

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000402-MR

MARK DOMINO

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
INDICTMENT NO. 02-CR-001091

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING, IN PART,
AND REVERSING, IN PART

** ** * * *

BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: This is a direct appeal by Mark Domino, who was convicted of three counts of terroristic threatening after a jury determined he had threatened to kill his ex-girlfriend, Billie Core, and Core's two children. He was sentenced to twelve-months' confinement and assessed a \$500 fine for each count, with the sentences to run concurrently. His arguments include denial of a speedy trial, ineffective assistance of counsel, prosecutorial misconduct, judicial bias, and

prejudicial introduction of irrelevant evidence. We believe these arguments are either moot or without merit, so we affirm. But because we agree that Domino was indigent and should not be required to pay the fines assessed against him, we reverse solely on that issue.

Domino and Core met on the internet in January 2001. After spending time together in Maryland and Virginia, Core left Domino to return to her home in Louisville. According to the record, Domino joined Core in Louisville in either late 2001 or early 2002. He moved into Core's apartment with her and her two small children, but their cohabitation was brief. The couple was unable to get along, and Core eventually asked Domino to move out.

On April 8, 2002, Domino arrived at Core's apartment unannounced and uninvited. Although Domino alleged his motive for the visit was reconciliation, the gun in his waistband and the ensuing fight proved otherwise. After forcing his way into Core's apartment, Domino asked Core if they could talk. The couple retreated to the bedroom to distance themselves from Core's children. Domino accused Core of cheating on him and, when asked to leave, proceeded to lift his shirt to expose the gun he was carrying.¹ The couple began to struggle, eventually

¹ The gun Domino was carrying was eventually discovered to be a pellet gun. However, Core testified she thought the gun was "real"; and

ending up in the living room. Core asked her daughter, Brianna, to call 911. But Domino claimed he would kill the children and Core if they attempted to contact the police.

Core's neighbor heard the struggle from her apartment and called 911. The police arrived quickly and found Domino standing over Core with his hands around her neck. Domino was arrested and Core was taken to a local hospital for medical attention.

Domino was indicted by the grand jury for burglary in the first degree, intimidating a witness, assault in the fourth degree, terroristic threatening in the third degree, and violation of a protective order. He was assigned a public defender. However, Domino repeatedly requested, and was eventually granted, the right to proceed *pro se* at trial with limited assistance of counsel. A jury found Domino guilty of three counts of terroristic threatening, and he was sentenced accordingly. This appeal followed.

In his somewhat rambling and bizarrely organized brief, Domino makes six main arguments. We will discuss each claim separately.

Domino first argues that his constitutional rights were violated because he was denied a speedy trial. Without

videotape from the trial proves the gun did, in fact, resemble an actual weapon.

even getting to the merits, we note that this argument is moot. Domino has already served out his sentence in this case. Even if we were to conclude that he had been denied a speedy trial, there is no remedy we could afford him. It is generally accepted that "an appeal will be dismissed where, due to subsequent events, the circumstances have changed so as to make the determination of the question unnecessary."² Since a decision on the merits of this issue would not benefit either party, we are not compelled to address it.

Second, Domino claims he received ineffective assistance of counsel. Again, we need not address this issue. The general rule is that:

a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review only claims of error which have been presented to trial courts.³

We acknowledge that Domino did file a "Motion to Reassign Council [sic] for Movant Due to Conflict of Interest." But the motion was never ruled upon, and Domino does not make a conflict of interest argument on appeal. Therefore, since Domino did not

² Sharp v. Robinson, Ky., 388 S.W.2d 121 (1965).

³ Humphrey v. Commonwealth, Ky., 962 S.W.2d 870, 872 (1998).

raise his ineffective assistance claims before the trial court, we decline to address them now.

However, for the sake of argument, even if we were to address the merits of this issue, Domino's claims would necessarily fail. Domino was permitted to proceed *pro se* with limited assistance of counsel. He was continually warned of the dangers of proceeding *pro se* by both the public advocate and the trial judge. Now, on appeal, Domino is arguing that the assistance he received was "too" limited, claiming the court restricted his defense counsel and that defense counsel provided him "very minimal assistance" at trial.

