

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-002256-MR

GENE D. BEAVERS

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET COLEMAN, JUDGE
ACTION NO. 03-CR-00642

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Gene D. Beavers appeals from a judgment entered upon a jury verdict convicting him of first-degree fleeing or evading police; possession of marijuana; driving under the influence, second offense; and reckless driving. We affirm.

On June 1, 2003, State Trooper Manuel Cruz observed Beavers traveling at a high rate of speed. Cruz activated his emergency equipment and pursued Beavers'

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

vehicle; however, Beavers failed to stop. Beavers' vehicle eventually began to smoke heavily, Beavers lost control, and the vehicle came to a stop. In the vehicle Cruz found an open alcoholic container, marijuana, rolling papers, and hemostats.

On November 25, 2003, in connection with the June 1, 2003, incident, Beavers was indicted for first-degree fleeing or evading police, KRS² 520.095; possession of marijuana, KRS 218A.1422; possession of drug paraphernalia, KRS 218A.500(2); driving under the influence, second offense, aggravated, KRS 189A.010; reckless driving, KRS 189.290; failure to signal, KRS 189.380; and possession of open alcoholic beverage container in motor vehicle, KRS 189.125.

Beavers was determined to be indigent, and Nancy Bowman-Denton of the Department of Public Advocacy was appointed to represent him. During the period of her representation of Beavers, a dispute developed between Bowman-Denton and Hardin County Commonwealth Attorney Chris Shaw. The disagreement revolved around the accusation by Shaw that Bowman-Denton was not diligent in engaging in plea negotiations with him in thirteen cases scheduled for trial in October and November 2004. A series of hearings were held on the matter in October 2004, at which time the dispute was aired before the trial court. The disagreement was eventually reported in the local newspapers. As a result of the dispute, on October 13, 2004, the trial court entered an order removing both Bowman-Denton and Shaw from participation in the thirteen affected cases, including Beavers'.

² Kentucky Revised Statutes.

Bowman-Denton and Shaw eventually resolved their differences, and on March 14, 2005, agreed orders were entered rescinding the prior removal orders, and Bowman-Denton and Shaw were reassigned to the case.

Trial was held on October 26 - 27, 2005. At the conclusion of the trial, the jury returned a verdict finding Beavers guilty of first-degree fleeing or evading police; possession of marijuana; DUI, second offense, aggravated; and reckless driving. The jury recommended sentences on the charges of three years; 12 months; six months and a \$500.00 fine; and a \$100.00 fine, respectively. Beavers was acquitted of the remaining charges.

Following trial, but prior to sentencing, Beavers retained new counsel. On January 10, 2006, well after the 5-day limitations period contained in RCr 10.06, Beavers filed a motion for a new trial along with a motion to file a belated motion for a new trial. As grounds for the motion Beavers alleged that the Commonwealth had failed to turn over pictures taken of Beavers' vehicle taken the night of his arrest by Trooper Cruz. Cruz and the Commonwealth had previously denied that any such photographs existed; however, Beavers alleged in his motion that the video tape from the camera mounted in Cruz's police vehicle disclosed that pictures had been taken of Beavers' vehicle. Beavers also alleged as grounds for relief ineffective assistance of counsel by Bowman-Denton; violation of his constitutional right to be present at critical stages of the trial by his absence from the October 2003 hearings relating to the dispute between Bowman-Denton

and Shaw; and violation of the bifurcated felony/misdemeanor sentencing requirements of KRS 532.055.

Beavers' motion for a new trial was denied, and final judgment and order imposing sentence was entered on October 9, 2006. This appeal followed.

