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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 75-1125

DONALD EUGENE WILLIAMS AND
TEDDY JOE WILLIAMS — APPELLANTS

V. — APPEAL FROM HENDERSON CIRCUIT COURT
HON. CARL D. MELTON, JUDGE

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

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This is to certify that a copy of the foregoing Brief for Appellee has been mailed, postage prepaid, to the Honorable Carl D. Melton, Judge, Henderson Circuit Court, Henderson County Courthouse, Henderson, Kentucky 42420; and to Jack Emory Farley, Esq., Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601, this 12th day of March, 1976.

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MARTHA LAYNE COLLINS
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SUPREME COURT

Assistant Attorney General

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COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE QUESTIONS PRESENTED

1. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT OVERRULED APPELLANTS MOTION FOR A CONTINUANCE?

2. WAS THE TRIAL COURT REQUIRED TO HOLD AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER THE APPELLANTS WERE MENTALLY COMPETENT; AND, IF SO, WAS ITS FAILURE TO DO SO A QUESTION COGNIZABLE ON APPEAL WHEN THE APPELLANTS FAILED TO OBJECT TO THE FAILURE TO HOLD A HEARING OR TO REQUEST THAT A HEARING BE HELD?

3. IS THE SUFFICIENCY OF THE INDICTMENT BEFORE THIS COURT ON APPEAL?

4. WAS THE PROSECUTION'S CLOSING ARGUMENT ON THE EFFECTS OF APPELLANTS CRIME PROPER?

COUNTERSTATEMENT OF THE CASE

Appellee accepts the appellant's Statement of the Case.

ARGUMENT

I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT OVERRULED APPELLANTS' MOTION FOR A CONTINUANCE.

The appellants trial was set for Tuesday, August 19, 1975 (TR 10). On July 15, 1975, the appellants moved the Court to order the Sheriff of Henderson County to transport them to the Trover Clinic in Madisonville to be examined by a psychiatrist (TR 17-19). On July 21, 1975, this motion was granted and the Sheriff was ordered to deliver the appellants to the Trover Clinic on August 13, 1975 (TR 20). The certificate on the order does not show that a copy of it was delivered to the Sheriff (TR 20).

On August 15, 1975, H. Carlton Buchanan, counsel for one of the appellants, prepared an affidavit (TR 24) as part of a motion for continuance which was not filed until August 18, 1975 (TR 25). This motion was sustained and the Court re-scheduled the appellants trial for September 26, 1975 and again ordered the Sheriff to transport the appellants to the Trover Clinic on September 22, 1975 (TR 30). This order was executed by the Sheriff of Henderson County on September 24, 1975 (TR 31).

On September 18, 1975, the appellants filed a motion to quash a subpeona which was apparently issued by the prosecution to compel the attendance of the psychiatrist at the Trover Clinic (TR 32-34). On September 19, 1975, this motion was sustained (TR 35).

The subpeona does not appear in the record.

On September 24, 1975 the appellants filed a motion for continuance (TR 36-37) on the ground that the psychiatric examination scheduled for September 24, 1975 was cancelled as a result of the subpeona issued by the prosecution (TR 38-39). No ruling was made on this motion; and at trial, the motion was not renewed.

Aside from the merits of whether the foregoing circumstances demonstrated that the trial court abused its discretion, the fact of the matter is that this question is not before this Court on appeal. The well established rule is that the failure to insist upon a ruling constitutes a waiver of it on appeal, James v. Commonwealth, 197 Ky. 577, 247 S.W. 945 (1923) in which this Court said:

> "...Because the court failed to act on [the] motion [for a continuance] we are forced, under frequent rulings of this court, to treat it as waived by defendant, and because of which he has no available complaint therefor this appeal...." James v. Commonwealth, supra,

S.W. at 947.

Furthermore, an examination of the merits of appellants' claim reveals that it should not be vindicated on this appeal. The keystone of their argument is that they were prevented from securing psychiatric evidence in their favor by the failure of the Sheriff to deliver them to the Trover Clinic or, in the alternative, by the issuance of a subpeona upon the psychiatrist (TR 38).

It should be noted that nowhere in the record does it appear that notice of the first order was ever given to the Sheriff. Thus, nonfeasance cannot be imputed to the Sheriff. Further, when the appellants complained to the Court, the Court entered a second order precisely as the appellants requested. The applicable rule in this regard is that an appellant cannot complain an appeal of rulings in the trial court which he induced the trial court to make, cf. Wathen v. Mackey, 300 Ky. 115, 187 S.W.2d 1000 (1945).

