RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000911-MR

JOHN P. MOORE — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 03-CR-00039

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: BARBER AND SCHRODER, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

BARBER, JUDGE: Appellant, John P. Moore (Moore), appeals his conviction for three counts of theft by failure to make required disposition in the Hopkins Circuit Court. We reverse the circuit court's denial of a request for mistrial based on improper pretrial publicity of a prosecutor's unrelated claims about the Appellant.

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Moore was convicted of three counts of theft by failure to make required disposition of property after a jury trial. Moore was the Chief of Police for the City of Nortonville. The charges stem from property which allegedly disappeared after an official search and seizure at the residence of a suspect. After the seizure all the items seized were photographed and cataloged by Moore and his deputy. Some of the items were placed in a safe and lockers at the police department, while others were stored in plain view. The suspect, through his lawyer, agreed to forfeit all the property seized in exchange for an agreement by which the suspect would not be prosecuted, but would work with police on related cases. The suspect signed a document forfeiting all the property to the city. In addition to personalty, $4,694 in cash was seized in the search. Following the forfeiture, Moore placed the cash in a cash drug fund in a safe at the police department. Later, $3,900 of the seized cash was used to make two controlled drug buys using a confidential informant. The city Mayor was shown the result of those drug buys on May 31, 2002.

Moore sold the remaining property to a local jeweler in two separate buys, one lot for $2,000 and the other lot for $400. The property had been valued at $3,000 by a local auction house, which would have charged a percentage of that sum to auction the goods. The funds from those sales were placed in

the drug fund at the police department. Moore testified that he intended to use those funds to purchase a drug dog for the police department. Last, Moore sold a $500 bill seized along with the cash for five (5) $100 bills to a local man, and placed that money in the drug safe also. All those transactions took place on April 1, 2002. The Mayor testified that the police department had no drug fund, and that the procedure was for all cash seized to be deposited in the city's account by the city clerk.

The Commonwealth claimed at trial that Moore had used the proceeds from the sale of the personalty and the $500 bill to purchase a boat for himself for $3000 on April 1, 2002. The seller testified that Moore took possession of the boat immediately after the purchase. Moore testified that he bought the boat on March 28, 2002, the Thursday before Good Friday, using funds his wife had made selling registered puppies that she raises. Moore provided photographs showing that he had possession and use of the boat over Easter weekend, March 30 and 31, 2002. The record shows that the check for the sale of the personalty was not cashed at the bank until April 2, 2002, meaning that the bank received it either on April 2, 2002, or after 2:00 p.m. on April 1, 2002.

On May 31, 2002 Moore was suspended from his position by the city Mayor. On June 6, 2002 Moore was called to the

police department by the Mayor. Moore testified that on that date all the safes and evidence rooms were open and the department was "a wreck." In June, 2002 it was determined that the drug fund and the drugs purchased with a portion of those funds were missing. Moore's ledger book containing a record of drug funds and drug buys was also determined to be missing.

At trial Moore's defense counsel made a motion for mistrial. This motion was made in part due to the one month delay in the presentation of evidence against him. The delay was caused by Moore's illness and related surgery. The illness occurred after presentation of the Commonwealth's case, but prior to the defense presenting its case. Moore complained that the jurors might have very little memory of the proceedings or that the jurors might have formed an impression as to guilt during the delay. When questioned by the court, various jurors admitted that they had little memory of the case, but no jurors complained that they would not be able to make a fair and informed decision. Moore contends that the delay prejudiced him sufficiently that his motion for mistrial should have been granted. The Commonwealth argues that the delay was unavoidable and should not be grounds for a mistrial.

Whether to grant a mistrial is based on the sound discretion of the trial court. Gosser v. Commonwealth, 31 S.W.3d 897, 906 (Ky. 2000). In order to show reversible error,

the defendant must prove an abuse of that discretion. Id. Moore does not show that Kentucky law requires a grant of mistrial where the trial is temporarily delayed. Sister courts have made similar rulings. See: People v. Cooper, 173 A.D. 2d 551, 570 N.Y.S.2d 147 (1991). In People v. Jimson, 135 Ca. App. 3d 873 (Ca. 1982), the court found that a delay caused by counsel's illness did not constitute sufficient grounds to require a mistrial.

Moore also requested that a mistrial be granted due to improper actions by the local prosecutor. Moore complains that the trial court erred in denying his motion for mistrial based on comments published by the Hopkins County Commonwealth Attorney. Although a special prosecutor was appointed in the present case, Mr. Massamore was the local prosecutor, and one with whom all the jurors were familiar. On January 24, 2004 the prosecutor was quoted in an article published in the *Madisonville Messenger*. In that article Mr. Massamore defended dismissal of cases by his office stating:

> "However, most of the dismissals occurred following the arrest of a police officer. The investigation which led to his arrest caused me to question the integrity of his cases. I could not, in good conscience, present his cases to a trial jury without undermining the credibility of our local jury system."