Kentucky law does permit a defendant to proceed *pro se* with limited assistance; however, the defendant must specify the "extent of services he desires."⁴ In response to the court's request that he submit an affidavit highlighting the role both he and defense counsel would play at trial, Domino stated that he intended to "receive assistance of counsel within every normal scope of counsel services" and that assistance would be limited to the scope of services he wished to incorporate in his defense. Essentially, the affidavit asserted that Domino wished to proceed *pro se* but not *pro se*. He wished to have counsel but to not have counsel. Unfortunately, Domino cannot have both. The court appropriately permitted Domino to consult with counsel

⁴ Wake v. Barker, Ky., 514 S.W.2d 692, 696 (1974).

during trial and to have counsel present at all stages. We do not think this amounts to any more of a "restriction" or "limitation" than the term "pro se with limited assistance of counsel" contemplates.

Domino further argues that counsel misrepresented his domicile to the court, failed to file motions as he requested, failed to provide him with requested documents, failed adequately to consult with him, and failed to examine the evidence. The record does not support any of these arguments. Defense counsel did state that Domino was not a resident of Kentucky, which, from what we can deduce from the record, was true. On his arrest citation, Domino listed his residence as Springfield, Massachusetts. Likewise, he was linked to both North Carolina and Virginia. His only connection to Kentucky was the brief period he lived with Core. Therefore, defense counsel's statement that Domino was not a resident of Kentucky was not a misrepresentation.

With regard to the other issues, Domino's own brief includes six different letters sent to him from the public advocate. The public advocate's office kept Domino abreast of all information pertaining to his trial, and he was adequately represented at every hearing and motion hour. There is no evidence that defense counsel failed to examine evidence or that

counsel failed to file motions. As such, we find no fault with counsel's assistance and reject Domino's argument.

Third, Domino argues that the prosecution provided misleading and materially false statements to the court. Specifically, he asserts that the prosecution incorrectly claimed the telephones in Cores's apartment had been destroyed, that Dana Todd "had pantomimed the pointing of a gun in a threatening manner," and that Brian Fantoni and Carol Cobb filed a "Notice of Intent to Introduce Evidence Pursuant to KRE 404(b)" that contained false information.

When presenting their cases to the jury, counsel for both parties must be permitted "broad latitude."⁵ Therefore, our review of claims of prosecutorial misconduct focuses on the overall fairness of the trial, rather than the "culpability" of the prosecutor.⁶

We find Domino's argument regarding prosecutorial misconduct to be completely baseless. Domino complains that the prosecution did its job. While we understand that some of the evidence introduced by the prosecution may have shed an unfavorable light on Domino, we do not believe that it constituted misconduct. There is nothing in the record to indicate that any of the evidence presented at trial was unduly

⁵ Dean v. Commonwealth, Ky., 844 S.W.2d 417, 421 (1992).

⁶ Commonwealth v. Petrey, Ky., 945 S.W.2d 417, 419 (1997).

prejudicial to Domino's case, nor was there anything introduced that appears to be blatantly incorrect or misleading. We cite to the language used by the Commonwealth in its brief:

As explained to [Domino] by the trial court, the appellant's version of events and the complaining witness' version of events are oftentimes in factual dispute, so that is why the entire matter is presented to the jury to make findings of fact. . . . Additionally, the trial court explained to appellant that inconsistencies in information were the subject of cross-examination and material with which to impeach a witness through use of prior inconsistent statement[s].

Our review of the videotapes from the trial confirms these statements. As such, we conclude there is no proof of prosecutorial misconduct.

Domino's fourth argument is that the trial judge should have recused herself. He claims judicial impropriety denied him a fair proceeding and that his constitutional rights were violated.

Domino's specific arguments are manifold. He claims he was denied fair proceedings because the trial judge did not allow him to file *pro se* motions while represented by counsel and that the judge did not grant his motion for new counsel based on an alleged conflict of interest. Domino claims his constitutional rights were violated because the trial judge "continuously delayed" a hearing regarding his request to

proceed *pro se* by directing him to discuss the matter with counsel. He also restates his previous ineffective assistance of counsel and speedy trial arguments, claiming the trial judge purposely limited the role of his defense counsel and intentionally delayed his trial. Additionally, Domino claims the trial judge displayed bias by "laughing and joking" with the Commonwealth's Attorney, refusing to grant his motion to appoint a new judge, "forcing" counsel upon him, and failing to prevent witnesses from being present in the courtroom while others were testifying.

