

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001069-MR

RICKY DEAN COX

APPELLANT

v. APPEAL FROM MARION CIRCUIT COURT
HONORABLE DOUGLAS M. GEORGE, JUDGE
ACTION NO. 97-CR-0042

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE, KNOX, and McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal from a conviction of wanton endangerment in the first degree, being a persistent felony offender in the first degree, and violating a domestic violence order, and from an order denying a motion for new trial.

Appellant Ricky Dean Cox ("Cox") claims that the trial court's failure to comply with KRS 29A.150 and Admin Proc. Part II § 17 in jury selection deprived him of his right to a fair trial.

Appellee Commonwealth of Kentucky ("Commonwealth") asserts that the trial court substantially complied with the statutes and rules pertaining to jury selection and the court did not abuse its discretion by denying the motion. We affirm the judgment of

conviction and the trial court's denial of the motion for a new trial.

The trial date for Cox was scheduled for March 9, 1998. In a February 2, 1998 order, the trial judge directed his clerk to summons 52 jurors for the trial. However, only 48 prospective jurors showed up. The judge had not excused any of the four absent jurors. Counsel for Cox objected, arguing that there were less jurors than the number required by the February order, and moved for a continuance. The trial court denied the motion.

On March 9, 1998, Cox was convicted of wanton endangerment in the first degree, being a persistent felony offender in the first degree, and violating a domestic violence order. Cox moved for a new trial on March 12th. One allegation was that the failure to obtain a total panel, due to the absent jurors, deprived Cox of a fair trial. The trial court denied this motion and sentenced Cox to twelve years imprisonment and a \$500.00 fine. This appeal followed.

Appellant argues that the trial court erred by not complying with KRS 29A.150 and the comparable rule under Admin. Proc. Part II § 17. KRS 29A.150 states in relevant part, as follows:

(1) A person summoned for jury service who fails to appear as directed shall be ordered by the court to appear forthwith and show cause for his failure to comply with the summons....

See also Admin. Proc. Part II § 17. Appellant contends that strict compliance is required since this is a statute pertaining to jury selection. Appellee counters that substantial not strict

compliance with jury selection is required. We agree with the Commonwealth.

In Commonwealth v. Nelson, Ky., 841 S.W.2d 628, 630 (1992), the Kentucky Supreme Court held that statutes and regulations pertaining to jury empaneling are not mandatory. There must be a substantial deviation by the trial court in order to warrant a reversal. Id. Therefore, the issue before this Court is whether failure by the trial court to order the absent jurors to appear and show cause constitutes a substantial deviation from the statutes and rules of jury empaneling.

Under KRS 29A.050, prospective jurors are randomly selected from a master list compiled from driver's license and voter registration lists. See also Admin Proc. Part II § 5. From this jury panel, KRS 29A.060(1) provides that:

[e]ach Circuit or District Judge shall inform the Chief Circuit Judge or his designee of his needs for qualified jurors.

See also Admin. Proc. Part II § 4. Neither the statute nor administrative rule states a specific number of jurors that must be summoned. It is within the discretion of the trial judge. However, there should be enough summoned jurors to accommodate the sixteen peremptory challenges, any possible challenges for cause, and the thirteen jurors who will serve in the criminal trial. RCr 9.40. See also RCr 9.36.

Appellant does not claim any error concerning the selection of the prospective jurors for the jury panel. All of the jurors were randomly selected and thus satisfied Appellant's right to a jury selected from a fair cross-section of the

community. See Partee v. Commonwealth, Ky., 652 S.W.2d 89
(1983). There was strict compliance with KRS 29A.050.

As to the number of jurors for panel, the trial court ordered 52 jurors to be summoned for the Cox trial. Since it was within the court's discretion to summon 52 jurors, it was also within the court's discretion to proceed with the 48 jurors on the jury panel. In fact, only 30 of the jurors were called for voir dire. Both the Commonwealth and Appellant were able to exercise their peremptory challenges, even after two jurors were excused by the trial court. The Appellant was not prejudiced by a panel of 48 prospective jurors. The trial court's failure to order the absent jurors to appear was not a substantial deviation from the statutes and regulations pertaining to jury selection.

For the aforementioned reasons, we affirm the judgment of conviction and the trial court's denial of the motion for a new trial.

ALL CONCUR.

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