

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000940-MR

RICHARD WAYNE TERRY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARTIN F. MCDONALD, JUDGE
ACTION NO. 05-CR-000953

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

** ** *

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

NICKELL, JUDGE: Richard Wayne Terry appeals from the final judgment of the Jefferson Circuit Court entered on April 5, 2006, following a jury verdict finding him guilty and sentencing him to five years' imprisonment. Having concluded that the Commonwealth was not required to reveal the identity of its confidential informant, we affirm in part. Having further concluded that Terry was entitled to a hearing pursuant to

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), prior to the trial court's decision to allow him to act as his own counsel, we vacate and remand for a new trial.

On March 22, 2005, Terry was indicted by a Jefferson County grand jury for trafficking in a controlled substance in the first degree (cocaine),² possession of marijuana,³ and possession of drug paraphernalia.⁴ The charges arose from a search of Terry's residence following a tip from a confidential informant that Terry was selling crack cocaine from the residence.

A jury trial commenced on February 9, 2006. Terry appeared with appointed counsel, and counsel requested a continuance of the trial for the purpose of obtaining records related to the release of cash seized during the search of Terry's residence. The trial court denied the request based on the Commonwealth's claim of inconvenience to the witnesses who were prepared to testify.

A lengthy court recess then ensued. When the trial resumed, defense counsel presented the trial court with a hand written motion prepared by Terry requesting that counsel be discharged. As grounds for the motion, Terry claimed he and counsel had not discussed strategy, that counsel had been "too busy" to talk to him prior to trial, and that he had the means to retain private counsel and wished to do so. Defense counsel stated that he had been unable to effectively communicate with Terry and that Terry

² Kentucky Revised Statutes (KRS) 218A.1412.

³ KRS 218A.1422.

⁴ KRS 218A.500.

refused to assist in his defense. The trial court denied the motion stating that it had been made only for the purpose of delay. It further instructed Terry that *voir dire* would continue and the presentation of proof would not begin until the next day which would give Terry additional opportunity to consult with counsel. Counsel again requested that the entire proceeding be continued until the following day, but the trial court denied the continuance.

During a break in *voir dire*, the trial court commented on the record, in Terry's absence, about Terry's "atrocious" body language, behavior, and its concern that if Terry were allowed to leave the courtroom for the evening he would not appear for trial the following day. Defense counsel stated that Terry had refused to speak to him or answer questions he had posed directly to Terry during *voir dire*. When Terry reappeared in the courtroom, the trial court informed him of the negative consequences of his actions and the fact that he would be taken into custody if he did not assure the court that he would properly participate in the trial.

The following day, the trial court conducted an *ex parte* hearing on defense counsel's request for a continuance due to an overnight breakdown in communication between he and Terry. Terry responded by stating that he had told counsel he did not want to be represented by him. Defense counsel stated that he was not opposed to hybrid representation,⁵ but if forced to continue with trial that day he could not effectively

⁵ Hybrid representation consists of a defendant acting as his own co-counsel. *See Hill v. Commonwealth*, 125 S.W.3d 221, 225 (Ky. 2004).

represent Terry. The trial court instructed Terry that he could proceed as his own counsel with appointed counsel in an advisory capacity only.

Ultimately, the trial proceeded with Terry representing himself, questioning witnesses, and testifying on his own behalf. The jury found Terry guilty of a lesser offense of possession of controlled substance in the first degree (cocaine),⁶ and possession of marijuana, but found him not guilty of possession of drug paraphernalia. The jury fixed a five-year sentence for possession of cocaine and a sentence of 12 months for possession of marijuana, with the sentences to run concurrently.

On February 17, 2006, Terry filed a motion for judgment notwithstanding the verdict, or in the alternative for a new trial. The trial court denied Terry's motion in its final judgment and sentenced him to five years' imprisonment on April 5, 2006. This appeal followed.

Terry's main argument is that the trial court allowed him to proceed as his own counsel without conducting a hearing pursuant to *Faretta, supra*. In Kentucky, a trial court is under an affirmative duty to hold a *Faretta* hearing when an accused attempts to make an absolute or limited waiver of the right to counsel. *Hill*, 125 S.W.3d at 226. Before a trial court allows a defendant to proceed as his own counsel, it must do three things: (1) conduct a hearing in which the defendant testifies to whether the waiver is voluntary, knowing, and intelligent; (2) warn the defendant during the hearing of the benefits relinquished and the perils arising from the waiver of counsel; and (3) make a

⁶ KRS 218A.1415.

finding on the record that the waiver is made voluntarily, knowingly, and intelligently.
*Id.*⁷

Terry invoked his right to self-representation before the commencement of *voir dire*. The trial court did not formally acknowledge Terry's desire to represent himself until the next day during an *ex parte* hearing prior to the jury panel being sworn. Although the trial court demonstrated an abundance of patience and caution for Terry's constitutional rights, the mandates of *Hill* were not satisfied before the trial court announced Terry would represent himself with appointed counsel in an advisory position only. There was no *Faretta* hearing and no finding that Terry's waiver of counsel was voluntary, knowing, and intelligent. Although we are reluctant to reward Terry's antics, we are constrained by precedent to vacate the final judgment and remand this case for a new trial.

Terry makes several other arguments on appeal. Because our resolution of his main contention requires us to remand for a new trial, our review of several other arguments becomes unnecessary. Therefore, we will not review Terry's arguments as related to the trial court's denial of several motions to continue the jury trial and the trial court's failure to strike certain jurors for cause.

However, we must address Terry's claim that the trial court erred in not requiring the Commonwealth to reveal the identity of its confidential informant since the

⁷ The Commonwealth cites *Iowa v. Tovar*, 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004), as controlling this case because *Tovar* was decided after *Hill*. However, we find *Tovar* to be distinguishable because it dealt specifically with a defendant's request to represent himself during guilty plea proceedings rather than a jury trial.

issue may arise upon retrial of this case. Kentucky Rules of Evidence (KRE) 508(a) gives the Commonwealth a privilege to refuse to disclose the identity of confidential informants. An exception to the general rule occurs “when the disclosure is voluntary, when the informant is a witness, and when the testimony of the informant is relevant to an issue.” *Taylor v. Commonwealth*, 987 S.W.2d 302 (Ky. 1998); KRE 508(c).

The only exception that might apply in this case is whether the confidential informant could give relevant testimony. As the confidential informant in this case was not a material witness to the crimes charged, but was only a tipster, the trial court properly refused to require the Commonwealth to reveal his/her identity. *See Thompkins v. Commonwealth*, 54 S.W.3d 147 (Ky. 2001); and *Taylor, supra*. Accordingly, we affirm on this issue.

For the foregoing reasons, we affirm in part and vacate in part, and we further remand this matter to the Jefferson Circuit Court for a new trial.

KELLER, JUDGE, CONCURS.

KNOPF, SENIOR JUDGE, CONCURS IN PART, DISSENTS IN PART AND FILES SEPARATE OPINION.

KNOPF, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority's conclusion that the confidential informant's identity need not be revealed. However, I respectfully disagree with the opinion relating to Terry's waiver of counsel. Terry's conduct and statements before the trial court clearly indicated his desire to proceed without counsel satisfying the requirements of *Faretta*. I would affirm the conviction in this appeal.

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