RENDERED: May 28, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002230-MR

EDWARD ERNESTINE TINSLEY — APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 96-CR-000070

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

JOHNSON, JUDGE: Edward Ernestine Tinsley (Tinsley) appeals from the judgment of the Daviess Circuit Court entered on August 6, 1996, finding him guilty of burglary in the third degree (Kentucky Revised Statutes (KRS) 511.040), receiving stolen property valued at less than $300 (KRS 514.110), operating a motor vehicle on a revoked or suspended license, (KRS 186.620), possession of drug paraphernalia (KRS 218A.500), of being a persistent felony offender in the first degree (KRS 532.080), and sentencing him to serve a fifteen-year sentence of confinement in the penitentiary. We affirm.

In the early morning hours of January 30, 1996, a Chinese restaurant in Owensboro, Kentucky was burglarized. The culprit obtained entry to the restaurant by throwing a rock through the front door. Cash in the amount of $238 was taken

from the restaurant including $70 in quarters, $50 in one dollar bills, and several five and ten dollar bills. Tinsley was immediately suspected as the perpetrator of the crime and police officers were instructed to be on the lookout for him.

Later that morning, Tinsley was observed by Officer Duane Harper (Officer Harper) driving into a gasoline station. Officer Harper, who was personally aware that Tinsley's driver's license had been suspended, approached Tinsley and asked to see his license. When Tinsley could not produce a license, Officer Harper placed Tinsley under arrest. Incident to his arrest, Tinsley was searched and the search produced a wad of five and ten dollar bills and a metal push rod.[1] While placing Tinsley in the police cruiser, Officer Harper observed several rolls of quarters and a crack pipe on the ground under the driver's side of the car Tinsley had been operating. After learning the denominations of the money taken during the burglary of the Chinese restaurant, Officer Harper arrested Tinsley for that crime as well. Tinsley was subsequently indicted on several charges arising from the events of that day and he was tried in July 1996. He was convicted on all charges and sentenced according to the jury's recommendations.

In this appeal, Tinsley raises two issues for this Court's consideration. First, he argues that he was denied a fair trial by the trial court's denial of his motion that the

[1]A device used to clean a crack pipe.

judge recuse himself.[2] The basis for Tinsley's motion was that Judge Castlen, formerly the Commonwealth's Attorney in Daviess County, had prosecuted Tinsley on an unrelated burglary charge in 1991. At the hearing on the motion, Tinsley contended that the trial court's setting of a high bond ($65,000), and its order that his co-defendant/pregnant girlfriend, Nicki Ferguson, have no contact with him prior to trial as a condition of her pre-trial release, indicated bias on the part of the judge. Judge Castlen stated that, as a condition of release, he frequently required those he released prior to trial to have no contact with their co-defendants except through counsel. The trial court inquired whether its pre-trial orders had had any adverse impact on the preparation of Tinsley's defense, and was assured by trial counsel that they had not. In denying Tinsley's motion, the trial judge opined that if he were required to recuse himself every time a recidivist appeared before him, a "bottleneck" in the system would result making it difficult to timely dispose of cases.

Tinsley insists that pursuant to KRS 26A.015, the trial judge was required to disqualify himself in order to "avoid the appearance of impropriety, and to maintain public confidence in our criminal justice system. . . ." KRS 26A.015(2) provides in pertinent part, as follows:

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[2]Tinsley did not file an affidavit with the circuit court clerk as provided by KRS 26A.020(1), to request the appointment of a special judge. However, such failure does not result in the waiver of the right to raise the propriety of the trial court's ruling on appeal. See Foster v. Overstreet, Ky., 905 S.W.2d 504 (1995).

> Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:
>
> (a) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding;
>
> (b) Where in private practice or government service he served as a lawyer or rendered a legal opinion in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter in controversy, or the judge, master commissioner or such lawyer has been a material witness concerning the matter in controversy;
>
> . . .
>
> (e) Where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.

