

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002735-MR

STERLE TRICE

APPELLANT

v. APPEAL FROM CUMBERLAND CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 00-CR-00010

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: DYCHE, JOHNSON, and KNOFF, JUDGES.

KNOFF, JUDGE: Sterle Trice appeals his conviction by a Cumberland County jury for second-degree criminal abuse. KRS 508.110. The jury fixed his sentence at two years and six months which the trial court imposed. Trice claims the trial court erred in denying his motion for funds for a mental health expert to assist in his defense. Because we believe this issue to be dispositive, we need not address the other issues raised in this appeal. Accordingly, we reverse and remand this case for the appointment of a mental health expert to assist the defendant in preparing for a new trial on the charge of second-degree criminal abuse.

Trice was indicted in March, 2000, for first-degree criminal abuse because of injuries his son sustained after Trice had used a foreign object to spank the boy for disciplinary reasons. The child suffered physical pain and numerous wounds to his body as a result.

On May 17, 2000, Trice, who was indigent and represented by a public advocate, filed a motion for a county-funded mental health expert to assist him in preparing his defense. Trice also requested an ex parte hearing on the matter. Along with the motion was a proposed order that Dr. Eric Y. Drogin, a certified forensic psychologist at the University of Louisville School of Medicine, be paid for up to thirty hours at the rate of \$200.00 per hour for defense-related services and \$125.00 per hour for travel time.

The trial court held an ex parte hearing on Trice's motion on May 25, 2000. During the hearing, Trice's trial counsel informed the court of Trice's extensive mental health history and of her belief that he may have a capacity defense. In addition, she informed the court that Trice was diagnosed as being schizophrenic. Trice's counsel also had in her possession Trice's mental health records, which she offered to the court for review. Those records, which were sealed and included in the record for future review, clearly indicated that Trice was schizophrenic, had a history of depression and substance abuse, and had been sexually abused as a child. Nevertheless, the trial court denied defense counsel's motion for funds without giving an explanation for the denial.

On June 2, 2000, Trice's trial counsel filed an ex parte motion for reconsideration of the original motion for funds to hire a mental health expert. In support of the motion, counsel cited Trice's many diagnoses, which range from manic-depressive disorder to paranoid schizophrenia. She further set forth a list of reasons Trice's case required the assistance of a mental health expert. The trial court heard the motion on September 28, 2000, along with another defense motion. When Trice's trial counsel raised the issue of the motion for funds for a mental health expert, the court interrupted, stating simply that the motion had been overruled. No further arguments were heard on the matter.

When an indigent defendant makes a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a mental health expert who will conduct an appropriate examination and assist in evaluating, preparing, and presenting the defense. Ake v. Oklahoma, 470 U.S. 68, 82-83, 84 L. Ed. 2d. 53, 66, 105 S. Ct. 1087 (1985).

Kentucky law is in accord with the United States Supreme Court's decision in Ake. KRS 31.110(1)(b) provides that an indigent defendant is "[t]o be provided [at state expense] with the necessary services and facilities of representation including investigation and other preparation." The Kentucky Supreme Court, in Binion v. Commonwealth, Ky., 891 S.W.2d 383 (1985), stated that in cases where the defendant's sanity is at issue, more than an examination by a neutral psychiatrist was

needed. The Court went on to say that "there must be an appointment of a psychiatrist to provide assistance to the accused to help evaluate the strength of his defense, to offer his own expert diagnosis at trial, and to identify weaknesses in the prosecution's case by testifying and/or preparing counsel to cross-examine opposing experts." Id. at 386.

To be entitled to the assistance of a mental health expert, an indigent defendant must show that his mental state is "seriously in question." Hunter v. Commonwealth, Ky. 869 S.W.2d 719, 722-23 (1994). "[T]rial courts are not required to provide funds to defense experts for fishing expeditions." Hicks v. Commonwealth, Ky., 670 S.W.2d 837, 838 (1994). The standard for determining whether a criminal defendant is entitled to funds for expert assistance is whether such assistance is "reasonably necessary." Id. On appeal, our role is simply to determine whether the trial court abused its discretion in denying Trice's motion for funds. Foley v. Commonwealth, Ky. 17 S.W.3d 878, 887 (2000).

In the instant case, it is clear that Trice suffers from numerous mental health problems. His trial counsel informed the trial court of such and provided it with Trice's lengthy mental health records. Because the preliminary evidence of Trice's serious mental problems is both too extensive and too complex for a non-expert to discount, we find the trial court's denial of expert assistance to be an abuse of discretion.

Consequently, Trice's conviction for second-degree criminal abuse must be vacated, and this matter must be remanded

for appointment of a mental health expert and for a new trial. However, Trice's conviction for the lesser-included offense of second-degree criminal abuse had the effect of acquitting him on the greater charge of first-degree criminal abuse. Accordingly, the double jeopardy clause precludes retrial on the greater charge. McGinnis v. Wine, Ky., 959 S.W.2d 437, 439 (1998).

For the reasons stated, we reverse Trice's conviction and remand this case to the trial court for the appointment of a mental health expert to assist Trice in preparing for a new trial on the charge of second-degree criminal abuse.

JOHNSON, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

Irvin J. Halbeib
Appellate Public Advocate
Louisville, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General
Frankfort, Kentucky

J. Gary Bale
Assistant Attorney General
Frankfort, Kentucky