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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001264-MR

WINSTON WARD JOHNSON — APPELLANT

v.

APPEAL FROM MONROE CIRCUIT COURT
HONORABLE EDDIE C. LOVELACE, JUDGE
ACTION NO. 05-CR-00082

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART
AND VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: NICKELL, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: This appeal involves a *pro se* defendant, Winston Ward Johnson, who was convicted of four counts of stalking in the first-degree and sentenced to a total of nine years' imprisonment. Johnson argues that the trial court erred when it failed to conduct a pretrial hearing regarding his defense that he was engaged in constitutionally protected activity; that the evidence was insufficient to establish his guilt on each of the four counts; that being convicted and sentenced for four counts of stalking violated double jeopardy; and that the court erred in not *sua sponte* giving self-defense and lesser

included offense instructions to the jury. We affirm in part and vacate and remand in part.

The alleged victim during the events leading up to this case was Monroe County Attorney, Wes Stephens, who was involved in a juvenile proceeding in which proof was presented that Johnson's son allegedly showed young boys pornography. After the proceeding ended, Johnson began standing across the street from Stephens' office holding various signs, most of which used colorful language to call Stephens a liar. At times, Johnson would move closer to Stephens' office and carry multiple signs. This course of conduct continued for about two months. During this two-month period, Johnson was allegedly threatened by various people. In response to the threats, Johnson began carrying a gun; however, he did not carry a gun everyday and the Commonwealth only alleges that he carried a gun on four separate occasions. These four occasions were the basis for the four charges of stalking in the first-degree.

KRS 508.140 defines stalking in the first-degree as follows "[a] person is guilty of stalking in the first degree, (a) When he intentionally: 1. Stalks another person; and 2. Makes an explicit or implicit threat with the intent to place that person in reasonable fear of: b. Serious physical injury; or c. Death . . . ." This definition is further elaborated upon by KRS 508.130 which states:

> (1)(a) To "stalk" means to engage in an intentional course of conduct:
> 1. Directed at a specific person or persons;
> 2. Which seriously alarms, annoys, intimidates, or harasses the person or persons; and
> 3. Which serves no legitimate purpose.
> (b) The course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress.

> (2) "Course of conduct" means a pattern of conduct composed of two (2) or more acts, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." If the defendant claims that he was engaged in constitutionally protected activity, the court shall determine the validity of that claim as a matter of law and, if found valid, shall exclude that activity from evidence.

Johnson argues that pursuant to KRS 508.130(2) the court should have held a hearing to determine whether or not his activity was constitutionally protected. The Commonwealth responds that Johnson waived the hearing.

A review of the record shows that during a pretrial hearing on February 14, 2006, the court, on two occasions, inquired if Johnson desired a hearing to determine whether or not his actions were constitutionally protected. On both occasions, Johnson acting *pro se*, stated that he did not want a hearing. The issue presented is whether the trial court was nevertheless required to conduct a hearing.

In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) the Supreme Court held that a criminal defendant who waives his right to counsel is entitled to a hearing to determine whether that waiver is voluntary, knowing, and intelligent, and to give him the appropriate warning regarding the perils of waiving counsel and representing himself. *See also Tinsley v. Commonwealth,* 185 S.W.3d 668 (Ky.App. 2006). During oral argument, Johnson's counsel stipulated that Johnson received an adequate *Faretta* hearing. Thus, he was apprised of his rights and the pitfalls and problems which can occur as a result of his *pro se* representation. We conclude that the lack of a hearing to determine whether his activity was constitutionally protected was a consequence of his *pro se* representation and not a basis for reversal of the jury's verdict.

The trial court inquired of the appellant if he desired a hearing. On two occasions, he refused. Nevertheless, Johnson argues that KRS 508.130 employs mandatory language which required that the trial court conduct a hearing regardless of his waiver. He correctly points out that the statute utilizes the word "shall" which is mandatory language rather than permissive. However, even where the legislature has mandated that a hearing be held in a criminal matter, the court is not required to do so if the defendant has voluntarily waived a hearing.

In *Humphrey v. Commonwealth*, 153 S.W.3d 854 (Ky.App. 2004), the court held that a juvenile could voluntarily waive his right to a preliminary hearing to determine if he was a youthful offender despite the mandatory language used in the applicable statutes. The Court reasoned that if a defendant can waive his constitutional right to a jury trial, there is no logical reason why he cannot waive his statutory right to a hearing. *Id*. at 857.

As recognized in *Humphrey*, it is well established that a defendant can knowingly and voluntarily waive even the most fundamental constitutional rights. Likewise, statutory rights are subject to waiver. *Id*. In this case, no fundamental right was waived; rather, it was the waiver of a hearing to determine whether that right existed, i.e., freedom of speech. Moreover, it would not be logical nor practical for the court to insist that an unwilling defendant proceed with a hearing. The court could not force the defendant to present evidence. Because the burden is on the defendant to establish that the activity is constitutionally protected, a hearing without the presentation of evidence would be futile. Logic dictates that the legislature did not intend its use of the mandatory term "shall" in KRS 508.130 to demand such a result. We conclude that the trial court

did not err when it did not hold a hearing to determine whether Johnson was engaged in constitutionally protected activity.