Although his article did not name Moore, the story was admittedly discussing Moore, and was available for the jurors to read during the delay in the case. During a hearing on the motion it was admitted that Massamore was concerned about the effect the article might have on Moore's trial, and apparently attempted to delay publication of the piece. Massamore stated to the newspaper, "I don't want anyone to think that we're trying to prejudice Mr. Moore or anything else." This statement shows that the prosecution was aware of the damage the article could do to the trial.

When determining whether a motion for mistrial should be granted on grounds of improper publicity, the issue is whether the public opinion was so aroused by the publicity as to prevent a fair trial. Hodge v. Commonwealth, 17 S.W.3d 824, 835 (Ky. 2000). Publicity regarding unrelated bad actions of the defendant constitutes grounds for a grant of mistrial. Brown v. Commonwealth, 789 S.W.2d 748, 749 (Ky. 1990). The law mandates that a defendant's right to fair trial requires that he be convicted, if at all, based solely on evidence presented at trial and "not by any outside influence, whether private talk or public print." Patterson v. Colorado, 205 U.S. 462 (1907).

With regard to publication of information in the media it is not necessary that actual prejudice from the articles be proven. Based on the circumstances of the case, the nature of

the article may require that the court grant a mistrial. Marson v. United States, 203 F.2d 904, 910-911 (6th Cir. 1953). The Commonwealth asserts that denial of the request for mistrial was appropriate due to the fact that only one juror admitted reading Massamore's article. When questioned, the other jurors were equivocal or denied reading the piece. Due to the extremely prejudicial and inflammatory nature of the article, the fact that at least one of the jurors read it and all of them were exposed to a community that had access to the paper constitutes grounds for a mistrial.

Even where there is no proof that the article has actually been read by the jurors, the availability of the article can create such potential for prejudice that a mistrial may be granted. Nevers v. Killinger, 169 F.3d 352, 363 (6th Cir. 1999). Statements made in the media by a prosecutor regarding a case or a defendant may constitute grounds for a mistrial. The prosecutor may not disseminate evidence about the case not admissible at trial. Bush v. Commonwealth, 839 S.W.2d 550, 554 (Ky. 1992). We recognize that mistrial "is an extreme remedy, and should be resorted to only where there is a fundamental defect in the proceedings which will result in a manifest injustice." Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996). The focus is not on the prosecutor's conduct, but on the overall fairness of the trial. Young v. Commonwealth,

129 S.W.3d 343, 345 (Ky. 2004). In the present case, the potential for error caused by the article discussing the prosecutor's opinion of Moore's conduct and its result was great enough that a mistrial should have been granted.

Moore contends that publicity about the case prior to and during the trial prejudiced him. During the time in which the case was delayed due to Moore's illness various newspaper articles discussing the case and testimony therein were also accessible by the jurors who were not sequestered in any way. At least five jurors admitted having read one or more of the articles.

Where, as here, the newspaper articles discussed evidence also presented at trial, and was cumulative rather than prejudicial, the motion for mistrial may be denied. United States v. Williams-Davis, 90 F.3d 490, 499 (D.C. Cir. 1996). As a general rule, if the court can determine, through voir dire or otherwise, that the publicity has either not been read by the jurors or has not affected the jurors, then publication of articles about the case does not constitute grounds for a mistrial. Lucas v. Commonwealth, 840 S.W.2d 212, 214 (Ky.App. 1992). In that case the Court stated that "We live in a time and society where the news media reports freely. It is unrealistic to expect to completely sanitize a trial and jury and the law of the Commonwealth does not require such. The

issue is whether the publicity influenced the jury and its verdict." Id., 840 S.W.2d at 215.

At the close of the Commonwealth's case the defense made a motion for directed verdict, asserting that the Commonwealth had failed to prove its case and that insufficient evidence of guilt had been shown. This motion was denied. Moore contends that the evidence of guilt on the three charges was insufficient to support a verdict of guilty, and that the conviction must be reversed on that ground. KRS 514.070 requires that to be found guilty a defendant be shown to have (1) intentionally failed to make a required disposition of the property of another, (2) that the defendant intentionally dealt with the property as his own, and (3) that the defendant failed to make the required disposition of the property. In ruling on a motion for directed verdict the trial court must draw all reasonable inferences from the evidence in favor of the Commonwealth. Questions regarding weight and credibility of the evidence are properly left for the jury. Slaughter v. Commonwealth, 45 S.W.3d 873, 875 (Ky. 2000). If the evidence presented is sufficient to induce a reasonable juror to believe that the defendant is guilty, the case must be presented to the jury. Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

Each of the foregoing allegations of error by the Appellant when reviewed alone does not mandate a reversal of the

conviction, but when taken together, we believe, the appellant did not receive a fair trial and therefore, reverse the conviction and remand to the trial court for a new trial in conformity with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jack N. Lackey, Jr.
Hopkinsville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Samuel J. Floyd, Jr.,
Assistant Attorney General
Frankfort, Kentucky