v. Commonwealth*, 233 S.W.3d 715, 718 (Ky. 2007) (citing *Bishop v. Caudill*, 118 S.W.3d 159, 161 (Ky. 2003)). Therefore, we will review the trial court's denial of the motion for a competency hearing for an abuse of discretion. The test of abuse of discretion is whether "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

On July 27, 2012, trial counsel filed a Motion for a Mental Examination given that he had recently spoken with "a medical professional currently seeing the defendant in the McCracken County jail." Based upon this conversation, he believed it was necessary to ask the court to order that Appellant be examined by Kentucky Correctional Psychiatric Center (KCPC).

On July 30, 2012, the parties took up the issue at a pretrial conference at which time the trial court inquired as to why a motion for a continuance was not filed at the same time as the motion for the mental examination. Pruitt answered that he had never questioned Appellant's competency until he spoke with the medical professional from the jail. The trial court reminded the parties that the trial date of August 13, 2012, which had been set for six

months, was quickly approaching. Thus, frustrated by counsel's untimely request, the trial court denied the motion because under RCr 7.24(4) the proposition for a request for relief should be made "a reasonable time in advance of the trial date."

However, at the conclusion of the trial, the trial court did enter an order for Appellant to be evaluated at KCPC to determine whether she was competent to stand trial and to evaluate her for criminal responsibility. After said evaluation, the trial court conducted a competency hearing at which the court heard testimony of Dr. Andre Cooley.

Cooley testified that there was nothing in Appellant's medical or social history indicating she suffered from mental illness. Furthermore, Cooley testified that not only was Appellant competent to stand trial and be held criminally responsible, but that she also possessed an IQ level that is in the "genius or Mensa category."

"KRS 504.100(1) requires a court to appoint a psychologist or psychiatrist to examine, treat and report on the defendant's mental condition whenever the court has reasonable grounds to believe that the defendant is incompetent to stand trial." *Gray*, 233 S.W.3d 715 at 718. "KRS 504.060(4) defines incompetency to stand trial as where, because of a mental condition, the defendant lacks the capacity to appreciate the nature and consequences of the proceedings against him or to participate rationally in his own defense." *Id.*

There is nothing in the record to indicate that Appellant was not competent to stand trial. The only basis for Appellant's request for a

competency hearing was based upon "a conversation with a medical professional currently seeing the defendant in the McCracken County Jail." Up until this point, the trial date having been set for over six months, there was no indication by Appellant's counsel that she was not competent to stand trial. Given that the trial court is in the best position, having all of the information, to make decisions regarding competency of a defendant we must give them upmost deference unless there is a clear abuse of discretion. *See id.* Based upon the information provided, we do not find that "the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English,* 993 S.W.2d 941at 945). Therefore, the trial court did not abuse its discretion in denying Appellant's motion for a competency hearing.

Furthermore, this Court reaffirmed a prior holding in *Padgett v. Commonwealth,* that when "there are sufficient, specific facts pointing toward incompetence, a hearing is absolutely mandatory, whether it is held at trial or *retrospectively*[.]" 312 S.W. 3d 336, 346 (Ky. 2010) (emphasis added) (affirming on the same grounds *Thompson v. Commonwealth,* 56 S.W.3d 406, 407-408 (Ky. 2001)). Therefore, even if the trial court did have sufficient evidence to order a competency hearing, it satisfied the requirements of due process by retrospectively ordering a competency hearing—not to mention that the competency hearing that was conducted revealed no information to indicate that Appellant was in any way incompetent to stand trial or accept criminal responsibility.

Appellant also argues that had the evaluation been conducted prior to trial she would have been able to use the information in support of her claims that she acted in self-defense and/or under extreme emotional disturbance. In support of this allegation, Appellant relies on *Ake v. Oklahoma*, 470 U.S. 68 (1985). In *Ake*, the United States Supreme Court held that states were required to provide *indigent* defendants with experts to assist in building their defense. However, in the present case Appellant was not indigent. While Pruitt, a court appointed attorney represented Appellant at the initial proceedings, he was eventually replaced when Appellant hired her own private counsel to represent her.

Therefore, the state was under no obligation to fund a competency evaluation to simply aid Appellant in her defense. If Appellant wished to have such an evaluation, then she was free to hire her own expert to do so. Appellant's reliance on *Ake* is thus misplaced.

III. CONCLUSION

For the aforementioned reasons, we affirm Appellant's conviction and corresponding sentence.

All sitting. All concur.

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