Thus, the first circumstance which appellants assert demonstrates an abuse of discretion is insubstantial. The second ground is more substantial but disposed of with as equal ease as the first circumstance because the second ground rests on the false premise that the issuance of a subpeona prevented the appellants from obtaining evidence in their favor.

In the first place, the psychiatrist was a potential witness. As such, he was subject to the process of the Court just as any other witness. Appellee has found no law, statute or rule which holds psychiatrists not subject to the subpeona power of the Court. Therefore, the issuance of the subpeona was not prima facie unlawful. Further, again when the appellants complained of the issuance of the subpeona, the Court immediately quashed it.

Secondly, that the issuance of the subpeona worked to prevent the evidence the witness would have given is not

appellants motion for a continuance because:

(1) The appellants were not diligent in seeing that the Sheriff was given a copy of the first order directing him to take the appellants to the Trover Clinic.

(2) The service of a subpeona upon appellants psychiatrist was not prima facie unlawful nor did it in fact prevent the appellants from obtaining the witness on their behalf.

(3) The essence of the motion was that a continuance was needed to allow them to prepare for their case; however, the appellants had four months in which to prepare which should have been sufficient, cf. Gibson v. Commonwealth, Ky., 417 S.W.2d 237 (1967).

(4) The appellants wanted additional time to secure the testimony of a witness, however, there was no certainty that the appellants would ever find a psychiatrist to examine them, cf. Harris v. Commonwealth, 214 Ky. 787, 283 S.W. 1063 (1926).

This Court has repeatedly stated that the denial of a continuance is a matter within the sound discretion of the trial court which will not be disturbed absent a clear showing of an abuse of that discretion, cf. Cornwell v. Commonwealth, Ky., 523 S.W.2d 224 (1975). The circumstances surrounding the issue here demonstrates that the failure of the appellants to have a psychiatrist of their own choosing was ultimately due to refusal of the witness to testify and not due to state action. In

a proposition firmly based in logic. Specifically, it is not apparent why a subpeona to testify would deter the psychiatrist from examining the appellants when, if the psychiatrist had examined the appellants, the appellants themselves would have requested the psychiatrist to testify. Thus, the demand of the subpeona upon the psychiatrist only required him to do what the appellants would have demanded he do anyway.

Thirdly, if it is realized that the psychiatrist is merely another witness who would offer evidence on behalf of the appellants, then it is apparent that the second motion for continuance was merely a request for delay to enable the appellants to gather more evidence; that is, a request for more time in which to prepare for trial.

The appellants had from May 15, 1975 (TR 4-6) until September 26, 1975 (TR 30) or four months in which to prepare. Further, they already had one continuance (TR 30). Finally, in their motions, the appellants admitted that it was next to impossible to procure another psychiatric witness (TR 33). Thus, it was not an abuse of discretion because, under the appellants own facts, the uncertainty in obtaining another witness meant that the trial would be put off forever (TR 33).

In summary there, if the question is preserved for review, it was not an abuse of discretion to deny

appellants motion for a continuance because:

(1) The appellants were not diligent in seeing that the Sheriff was given a copy of the first order directing him to take the appellants to the Trover Clinic.

(2) The service of a subpeona upon appellants psychiatrist was not prima facie unlawful nor did it in fact prevent the appellants from obtaining the witness on their behalf.

(3) The essence of the motion was that a continuance was needed to allow them to prepare for their case; however, the appellants had four months in which to prepare which should have been sufficient, cf. Gibson v. Commonwealth, Ky., 417 S.W.2d 237 (1967).

(4) The appellants wanted additional time to secure the testimony of a witness, however, there was no certainty that the appellants would ever find a psychiatrist to examine them, cf. Harris v. Commonwealth, 214 Ky. 787, 283 S.W. 1063 (1926).

This Court has repeatedly stated that the denial of a continuance is a matter within the sound discretion of the trial court which will not be disturbed absent a clear showing of an abuse of that discretion, cf. Cornwell v. Commonwealth, Ky., 523 S.W.2d 224 (1975). The circumstances surrounding the issue here demonstrates that the failure of the appellants to have a psychiatrist of their own choosing was ultimately due to refusal of the witness to testify and not due to state action. In

this respect, this case is not different from any other case in which one side prevails over another simply because one or more witnesses refuse to testify. Those cases are not reversed and neither should this one be.

II

WAS THE TRIAL COURT REQUIRED TO HOLD AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER THE APPELLANTS WERE MENTALLY COMPETENT; AND, IF SO, WAS ITS FAILURE TO DO SO A QUESTION COGNIZABLE ON APPEAL WHEN THE APPELLANTS FAILED TO OBJECT TO THE FAILURE TO HOLD A HEARING OR TO REQUEST THAT A HEARING BE HELD.

