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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000039-MR

JOSHUA ROSCOE MARCUM APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT V. COSTANZO, JUDGE
ACTION NO. 16-CR-00298

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JONES AND L. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: Joshua Roscoe Marcum appeals from the Bell Circuit Court's final judgment and sentence of imprisonment entered October 11, 2017. At his jury trial, Marcum was convicted of several offenses, including first-degree possession of a controlled substance, and he was thereafter sentenced to three years' imprisonment. Because the trial court committed structural error by its

failure to ensure a valid waiver of Marcum's right to counsel, we reverse and remand for a new trial.

I. Background

On or about May 10, 2016, Marcum and his mother entered the Appalachian Regional Healthcare HomeCare store (ARH) in Middlesboro, Kentucky. ARH is a medical equipment retailer. Marcum's mother, who is disabled, needed a walker and a portable bedside toilet. She tendered a prescription for those items to ARH employee Megan Raines. Raines went into the back of the store to retrieve the portable toilet. She returned after about five minutes and found Marcum and his mother were no longer present. Raines walked outside and saw Marcum trying to assist his mother into their vehicle, at which point she yelled at Marcum to come back to the store because he still needed to sign paperwork and retrieve the toilet. Marcum returned to the store and completed the transaction. Raines would later testify how Marcum's demeanor appeared to be nervous and hurried.

Shortly after the Marcums left, another employee started work, and Raines asked the employee to clean a knee scooter which had been recently returned to the store. The employee could not do so because the scooter had disappeared. Raines knew the scooter had been in the store earlier, prior to the Marcums' visit. She telephoned police and told them about the incident.

Sergeant Wade Barnett of the Middlesboro Police Department responded to Raines's complaint. Raines gave him a description of the scooter, including the scooter's serial number, and described the Marcums' vehicle, a silver hatchback. Sergeant Barnett was familiar with Marcum and recognized the description of the vehicle. The sergeant used his radio to send a description of the vehicle to another police officer, Jeremiah Johnson. Officer Johnson located the suspect vehicle near the Marcum residence. As he approached, he saw a male get out of the rear passenger seat of the vehicle and go into a nearby wooded area.

Officer Johnson performed a stop of the vehicle, which contained an unidentified female driver, Marcum's disabled mother in the front passenger seat, and the scooter in the rear hatch area. The serial number on the scooter matched the one Raines had given police. At this point, Sergeant Barnett arrived on the scene and began to question the occupants of the vehicle, while Officer Johnson began searching for the male who left the vehicle prior to the stop. After walking a short distance in the same direction as the male subject, Officer Johnson discovered Marcum lying down on the other side of a railroad track, apparently in an attempt to avoid detection. Officer Johnson detained Marcum and questioned him about the scooter. Marcum denied knowledge of any wrongdoing. When asked why he was lying down beside the railroad track, Marcum replied he was "just relaxing."

As Officer Johnson escorted Marcum back toward the police cruiser, Marcum became increasingly irate and agitated. He shouted at the officer and ultimately uttered what the officer believed was a threat of violence against him. Sergeant Barnett saw the two men returning to the cruiser and witnessed Marcum's tirade. Sergeant Barnett watched as Officer Johnson performed a patdown of Marcum. Officer Johnson's patdown discovered two plastic bags of a substance which field-tested as positive for methamphetamine, a razor, and a piece of a straw. As Sergeant Barnett transported Marcum to the detention center, Marcum uttered another perceived threat aimed at the sergeant.

The Bell County grand jury indicted Marcum on the following charges: first-degree possession of a controlled substance (methamphetamine),[1] possession of drug paraphernalia,[2] second-degree disorderly conduct,[3] receiving stolen property (under $500),[4] and two counts of third-degree terroristic threatening.[5] The court appointed counsel for Marcum from the Department of Public Advocacy (DPA). In multiple pretrial hearings, Marcum frequently

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[1] Kentucky Revised Statute (KRS) 218A.1415, a Class D felony.

[2] KRS 218A.500, a Class A misdemeanor.

[3] KRS 525.060, a Class B misdemeanor.

[4] KRS 514.110, a Class A misdemeanor.

