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RENDERED: DECEMBER 15, 2016
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000541-MR

SCOTT YOUNG APPELLANT

V. ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NO. 12-CR-001967

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

Appellant, Scott R. Young, appeals from a judgment of the Jefferson Circuit Court convicting him of second degree assault and being a persistent felony offender (PFO). His ten year sentence for the assault conviction was enhanced by the PFO conviction and he was sentenced to prison for a total of twenty years. Appellant asserts the trial court erred by improperly restricting his right to hybrid counsel.

Because we agree that error occurred, and because such error has been held to be structural, we reverse and remand for a new trial or other appropriate proceedings consistent with this opinion. For the reasons stated below, it is unnecessary to address the other claims of error raised by Appellant.

I. FACTUAL AND PROCEDURAL BACKGROUND

Pamela Walker testified that she and Appellant were just friends, but Appellant wanted a closer relationship and Walker rebuffed his efforts in that regard. While at home one day, she saw Appellant walking down the street toward her residence. She anticipated his arrival at her door, but when the doorbell did not ring, she opened the door to look outside. At that point, according to Walker's testimony, Appellant forced his way into her residence, struck her with a bat that she kept by the door, and held a box cutter knife to her throat.

Walker lost consciousness and upon awakening, with Appellant still present, she assessed her injuries and walked to a nearby hospital emergency room. Appellant went with her. While being treated, Walker handed a nurse a note reading "he did it." Hospital personnel contacted the police. Appellant was subsequently arrested and indicted for the offenses of first degree assault, menacing, and being a first degree persistent felony offender. The menacing charge was dismissed prior to trial.

II. ANALYSIS

Appellant contends that the trial court erred by misinforming him about his right to hybrid counsel after he expressed a desire to defend himself in a manner inconsistent with the advice of his appointed counsel. Appellant prepared a motion asking the court to compel the complaining witness to submit to a competency evaluation, but his attorney refused to file it. Because of the disagreement over that motion, and because correspondence from counsel led Appellant to think she had

a bias against him, Appellant asked the trial court to replace his attorney with another attorney, which Appellant referred to as "conflict counsel."

To address Appellant's concerns, the trial court conducted an *ex parte* hearing with Appellant and counsel to discuss Appellant's representation. The trial court asked Appellant: "Do you want to represent yourself in this action or do you want to act as co-counsel in this action?" Appellant replied: "I don't want at any time to act as co-counsel by myself. I don't know much about the law, your honor." The phrase "co-counsel by myself" is somewhat self-contradictory. In context, we understand Appellant to mean that he did not want to represent himself because he needed a lawyer's assistance. Explaining self-representation and the role of co-counsel, the trial court told Appellant:

> You would then give [your attorney] direction about certain things that you want her to handle, but you would primarily be responsible for your case. You are responsible for your representation and [your attorney] is here as what we call "whisper counsel." [Your attorney] would give you advice as necessary, handle certain aspects of the case, but you are primarily responsible for representing and defending your case.
>
> Do you want to do that or do you want [your attorney] to continue in her capacity as your representative? Which means she gets to make certain procedural calls when it comes to the handling of your case . . . .

After providing this explanation, the judge asked: "Do you want to represent yourself?" Appellant said: "No sir, I don't."

The Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution provide a criminal defendant the right to counsel

and the right of self-representation. Since *Wake v. Barker*, 514 S.W.2d 692, 696 (Ky. 1974), we have recognized that under the Kentucky Constitution, "an accused may make 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 services (within, of course, the normal scope of services). However, "[e]ven when a defendant makes a knowing, intelligent, and voluntary request to proceed pro se or with hybrid representation, the right of self-representation is not absolute[,] . . . trial courts may place certain restrictions on a defendant's right to self-representation." *Allen v. Commonwealth*, 410 S.W.3d 125, 134 (Ky. 2013).

In *Baucom v. Commonwealth*, 134 S.W.3d 591, 592 (Ky. 2004), we concluded that a trial court erred by presenting a defendant who sought limited self-representation with the false dichotomy of complete self-representation or full representation, failing to present the third alternative, hybrid representation.

The trial court in *Baucom* denied the defendant's requests for a limited waiver of counsel. Facing the choices offered by the trial court — accept an appointed attorney or represent himself entirely on his own — he chose to represent himself during the entire proceeding. Although the *ex parte* hearing in this case was not initiated by Appellant's unequivocal request for a limited waiver of counsel, the trial court provided Appellant with unequivocal choices. Like the defendant in *Baucom*, Appellant was given only two options: representation by counsel or self-representation with counsel playing the secondary, advisory role as "whisper counsel." While the latter choice may well represent the hybrid representation desired by some defendants, *see Wake*,

514 S.W.2d at 696 ("If the accused desires to have counsel available only for the purpose of consultation during the trial, why should he not be entitled to that?"), the explanation provided did not inform Appellant that he could make a limited waiver of counsel, specifying the extent of services desired, and pursuant to which, counsel would then be confined to rendering those services. Appellant was also not told that he could represent himself in arguing a motion to evaluate the victim's competence while retaining the benefit of representation by counsel in all other matters, which amounted to an inaccurate explanation to Appellant of his options by omission.

We are constrained to conclude that Appellant was denied the right to hybrid counsel under the Kentucky Constitution and was thus deprived of the opportunity to pursue his own strategies for his defense. We make no judgment about the wisdom of his motion to evaluate the competence of the complaining witness, nor do we suggest that his motion should have been granted, but the making of the motion would not have violated any procedural rules. The failure to provide a defendant with the option of hybrid counsel is structural error and requires reversal of his conviction. *Mitchell v. Commonwealth*, 423 S.W.3d 152, 162 (Ky. 2014) (citing *Baucom*, 134 S.W.3d at 592).

