

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001126-MR

JERRY L. LEWIS

APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 00-CR-00045

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * * * *

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from a judgment pursuant to a jury verdict convicting an inmate of third-degree assault for hitting a penitentiary corrections officer. Appellant argues that there was insufficient evidence to support the verdict and that he was denied his constitutional right to counsel. Upon review of the record and the applicable law, we adjudge that appellant was denied his constitutional right to counsel when the trial court refused to allow him to act as pro se co-counsel

with appointed counsel. Hence, we vacate the judgment and remand the matter for further proceedings consistent with this opinion.

On May 11, 2000, appellant, Jerry Lewis, an inmate at the Kentucky State Penitentiary, was in the facility's law library and approached Corrections Officer Charles Roberts. Lewis asked Officer Roberts about a disciplinary write-up that Roberts had issued against Lewis the previous day. Officer Roberts testified that Lewis appeared agitated over this write-up. After confronting Officer Roberts, Lewis walked to another section of the library where he encountered fellow inmate Herbert Smith. The two men exchanged words, then began pushing and fighting. Officer Roberts, in a nearby legal office, heard the radio call regarding a fight in the law library and responded to break up the fight. When Roberts arrived at the scene, he observed Lewis hitting Smith. Roberts yelled, "Stop, it's over." According to Roberts, Lewis turned and looked up at Roberts and then returned to beating Smith. When Roberts reached in to try to stop the fight, Lewis reared his arm backwards and hit Roberts in the mouth with his elbow. All three men then tumbled to the floor. Shortly thereafter, other officers arrived to help break up the fight. Once the fight was over, Roberts testified that his lip felt warm and hurt.

Thereupon, Roberts went to prison infirmary to have his lip examined. While there, he observed a bruise on his lower lip.

Lewis was indicted on charges of assault in the third degree and second offense persistent felony offender (PFO II) and tried by a jury on March 18, 2002. At trial, Lewis defended his case pro se, with court-appointed stand-by counsel available for consultation and assistance, as we shall discuss further below. Lewis was ultimately convicted of third-degree assault and waived sentencing, agreeing to a sentence of five years' imprisonment to be served consecutive with the sentence he was presently serving. This appeal by Lewis followed.

Lewis first argues that the trial court erred in failing to direct a verdict in his favor, contending that there was insufficient evidence that Roberts suffered a "physical injury" within the meaning of KRS 508.025(1)(b). KRS 508.025(1)(b) provided in May of 2000:

A person is guilty of assault in the third degree when the actor:

(b) Being a person confined in a detention facility, . . . inflicts physical injury upon . . . an employee of the facility.

KRS 500.080(13) provides that "'physical injury' means substantial physical injury or any impairment of physical condition."

"On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal." Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). Lewis maintains that the Commonwealth did not establish that Roberts' injury was "substantial" or resulted in an "impairment of physical condition," citing Hedges v. Commonwealth, Ky., 937 S.W.2d 703 (1996). In Hedges, the Court adjudged that the defendant did not inflict a "physical injury" upon the victim pursuant to KRS 508.030 when he grabbed the victim by the neck. However, in that case, it was undisputed that the defendant's conduct did not cause any injury to the victim. The case at bar is nearly identical to Covington v. Commonwealth, Ky. App., 849 S.W.2d 560 (1992), wherein a prison corrections officer was hit in the face while trying to subdue an inmate involved in a fight. The corrections officer suffered a bruise and a scratch on his face which caused him pain and required medical treatment. This Court followed the holding in Meredith v. Commonwealth, Ky. App., 628 S.W.2d 887, 888 (1982), which interpreted "impairment of physical condition" within KRS 500.080(13) to mean "any injury", and affirmed the conviction for third-degree assault. Covington, 849 S.W.2d at 564.

Likewise, in the present case, Officer Roberts suffered a bruise on his lower lip which he testified hurt and for which he sought medical treatment. Additionally, Graham Mintz, the prison librarian who witnessed the incident, testified that when Roberts attempted to pull the inmates apart, he saw Roberts' head fly backwards. Mintz further testified that after the fight, he observed a sore spot on Roberts' lower gum. In our view, there was sufficient evidence of a "physical injury" to sustain a conviction for third-degree assault.

Lewis's second argument is that he was denied his constitutional right to the assistance of counsel in defending his case. At Lewis's arraignment, when asked by the court if he desired court-appointed counsel, Lewis expressed that he wanted to represent himself but also wanted counsel appointed to act as co-counsel in the case. Lewis insisted that he wanted to be lead counsel on his case, but that he also needed the assistance of an attorney since he did not have the requisite legal skills and access to legal materials to adequately prepare his own defense. The court elicited from Lewis that he had a bachelor's degree in Geology from the University of Kentucky and recognized that Lewis seemed to be a bright articulate individual. The court then gave Lewis two choices - he could have counsel appointed for him as lead counsel and still be entitled to participate in and have input into his defense or he could

proceed pro se and have appointed counsel available at trial as stand-by counsel to lend assistance and answer questions. The court specifically stated that it could not allow Lewis to act as co-counsel with court-appointed counsel because of the potential for conflicts regarding Lewis's defense in the event the two did not agree. Given the two options, Lewis stated that he would proceed pro se.