[5] KRS 508.080, a Class A misdemeanor.

expressed his unhappiness with his appointed counsel to the court and tentatively mentioned the idea of replacing DPA with hired counsel or possibly representing himself. Finally, in a hearing held June 13, 2017, Marcum once again broached the subject of representing himself, at which time Marcum's appointed counsel asked to withdraw. The trial court then asked Marcum if he wished to represent himself using the following colloquy:

> Trial court: Alright, Mr. Marcum, so you're telling the court you do not wish to be represented by the Department of Public Advocacy, that you wish to represent yourself?
>
> Marcum: (indistinct mumbling)
>
> Trial court: (cuts him off) Just yes or no.
>
> Marcum: Yes.
>
> Trial court: And you understand how dangerous that could be?
>
> Marcum: (might be nodding, nothing audible)
>
> Trial court: You understand that this is a very serious charge, carries time in the penitentiary, you understand all that?
>
> Marcum: (nods)
>
> Trial court: And again, it's your, you freely, voluntarily, want to represent yourself, is that correct?
>
> Marcum: I was, I thought—
>
> Trial court: (cuts him off) Yes, yes or no?

Marcum: Yes, sir, I was thinking, you know, I was hoping maybe rehab, something like that. Maybe split time up. Maybe do half time, you know, go to rehab, I just don't—

Prosecutor: Mr. Marcum, if you want to talk about an offer, we can discuss that. However, at no point will rehab, or probation, or any of that ever be an option for you based on your prior criminal record.

Trial court: Alright, in that the defendant has made clear to the court that he does not wish to be represented by the Department of Public Advocacy, and he wishes to represent himself, DPA will be relieved of representation. (to Marcum) Are you currently under the influence of drugs or alcohol as you stand here today?

Marcum: No, sir.

Trial court: And you're clearheaded and clear-thinking, and this is what you want to do?

Marcum: (nods)

Trial court: I need you to answer for the court.

Marcum: Yes, sir.

Trial court: Okay. Alright. Be relieved of representation, show that Mr. Marcum will be representing himself. This matter will be reset for jury trial on June the 20th, 9 a.m.

. . .

Trial court: (to Marcum) Again, you're sure this is what you want to do, you want to represent yourself? I need you to answer.

Marcum: Yes, sir.

. . .

Trial court: Mr. Marcum, you be back here on June 20th, at 9 a.m. Be prepared for trial. Any witnesses, it's your responsibility to have them here. It's going to be your responsibility to be prepared and ready to go to trial and conduct a trial as if though [*sic*] you had an attorney. You understand all that?

Marcum: (nods, asks about notifying witnesses)

Trial court: You can bring them through the clerk's office, you have subpoenas issued, for them to be here, but it's your responsibility to have all that done, you understand that?

Marcum: Yeah.

Trial court: Alright. Be back here on June the 20th. 9 a.m. At which time, we'll have the jury here and be ready to go. Alright? That's it.

On the morning of trial, Marcum advised the court he was uncertain whether his witnesses were present. The trial court informed Marcum it was his responsibility to have subpoenaed those witnesses. Additionally, the court reminded Marcum that he had been warned about representing himself and that he would be held to the same standard as an attorney.

During the trial, the Commonwealth presented testimony from Megan Raines, Sergeant Barnett, and Officer Johnson, which conformed to the abovementioned narrative. The Commonwealth also presented testimony from a

forensic scientist who previously worked at the Kentucky State Police crime laboratory, who confirmed the presence of methamphetamine in one of the plastic bags. Marcum's cross-examination of the Commonwealth's witnesses was restricted by the trial court, which informed him that he could only question witnesses about what was asked on direct examination.

For his defense, Marcum presented one witness, his mother, who testified she had a prescription for the scooter and asserted it had been legally acquired from ARH. She also asserted the plastic bags found on Marcum contained "Epsom salts" which she used as a bath product. Marcum informed the court he wished to call his mother's doctor as a witness about the prescription, but it became apparent that Marcum had failed to subpoena anyone.

After a short deliberation, the jury convicted Marcum on all counts of the indictment. During the penalty phase, the Commonwealth explained to Marcum that he could either stipulate to his previous convictions, or she could call the clerk to the stand and have her testify. Marcum equivocated on the question before eventually agreeing to stipulate to his convictions. The trial court permitted evidence of Marcum's criminal history through certified judgments as Commonwealth's Exhibit 5. This exhibit included not only convictions, but also dismissed charges and names of previous victims. The jury was permitted to

consult Commonwealth's Exhibit 5 and the parole eligibility chart during its deliberation.

The jury deliberated on the penalty and returned after approximately five minutes, fixing Marcum's sentence as follows: three years' imprisonment for possession of methamphetamine; twelve months' incarceration for each count of possession of drug paraphernalia, terroristic threatening, and receiving stolen property; and ninety days' incarceration for disorderly conduct. On October 11, 2017, the trial court sentenced Marcum to a concurrent term of three years' imprisonment, in accordance with the jury verdict. This appeal followed.

