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Reply Brief 1975-SC-1125

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REPLY BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 75-1125

DONALD EUGENE WILLIAMS and TEDDY JOE WILLIAMS — APPELLANTS

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

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANTS

FILED

APR 1 1976

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CERTIFICATE OF SERVICE:

I hereby certify that a copy of the foregoing Reply Brief For Appellants has been mailed, postage prepaid, to Hon. Carl D. Melton, Judge, Henderson Circuit Court, Henderson County Courthouse, Henderson, Kentucky 42420; Hon. Ulvester Walker, Commonwealth Attorney, 51st Judicial District, Henderson, Kentucky 42420; and Hon. Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 1st day of April, 1976.

William M. Radigan

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COMMONWEALTH OF KENTUCKY — APPELLEE

* * * * * * * * * * *

MAY IT PLEASE THE COURT:

PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to respond to the arguments contained in the brief for appellee in the above-captioned action.

QUESTIONS TO WHICH REPLY BRIEF ADDRESSED

I.

WAS THE TRIAL COURT'S OVERRULING OF APPELLANTS' PRETRIAL MOTION FOR A CONTINUANCE TO OBTAIN A PSYCHIATRIC EXAMINATION AN ABUSE OF DISCRETION AND A DENIAL OF APPELLANTS' CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW?

II.

WAS THE TRIAL COURT'S USE OF OUT-OF-COURT CERTIFICATIONS BY A PHYSICIAN TO DETERMINE THE MENTAL CONDITION OF APPELLANTS PRIOR TO TRIAL A DENIAL OF APPELLANTS' RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

III.

DID THE TRIAL COURT ERR TO APPELLANTS' SUBSTANTIAL PREJUDICE BY ALLOWING THE TRIAL AND CONVICTION OF APPELLANTS ON A FATALLY DEFECTIVE INDICTMENT?

IV.

DID THE PROSECUTOR ERR TO APPELLANTS' SUBSTANTIAL PREJUDICE BY IMPROPER AND PREJUDICIAL COMMENTS DURING CLOSING ARGUMENT?

ARGUMENTS

I.

THE TRIAL COURT'S OVERRULING OF APPELLANTS' PRETRIAL MOTION FOR A CONTINUANCE TO OBTAIN A PSYCHIATRIC EXAMINATION WAS AN ABUSE OF DISCRETION AND A DENIAL OF APPELLANTS' CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

In response to this assignment of error, appellee initially argues that appellants waived their right to appeal this issue due to their failure to insist on a ruling on their motion for a continuance, (Appellee's brief, p. 2). Appellants submit that appellee's position is fallacious in the extreme. Pursuant to the provisions of RCr 9.04, appellant's defense counsel filed a timely Motion for Continuance with the trial court two days prior to the scheduled trial date (T.R., p. 36). In the accompanying affidavit, defense counsel explained that they still planned to rely upon evidence of mental disease or defect and that the additional time was necessary so that appellants could be examined by a psychiatrist of their own choosing (T.R., pp. 38-39). Inasmuch as the trial date was not continued, it is obvious that the court below failed to grant appellants' motion.

Additionally, the various motions and affidavits filed by defense counsel in the case sub judice demonstrates that the two attorneys believed that a psychiatric examination of

appellants was essential to the formulation of a defense. The net effect of the denial of a continuance was that trial defense counsel, deprived of psychiatric evidence, presented no defense at all. With this denial of an adequate opportunity for preparation and presentation of a defense, appellants were denied "the right to a fair opportunity to defend against the state's accusations." Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973). Consequently, this Court is justified in reviewing the instant allegation of error. Jackson v. Commonwealth, Ky., 450 S.W.2d 244 (1970).

In turning to the particular circumstances surrounding appellants' request for a continuance, the counsel for the Commonwealth submits that the two unsuccessful attempts to have appellants evaluated by a psychiatrist of their own choosing were not caused by the Commonwealth.

In examining the failure of the Henderson County Sheriff to transport appellants to the Trover Clinic for the August 13th appointment with a psychologist, appellee contends that "appellants were not diligent in seeing that the Sheriff was given a copy" of the Order of July 21, 1975 (Appellee's brief, p. 5). Appellants submit, however, that they have no obligation to oversee the enforcement of an order of a circuit court directing the sheriff to undertake the transportation of prisoners to a designated location. Under the provisions of KRS 70.140, the sheriff is required to attend a circuit court and, additionally, to "obey the orders of said courts." Furthermore, the sheriff has the obligation to attend the clerk's office daily to receive any relevant material which may have been filed. KRS 70.075. By his failure to obey the July 21st Order, the Henderson County Sheriff was subject to a fine of twenty dollars. KRS 70.990(2). Contrary to the implication of appellee, the blame for the failure of appellants to keep the August 13th appointment with Dr. Johnson at the Trover Clinic can be directly imputed to the Henderson

County Sheriff.

