

IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

FILED

November 22, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

DEBBIE KAY MARION, as next)	C/A NO. 03A01-9906-CV-00229
friend for JONI MARION and)	
JOY K. BOWLING, children)	
under the age of 18 years,)	
)	
Plaintiff-Appellee,)	
)	
)	APPEAL AS OF RIGHT FROM THE
)	SCOTT COUNTY CIRCUIT COURT
v.)	
)	
)	
)	
CHARLES DAVID BOWLING,)	
)	HONORABLE CONRAD TROUTMAN,
Defendant-Appellant.)	JUDGE

For Appellant

For Appellee

CHARLES DAVID BOWLING
Pro Se
Pikeville, Tennessee

JANETTE TAYLOR
Oneida, Tennessee

OPINION

AFFIRMED AND REMANDED

Susano, J.

This is an action brought by Debbie Kay Marion ("Marion") on behalf of her two minor children seeking damages for injuries allegedly sustained by the children as a result of the criminal conduct of the defendant, Charles David Bowling ("Bowling"). After a bench trial, the court below awarded Marion, in her representative capacity, the sum of \$100,000 in compensatory damages. Bowling appeals, claiming several violations of due process in that: 1) he did not have a trial by jury; 2) he was not present at trial; 3) the trial was held prior to the final resolution of the issues raised by him in his petition for post-conviction relief; 4) his criminal convictions were introduced into evidence at trial; 5) he was denied the appointment of counsel; and 6) the trial court failed to hold a pretrial conference. Bowling also argues that the trial court erred in considering the testimony of members of his family.

I.

Bowling is currently serving a 25-year sentence on

his conviction of twelve counts of rape of a child. After he was convicted at the trial level, he was sued by Marion who proceeded on behalf of her daughters, Joni Marion ("Joni"), the victim of Bowling's crimes, and Joy K. Bowling ("Joy"). In her complaint, Marion alleges that Joy, Bowling's biological daughter, witnessed these rapes. Marion sought compensatory damages for the injuries suffered by both children.

In his answer, Bowling requested that Marion's suit be held in abeyance while he appealed his conviction. He also filed a motion seeking the appointment of counsel. While the trial court did not respond to Bowling's latter motion, it did grant a continuance pending the completion of his direct appeal. The Court of Criminal Appeals affirmed his conviction, **State v. Bowling**, No. 03C01-9710-CR-00478, 1998 WL 338205 (Tenn.Crim.App., filed June 26, 1998), and the Supreme Court denied Bowling's application for permission to appeal on February 1, 1999.

At a bench trial on April 19, 1999, the trial court in the instant case heard testimony from Marion; the guardian ad litem appointed to represent Joni and Joy; Bowling's sister, Mary Muse, who had his power of attorney; and several members of Bowling's family. The final judgment of the trial court indicates that the record of Bowling's criminal convictions was also received into evidence. Bowling was not

present at the final hearing. The trial court awarded Marion \$100,000 in compensatory damages for the injuries sustained by Joni as a result of Bowling's criminal conduct.¹ Bowling, proceeding *pro se*, appealed.

II.

Our review of this non-jury case is *de novo* upon the record of the proceedings below; however, that record comes to us with a presumption that the trial court's findings are correct. Rule 13(d), T.R.A.P. We must honor this presumption unless we find that the evidence preponderates against those findings. *Id.*; ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are not accorded the same deference. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

III.

Bowling argues that he was denied his right to trial by jury. Bowling admits that he failed to request a jury trial, as required by Rule 38, Tenn.R.Civ.P. He contends, however, that because of his limited education and lack of legal training, the trial court should have ordered a jury trial for him pursuant to Rule 39.02, Tenn.R.Civ.P.

We find no merit in this argument. Rule 39.02 " places within the discretion of the trial judge, upon motion by a party, the power to grant a jury trial even though the moving party had not made a timely demand for a jury as required by Rule 38." **Smith v. Williams**, 575 S.W.2d 503, 505 (Tenn.App. 1978)(emphasis added). Bowling never asked the trial court for a jury trial. Rule 39.02 "do[es] not give the trial judge the authority to force a jury upon the parties." **Id.** Bowling cannot now argue that the trial court erred in failing to act upon a request that he did not make.

Bowling next argues that he was denied due process because he was not present at the trial. The record contains two motions filed by Bowling requesting that he be brought from prison to attend pretrial hearings on September 1, 1998, and January 11, 1999. The record does not include a transcript of what transpired at those hearings, nor does the record reflect the trial court's response, if any, to these motions. We assume from the trial court's inaction that these motions were denied *sub silentio*. There is no indication in the record that Bowling filed a motion asking to be present at the final hearing. However, even if he had, we find no error in the trial court's failure to ensure his presence at trial.