Because we reverse the judgment for the reason set forth above, we decline to address the other claims of error. Appellant's claim that the trial court erred by striking two jurors is unlikely to recur upon retrial. His claim that trial evidence was not properly and timely disclosed prior to trial is now moot. Appellant also argued that the trial court improperly admitted the note passed from Walker to the nurse under the hearsay exception for statements

made for purposes of medical treatment, KRE 803(4). The Commonwealth concedes that the note does not fit within the medical statement exception, but contends the note was otherwise admissible. Accordingly, we leave it for the trial court upon remand to evaluate the admissibility of the note under the grounds cited by the Commonwealth at the time the evidence is proffered.

III. CONCLUSION

For the reason set forth above, the judgment of the Jefferson Circuit Court in this action is reversed, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

All sitting. Minton, C.J.; Cunningham, Noble, and Venters, JJ., concur. Keller, J., dissents by separate opinion in which Hughes and Wright, JJ., join.

KELLER, J. DISSENTING: I respectfully dissent. The majority reverses because the trial court did not adequately advise Young that he could act as hybrid counsel. I agree with the majority that, after a lengthy discussion with Young, the trial court did not specifically ask Young if he wanted to act as hybrid counsel. However, based on my review of the record, Young was aware of the various possibilities with regard to representation, and his request for "conflict counsel" was a request for a new attorney, not for complete or partial self-representation.

On May 6, 2014, the date this matter was scheduled for trial, the Commonwealth's attorney stated that she believed the parties had reached a plea agreement and had, therefore, released her witnesses from subpoena. However, she noted that Young's counsel had contacted her the previous day

and indicated that Young was no longer amenable to the plea agreement. The Commonwealth then moved for a new trial date.

Counsel for Young, after reciting the possible penalties Young faced if found guilty and the terms of the plea offer, agreed that her client no longer wanted to accept the offer. Counsel then stated that Young wanted to file a motion, noting that it was not a motion she would file. However, counsel indicated that she believed Young could file the motion himself if the court permitted him to act as co-counsel. The court stated that any problems Young had with his representation, *i.e.* whether he wanted to represent himself, act as co-counsel, or replace his current counsel, would have to be addressed in a separate *ex parte* hearing, which the court scheduled for May 16.

On May 8, 2014, Young's counsel sent him correspondence,[1] which stated in pertinent part:

> I saw that you wanted to file your motion. To file your own motions in your case, you must either represent yourself in this matter, or request the court to allow you to be co-counsel. Therefore, I asked the judge to schedule an *ex parte* hearing (where the prosecutor will not attend) so that you may let the judge know in what capacity you wish to act in this case . . . . I am . . . enclosing a copy of Hill v. Commonwealth, 125 S.W.3d 221 (Ky. 2004). Please familiarize yourself with it before the hearing on May 16th.

I note that, in *Hill*, this Court stated that "'an accused may make 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 (within, of course, the normal scope of counsel services).'" *Id.* at 225, quoting *Wake v. Barker,* 514 S.W.2d 692, 696 (Ky. 1974).

[1] Young attached this correspondence to a motion he filed with the court.

The Court then set forth the obligations of the trial court to advise the defendant of the risks inherent in any type of self-representation and to determine that the defendant's choice was knowing and intelligent. *Hill*, 125 S.W.3d at 226.

At the May 16 hearing, which lasted nearly 40 minutes, Young's counsel discussed the events that led to Young's withdrawal of his plea and the motion Young wanted to file. Counsel also stated that she explained to Young that he could act as his own counsel or as co-counsel so that he would have an opportunity to be heard. She noted that Young had presented her with a motion to appoint "conflict counsel" that morning. The court read from the motion and noted that Young wanted to replace counsel[2] because: (1) she had not adequately reviewed discovery or she would have realized the victim was incompetent; (2) she refused to file a motion seeking a competency evaluation of the victim; and (3) she wrote that Young had brutally beaten the victim, indicating she did not believe him and would not adequately represent him. Furthermore, the court stated that Young admitted in his motion that counsel had advised him of his entitlement to a *Faretta*[3] hearing. When asked what he wanted with regard to "conflict counsel," Young essentially recited the preceding and stated that he wanted an attorney who was on his side. The court noted that, absent some other conflict, the attorney's belief that Young

[2] In his written motion, which the trial court sealed, Young specifically stated that he wanted a new attorney.

[3] *Faretta v. California*, 422 U.S. 806, 835 (1975) (the court must determine if a defendant is knowingly and willingly foregoing his right to representation by counsel).

might not be innocent was not sufficient reason to remove counsel because such "conflicts" are often present.

The court then asked Young if he wanted to represent himself or to act as co-counsel. As set forth in the majority opinion, the court then explained what acting as co-counsel or "whisper counsel" means. The court asked Young what he wanted to do and Young said, "I still feel it's a conflict your honor . . . . How will I know [counsel is] not going to sell me out?" The court stated that he did not hear anything that would disqualify counsel and, when asked if he wanted to represent himself, Young said he did not. Finally, Young said all he wanted was for counsel to do her best, which she said she would do. The court then denied the motion for conflict counsel and the motion to determine competency of the victim, and the parties proceeded to trial approximately one month later.

While the court's description of "whisper counsel" may not have been as artful as possible, it was consistent with this Court's description of a limited waiver of counsel as set forth in *Hill*. Furthermore, it is clear to me that Young had also been advised by his counsel regarding his options for representation. Finally, it is crystal clear that Young wanted to replace his counsel; he did not want to partially or wholly represent himself. Therefore, because Young had sufficient information regarding full and partial self-representation, representation he never requested, I would affirm.

Hughes and Wright, JJ., join.

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