KRS⁷ 26A.015 requires a judge to disqualify in a proceeding where "[the judge] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding," or where "[the judge] has knowledge of any other circumstances in which [the judge's] impartiality might reasonably be questioned."⁸

We believe Domino's arguments on this issue are, again, without merit. The trial judge in this case exhibited extreme patience and fairness throughout the course of the trial. There was no evidence that the judge expressed any

⁷ Kentucky Revised Statutes.

⁸ KRS 26A.015(2)(a), (e); see also, Webb v. Commonwealth, Ky., 904 S.W.2d 226, 227 (1995).

personal bias towards Domino, nor was there any proof that the judge's partiality should have been questioned.

To address each of Domino's arguments in brief: the judge properly prohibited Domino from filing *pro se* motions while represented by counsel. The key to a *pro se* proceeding is that the defendant represents himself. While he was represented by counsel and before a motion to proceed *pro se* had been granted by the court, Domino could not file his own motions. Therefore, the judge appropriately dismissed the *pro se* motions he filed while represented by the public defender. As such, the judge properly declined to address Domino's *pro se* motion to reassign counsel.

The trial judge "delayed" granting Domino's motion to proceed *pro se* because the judge wanted Domino to consider the risks associated with representing himself and to have adequate time to discuss the ramifications of proceeding *pro se* with counsel. We believe this action reflects the trial judge's concern that Domino's interests be adequately represented. Moreover, delays in bringing Domino's case to trial were not intentional but, rather, a matter of scheduling conflicts with the judge's trial calendar.

The ineffective assistance and speedy trial arguments need not be readdressed as we have already discussed both issues in full.

Finally, there is no indication that the judge was biased. Having viewed those parts of the trial videos where Domino claims the judge was "laughing and joking" with the prosecution, there is insufficient evidence to substantiate his claim. The judge properly denied the motion to appoint a new judge, as there was no reason why she should disqualify herself. Likewise, the judge did not act improperly by allowing Detective Underwood, a witness for the prosecution, to remain in the courtroom. The Commonwealth chose Underwood as a representative to sit at counsel table. Therefore, he was properly present during the whole of the trial.

Based on these reasons, we see no reason why the judge should have recused herself, nor do we find any indication of judicial bias or misconduct.

Fifth, Domino argues he was denied a fair trial because irrelevant evidence was introduced. He claims that the trial court improperly allowed evidence of the existence of a gun to be introduced at trial. Domino supports his argument by claiming that the presence of a weapon is not an element of terroristic threatening; therefore, he claims it should have been suppressed due to its prejudicial nature.

What Domino fails to address is the fact that the presence of a weapon is an element of burglary in the first

degree,⁹ with which he was also charged. Although he was only convicted of three counts of terroristic threatening, that fact does not preclude the introduction of evidence pertaining to the other crimes for which he was charged. We will not disturb a ruling on the admissibility of evidence unless we conclude the trial court abused its discretion.¹⁰ Here, the court clearly did not. Therefore, we affirm the decision to introduce evidence of the pellet gun.

Finally, Domino argues he was improperly assessed fines because of his indigent status. We agree.

While the record does not indicate that a motion and affidavit to proceed *in forma pauperis* was filed at the trial level, we believe Domino's financial status may be inferred from the fact that he was represented by a public advocate from the inception of the charges at the district court level and he was unable to make bond. Likewise, Domino did request and was granted permission to proceed *in forma pauperis* on appeal. KRS 534.040(4) states that fines for misdemeanors will not be imposed upon persons determined by the court to be indigent. That determination is made by looking at the factors in KRS 31.120. After examining these factors, it is clear that Domino was indigent and was improperly assessed fines in the

⁹ KRS 511.020.

¹⁰ Commonwealth v. English, Ky., 993 S.W.2d 941 (1999).

amount of \$1,500. Therefore, we reverse the judgment solely as to that issue.

For the reasons stated herein, the judgment of the Jefferson Circuit Court is affirmed with regard to Domino's arguments of denial of a speedy trial, ineffective assistance of counsel, prosecutorial misconduct, judicial bias, and improper introduction of irrelevant evidence. It is reversed solely on the issue of the improperly assessed fines.

BARBER, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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