The right of an incarcerated defendant to attend a civil trial is addressed in T.C.A. § 41-21-304(a), which provides, in pertinent part, as follows:

In no civil case can a convict be removed from the penitentiary to give personal attendance at court, but testimony may be taken by deposition, as in other cases....

Id. Although to our knowledge no reported case has interpreted this provision, we have applied this statute in at least one unreported case. In **State v. Moss**, C/A No. 01A01-9708-JV-00424, 1998 WL 122716 (Tenn.App. W.S., filed March 20, 1998), we held that an incarcerated defendant does not have an absolute right to attend a hearing in a civil matter. 1998 WL 122716 at *5. "As long as the prisoner defendant is afforded ample opportunity to present his side of the controversy, there is no need for him to appear personally." **Id.** In any event, "the question of whether to permit a prisoner/litigant in a civil case to be physically present in court is within the trial court's sound discretion."

Tolbert v. Tolbert, C/A No. 03A01-9406-CV-00230, 1994 WL 705230, at *3 (Tenn.App. E.S., filed December 15, 1994).

We find and hold that the trial court did not abuse its discretion in failing to honor Bowling's request to attend hearings in this action. Bowling had ample opportunity to present "his side of the controversy"; he could have filed his deposition pursuant to the Rules of Civil Procedure, but failed to do so. We cannot accept his argument that depositions should be taken now when he failed to act when this action was pending below. Bowling again raises his lack of education and legal training as excuses for his failure to follow the Rules of Civil Procedure. While we appreciate the difficulties that *pro se* litigants face in representing themselves, we have noted that

[p]arties who choose to represent themselves are entitled to fair and equal treatment. However, they are not excused from complying with applicable substantive and procedural law, and they must follow the same procedural and substantive law as the represented party.

Irvin v. City of Clarksville, 767 S.W.2d 649, 652 (Tenn.App. 1988)(citations omitted).

Bowling also argues that the trial court violated his due process rights when it did not postpone the trial until his post-conviction petition was resolved. Bowling

cites no authority, nor are we aware of any, requiring such a postponement. Bowling also challenges the use of his criminal convictions at trial. We find no merit in this argument, for it is well-established that a criminal conviction may be used in a subsequent civil action to prove issues that were determined in the prior criminal trial. **Grange Mut. Cas. Co. v. Walker**, 652 S.W.2d 908, 910 (Tenn.App. 1983). Furthermore, "[t]he pendency of an appeal may be shown but does not affect admissibility." Rule 803(22), Tenn.R.Evid.

Bowling argues that he did not receive a fair trial because the trial court did not appoint counsel to represent him. He cites T.C.A. § 41-21-302 as authority for the proposition that an incarcerated civil defendant is entitled to the appointment of counsel. T.C.A. § 41-21-302 provides as follows:

If a bill or petition is filed against a convict in any court having jurisdiction, or any interrogatories propounded to the convict as a party to the suit, which require to be answered, the convict may be allowed the aid of counsel to prepare an answer.

Id. Bowling's interpretation of this language is erroneous. "This statute does not require the State to provide counsel to prisoners who are parties in civil cases; it merely permits prisoners to use counsel." **Tuttle v. Tuttle**, C/A No.

01A01-9512-CV-00546, 1997 WL 629956, at *2 (Tenn.App. M.S.,

filed October 10, 1997). This issue is found adverse to the appellant.

Bowling next argues that he was denied a fair trial because the court did not comply with the provisions of Rule 16.01, Tenn.R.Civ.P., which provides that any party may request, or the court in its discretion may conduct, a pretrial planning or scheduling conference. Bowling claims that the trial court and Marion's attorney took advantage of his limited education and lack of legal training by not having such a conference with him. Bowling cites no authority, and we know of none, which holds that the failure to hold a pretrial conference constitutes a due process violation. This issue is found adverse to Bowling.

Finally, Bowling challenges the admissibility of the testimony of his family members at trial, claiming that their testimony had "no bearing on this case." However, he did not include a transcript of the trial testimony in the record on appeal. In the absence of a transcript or statement of the evidence, we must presume that the trial court acted appropriately with respect to the introduction of the challenged evidence. *Irvin*, 767 S.W.2d at 653.

IV.

Accordingly, the judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant. This

case is remanded to the trial court for the enforcement of the judgment and collection of costs assessed below, all pursuant to applicable law.

Charles D. Susano, Jr., J.

CONCUR:

Houston M. Goddard, P.J.

Herschel P. Franks, J.