DENIAL OF RIGHT TO BE PRESENT AT CRITICAL STAGE OF TRIAL

As previously noted, following his arrest Beavers was determined to be indigent, and Nancy Bowman-Denton of the Department of Public Advocacy was appointed to represent him. During the period of her representation of Beavers, a dispute developed between Bowman-Denton and Commonwealth Attorney Chris Shaw. The disagreement revolved around the accusation by Shaw that Bowman-Denton was not diligent in engaging in plea negotiations with him in thirteen cases scheduled for trial in October and November 2004. A series of hearings were held on the matter in October 2004, at which time issues surrounding the dispute were discussed. Beavers was not present at any of the hearings.

As a result of their disagreement and the surrounding controversy, on October 13, 2004, the trial court entered an order removing both Bowman-Denton and Shaw from participation in the thirteen affected cases, including Beavers'. Bowman-Denton and Shaw eventually resolved their differences, and on March 14, 2005, agreed orders were entered rescinding the prior removal orders, and Bowman-Denton and Shaw were reassigned to the case.

As noted, Beavers was not present at the October 2004 hearings during which the Bowman-Denton/Shaw controversy was addressed and which eventually led to both of the attorneys being removed from the case. Beavers contends that his absence from the hearings violated his constitutional right to be present at all critical stages of the trial of his case.

RCr³ 8.28(1) provides, in part, as follows: “The defendant shall be present at the arraignment, at every critical stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of the sentence.”

In *United States v. Byers*, 740 F.2d 1104 (D.C.Cir.1984), the federal Court of Appeals explained what constitutes a “critical stage” for Sixth Amendment purposes. “It is a test under which, as the initial criterion of Sixth Amendment applicability, the accused must find himself ‘confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.’” *Id.* at 1117-18 (quoting *United States v. Ash*, 413 U.S. 300, 310, 93 S.Ct. 2568, 2574, 37 L.Ed.2d 619 (1973)). In further analyzing *Ash*, the court described two elements of this criterion:

[T]he defendant must be confronted *either* with the need to make a decision requiring distinctively legal advice-which may occur even in a context in which the prosecutor or his agents are not present- or with the need to defend himself against the direct onslaught of the prosecutor-which may require some skills that are not distinctively legal[.]

³ Kentucky Rules of Criminal Procedure.

Id. at 1118 (emphasis in original). On this latter point, the court described such nonlegal skills as “ ‘being schooled in the detection of suggestive influences.’ ” *Id.* (quoting *United States v. Wade*, 388 U.S. 218, 230, 87 S.Ct. 1926, 1934, 18 L.Ed.2d 1149 (1967)); *Cain v. Abramson*, 220 S.W.3d 276, 279 -280 (Ky. 2007)

Further, federal and Kentucky courts generally have held that pretrial hearings that involve solely legal issues or arguments, rather than evidentiary issues, do not represent critical stages which require the presence of defendants. *See, e.g., United States v. Cornett*, 195 F.3d 776, 781 (5th Cir.1999); *United States v. Pepe*, 747 F.2d 632, 653 (11th Cir.1984); *Caudill v. Commonwealth*, 120 S.W.3d 635, 652 (Ky.2003); *Tamme v. Commonwealth*, 973 S.W.2d 13, 38 (Ky. 1998). Thus, a defendant's right to be present is not implicated where the hearing or conference concerns only procedural matters. *See Clark v. Stinson*, 214 F.3d 315, 322 (2nd Cir.2000); *Small v. Endicott*, 998 F.2d 411, 415 (7th Cir. 1993);

The issues under consideration in the October hearings concerned a general disagreement between the prosecutor's office and Bowman-Denton involving the latter's diligence in responding to plea offers. The focus of the hearings was how to resolve the dispute and what steps would need to be taken, procedurally, to address the thirteen cases at issue. No substantive evidentiary issues relevant to Beavers' guilt or innocence were addressed at the hearings, but, rather, the issues discussed related to a general dispute between Bowman-Denton and the Commonwealth Attorney's office. Because the subject of the hearings concerned procedural matters, we do not believe that Beaver's

constitutional right to be present at all critical stages of the trial against him was implicated.