It is our responsibility to review the record to determine whether disqualification was required. Clearly, the provisions of KRS 26A.015 are mandatory. However, "[a] party's mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds to require recusal." Webb v. Commonwealth, Ky., 904 S.W.2d 226, 230 (1995). Further, this Court has held that the trial judge is in the "best position to determine whether questions raised regarding his impartiality [are] reasonable." Jacobs v. Commonwealth, Ky.App., 947 S.W.2d 416, 417 (1997).

Tinsley argues that Small v. Commonwealth, Ky.App., 617 S.W.2d 61, 63 (1981), holds "that a judge should disqualify himself in any proceedings where he has participated in previous proceedings concerning the same defendant to the extent that his

impartiality might reasonably be questioned." However, Small, supra, does not hold that a judge must disqualify himself if he has previously been involved in the prosecution of the defendant. In Small this Court held that the trial judge should have sua sponte disqualified himself from presiding over a probation revocation hearing as the judge, since in his former role as Commonwealth's attorney, he had "participated in the plea bargaining of [Small's] original sentence. . . ." Id. at 63. This Court reasoned that the revocation proceeding was "sufficiently related to the underlying criminal action as to present the appearance of impartiality which is 'next in importance on[ly] to the fact itself.'" Id., citing Wells v. Walter, Ky., 501 S.W.2d 259, 260 (1973).

Similarly, in Carter v. Commonwealth, Ky.App., 641 S.W.2d 758 (1982), this Court again determined that the trial judge, who served as an assistant prosecutor several years earlier at a time when the defendant was indicted and pled guilty to criminal charges, should have disqualified himself from presiding over the defendant's motion pursuant to Kentucky Rules of Civil Procedure 60.02 to set aside those guilty pleas.

> It is undisputed that the trial judge was the Christian County Attorney when the appellant entered his pleas of guilty in 1973 and 1977. As such, he served as an assistant to the Commonwealth Attorney, who prosecuted the appellant. Although the appellee argues that the trial judge had little, if any, recollection of any involvement in the appellant's plea bargaining with the Commonwealth Attorney, the language of the statute is mandatory. Specifically, a trial judge shall disqualify himself if he has any personal bias or prejudice concerning the

> party involved, or was associated in practice with a lawyer involved in the controversy.

Id. at 759.

Unlike the circumstances in Small and Carter, supra, where the trial judges were involved in some way with the prosecution of the defendants on the charges underpinning the current controversies pending before them, Judge Castlen had no involvement in the prosecution of Tinsley on the charges contained in the 1996 indictment which resulted in the trial over which Judge Castlen presided. Indeed, over five years had passed between Judge Castlen's former prosecution of Tinsley on unrelated charges,[3] and the indictment of Tinsley on the current charges. Neither Small nor Carter, nor a strict application of KRS 26A.015, require a trial judge to recuse himself merely because he has previously been involved in the prosecution of the defendant on unrelated criminal charges.

The facts in the case sub judice are similar to those in Jenkins v. Bordenkircher, 611 F.2d 162 (6th Cir. 1979), involving an appeal of the denial of a writ of habeas corpus. In that case, the Court determined that the defendants, prosecuted "between five and thirteen years before the trial of the present case," by the trial judge (in his capacity as Henderson Commonwealth's Attorney) were not deprived of a fair trial by the judge's failure to recuse himself. Id. at 166. "Absent some showing of hostility or prejudgment we will not assume that a

[3]In his brief, Tinsley suggests that Judge Castlen had prosecuted him on "numerous" occasions; however, other than the 1991 burglary, there is no evidence of record of other instances of such contact between Judge Castlen and Tinsley.

state court judge would not be able to give a defendant a fair trial solely because of his earlier contacts with the defendant in prosecuting totally unrelated charges." Id. See also, Bussell v. Commonwealth, Ky., 882 S.W.2d 111, 112 (1994) (prior representation of defendant by a judge is not the basis for recusal when the disposition of the earlier case is not an "element" of the current charge).