II. Analysis

Marcum presents five arguments on appeal. First, he argues the trial court failed to ensure he knowingly, intelligently, and voluntarily waived his right to counsel pursuant to *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Second, Marcum argues the trial court improperly limited the scope of his cross-examinations. Third, Marcum argues the trial court erroneously failed to grant deferred prosecution or presumptive probation for his drug offense pursuant to KRS 218A.1415(2)(c)-(d). Fourth, Marcum argues the trial court erroneously permitted the jury to consider improper evidence during the penalty phase of his trial. Fifth, and finally, Marcum argues the cumulative weight of these errors prevented him from getting a fair trial.

Most of Marcum's allegations of error are unpreserved. However, "[t]he failure to comply with [*Faretta*] requirements constitutes 'structural' error[.]" *Tinsley v. Commonwealth*, 185 S.W.3d 668, 674 (Ky. App. 2006). "Structural errors are defects affecting the entire framework of the trial and necessarily render the trial fundamentally unfair. Such errors preclude application of the harmless error rule and warrant automatic reversal under that standard." *McCleery v. Commonwealth*, 410 S.W.3d 597, 604 (Ky. 2013) (citations omitted). Furthermore, "[t]hough the U.S. Supreme Court has not expressly held that structural errors require reversal when not preserved . . . it has strongly suggested that this is the case." *Id*. (citing *United States v. Marcus*, 560 U.S. 258, 130 S. Ct. 2159, 2164, 176 L. Ed. 2d 1012 (2010)). As a result, a *Faretta* violation would obviate the necessity of considering the remainder of Marcum's issues because a new trial would be necessary for that reason alone.

In *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the United States Supreme Court explained:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the

> record will establish that he knows what he is doing and his choice is made with eyes open.

Id., 422 U.S. at 835, 95 S. Ct. at 2541 (citations and internal quotation marks omitted). A trial court has three duties under *Faretta* to show a proper waiver of counsel:

> First, the trial court must conduct a hearing in which the defendant testifies as to whether the waiver is voluntary, knowing, and intelligent. Second, the trial court must warn the defendant in the hearing of the benefits relinquished and the perils arising from the waiver of counsel. Finally, the trial court must make a finding on the record that the waiver is voluntary, knowing, and intelligent.

Tinsley, 185 S.W.3d at 674 (citations omitted).

A trial court is not required to follow any particular script or formula in its colloquy with the defendant. *See Depp v. Commonwealth*, 278 S.W.3d 615, 617 (Ky. 2009), *accord Iowa v. Tovar*, 541 U.S. 77, 88, 124 S. Ct. 1379, 1387, 158 L. Ed. 2d 209 (2004). "[T]he analysis regarding whether waiver of counsel is adequate at any stage requires a pragmatic approach to right-to-counsel waivers, one that asks, what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance [counsel] could provide to an accused at that stage[.]" *Id*. at 617-18 (citation and internal quotation marks omitted). *Depp* also indicates that the analysis, and our review, should be based on the

record, *not* whether the trial court used the "magic words" of "voluntary, knowing and intelligent." *Id*. at 619.

In a subsequent case, the Kentucky Supreme Court gave further guidance on the *Faretta* colloquy:

> Because the colloquy between a defendant and the trial court need not follow a script, a determination of whether the eyes of a defendant who seeks to represent himself were sufficiently opened is a determination that must be made on a case-by-case basis. At a minimum, however, "before a defendant may be allowed to proceed *pro se*, he must be warned specifically of the hazards ahead."

Commonwealth v. Terry, 295 S.W.3d 819, 822 (Ky. 2009) (footnotes omitted) (quoting *Tovar*, 541 U.S. at 88-89, 124 S. Ct. at 1387). In *Terry*, our Supreme Court held that "[e]xhortations by a trial court to a defendant to 'shine' and 'cooperate' and to 'sit up' and to 'put your game face on' are insufficient to ensure that a defendant is knowingly, intelligently, and voluntarily seeking to waive counsel." *Id*. In an attempt to provide direction to the trial courts of the Commonwealth, the *Terry* court noted with approval the model questions used by federal courts for a *Faretta* colloquy:

> When a defendant states that he wishes to represent himself, you should . . . ask questions similar to the following:
>
> (a) Have you ever studied law?
>
> (b) Have you ever represented yourself or any other defendant in a criminal action?

(c) You realize, do you not, that you are charged with these crimes:

(Here state the crimes with which the defendant is charged.)

(d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court . . . could sentence you to as much as years in prison and fine you as much as ____ $_____?