In any event, the dispute between the prosecutor and Bowman-Denton was eventually resolved, and Beavers' trial was held almost a year after the relevant events. In this vein, Beavers has failed to identify how he was prejudiced by his absence from the hearings involving an unrelated dispute between his appointed counsel and the prosecutors one year prior to his trial. Hence, even if Beavers' right to be present was implicated during the October 2003 hearings, we believe any error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986) (“[W]e have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.”) RCr 9.24.

DISCOVERY VIOLATION

Trooper Manuel Cruz's police cruiser was equipped with a video camera. The camera was activated during the car chase and recorded the chase, Beavers' arrest, and events at the scene subsequent to the arrest. As conceded by the Commonwealth, the video recording discloses a Trooper taking photographs of the scene during the period following Beavers' arrest. During the course of taking photographs, the Trooper trains the camera on Beaver's vehicle, and, it appears, may have taken photographs of the vehicle. Nevertheless, Trooper Cruz and Trooper Warrell, who assisted Cruz with

Beavers' arrest and was present at the scene, maintain that they are unaware of any photographs of Beavers' vehicle. Relying upon the statements of the Troopers, during the trial proceedings the Commonwealth maintained that it was unaware of any photographs taken of Beavers' vehicle the night of his arrest. Accordingly, no such photographs were provided to Beavers in connection with discovery; the video recording, however, was turned over to Beavers.

The gist of Beavers' argument is that the Commonwealth's failure to disclose the pictures taken at the scene following Beavers' arrest deprived them of the opportunity (1) to show that there was no open alcoholic container present in the vehicle; (2) to show that there was no marijuana in plain view; and (3) to impeach the troopers' statements that no pictures were taken at the scene.

“It is clear that the government must produce evidence that is favorable to the accused and material to the question of his guilt and punishment.” *Eldred v. Commonwealth*, 906 S.W.2d 906, 701 (Ky. 1994) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 55-56, 107 S.Ct. 989, 1000, 94 L.Ed.2d 40, 57 (1987). “[A] criminal defendant's right to due process prohibits the government from withholding material exculpatory evidence, in good or in bad faith.” *Metcalf v. Commonwealth*, 158 S.W.3d 740, 746 (Ky. 2005) (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963)).

In this case there exists a factual dispute regarding whether photographs taken the night of Beavers' arrest exist. With Beavers having failed to raise this issue by

motion to compel and, correspondingly, to request an evidentiary hearing to resolve the factual dispute, we conclude that the issue is not properly preserved. *See Grundy v. Commonwealth*, 25 S.W.3d 76, 84 (Ky. 2000); *Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky.App. 1998); and *Hopewell v. Commonwealth*, 641 S.W.2d 744, 745 (Ky.1982).

In any event, we note that the photographs would not have produced the benefits alleged by Beavers. As noted, he alleges that his failure to obtain the photographs deprived him of the opportunity (1) to show that there was no open alcoholic container present in the vehicle; (2) to show that there was no marijuana in plain view; and (3) to impeach the troopers' statements that no pictures were taken at the scene. However, (1) he was acquitted of possession of an open alcoholic container; (2) Beavers did not move to suppress the marijuana on the basis that it was not in plain view and, in any event, an officer may search the passenger compartment as a search incident to arrest, *Thornton v. United States*, 541 U.S. 615, 621-623, 124 S.Ct. 2127, 2131-2132, 158 L.Ed.2d 905 (2004); *Rainey v. Commonwealth*, 197 S.W.3d 89, 93 (Ky.2006), and, accordingly, it makes no difference whether the marijuana was in plain view; and (3) Beavers did have a copy of the video tape of the which showed a Trooper appearing to take pictures at the scene, and Beavers could have impeached Troopers Cruz and Warrell's testimony (perhaps more successfully than with the actual photographs) based upon evidence it did have in its possession.