Although Tinsley suggests that the judge may have learned of his "reputation" and "m.o." while serving as the Daviess Commonwealth's Attorney, there is no evidence that the trial judge had any extra-judicial involvement in, or knowledge of, the 1996 charges. See Marlowe v. Commonwealth, Ky., 709 S.W.2d 424 (1986) (recusal only appropriate where information is obtained from extra-judicial source). Furthermore, Tinsley has not pointed to a single error, or questionable ruling made by the trial court during the trial to indicate evidence of actual bias or prejudice.

Nevertheless, Tinsley argues that the judge may have been prejudiced against him as follows:

> [I]t is at least possible that Judge Castlen allowed his knowledge of Tinsley to influence him in his rulings in this case. For instance, Judge Castlen might have felt more inclined to encourage Tinsley's lawyer to proceed with a suppression hearing, if he had no prior knowledge of Tinsley, his "m.o.," and his reputation.

This argument does not suggest any prejudice or bias on the part of the trial court. Under our adversarial system, it is not appropriate for the trial court to "encourage" parties to proceed in a certain manner. Instead, the trial court must remain

detached and impartial. Accordingly, as the record clearly reveals that Judge Castlen had no extra-judicial knowledge of the 1996 burglary, and had not served as the attorney for the Commonwealth at any time relevant to the 1996 criminal charges against Tinsley, and further, there being no evidence of actual bias or impartiality on the part of Judge Castlen, we conclude that the trial court did not err in denying the motion for recusal.

Next, Tinsley argues that the evidence seized from his person and near his automobile should have been suppressed. Tinsley acknowledges that this issue has not been preserved for review.[4] However, he asks that we review it under Kentucky Rules of Criminal Procedure 10.26, the palpable error rule, or in the alternative, that this Court determine that Tinsley's trial counsel was ineffective in failing to move for a suppression hearing entitling him to relief from the sentence.

The crux of Tinsley's argument is that, although Officer Harper had cause to stop and arrest him for driving on a suspended or revoked license, a class B misdemeanor, it is not "normal" to make a custodial arrest for a minor traffic violation. He relies on Clark v. Commonwealth, Ky.App., 868 S.W.2d 101, 108 (1993), in which this Court held that a "complete

[4]Tinsley filed a pro se motion on the morning of trial, against the advice of trial counsel, to suppress only that evidence bearing on the drug paraphernalia charge. He argued that since there was no evidence indicating the presence of cocaine on the push rod or in the pipe, the Commonwealth could not prove that it was paraphernalia. Trial counsel informed the trial court that he was not prepared to argue the motion and it was overruled without a hearing.

search" of an automobile, forty minutes after the driver was arrested for speeding and driving without a license, was not justified under the "search incident to arrest" exception to the warrant requirement. Tinsley's reliance on Clark is, we believe, misplaced for two reasons: (1) the search of which Tinsley complains was of his person, not his car; and, (2) the search occurred immediately upon his arrest, not some time later.

In this Commonwealth, a police officer may make an arrest without a warrant when a misdemeanor has been committed in his presence. See KRS 431.005(1)(d). Tinsley does not challenge the fact that he committed a misdemeanor in the presence of Officer Harper. It is well settled that once an officer makes a valid custodial arrest, he may make a warrantless search of the person arrested and the area within his immediate control incident to that arrest. Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685, 694 (1969); see also, U.S. v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); and Collins v. Commonwealth, Ky., 574 S.W.2d 296 (1978). Thus, whether or not it is "normal" to arrest a person driving on a suspended license, a search of a person so arrested is valid.

Finally, Tinsley suggests that Officer Harper had no reason to search under his vehicle for evidence. We agree with the Commonwealth that Tinsley could not possibly have had any expectation of privacy in the area under his automobile at the gasoline station. See Adams v. Commonwealth, Ky.App., 931 S.W.2d 465 (1996) (defendant had "no reasonable expectation of privacy" in bag discarded while "eluding police").

Accordingly, the judgment of the Daviess Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Susan Jackson Balliet
Louisville, KY

BRIEF FOR APPELLEE:

Hon. A. B. Chandler III
Attorney General

Hon. Gregory C. Fuchs
Assistant Attorney General
Frankfort, KY