

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-000873-MR

DAVID KOHER

APPELLANT

APPEAL FROM PERRY CIRCUIT COURT  
v. HONORABLE JOHN DAVID CAUDILL, SPECIAL JUDGE  
ACTION NO. 02-CR-00166

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; MILLER, SENIOR JUDGE.<sup>1</sup>

MILLER, SENIOR JUDGE: Appellant David Koher (Koher) brings this appeal from a judgment of the Perry Circuit Court, sitting without jury, entered April 14, 2004, adjudging him guilty of criminal abuse in the second-degree<sup>2</sup> and sentencing him to five years in the state penitentiary, more specifically two years to

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

<sup>2</sup> Kentucky Revised Statutes 508.110, a class D felony carrying a penalty of one to five years in the penitentiary.

serve and three years with supervised probation. Before us, Koher argues a denial of his state and federal constitutional rights 1) to effective assistance of counsel by the trial court's denial of "hybrid representation;" 2) to a knowing, intelligent, and voluntary waiver of counsel by the trial court's denial of his motion for standby counsel; and 3) to due process and a fair trial in the trial court's denial of a) his motion for continuance; b) his motion for a new trial; c) his motion for a directed verdict of acquittal; d) his motion for a bill of particulars and insufficient indictment; e) and his motion to introduce evidence of his religious beliefs. Because Koher was denied his state constitutional right to hybrid counsel as mandated in Hill v. Commonwealth, 125 S.W.3d 221, 225 (Ky. 2004) and Baucom v. Commonwealth, 134 S.W.3d 591, 592 (Ky. 2004), we reverse and remand for a new trial.

Koher initially argues, and the Commonwealth concedes, that the trial court erred in refusing to allow him the benefit of "hybrid counsel." As stated in Baucom at 592:

Wake v. Barker, Ky., 514 S.W.2d 692 (1974), held 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 696. See also Hill v. Commonwealth, Ky., 125 S.W.3d 221 (2004), which reaffirms the concept of "hybrid representation" because Section 11

of the Kentucky Constitution, unlike the United States Constitution, explicitly guarantees a criminal defendant the right to be heard "by himself and counsel." . . . [W]e are required to apply the Kentucky constitution because it affords greater protection for citizens who are accused of crimes. Here, it was clear that the trial judge presented Baucom with only two alternatives: either represent himself or accept appointed counsel. Under Section 11 of the Kentucky Constitution, as interpreted by existing case law, Baucom was entitled to a third alternative, and the one he requested, a hybrid representation. This being a structural error, we are obliged to reverse. See Hill.

As the facts herein are the same as in Baucom, we are, as was the Supreme Court therein, obliged to reverse and remand for a new trial. Upon retrial, the trial court is directed to give Koher the opportunity for standby counsel, consistent with Hill and Baucom, supra; and with regard to waiver of counsel, is further directed to follow the constitutional mandates of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) requiring a hearing, warnings, and a finding as to whether the defendant's waiver of his right to counsel was knowing, intelligent, and voluntary.

In view of our reversal here upon the confessed error, we deem it unnecessary to address the remaining contentions on this appeal.

For the foregoing reasons, the judgment of the Perry Circuit Court is reversed and remanded for a new trial consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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