

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000947-MR

BRIAN NORMAN

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 96-CR-000084

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, KNOX, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Brian Norman (Norman) has appealed from the judgment of the Pike Circuit Court entered on April 8, 1997, which convicted him of the offense of unauthorized use of a motor vehicle (Kentucky Revised Statutes (KRS) 514.100), and which sentenced him to serve a sentence of twelve months' confinement in the Pike County Jail and pay a fine of \$500.00. We affirm.

The events which led to Norman's arrest and conviction occurred on the evening of December 14, 1995. Iva Jane Hurley (Hurley) had taken several items to an auction in Pikeville to sell. While she was busy selling these items, Hurley learned that her car was blocking traffic outside the auction house.

Although she was not well acquainted with Norman, Hurley had seen him at the auction on previous occasions and asked him to move her car for her. He agreed.

Instead of merely moving the car out of the way of other traffic, Norman, accompanied by his older brother, Jimmy Norman (Jimmy), drove the car away from the auction house. He had not gone far when he was observed on the Pikeville by-pass driving at a high rate of speed without the vehicle's headlights on. Sergeant Larry Sanders of the Pikeville Police Department turned his emergency lights on and attempted to pull Norman over, but Norman did not stop. After a short chase, Norman stopped the car and he and Jimmy exited the vehicle. The two men hid under bushes near the jail before they were eventually apprehended.

Norman was charged with the offense of theft by unlawful taking over \$300.00 and was tried on April 2, 1997. On the day before his trial, Norman sought a continuance on the basis that the jury would be chosen from the same panel from which a jury had been selected the week before in Jimmy's trial on unrelated criminal charges.¹ The motion was denied.

On the morning of trial, Norman renewed his motion for a continuance and also moved to strike for cause all jurors from the panel who actually served on his brother's criminal case. These motion were also denied. When, during voir dire, a venire person asked the name of Norman's mother, Norman's counsel, Hon.

¹Jimmy was scheduled to be tried for the crime of receiving stolen property, which charges had been pending since 1993. On the first day of Jimmy's trial, the trial court declared a mistrial when, during lunch, Jimmy was escorted, in handcuffs, in the presence of several jurors.

John Nelson (Attorney Nelson), insisted that his client could not get a fair trial with the same panel. Counsel asked for a mistrial, stating as follows:

Attorney Nelson: Your honor, I think at this time, I need to make a motion for mistrial on the basis of the grounds I raised in my motion to continue. One of the jurors has asked me who this boy's mother was and I am forced to ask her to approach the bench and you know, Brian Norman's mother is Connie Norman and his brother was on trial last week before the same jury panel. They were identified before this same jury panel as Jimmy Norman's parents and you know, Brian is Jimmy's brother. They look alike. He's on trial a week later for a similar type of charge to the one Jimmy was on trial for last week. I believe that Brian cannot get a fair trial based upon what happened last week and based upon the issues I raised in my motion to continue.

Judge Lowe: Well, if she said she knew the boy then I might be inclined to agree with you, but as far as she's concerned he's a stranger.

Attorney Nelson: Well, I'm not so much concerned about her answer as that when these jurors make inquiries about who his mother is and we have to approach the bench for that, that invites speculation by the jury and the last case was tried so recent in time and I can't very well ask each of these jurors whether they know about this family relationship between Brian and Jimmy or Brian and his parents for obvious reasons.

Judge Lowe: Well, John, there'd be a lot of cases I couldn't try every term if I couldn't try relatives. We try cousins and even brothers during the same term of court. It's unfortunate, but I don't know how to get around it. I don't know that we can go to a rule that we can't try anybody that's related to anybody else during the same term of court. If that's what the Court of Appeals tells me to do, I'll do it, but right now I don't think we've got such a law, so your motion's overruled.

During the trial, the Commonwealth agreed with Norman that the identity of Norman's companion on the night of the alleged crime would not be revealed to the jury. At the close of the evidence, the trial court instructed the jury on theft by unlawful taking over \$300, and the lesser included offense, unauthorized use of a motor vehicle. As stated earlier, the jury returned a verdict of guilty on the misdemeanor offense and recommended the maximum penalty, confinement in the county jail for twelve months and payment of a fine of \$500.00. This appeal followed.