Before discussing the substantive merits of this argument, some preliminary discussion may be helpful to delineate the basis of the trial court's action. The appellants filed a notice of intent to rely on a defense of insanity required by KRS 504.050. This notice and this statute is solely directed to insanity at the time the offense was committed and is entirely a matter of defense at a trial upon the merits. The statute and notice has absolutely nothing to do with the appellants competency to stand trial. Competency to stand trial is specifically governed by KRS 504.040[1] and RCr. 8.06.

---

[1] KRS 504.040:

(1) No person who, as a result of mental disease or defect, lacks capacity to appreciate the nature and consequences of the proceedings against him or to participate rationally in his own defense shall be tried, convicted or sentenced for the commission of an offense, so long as such incapacity endures.

(2) When a defendant is found to have a mental disease or defect, as described in subsection (1), the court may on motion of the prosecuting attorney or on its own motion proceed immediately to have the defendant committed for examination and possible detention pursuant to the provisions of KRS Chapter 202.

RCr. 8.06 provides, in part, that:

> "If...there are reasonable grounds to believe that the defendant is insane, the proceedings shall be postponed and the issue of sanity determined as provided by law...."

It should be noted that RCr. 8.06 does not require a hearing on appellants sanity unless "there are reasonable grounds to believe that the defendant[s] are insane." Thus, as a first question, it may be asked whether the trial court had reasonable grounds to believe that the appellants were unable to assist counsel. The obvious answer is that the trial court was not put on notice that the appellants were unable to assist counsel because the notice which they filed was specifically pursuant to the authority of KRS 504.050 which, as discussed above, is concerned only with insanity as a defense on the merits, see KRS 504.020. Secondly, the trial court has the report of a psychiatrist who specifically found the appellants capable of assisting their attorneys [see TR 15, 17].

Therefore, under these circumstances, the trial court did not have reasonable grounds to believe that the appellants were unable to assist their counsel. For this reason, there was no need for the trial court to order a hearing to determine the appellants competency as required by RCr. 8.06 and KRS 504.040. Thus, we are able to arrive at the first proposition that the appellants were not entitled to an adversary hearing on the question

of whether they were competent to stand trial because there was an absence of reasonable grounds to show that they were not so competent.

Indeed, because the only indication of incompetence to stand trial came in a notice under KRS 504.050, there is some doubt as to whether the trial court would have abused its discretion if it had not ordered a psychiatric examination, cf. Dye v. Commonwealth, Ky., 477 S.W.2d 805, 806 (1972). However, the examination was ordered and the results received indicated appellants were competent to stand trial. These results foreclosed the issue. If the appellants were not satisfied with the results, it was incumbent upon them to object to them and to move for a hearing. Absent an objection or motion, whether a hearing should have been held is not preserved for appellate review, RCr. 9.22.

The final point to discuss is whether the federal constitution required the trial judge to hold an adversary hearing on the issue of appellants competency to stand trial. There are three federal cases which bear upon this point.

In Pate v. Robinson, 383 U.S. 375, 385, 15 L.Ed.2d 815, 822, 86 S.Ct. 836 (1966), the Supreme Court held that when the evidence raises a "bona fide" doubt as to a defendant's competence to stand trial, the trial judge must order a sua sponte hearing on the issue. In Archer v. Holmes, ____F.Supp.____ (E.D. of Ky., memorandum opinion

issued on June 4, 1975), which appellant attached to his brief, the district court noted that the Supreme Court did not hold any certain procedure to be constitutionally mandated nor did the Supreme Court prescribe a general standard with respect to the nature or quantum of evidence necessary to impose upon the trial court the duty to hold a hearing, Archer v. Holmes, supra at 2-3.

The district court's characterization of the holding of the Pate v. Robinson, supra, is identical with that found in the Conner v. Wingo, 429 F.2d 630, 632 (6th Cir. 1970) and that found in Drope v. Missouri, 420 U.S. 162, 172-73, 43 L.Ed.2d 103, 113, 95 S.Ct. 896, 904 (decided February 19, 1975). Therefore, we must consider whether the evidence before the trial court raised a "bona fide" doubt as to whether the appellants were competent to stand trial.

First, there is the motion for examination filed by the appellants counsel (TR 7-8). In this motion, appellants counsel stated that they have been unable to communicate with their clients to secure intelligible or responsive answers and that counsel doubted their competence to stand trial (TR 8). Pursuant to this motion, an examination of the appellants was made (TR 13-17).

