

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002333-MR

CARL SMITH

APPELLANT

V. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 96-CR-55

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; GUIDUGLI and SCHRODER, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a judgment entered by the Jackson Circuit Court. A jury convicted appellant of third-degree assault and he was sentenced to one year's imprisonment. On appeal, appellant contends that the court erred by denying his motion for a new trial. We disagree with his contention. Hence, we affirm.

Appellant was convicted on June 10, 1997, and he filed a motion for a new trial on July 18, 1997. Appellant alleged that he was denied an impartial jury because three of the jurors failed to disclose during voir dire that they served on a jury which, some three months earlier, convicted appellant of the

offense of possession of marijuana. The court denied appellant's motion. This appeal followed.

RCr 10.06 requires a motion for a new trial to be filed within five days after the return of a verdict, unless the motion is based on a claim of newly discovered evidence. In the latter case, the motion must be filed within one year after entry of the judgment unless the court, for good cause, permits otherwise. Here, although appellant did not file a motion for a new trial until some six weeks after the verdict was returned, he argues that his motion was timely because the information concerning the three jurors was newly discovered evidence, and the one-year time limit set forth in the rule therefore was applicable. We disagree.

It is settled that "a motion for new trial based upon newly discovered evidence must be accompanied by an affidavit showing that Appellant exercised sufficient diligence to obtain the evidence prior to his trial." Collins v. Commonwealth, Ky., 951 S.W.2d 569, 576 (1997) (citing Wheeler v. Commonwealth, Ky., 395 S.W.2d 569 (1965)). Here, neither appellant nor his trial counsel filed an affidavit stating that they exercised due diligence. More important, a claim of "newly discovered evidence" necessarily involves evidence regarding the offense being tried rather than, as here, information concerning a collateral matter as to the jury's impartiality. As appellant's motion for a new trial did not involve newly discovered evidence,

it was clearly untimely and the court did not err by denying the motion.

Further, we note that the record shows that appellant and his counsel were present for both of his trials. Obviously, therefore, they knew or in the exercise of reasonable care should have known that the same three jurors were seated for both trials. Thus, even if appellant's motion had been timely, it would be necessary to conclude that it lacked merit because appellant waived his right to challenge the three jurors at the time they were seated. See RCr 9.34; RCr 9.36. Finally, given the overwhelming evidence as to appellant's guilt, it is clear in any event that no manifest injustice occurred.

The court's order is affirmed.

ALL CONCUR.

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