(Then ask [the defendant] a similar question with respect to each other crime with which he may be charged in the indictment or information.)

(e) You realize, do you not, that if you are found guilty of more than one of those crimes[,] this court can order that the sentences be served consecutively, that is, one after another?

(f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.

(g) Are you familiar with the [Kentucky] Rules of Evidence?

(h) You realize, do you not, that the [Kentucky] Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?

(i) Are you familiar with the [Kentucky] Rules of Criminal Procedure?

(j) You realize, do you not, that those rules govern the way in which a criminal action is tried . . . ?

> (k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.
>
> (l) (Then say to the defendant something to this effect):
>
> I must advise you that in my opinion[,] you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.
>
> (m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?
>
> (n) Is your decision entirely voluntary on your part?
>
> (o) If the answers to the two preceding questions are in the affirmative, [and in your opinion, the waiver of counsel is knowing, intelligent, and voluntary,] you should then say something to the following effect:
>
> "I find that the defendant has knowingly[, intelligently,] and voluntarily waived his right to counsel. I will therefore permit him to represent himself."

Id. at 824-25 (footnoted citation omitted). The *Terry* court stressed that a trial court's failure to adhere to the model questions would not necessarily be reversible error; the questions are merely "a good guide for a *Faretta* hearing." *Id*. at 825. The Kentucky Supreme Court reinforced *Terry* in a subsequent case, stressing that

"the trial court must ensure that the defendant is proceeding with 'eyes open,' and to do so 'he must be warned *specifically* of the hazards ahead' and of the possible consequences of a decision to forgo the aid of counsel." *Grady v. Commonwealth*, 325 S.W.3d 333, 342 (Ky. 2010) (emphasis in *Grady*) (quoting *Terry*, 295 S.W.3d at 822). In short, although following a script is unnecessary in a *Faretta* hearing, it is nonetheless crucial to provide *some* substance in warning a criminal defendant who seeks to represent himself; what substance is required will depend on the defendant, the case, and the stage of the proceedings. *See Lamb v. Commonwealth*, 510 S.W.3d 316, 321 (Ky. 2017); *see also Tovar*, 541 U.S. at 88, 124 S. Ct. at 1387.

Based on these principles, the trial court's colloquy with Marcum on June 13, 2017, was insufficient to comply with *Faretta*. The trial court completely failed to "warn[] *specifically* of the hazards ahead[,]" *Grady*, 325 S.W.3d at 342, before finding a valid waiver of his right to counsel. At most, the trial court asked Marcum whether he was aware that his proposal was "dangerous" and the charge he faced "carries time in the penitentiary." By way of comparison, the model questions referenced in *Terry* would, at a minimum, have made Marcum aware of the *specific* penalty range he faced upon conviction for each charge. Furthermore, when the appropriate stage of the proceeding is considered, *i.e.*, jury trial, the model questions would have warned Marcum of how he would be expected to

present testimony and the necessity to become familiar with the Kentucky Rules of Evidence and Rules of Criminal Procedure—all of which would govern the proceedings. In response to Marcum's direct question on the subject, the trial court informed Marcum of the necessity to submit subpoenas for witnesses—however, this was done *after* the court found Marcum had voluntarily waived his right to counsel. At that point, the information was too late to have formed part of an intelligent waiver. Briefly stated, the trial court did not provide "enough information to assure that Appellant's waiver of counsel was done with 'eyes open.'" *Lamb*, 510 S.W.3d at 321. We must, therefore, reverse and remand for a new trial.

Although we need not consider Marcum's other arguments, several of his issues require comment to prevent potential errors upon retrial. First, the law in Kentucky is that of "wide open" cross-examination, which is not restricted to the material presented on direct examination. *Commonwealth v. Armstrong*, 556 S.W.3d 595, 599-600 (Ky. 2018). Next, the evidence offered by the Commonwealth during the penalty phase should "avoid identifiers, such as naming of victims, which might trigger memories of jurors who may—especially in rural areas—have prior knowledge about the crimes." *Stansbury v. Commonwealth*, 454 S.W.3d 293, 304 (Ky. 2015) (quoting *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011)). Finally, the Kentucky Supreme Court has held it is manifestly

unjust, amounting to palpable error, for a jury to hear evidence of dismissed, set aside, or original charges during the penalty phase. *Id*. at 304-05 (citing *Blane v. Commonwealth*, 364 S.W.3d 140, 152 (Ky. 2012)).

III. Conclusion

For the foregoing reasons, we reverse the trial court's judgment and sentence of conviction and remand for a new trial.

ALL CONCUR.

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