As to the appellant Donald Williams, the psychiatrist noted that Donald stated that he had been previously hospitalized on three occasions in psychiatric institutions (TR 14). Nevertheless, at the time of the

interview, the psychiatrist observed:

> "At the time of the interview, Don appeared to be about his stated age, a rather husky and healthy looking male individual with a mustache and moderately long hair. He did appear to be clean and well groomed. He made good eye contact and was animated. His speech was of normal rate and volume was distinct and easily understood. His conversation was spontaneous and the discussion was one of questions and answers. No hallucinations or delusions were noted during the interview. He was correctly oriented and had apparently fairly good recall although as noted in the above history, he had difficulty in approximation of dates. I did not believe there was clinical evidence for retardation and it was felt he was probably of dull normal intelligence." (TR 14).

It was further the psychiatrist's conclusion that Don was capable of assisting his attorney in his defense (TR 15).

As to the appellant, Teddy Williams, it appeared that he had attempted suicide a week earlier (TR 17); however, at the time of the interview:

> "At the time of interview, Mr. Williams was noted to be a reasonably husky and healthy appearing white male with a mustache and moderately long hair. He appeared to be neat and clean and polite and courteous. He made poor eye contact during the interview and at times appeared to be studying the questions before he answered[.]
>
> . . .
>
> His conversation consisted of questions and answers. He denied ever hearing voices or seeing objects or hallucinations of any kind and no delusions were apparent. He was reasonably well oriented, had reasonably good recall although he could

not recall dates or places well. Likely, judgmental abilities have been impaired and insight also. His intellect was believed to be normal or dull normal and he did not appear to be retarded." (TR 16-17).

The psychiatirst also found that Teddy was able to assist his counsel in his defense (TR 17).

The second psychiatrist reported on Donald Williams as follows:

> "Patient appears to be roughly oriented, stating it was mid-August 1975. He knew the place and person. There is no indication of memory deficit although he indicated he could not remember some things which had happened to him. He was non-specific about this. Speech was soft but coherent and goal directed. Affect was rather bland. Mood was one of moderate depression. He claims he cries from two to three time a week. Appetite however has been good and weight is stable. He does have difficulty getting to sleep. Although he claims he is not thinking of suicide now, he had entertained such thoughts several months ago and about 8 years ago he lacerated his left forearm. When presented with several hypothetical situations requiring judgment, he indicated that should he find an envelope on the sidewalk which was stamped, sealed and addressed, he would probably open it. Should he think that there was a fire in a building, he would leave and call the Fire Department. Attempts at proverb interpretations were done abstractly although he had claimed he had not heard of most of the proverbs. He was able to recall five numbers forward. He was able to adequately make change from a dollar. Intellectually he is judged to be in the low average range. He denied hallucinations, delusions, or that anyone was trying to harm him. He thought

he had no mission on earth. There does not appear to be a thinking disorder." (TR 28-29).

The second psychiatric report on Teddy Williams was as follows:

> "Patient is oriented in all spheres except for the exact date, thinking that this was the 10th of August. There is no indication of recent or remote memory deficit. Speech is coherent although he tends to speak in a low volume and sometimes mumbles. Affect was bland although not inappropriate. Mood he describes as "good". Appetite has been good and weight stable. He does not cry nor does he feel like it. About 3 months ago he lacerated his wrists but indicates he is not contemplating injuring himself or suicide at this time. Sleep is restless. Impulse control is apparently poor. When presented with several hypothetical situations requiring judgment, he responded as follows: Should he find an envelope on a sidewalk, he said he would pick it up and if he were near a mailbox he might drop it in. Should he smell smoke in a theater, he would get out but would do nothing else. He was able to adequately subtract 36¢ from a dollar. He was able to recall five numbers forward. Attempts at proverb interpretations were done somewhat incompletely but abstractly. He denied that anyone was trying to hurt him or that he had a special mission or purpose on earth. Hallucinations, delusions, and depersonalization are denied. Intellectually he is judged to be in the low average range." (TR 26-27).

At best therefore, the appellants present anti-social personalities (TR 15, 17, 27, 29) which is, of course, a mental defect which does not alleviate them from

criminal responsibility, see KRS 504.020. The evidence shows that Donald had a history of psychiatric treatment (TR 14) which, however, did not affect his present ability to assist counsel. Teddy had apparently attempted suicide (TR 17); however, this did not affect his present ability to assist counsel (TR 17) especially a month later at the second examination (TR 29).

