

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002477-MR
&
NO. 2008-CA-000092-MR

KYLE DEAN SPEER

APPELLANT

v. APPEALS FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 05-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

KELLER, JUDGE: This is the second appeal by Kyle Dean Speer (Speer), related to his conviction of first-degree Stalking and Harassing Communications. In his first appeal, Speer argued that the trial court erred: when it failed to hold a

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

competency hearing; when it did not permit Speer to proceed *pro se*; and when it denied him the right to confront witnesses. After reviewing the record, this Court remanded this matter to the trial court with instructions to determine whether a retrospective competency hearing was permissible and, if so, to conduct such a hearing. This Court held the other issues in abeyance. *Kyle Dean Speer v. Commonwealth*, 2007 WL 3317602, *5 (Ky. App. 2007). In the current appeal, Speer argues the circuit court failed to conduct “a proper hearing” on remand. Having reviewed the record, we affirm the circuit court with regard to all issues.

FACTS

A jury convicted Speer of Stalking in the first degree and of Harassing Communications. Speer’s conviction arose out of the nearly constant telephone calls he made to Linda Fragipane (Fragipane), and/or her daughter, following the termination of his relationship with Fragipane. Additional salient facts will be set forth as we analyze each issue raised by Speers.

ANALYSIS

1. Competency Hearing

Prior to trial, Speer’s counsel requested a mental evaluation, which the court ordered. The evaluating psychologist, Dr. Sivley, stated that Speer had poor judgment and a distrust of the public defenders’ office that could impair his ability to assist in planning his defense. However, Dr. Sivley also stated that Speer was not psychotic, was able to appreciate the charges against him, and was competent to participate in his own defense. The trial court, without holding a competency

hearing, found that Speer was competent to stand trial and to assist in his own defense.

As noted above, Speer appealed his conviction, arguing in part that the court erred when it did not hold a competency hearing. This court agreed and remanded this matter to the trial court for a determination if a retroactive competency hearing was appropriate. The trial court determined that a retroactive competency hearing was appropriate and held that hearing.

At the hearing, Dr. Timothy Allen (Dr. Allen), a psychiatrist at KCPC, testified that Speer was a patient at that facility from November 23, 2005, through January 9, 2006. Dr. Allen evaluated Speer during his stay at KCPC to determine if he was competent to stand trial and to assist his counsel at trial on charges unrelated to this appeal. Dr. Allen testified that Speer has a personality disorder that leads him to be somewhat difficult to deal with and further, to make choices that others might not agree are the best options. However, Dr. Allen stated that Speer is not psychotic; was mentally competent to stand trial; understood the charges against him; and was competent to assist his counsel in his impending trial. Furthermore, Dr. Allen testified that Speer understood the process of a criminal trial, including the role to be played by the judge, the witnesses, and the attorneys. Although Dr. Allen stated that competency can fluctuate, sometimes from day-to-day, he testified that Speer's competency was "stable" and not subject to any significant fluctuation.

In addition to his examination of Speer, Dr. Allen reviewed Dr. Sivley's July 29, 2005, report and the videotape of Speer's testimony and closing argument during the trial at issue herein. Dr. Allen noted that he and Dr. Sivley reached essentially the same conclusions, which lends credence to Dr. Allen's opinion that Speer's condition was stable. As to Speer's conduct during trial, Dr. Allen noted that Speer's testimony tended to focus on his theory that others were conspiring against him to keep him from presenting evidence on his behalf. According to Dr. Allen, Speer's closing argument, although it contained a significant amount of extraneous detail that may have been somewhat confusing to the jury, showed logical coherence. Based on the above, Dr. Allen concluded that Speer was competent to stand trial and to assist his counsel at trial in September 2005. We note that Speer was present at the hearing and that court-appointed counsel for Speer cross-examined Dr. Allen.

Speer complains on appeal that Dr. Sivley did not testify at the competency hearing, thus depriving him of the right to cross-examine the physician who determined he was competent.

A retrospective competency hearing, 'may satisfy the requirements of due process provided it is based on evidence related to observations made or knowledge possessed at the time of trial.' *Cremeans v. Chapleau*, 62 F.3d at 169. Other factors bearing on the constitutional permissibility of a retrospective hearing include: (1) the length of time between the retrospective hearing and the trial; (2) the availability of transcript or video record of the relevant proceedings; (3) the existence of mental examinations conducted close in time to the trial date; and (4) the availability of the recollections of non-

experts-including counsel and the trial judge-who had the ability to observe and interact with the defendant during trial. See *United States v. Makris*, 535 F.2d 899, 904-05 (5th Cir.1976), cert. denied, 430 U.S. 954, 97 S.Ct. 1598, 51 L.Ed.2d 803 (1977).

Thompson v. Commonwealth, 56 S.W.3d 406, 409 (Ky. 2001).

The retrospective hearing was conducted more than two years after trial; however, the evaluations on which the court relied in determining competency were performed close in time to trial. Dr. Sivley conducted his evaluation of Speer approximately two months before trial and Dr. Allen conducted his evaluation less than two months after trial. Because the evidence presented at the hearing was garnered close in time to trial, the delay in holding the hearing did not interfere with Speer's right to due process.

Although Dr. Sivley did not testify, Dr. Allen had available for review Dr. Sivley's report and video of Speer's conduct during trial, giving him a unique view of Speer's condition before, during, and after trial. Furthermore, Dr. Allen examined Speer less than two months after trial. *Thompson* only requires that an examination be conducted close in time to trial, not before trial. Therefore, Dr. Sivley's examination and report were not required to satisfy the dictates of *Thompson* and Dr. Sivley's absence from the hearing could not, therefore, interfere with Speer's right to due process.