The sole issue raised by Norman concerns the trial court's failure to grant his motions for a continuance and to strike for cause those jurors who had actually served on the jury during Jimmy's trial the previous week. Norman argues that he was deprived of his federal constitutional right to a trial by an impartial and unbiased jury by the trial court's rulings. While we agree that a criminal defendant's right to an impartial jury is fundamental, see Smith v. Commonwealth, Ky., 734 S.W.2d 437, 455 (1987), we disagree with Norman's argument that his rights in this regard were infringed by the rulings of the trial court.

Kentucky Rules of Criminal Procedure (RCr) 9.36(1), which concerns when it is appropriate to remove a juror for cause, states that "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, he shall be excused as not qualified." "This rule invests discretion in the trial court to detect and determine partiality and bias from particular circumstances or

relationships between the juror and the accused or the case.” Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 299 (1997). Absent an abuse of that discretion, this Court will not disturb the trial court’s decision. Mabe v. Commonwealth, Ky., 884 S.W.2d 668 (1994).

Norman argues that the jury panel that tried him “was biased because some of the venire (sic) persons had prior knowledge of the fact[s] in the case.” He relies on Gapoian v. Commonwealth, 302 Ky. 867, 196 S.W.2d 744 (1946), a case in which a robbery conviction was reversed because the trial court refused to strike for cause potential jurors who had previously tried the appellant’s co-defendant. The trial court’s refusal to grant the appellant’s motion in Gapoian was characterized as “manifest error.” Id. at 745. However, the facts in the instant case are significantly distinguishable from those in Gapoian. Specifically, Jimmy was not tried the week prior to Norman for his involvement in the events of December 14, 1995, and the unlawful use of Hurley’s automobile. Accordingly, even if the jurors made a connection between Norman and his brother, Jimmy, based on their last names or similar physical characteristics, the potential jurors in this case did not actually serve as jurors in a prior trial involving the same offense. In Gapoian, the jurors were involved with the trial and sentencing of the appellant’s co-defendant on charges stemming from the same robbery as the appellant.

As Bowling, supra, states “[b]ias is not automatically implied even where a juror has heard evidence at a previous trial

of the same case." Id. (citation omitted). Despite Norman's argument to the contrary, there is no evidence in this record that the jurors had any prior knowledge of the facts of his case. Thus, we are not persuaded that the trial court abused its discretion by refusing to strike potential jurors for cause merely because of their participation in the earlier aborted trial of Jimmy on unrelated charges.

Next, Norman insists that the trial court abused its discretion in refusing to grant his motion for a continuance. Again, this is a matter left to the sound discretion of the trial court. A denial of a request for a continuance will not be disturbed "unless such discretion was plainly abused or resulted in a manifest injustice." Lear v. Commonwealth, Ky., 884 S.W.2d 657, 659 (1994) (citation omitted). "In order to obtain a continuance, a criminal defendant must show sufficient cause." Dishman v. Commonwealth, Ky., 906 S.W.2d 335, 339 (1995) (citation omitted); RCr 9.04.

Norman insists that he was denied "substantial justice" by the fact that he was tried by the same jury "that convicted his brother one week prior to [his] trial." As noted earlier, Norman's brother was not convicted of any crime prior to Norman's trial, nor were the issues involved in the earlier trial the same as those for the jury's consideration in Norman's trial. Thus, any potential prejudice created by the nearness in time of two unrelated trials of related defendants was lessened by the parties' agreement that the jury not be informed of the relationship between Norman and Jimmy. Further, while not argued

by the parties, we note that any error would have been harmless since the jury accepted Norman's defense. For these reasons, we do not believe the trial court's denial of Norman's request for a continuance warrants a reversal of his conviction.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Ann T. Eblen
Louisville, KY

BRIEF FOR APPELLEE:

Hon. A. B. Chandler, III
Attorney General of Kentucky
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Hon. Dana Todd
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