FAILURE TO HOLD BIFURCATED SENTENCING PROCEEDINGS

Beavers was found guilty of one felony: first-degree fleeing or evading police, and three misdemeanors: possession of marijuana; DUI, second offense; and reckless driving. Citing KRS 532.055 and *Commonwealth v. Philpot*, 75 S.W.2d 209 (Ky. 2002), Beavers contends that the trial court erred by failing to bifurcate the felony and misdemeanor sentencing phases. *Philpot* holds, in summary, that in cases, such as this, where a defendant is convicted of both misdemeanor and felony charges, sentencing should first be held on the misdemeanor cases without the introduction of prior convictions. Then, a hearing on the felony convictions should be held, at which time prior convictions may be introduced in accordance with KRS 532.055's truth in sentencing provisions.

Beavers, however, concedes that “Mr. Beavers is aware that the Court asked [trial counsel Bowman-Denton] if she wanted a bifurcated proceeding, which she indicated she did not.” Thus, this issue is unpreserved.

Accordingly, our review is limited to the palpable error standard under RCr 10.26. Palpable error is defined as an irregularity which affects a party's substantial rights and, if the appellate court does not address the irregularity, it will result in a manifest injustice to the party. *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 837 (Ky. 2003). In other words, after considering the whole case, if the appellate court does not believe that there is a substantial possibility that the result would have been any different, then the irregularity will be deemed non-prejudicial. *Id.*

We are not persuaded that Beavers is entitled to relief under the palpable error standard. The 12-month sentence for possession of marijuana and the six-month sentence for DUI are to run concurrently with Beavers' three-year sentence for first-degree fleeing. As such, he will not be required to serve any additional period of incarceration for his misdemeanor jail-sentences. And while the fines imposed represent the maximum statutory penalty for DUI, second offense, *see* KRS 189A.010(5) (providing for fine of not less than \$350.00 nor more than \$500.00) and reckless driving, *see* KRS 189.060 (providing of fine of not less than \$20.00 nor more than \$100.00), we do not believe the imposition of these fines, which together total only \$220.00 more than the statutory minimums, resulted in a manifest injustice.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his motion for a new trial, Beavers alleged as a ground for relief, among other things, that he received ineffective assistance of counsel in the trial proceedings based upon the deficient representation of trial counsel Bowman-Denton. The trial court denied the motion by order entered October 9, 2006.

The jury returned its verdict on October 27, 2005. RCr 10.06 provides that “[a] motion for a new trial shall be served not later than five (5) days after return of the verdict.” Beavers filed his motion for a new trial on January 10, 2006, and, thus, the motion was not timely. In addition, we review the trial court's denial of a new trial motion for abuse of discretion. *Brown v. Commonwealth*, 174 S.W.3d 421, 428 (Ky.

2005). In light of the untimeliness of Beavers' motion, the trial court did not abuse its discretion in denying the motion.

Moreover, a claim of ineffective assistance of counsel generally will not be reviewed on direct appeal because there usually is no record or trial court ruling specifically on the issue and there is a potential problem of conflict of interest for trial counsel filing notices of direct appeal. *See Humphrey v. Commonwealth*, 962 S.W.2d 870, 872 (Ky.1998) (indicating the better approach involving claims not preserved by trial counsel is to first file a RCr 10.26 substantial or palpable error motion in the appellate court, and then if unsuccessful, to raise an ineffective assistance of counsel claim in a post-judgment collateral attack); *Hibbs v. Commonwealth*, 570 S.W.2d 642, 643 (Ky.App.1978). However, where the ineffective assistance claim is specifically raised in a new trial motion and ruled on by the trial court, it may be reviewed on direct appeal. *Humphrey, supra*. As the trial court did not rule upon Beavers' claim of ineffective assistance of counsel, the issue is not properly before us. His remedy is to pursue this claim through a post-conviction motion pursuant to RCr 11.42

CONCLUSION

For the foregoing reasons the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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