Appellants' defense counsel rescheduled the appointment with Dr. Johnson, a private psychologist, for September 23, 1975 (T.R., p. 24). However, prior to the date of the scheduled appointment, the Commonwealth's Attorney issued a subpoena for Dr. Johnson. As a result of this action, the Trover Clinic cancelled the September 23rd appointment (T.R., pp. 32-33). In examining these facts, appellee argued that "the service of a subpoena. . .[on Dr. Johnson]. . .was not prima facie unlawful nor did it in fact prevent the appellants from obtaining the witness on their behalf" (Appellee's brief, p. 5). Appellants submit that the attorney for the Commonwealth is incorrect in both his contentions.

Initally, it should be noted that communications between a psychologist and patient "are placed upon the same basis as those provided by law between attorney and client, and nothing. . . shall be construed to require any such privileged communications to be disclosed." KRS 319.111. Inasmuch as appellants would have to consent to Dr. Johnson's testimony, they are the only party who could have issued a subpoena to compel Dr. Johnson's attendance at trial. KRS 421.210(4). Additionally, appellee's analysis ignores the fact that the trial court, in response to appellants' motion, quashed the subpoena issued by the Commonwealth's Attorney (T.R., p. 35).

In their Motion to Quash Subpoena, appellants' trial counsel explained the effect of the Commonwealth's actions:

> The action of the Commonwealth has, in effect, deprived the Defendants of their right to be examined by a psychiatrist of their own choosing because, as the Court has been previously advised, the psychiatric department of the Trover Clinic is the only agency with which the family of the Defendants' have been able to make suitable financial arrangements to have the Defendants examined by a qualified psychiatrist. The right of the Defendants to a fair and impartial trial and due process of law as

> guaranteed them by the 6th and 14th amendments to the United States Constitution and by Section 11 of the Kentucky Constitution has been materially damaged by the issuance of the subpeona to Dr. Johnson and will continue to be damaged unless the relief sought herein as granted (T.R., p. 33).

Accordingly, an examination of the factual circumstances surrounding the Motion for Continuance demonstrates that appellants were thwarted in their attempts to gain a psychological evaluation by agents of the Commonwealth. When this is juxtaposed with the express intention of appellants' trial counsel to rely upon a defense of mental disease or defect, the need and justification for a continuance reached due process proportions.

Appellee lastly submits that the four month period from May 15, 1975, until September 26, 1975, was sufficient time for appellants' counsel to prepare for trial. (Appellee's brief, p. 4). However, in view of the Commonwealth's interference with appellants' continuous attempts during this four month period to obtain a psychological evaluation, appellee's argument can only be regarded as meritless.

In the instant case, trial defense counsel requested a continuance for the purpose of obtaining a psychiatric evaluation of appellants. It is apparrent from the record that appellants' counsel, ever since their appointment in May of 1975, had not only a serious question of their clients' competency to stand trial, but also expressed a desire to utilize an insanity defense at trial. The two attorneys had twice made appointments with a private psychiatrist to examine appellants. However, these attempts at an evaluation of their mental condition were thwarted by agents of the Commonwealth. Up until two days prior to trial, trial defense counsel expressed doubts concerning the mental condition of their clients. The denial of the motion by the Henderson Circuit Court forced appellants to trial without adequate preparation and while the physical and mental condition of appellants was

undiagnosed by a psychiatrist of their own choosing. As a result, appellants were precluded from presenting a defense at trial. Unquestionably, the actions of the court below constituted a denial of appellants' constitutional right to a fair trial.

For the reasons delineated above and in their initial brief, appellants request this Court to reverse their conviction.

II.

THE TRIAL COURT'S USE OF OUT-OF-COURT CERTIFICATIONS BY A PHYSICIAN TO DETERMINE THE MENTAL CONDITIONS OF APPELLANTS PRIOR TO TRIAL WAS A DENIAL OF APPELLANTS' RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellee initially argues that "the trial court was not put on notice that appellants were" not competent to stand trial because defense counsel only filed a notice under KRS 504.050 dealing with insanity as a defense. (Appellee's brief, p. 7). Such a position will not withstand the scrutiny of analysis.