Comparing these facts with those in _Pate v. Robinson_, _supra_ and _Drope v. Missouri_, _supra_, the conduct of the appellants here does not remotely approach the bizarre and manifest irrational conduct which the defendants exhibited before and during the trial in those cases. Therefore, the constitutional "bona fide" doubt is not present in this case; and its facts distinguish it from _Pate v. Robinson_, _supra_ and _Drope v. Missouri_, _supra_, see _Conner v. Wingo_, _supra_ at 637. Thus, there was no consitutional reason to hold a hearing _a fortiori_, appellants were not deprived of their right to confront the two psychiatrists.

In regard to this right of confrontation, we need point out only that _Archer v. Holmes_, _supra_, does not compel a contrary result. In the _Archer_ case, the district court found constitutional error because the trial court found _Archer_ competent based on the opinion of a physician, not a psychiatrist, to which _Archer_ and his counsel were not privy. In the instant case, the psychiatrist's report was available to the appellants'

counsel (TR 13, 28). Thus the requirement of due process found lacking in the Archer case was fully complied with here.

III

THE SUFFICIENCY OF THE INDICTMENT IS NOT BEFORE THIS COURT ON APPEAL.

Nowhere in the record does it appear that the appellant challenged the sufficiency of the indictment returned against them. As such its sufficiency is not reviewable, cf. Boggess v. Commonwealth, Ky., 447 S.W.2d 88 (1969). In any event, the indictment follows RCr., Form 15, Burglary (adopted effective February 5, 1975).

IV

THE PROSECUTION'S CLOSING ARGUMENT ON THE EFFECTS OF APPELLANTS CRIME WAS PROPER.

(A) APPELLANTS OPEN THE DOOR

> "Assume though for a moment that the amount is correct and what do we have? We have $154.82 worth of food that wasn't taken. We have a young man sitting here, two young men who didn't intend to hurt anybody, who didn't hurt anybody, who didn't take anything, who didn't deprive anyone of anything. The Commonwealth, through Mr. Walker, may have you believe or attempt to have you believe that there is no crime imaginable, that is so enhanced or so reprehensible as taking something that belongs to someone else. Ladies and gentlemen we must surely realize that that is a matter of context, it is a matter of the moment. If these boys were accused of murder, murder then would be the most serious crime imaginable. The same thing for rape. What ever crime, what ever the crime that the Commonwealth of Kentucky seeks to prove here in this courtroom is for that moment the most serious crime. It always has been." (TE 81-82, Closing argument

by appellants' counsel).

(B) THE PROSECUTION STEPS IN

"Didn't deprive anybody of anything. That's what the defense counsel argues. When you catch their clients, you know, they didn't do anything. They didn't take anything. Why sure they didn't take anything. They got caught. If they had taken anything then we would have had a lot more problems than we do here today, ladies and gentlemen, with your deciding this case. The fact is they were going to deprive someone of something. They were going to deprive these young school kids of their lunches out there. They didn't care. They don't care about the young children that have to go there daily, and would have had to come the next day and maybe not have anything to eat there. The school people would have to run around --

MR. BUCHANAN:

Objection, Your Honor.

THE COURT:

Overruled, it's argumentative.

MR. WALKER:

Would have had to try to scrounge up food for the young children,[2] the younger children there that needed it. May poor families can't afford anything. They can't send money to school for the school lunches, a lot of them are on the Federal School Lunch Program. They have to have this food. They are in school, they have to have it. It's for them. For the young mentally retarded children that they are trying

---

2 As a matter of fact, had the appellants succeeded, the school would be forced to go to the federal bureaucracy to get the food replaced (TR 61); and the Court may take judicial notice of the promptness and responsiveness of the federal establishment.

> to train there and help be useful citizens. These two would take from them as well as from anyone else. They don't care who it belonged to. It didn't matter to them. They were out to take care of themselves.
>
> Mr. Buchanan raised the issue that I as Commonwealth's Attorney would take the position that this was one of the worst crimes that can be. Well that's not the worst crime it can be against people, I'll submit to that, but it is a crime. And that's what we are here about, ladies and gentlemen, whether or not they committed a violation of the State Statutes. It's a crime." (TE 88-89, Closing argument

by prosecution).

(C) PAYING THE PIPER

Once the appellants opened the door, the prosecution was entitled to make a response thereto, cf. Hunt v. Commonwealth, Ky., 466 S.W.2d 957 (1971).

Furthermore, in view of the light sentence appellants received three years (TR 47, 49), the comment cannot be considered prejudicial, cf. Rupard v. Commonwealth, Ky., 475 S.W.2d 473 (1971).

CONCLUSION

Based upon the facts of this case and the arguments set forth in this brief, no error was committed during the course of appellants trial and the judgment of conviction and sentence imposed upon them should be affirmed.

Respectfully submitted,

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