Finally, we note that the judge who conducted the retroactive competency hearing was the judge who conducted Speer's trial, giving him insight into Speer's competency at the time of trial as required by *Thompson*. The trial

court, having met the requirements of *Thompson*, committed no error in holding the retrospective competency hearing or in conducting that hearing.

2. Denial of Right to Self-Representation

At the beginning of trial, Speer's court-appointed counsel advised the trial judge that Speer wanted to retain separate counsel. The judge stated that Speer was free to do so, as long as counsel was there and prepared to try the case that day. Speer did not have alternative counsel available so the judge proceeded with jury selection. As the judge was addressing the jury, Speer got up from counsel table and began speaking with someone not visible on the video. The judge asked Speer to sit down and Speer refused, indicating that court-appointed counsel did not represent him and/or was not adequately representing him. Following a short, but heated exchange, during which Speer did not ask to represent himself, Speer was removed from the courtroom.

Speer argues that the court erred by not permitting him to represent himself during trial. Speer admits that he did not directly ask to represent himself; however, he argues the trial court should have interpreted his actions as such a request and then held a hearing as required by *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

“The function of the Court of Appeals is to review possible errors made by the trial court, but if the trial court had no opportunity to rule on the question, there is no alleged error for this court to review.” *Kaplon v. Chase*, 690

S.W.2d 761, 763 (Ky. App. 1985). Because Speer did not present this issue to the trial court, we hold against him without further review.

However, Speer argues that the court should have discerned from his comments that he wanted to proceed *pro se* and the court's failure to permit him to do so was a structural error and therefore, reviewable. This argument is flawed for at least two reasons. A criminal defendant is entitled to represent himself; however, he must timely and unequivocally request to proceed *pro se*. *Deno v. Commonwealth*, 177 S.W.3d 753, 757-58 (Ky. 2005). Speer never unequivocally requested to proceed *pro se*, and the trial court would have had to make an unreasonable leap of logic to infer that Speer's comments constituted such a request. Furthermore, even if we construed Speer's behavior as constituting such a request, making it the day of trial as the jury is being seated is not timely. Therefore, we discern no error in the court's refusal to grant a request that Speer did not make.

3. Exclusion of Speer from Courtroom

As noted above, the judge had Speer removed from the courtroom following his outburst. The judge then temporarily recessed court in order to discuss with counsel in chambers how to proceed. Counsel for Speer suggested that, if Speer could not control himself, the least restrictive and least prejudicial option would be for Speer to observe the proceedings on video from the judge's chambers. Furthermore, counsel suggested that her assistant could sit with Speer and relay to her any questions, observations, etc., Speer had. For the sake of

security, the judge stated that he would have a deputy present and that Speer would be handcuffed to a chair. While these discussions were taking place, a deputy advised the judge that he had spoken with Speer and Speer said he would not disrupt the proceedings again. However, after counsel later consulted with Speer, she advised the judge that Speer had not been able to or willing to state he would not disrupt the proceedings again. Furthermore, counsel indicated that, based on her experience with Speer, he probably would disrupt the proceedings again. Therefore, the judge determined to proceed with Speer observing the trial from chambers with the opportunity to consult with counsel through her assistant. Speer complains on appeal that his physical separation from the courtroom violated his right to confront witnesses.

“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.” *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970). However,

a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Id. 397 U.S. at 343, 90 S.Ct. at 1060-61 (footnote omitted). Additionally, Kentucky Rules of Criminal Procedure (RCr) 8.28(2) provides that “[a] defendant who persists in engaging in disruptive conduct after being warned by the court that such conduct will cause him or her to be removed may be excluded from the courtroom.”

Speer does not dispute that the judge had the authority to remove him from the courtroom. However, he claims that his behavior was not egregious enough to warrant removal from the courtroom and that, once removed, the judge should have advised Speer that he could return if he could behave.

Whether to remove or to otherwise discipline a disruptive defendant is within the discretion of the trial judge. *Id.* 397 U.S. at 343, 90 S.Ct. at 1061. We have reviewed the record and we discern no abuse of discretion on the part of the judge. During Speer’s outburst, the judge advised him to sit down three times, asked him if he was going to sit down and be quiet twice, and advised him that he would “be escorted from the courtroom” if he could not be quiet. We believe that the judge offered Speer sufficient opportunity to conform his behavior to proper courtroom decorum before having him removed. Furthermore, in light of the charges against Speer, the judge’s swift removal of Speer likely inured to his benefit by keeping him from potentially further alienating the jury with his behavior.

Once Speer was removed, the judge did offer him the opportunity to return when he permitted counsel to discuss Speer’s options with him. After that

discussion, counsel advised that Speer could not promise to behave. In light of Speer's inability to promise that he would behave, the judge's decision to keep Speer out of the courtroom was not an abuse of discretion.

We note that Speer argues that the judge should have discussed this matter with Speer rather than having counsel do so because Speer did not trust counsel. However, Speer objected to counsel, not the judge. If Speer returned to the courtroom, he would have had to sit next to counsel, not the judge. Therefore, counsel was precisely the correct person to discuss this with Speer, because it was counsel's presence Speer would have had to tolerate. Therefore, we discern no error in the judge not personally discussing this matter with Speer.

CONCLUSION

For the foregoing reasons, we discern no error in the trial court's decision to hold a retroactive competency hearing and its decision to exclude Speer from the courtroom. Furthermore, we discern no error in the trial court's failure to permit Speer to represent himself, particularly when Speer never requested to do so. Therefore, we affirm Speer's conviction and sentence.

ALL CONCUR.

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