Johnson also contends that he was entitled to a directed verdict of acquittal because the Commonwealth failed to establish the elements necessary for first-degree stalking. The standard on a motion for directed verdict is well established:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

There was ample evidence to support a reasonable conclusion that Johnson's conduct during the two-month period during his interaction with the county attorney constituted stalking in the first-degree as defined in KRS 508.130. He stood visibly outside the office holding threatening signs and wearing clothing with intimidating language directed at Stephens. As time passed, he became increasingly threatening toward Stephens to the point of standing directly in front of his office while armed with a gun. Stephens and his staff testified that Johnson's actions caused them to fear for their safety. It was not clearly unreasonable for the jury to find Johnson guilty of first-degree stalking.

A more problematic question is whether Johnson could be found guilty of four counts of first-degree stalking or whether his two months of activity constituted the same course of conduct so that only one charge could be supported by the evidence.

Johnson contends that his multiple convictions constitute double jeopardy. Johnson was armed with a weapon on at least four separate occasions, thus the trial court submitted four counts of first-degree stalking to the jury. At oral argument, the Assistant Attorney General, however, agreed that under the specific facts of this case Johnson could not be convicted of four counts of first-degree stalking. We, therefore, do not address the merit of Johnson's argument. In view of the Commonwealth's stipulation, we reverse counts two, three, and four of the judgment.

Finally, we find no reversible error in the trial court's failure to instruct the jury on second-degree stalking and self defense. Johnson did not request either instruction but contends that this court should nevertheless consider his alleged error. RCr 9.54(2) states that a party shall not assign as error the giving or the failure to give an instruction unless either by an offered instruction, motion, or timely objection which presents his position to the trial court. Absent a proper objection, our review is subject to the palpable error rule and we will reverse the trial court only if the failure to give the instructions resulted in a manifest injustice. RCr 10.26; *Brock v. Commonwealth*, 947 S.W.2d 24, 28 (Ky. 1997).

If a juror could reasonably doubt a defendant's guilt on one charge but believe beyond a reasonable doubt that he is guilty of a lesser-included offense, an instruction on the lesser-included offense is appropriate. *Osborne v. Commonwealth*, 43 S.W.3d 234 (Ky. 2001). Stalking is enhanced from second-degree to first-degree when the defendant commits the stalking with "a deadly weapon on or about his person." KRS 508.140(b)(4). Johnson admitted that he carried a gun while outside Stephens' office, thus, there was no evidentiary foundation for giving a lesser-included instruction on second-degree stalking.

Furthermore, Johnson's alleged error that he was entitled to a self defense instruction is meritless. Although he contends that his motive for carrying the weapon was because he feared for his own safety and not to threaten Stephens, even if true, this would not warrant an instruction on self defense. If the accused stalked a victim while armed with a deadly weapon, he is guilty of first-degree stalking. KRS 508.140.

The judgment of conviction as to count one is affirmed. The judgment of conviction is hereby vacated as to counts two, three, and four, and the case is remanded to the trial court for entry of a new judgment of conviction and sentence consistent with this opinion.

NICKELL, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS IN PART AND FILES SEPARATE OPINION.

STUMBO, JUDGE: Respectfully, I must dissent from that portion of the majority opinion which holds that the trial court did not err in failing to hold a hearing to determine the validity of the defendant's claim that he was engaged in constitutionally protected activity as required by KRS 508.130. The majority held that the Appellant

waived the right to a hearing and thus there is no error. That ruling, however, does not address the problem raised by the statute. The statute requires that if the defendant claims he is engaged in constitutionally protected activity, the trial court "shall determine the validity of that *claim as a matter of law* and, if found valid, shall exclude that activity from evidence." This is not an appeal from a trial court's failure to make findings of fact but one from a case in which the trial court failed to determine a matter of law as mandated by statute. The majority states that Appellant waived his right to a hearing during the February 12, 2007, pretrial. A careful review of the transcript, however, reveals that when the trial court asked Appellant whether he wished to have a hearing, Appellant clearly indicated his belief that the conduct at issue was constitutionally protected. It is equally clear that he did not understand what would have been determined at the hearing he was waiving. After Appellant stated that his actions were an exercise of "a natural and inherent inalienable right . . . protected under the constitution as stated in the Bill of Rights," the following exchange occurred:

> Court: Are you asking again-let me repeat what I asked you-are you asking me to conduct a hearing based upon KRS 508.130 to determine if the course of conduct you are alleged to have engaged in was conduct that was constitutionally protected?
>
> Appellant: Is this something that the jury could determine?
>
> Court: Well, I - I can't go into - once again that's where an attorney could help you. I really, as a judge, cannot answer questions. I want to be nice to you. I want to be hones [sic] and up front with you as I've tried to be so my time of trying to help you has come to an end. I've got to be fair and impartial and conduct this trial according to law. Are you asking me to have such a hearing?
>
> Appellant: No, I'm not.

There are two issues to be considered in resolving this matter: first, was Appellant's waiver a knowing and intelligent one; and second, can a statutorily mandated finding of law be waived. For a waiver to be voluntary, it must be knowing, intelligent and expressly renounce a right with full awareness of the consequences of such a waiver. *See Adams v. U.S. ex rel McCann*, 317 U.S. 269, 278, 63 S.Ct. 236, 87 L.Ed. 268 (1942). Here, it is clear to me that Appellant was under the impression that it would be up to a jury to determine whether his actions were constitutionally protected. The trial court did nothing to disabuse him of that notion. The determination of this matter of law is, under KRS 508.130, the court's, not the jury's. The word "shall" used in a statute means the action is compulsory and mandatory. *See Vandertoll v. Commonwealth*, 110 S.W.3d 789, 795-796 (Ky. 2003). Because the trial court refused to take any review at all of Appellant's constitutional claim, I would also reverse this conviction for a determination of the legal issue by the trial court.

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