Besides discussing the alleged insanity of appellants at the time of the crime, defense counsel in their Notice of Intent discussed appellants' present mental condition. The two attorneys stated, inter alia, that they had been unable to consult with their clients or prepare a defense:

> They have endeavored to consult with these defendants, and have been effectively unable to communicate with them regarding the charges brought against them, in that they have been unable to secure intelligible or responsive answers that might enable them to properly prepare for their defense. . .based upon their observations of these defendants, they doubt their fitness to proceed or to participate rationally in their own defense upon these charges (T.R., p. 8).

The similarily between this language and the statuatory language of KRS 504.040 is apparent. see: Commonwealth v. Strickland, Ky. 375 S.W.2d 701 (1964).

Additionally, the argument of the attorney for the Commonwealth demonstrates a misconception of the distinctions between

incompetency to stand trial and insanity as a defense. "There is a vast difference between that mental state which permits an accused to be tried and that which permits him to be held responsible for a crime." Winn v. United States, 270 F.2d 326, 328 (D.C. Cir. 1959). "Whereas 'insanity' might be necessary for an acquittal, a lesser mental disorder might prevent a defendant from standing trial." Johnson v. United States, 344 F.2d 401, fn. 13 (5th Cir. 1965). Appellants submits that the filing with the trial court of a notice of intent to introduce evidence of mental disease or defect to show lack of criminal responsibility inherently carries with it a notice of "reasonable grounds to believe that the defendant is insane." RCr 8.06.

When the legal criteria of capacity to stand trial is applied to the case at bar, it becomes apparent that reasonable grounds to believe appellants incompetent were called to the attention of the trial court by appellants' counsel.

The counsel for the Commonwealth then submits that since the trial court had a report from a psychiatrist which concluded that appellants were competent then there did not exist "reasonable grounds to believe that the appellants were unable to assist their counsel." (Appellee's brief, p. 7). Such an argument demonstrates a misconception of the issue presented in appellants' initial brief. The questioned aspect does not run to the trial court's finding of reasonable grounds to believe appellants incompetent but, instead, as to whether or not the court below erred in failing to grant appellants an adequate hearing on the issue of competency once the psychiatric reports were received.

The Supreme Court in Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961), emphasized that:

> A state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures which conform to the requirements of the Fourteenth Amendment. Id., 81 S.Ct. at 745.

Five years later, in Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), the Supreme Court reiterated the Rogers principle and applied it as the criterion for an adequate hearing in state court on an accused's competence to stand trial. Id., 86 S.Ct. at 842. In the cited case, the Supreme Court also enunciated an ancillary theorem that a defendant cannot waive his right to have the court determine his capacity to stand trial.

Recently, in Via v. Commonwealth, Ky., 522 S.W.2d 848, 849 (1975), this Court analyzed the relationship between RCr 8.06 and the constitutional necessity of a due process competency hearing:

> The Supreme Court cases speak in terms of a hearing's being required when there is sufficient doubt of the defendant's competency as to require further inquiry, which does not differ materially from our requirement based on the existence of reasonable grounds to believe the defendant is insane.

The reasonable grounds must be called to the attention of the trial court by the defendant or must be so obvious that the trial court cannot fail to be aware of them, in which latter case a motion for a hearing on mental capacity is not required. Via v. Commonwealth, supra, at 848-849, citing Matthews v. Commonwealth, Ky. 468 S.W.2d 313 (1971).

The Supreme Court in the recent case of Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), explicitly discussed the heavy weight which must be accorded a defense counsel's expression of concern over the psychiatric condition of an accused:

> However, we are constrained to disagree with the sentencing judge that counsel's pretrial contention that "the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial," did not raise the issue of petitioner's competence to stand trial. Id., 95 S.Ct. at 906.

Although the Supreme Court did not suggest that courts must accept without question a lawyer's representations concerning the competence of his client, they did conclude that "an expressed doubt in that regard by one with the closest contact with the defendant" is unquestionably a factor which should be considered.

Id., 95 S.Ct. at 906 n. 13.

In Drope v. Missouri, supra, the Supreme Court delineated the standards which are relevant in determining whether a hearing on competency is constitutionally required:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may in some circumstances, be sufficient. Id., 95 S.Ct. at 908.

In the case sub judice, appellants submit that they met these requirements. Trial defense counsel expressed their concern regarding appellants' incompetency in May of 1975. During the four months preceeding trial, the defense counsel continually expressed their concern about appellants' mental condition by their attempts to obtain a psychiatric evaluation by Dr. Johnson. This question of appellants' mental state was reflected up until two days prior to trial in the affidavit which accompanied the Motion for Continuance. It was likewise apparent to the trial court that Donald Eugene Williams had been hospitalized on at least three occasions in psychiatric hospitals. (T.R., p. 14). Additionally, Teddy Joe Williams had attempted suicide in early June of 1975. (T.R., p. 17).