Subsequently, at a pretrial hearing, Lewis renewed his motion to act as co-counsel with appointed counsel. Lewis maintained that without the assistance of counsel, he had limited access to the court and to legal research materials necessary to prepare his defense because he was in segregation at the prison. Again, the court denied Lewis's motion to act as co-counsel with court-appointed counsel.

On the morning of trial, Lewis moved for a continuance on grounds that he had not been able to adequately prepare his defense because he had been awaiting a decision on a motion to have the case removed to federal court and also because he did not have the assistance of counsel to help prepare his defense. Lewis again argued that because he was not a skilled attorney and was in segregation, he did not have access to certain legal materials, such as the rules of criminal procedure, which he needed to prepare motions and subpoena witnesses. Specifically, he alleged that he had been unable to procure certain inmate

witnesses at trial because he was unable to communicate with them at the facility because of his segregation or because the inmates were no longer at the facility. The court denied the motion, reminding Lewis that the court had previously given him the opportunity to have court-appointed counsel prepare his defense. The court then asked Lewis if he still desired to proceed at trial with stand-by counsel available to answer questions. Lewis reluctantly agreed to stand-by counsel and the trial proceeded.

During the trial, Lewis made his own opening and closing statements, examined and cross-examined witnesses, and presented proof in the form of seven exhibits and the testimony of two witnesses. Six of the seven exhibits were ruled inadmissible. Besides testifying in his own defense, Lewis called only one other witness, Joe Dunlap, a supervising officer at the prison. During the course of the trial, stand-by counsel was seated next to Lewis at counsel table and Lewis conferred with him on several occasions, including prior to cross-examination of certain witnesses and prior to calling himself as a witness. In addition, stand-by counsel accompanied Lewis during all bench conferences and reviewed the instructions. At one point, stand-by counsel made an argument directly to the court regarding the mental state necessary for certain assault instructions.

The Commonwealth maintains that Lewis had the benefit of participating in his own defense and having an attorney available for counseling and to answer technical questions such that he was not denied his constitutional right to counsel. The Sixth Amendment of the United States Constitution requires that the accused "have the Assistance of Counsel for his defense." Under Section 11 of the Kentucky Constitution, a defendant is guaranteed "the right to be heard by himself and counsel." (emphasis added.)

Appellant cites Wake v. Barker, Ky., 514 S.W.2d 692 (1974), in support of his position that he was constitutionally entitled to act as co-counsel with appointed counsel. In Wake, despite the defendant's wishes to try his case pro se without the assistance of counsel, the trial court compelled the defendant to accept the association of counsel in his defense. The then Court of Appeals held that a defendant has the right to defend his case pro se without the assistance of counsel, subject to the court's right to appoint stand-by counsel only in the event the court has reasonable grounds to believe that the defendant would act disorderly, disruptive, or disrespectful in defending his case pro se. The Court went on to additionally hold that a defendant has the right to accept limited assistance of counsel, specifically dictating what types of services he wishes counsel to provide:

[I]t is our conclusion 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). We think that this is embraced within the right-to-counsel and equal-protection provisions of the federal and state constitutions. 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? We recognize that such kinds of limitations on an attorney's function may create situations in which it will be necessary or desirable that a record be made to guard against future claims of ineffective assistance of counsel in regard to what advice was sought and what was given, but we do not believe that this would constitute an insurmountable obstacle.

Wake, 514 S.W.2d at 696.

It is clear to us from the Court's holding in Wake, that the trial court in the instant case erred in refusing to allow Lewis to make a limited waiver of counsel and act as co-counsel with appointed counsel. Lewis had the right to participate in the defense of his case to the extent he desired and have counsel available to provide any reasonable legal services that he felt ill-equipped or incapable of providing.

The Commonwealth alternatively argues that, given stand-by counsel's participation in Lewis's trial, Lewis essentially got what he asked for -- to act as co-counsel with appointed counsel. This argument ignores the fact that Lewis

expressed to the court from the outset that he wished to have counsel available to prepare pleadings and motions and generally help in the preparation of his defense, since he had limited legal knowledge and access to legal materials. We would note that no pretrial discovery motions or subpoenas were filed by Lewis, although Lewis did make an oral motion for a competency evaluation which the court denied. Although Lewis got the benefit of having counsel available at trial, at that point it was too late and the damage had been done. Lewis did not have the opportunity for pretrial assistance of counsel to help prepare a defense and build his case for trial.

For the reasons stated above, the judgment of the Lyon Circuit Court is vacated and the matter remanded for further proceedings consistent with this opinion. Given our decision above, Lewis's remaining arguments are rendered moot.

COMBS, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS.

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