RENDERED: March 7, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002147-MR

GREGORY A. BERRY — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 01-CR-00047 AND 01-CR-00081

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

TACKETT, JUDGE: Greg Berry appeals from the judgment of the Hopkins Circuit Court, finding him guilty of assault in the second degree and being a persistent felony offender in the first degree. Berry argues on appeal that he was denied his right to counsel, that his prosecution was barred by double jeopardy, and that the court improperly instructed the jury on the issue of self-defense. After a thorough review of the record, we agree that he was denied his right to counsel when the court accepted a waiver of representation that did not

qualify as “intelligent and voluntary”, and reverse and remand for a new trial.

Berry was accused of assault in the second degree after an altercation with the parents of his ex-wife, Kimberly. The altercation arose while the McGregors were removing property belonging to Kimberly, who was incarcerated on methamphetamine possession charges, as Berry was also preparing to move out of the house that he and Kimberly had shared. With both men inside the house, Mr. McGregor demanded reimbursement for expenses incurred while taking care of Berry’s children, and a heated argument ensued. What happened next is disputed; the McGregor’s claimed that Berry pushed Mrs. McGregor to the floor and that when she reached for a nearby golf club to help her stand up, Berry took it from her, whereupon Mr. McGregor tried to take it from Berry. Allegedly, Berry wrested the club from McGregor, and hit Mr. McGregor over the head with it. Berry argues instead that Mrs. McGregor tried to hit him with the club, which he took from her to protect himself, and that Mr. McGregor tried to take it back, and the injury to Mr. McGregor occurred in the struggle over the club.

The procedural history of this matter is somewhat convoluted. Berry was initially appointed a public defender, and the fee was set at $1,000 by the circuit court, to be taken from Berry’s $5,000 bond posted. On the day this matter was

scheduled for trial, the Commonwealth, in voir dire, told the jury that they would be asked to decide whether a golf club is a dangerous instrument. Defense counsel immediately objected, and at a bench conference defense counsel argued, successfully, that the Commonwealth should not be permitted to pursue the theory that a golf club is a dangerous instrument when the indictment alleged that Berry had inflicted a serious physical injury. The Commonwealth moved for leave to amend the indictment, which the court denied. The Commonwealth then announced that it would voluntarily dismiss the indictment under Rule of Criminal Procedure (RCr) 9.64, and would seek to indict Berry for inflicting a physical injury with a dangerous instrument. Berry did not object to the voluntary dismissal, and an order was entered dismissing the indictment. The order was silent as to whether the dismissal was with or without prejudice.

Once Berry was re-indicted, the circuit court refused to appoint a public defender on the new indictment, holding that Berry had the resources to hire counsel. On the morning of trial, the following exchange occurred between the court and the defendant:

> Judge: . . .Now has anything changed about that and uh but then and you elected not to hire your own attorney, is that correct?
>
> Berry: Yes sir.

Judge: And and why is that?

Berry: Uh well uh[the victim is]lying, I'm just not gonna I'm not gonna pay money to have him get up there and lie.

Judge: Okay but would you be able to pay money?

Berry: Well I already have [paid money] to one, I paid him uh I guess what you would a good fee.

Judge: You paid who a good fee?

Berry: I paid Michael Rochell [the public defender form the first trial], he got paid for his fee, I guess a thousand dollars.

. . .

Judge: . . . but is it your decision that you don't feel that that you need an attorney?

Berry: Well I'm sure it would be nice to have one, uh but I would rather go at it on my own.

(TE, Tape 2, 6/26/01, 8:49:15)

Berry proceeded to trial *pro se*, and was swiftly convicted of assault and being a persistent felony offender in the first degree, having no knowledge of how to effectively present his case. The jury recommended the minimum ten-year sentence, which the court imposed. This appeal followed.

Berry first argues that the dismissal of the first indictment should have been with prejudice, and that a

subsequent prosecution for the same offense constitutes double jeopardy. Berry points out that the only reason that the Commonwealth dismissed the indictment was to avoid running afoul of RCr 6.16, which would have forced the Commonwealth to go to trial under the theory that Berry had inflicted a serious physical injury on McGregor, which the Commonwealth would almost certainly have lost as the medical evidence did not support the allegation that the injury was serious. Berry argues that because the Commonwealth acted to circumvent the Rules of Criminal Procedure, the dismissal should be treated as involuntary under Civil Rule 41.02, and that the dismissal be treated as an adjudication of the merits of the case. The Commonwealth responds by arguing that there is no clear prohibition against such a voluntary dismissal, and therefore the applicable rule is Civil Rule 41.01, which treats a voluntary dismissal as a dismissal without prejudice. While it is arguable that the Commonwealth's procedural tactics were somewhat dubious, we must agree with the Commonwealth that there seems to be no prohibition against this kind of procedural maneuver. No jeopardy attached as the jury was not sworn, and the Commonwealth was operating within the technical boundaries of the rules when it voluntarily dismissed the action. Therefore, Berry's claim that a subsequent prosecution is barred must fail.

However, turning to the question of whether Berry intelligently and voluntarily waived his right to counsel, we conclude that the court erred in allowing Berry to proceed to trial. The right to counsel is one of the most fundamental of all civil rights, and must be treated with the utmost care and respect. Faretta v. California, 422 U.S. 806, 95 S.Ct 2525, 45 L.Ed.2d 562 (1975); Moore v. Commonwealth, Ky. App., 556 S.W.2d 161 (1977) ("Moore I"). All reasonable inferences against a waiver must be drawn; a clear and unequivocal waiver of the right to counsel must be made. Moore v. Commonwealth, Ky., 634 S.W.2d 426 (1982) ("Moore II"). Here, the record reveals that the court did not sufficiently inform Berry of the risks of proceeding to trial without counsel. Berry appeared to have no inkling of the danger of proceeding pro se on a felony case, let alone one with a potential sentence of twenty years' imprisonment. It is the trial court's duty to adequately safeguard the rights of even those who unwisely underestimate the dangers that they face at trial. This principle is codified in KRS 31.140, which requires that a trial court, before accepting a waiver of the right to counsel, find that a defendant has "acted with full awareness of his rights and of the consequences of a waiver." A *pro se* criminal defendant has little chance of prevailing against an experienced prosecutor, as the average person has little if any knowledge of how to

effectively present a case, cross-examine witnesses, or any of the other nuances of trial practice with which attorneys are familiar. A trial judge should be well aware of the disparity in skill between a *pro se* litigant and an experienced attorney; a trial judge, when faced with a criminal defendant who appears to have little knowledge of the danger he faces and who wishes, for whatever reason, to proceed without counsel, is obligated both morally and constitutionally to inform a defendant of the fate that likely awaits him if he should proceed with his folly. The Commonwealth, unconvincingly, argues that Berry's statement that he would rather "go on my own behalf" constitutes an intelligent and voluntary waiver. Berry's election to proceed to trial *pro se* may have been "voluntary", in that Berry's decision was apparently motivated by his unwillingness to pay an attorney. It could hardly be called "intelligent" within any meaningful definition of the term, as it appears from the record that Berry did not appreciate the natural and probable consequences of his waiver. For this reason, we are compelled to reverse the judgment of the Hopkins Circuit Court and remand the matter for a new trial. Further, we instruct the court, on remand, to hold a new hearing to determine whether Berry may be entitled to appointed counsel.

Berry also raises an issue pertaining to jury instructions. As we are reversing the judgment on other grounds, we decline to address the issue.

For the foregoing reasons, the judgment of the Hopkins Circuit Court is reversed, and the matter remanded for a new trial.

BARBER, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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