Under these circumstances, the trial judge was required to order a hearing to determine appellants' present sanity and capacity to stand trial. The failure of the trial court to take such actions constituted a denial of appellants' constitutional right to a fair trial.

Even though the psychiatric evaluations ordered by the court below indicated that appellants were competent to stand trial, this would not allow the trial court to deny appellants an evidentiary hearing on their competency to stand trial.

In Via, supra, this Court explained that:

> From the record in the instant case we think the existence of reasonable

> grounds to believe Vesta was not mentally competent to stand trial had to be obvious to the trial court, which fact required that an evidentiary hearing be held. If there were facts in existence tending to establish Vesta's mental competency they are not in the record, and even if they were in the record the rule would seem to be, under Pate and Drope, that the fact that they might warrant a finding of mental capacity would not eliminate the necessity of a hearing. Id., at 850.

Consequently, if the trial judge had before him reasonable grounds to believe appellant was not mentally competent as well as evidence to the contrary, he must still conduct the evidentiary hearing.

In Via, supra, this Court acknowledged that "if there are reasonable grounds to believe the defendant is insane, a hearing is required" under RCr 8.06. This Court added that:

> And the Supreme Court of the United States has indicated that the hearing must be an evidentiary one conforming with due process requirements. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815; Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (decided February 19, 1975). Id., at 849.

Appellants submit that the in camera procedure employed by the trial judge in the instant case constituted a denial of their constitutional right to confrontation of witnesses. For the reasons delineated, this Court must reverse their conviction by the Henderson Circuit Court.

III.

THE COURT BELOW ERRED TO APPELLANTS' SUBSTANTIAL PREJUDICE BY ALLOWING THE TRIAL AND CONVICTION OF APPELLANTS ON A FATALLY DEFECTIVE INDICTMENT.

In view of the limited arguments submitted by the attorney for the Commonwealth, appellants will rely upon the statements of facts and conclusion of law contained in their initial pleadings.

IV.

THE PROSECUTOR ERRED TO APPELLANTS' SUBSTANTIAL PREJUDICE BY IMPROPER AND PREJUDICIAL COMMENTS DURING CLOSING ARGUMENT.

Appellee's argument that appellants' counsel "opened the door" for the prosecutor's comments (Appellee's brief, p. 16) is so tenuous as to be frivolous. That portion of appellants' closing argument cited in appellee's brief was merely a reflection on the fact that the alleged crime was not violent in nature and did not involve robbery. The only additional factor examined by appellants' counsel was an anticipation of the Commonwealth's Attorney's tendency of prejudicial argument to the jury during closing argument. The record unequivocally demonstrates that defense counsel's anticipatory remarks were well-founded.

The prosecutor argued that appellants "don't care about the young children that have to go there daily. . .and maybe not have anything to eat there." (T.E., pp. 88-89). The jury was told that the school would have great difficulty in replacing this food (which, of course, was not taken). The Commonwealth's Attorney implied that the appellants' actions would harm "the young mentally retarded children that they are trying to train there and help be useful citizens." (T.E., p. 89). Additionally, appellants were described as having no regard for anyone's individual personal property. Consequently, the prosecutor continued, ". . .why have much regard for them?" (T.E., pp. 92-93). The jury was finally told to make an example of appellants for the benefit of the community.

To argue that these arguments were a "necessary and reasonable" response to appellants' closing statement would be fallacious in the extreme. See: State v. Wright, La, 205 So. 2d 381 (1967). Neither could the prosecutor's inflammatory comments be considered "a reasonable argument in response to matters brought up by the defendant." Hunt v. Commonwealth, Ky.,

466 S.W.2d 957, 959 (1971).

Appellants submit that the sole purpose of the prosecutor's closing argument was to inflame and prejudice the jury against them. It should be noted that appellee did not attempt to argue that the Commonwealth's Attorney's remarks to the jury were not improper. Appellants submit that this silence on the part of the counsel for the Commonwealth must be taken as a tacit concession of the merits of appellants' allegation of error. Consequently, this Court must reverse appellants' conviction.

CONCLUSION

For the reasons delineated above and in their initial brief, appellants respectfully request this Court to reverse their conviction by the Henderson Circuit Court.

Respectfully submitted,

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