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(2007-SC-0200-D)

## Commonwealth Of Kentucky

### Court of Appeals

NO. 2005-CA-000719-MR

BEN MUSGROVE

APPELLANT

v. APPEAL FROM MCCREARY CIRCUIT COURT  
HONORABLE JERRY D. WINCHESTER, JUDGE  
ACTION NO. 04-CR-00023

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON, JUDGES.

GUIDUGLI, JUDGE: Benjamin Musgrove has appealed from the judgment and sentence of the McCreary Circuit Court entered on March 7, 2005, following his conviction stemming from a charge of Trafficking in a Controlled Substance First Degree.<sup>1</sup> Having concluded that the trial court erred in failing to excuse a

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<sup>1</sup> KRS 218A.1412 (2006).

disqualified juror during voir dire, we reverse and remand for a new trial.

On October 3, 2003, Lake Cumberland Drug Task Force Agent Robbie Clark and Kentucky State Police Detective Billy Correll met with Mattie Patton, a confidential informant, to arrange drug buys. Ms. Patton arranged to buy a controlled substance from the Appellant. Upon arriving at Appellant's home, Patton asked Appellant how many "40s"<sup>2</sup> she could get for \$200, and Appellant told her three. Patton purchased three Oxycontin pills from Appellant for \$60 a piece.

Thereafter, a McCreary County Grand Jury indicted Appellant for First-Degree Trafficking in a Controlled Substance, and the case proceeded to trial on December 22, 2004. During voir dire by defense counsel, juror number nine indicated that he had served on the grand jury recently. When asked how recently he had served on the grand jury, he stated "last week." During a bench conference, defense counsel moved that the juror be removed for cause due to the recent grand jury service. The Commonwealth stated that juror number nine had sat on the grand jury for one day and that he had no knowledge of the Appellant's case. The trial court denied the motion to strike juror number nine for cause.

After a one-day jury trial, the jury returned a guilty verdict against the Appellant for First-Degree Trafficking in a Controlled Substance, and the trial court sentenced Appellant to

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<sup>2</sup> Ms. Patton testified that a "40" means Oxycontin, 40 Milligrams.

eight years. The Appellant has instituted this appeal arguing that his constitutional right to a fair and impartial jury was violated because juror number nine should have been struck for cause. Appellant argues that juror number nine was a "disqualified juror" under KRS 29A.130 and 29A.080 and that therefore, the trial court should have excused this juror as a matter of law. We agree and reverse the trial court's conviction and remand this case to McCreary Circuit Court for a new trial.

Generally, a trial court's decision whether to excuse a juror for cause is reviewed for abuse of discretion.<sup>3</sup> However, this case turns on the interpretation of KRS 29A.130 and 29A.080. The construction and application of statutes is a question of law, and as such, is subject to the *de novo* standard of review.<sup>4</sup> The Appellant claims that the trial court erred by failing to remove juror nine because by statute this juror was disqualified from serving on the jury in this case. The Commonwealth argues that even if the trial court erred in failing to remove juror nine for cause, this was harmless error because Appellant used a peremptory strike to remove this juror and he never sat on the jury which convicted the Appellant.<sup>5</sup>

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<sup>3</sup> Adkins v. Commonwealth, 96 S.W.3d 779 (Ky. 2003); Pendleton v. Commonwealth, 83 S.W.3d 522 (Ky. 2002).

<sup>4</sup> Osborne v. Commonwealth, 185 S.W.3d 645, 648 (Ky. 2006), citing Bob Hook Chevrolet Isuzu v. Transportation Cabinet, 983 S.W.2d 488, 490 (Ky. 1998).

<sup>5</sup> See Morgan v. Commonwealth, 189 S.W.3d 99, 104 (Ky. 2006).

The sole issue before this Court is whether Appellant's constitutional right to a fair and impartial jury was impaired when he was forced to use a peremptory challenge to remove a juror who was otherwise disqualified from jury service in this case. The Appellant's main contention is that since Kentucky statutory law disqualified juror nine from sitting on the jury, he should never have been permitted to remain throughout voir dire once an objection was raised. If juror nine was disqualified as a petit juror in this case, and had this juror not remained throughout voir dire, Appellant argues that it would not have been necessary to use a peremptory challenge to remove this juror. Appellant cites KRS 29A.130, which states:

(1) Except as set out in this section, in any twenty-four (24) month period, a person shall not be required to:

(c) Serve as both a grand and petit juror.

This section does not state that a juror cannot serve on both the grand and petit jury within the prohibited time frame; only that the state cannot require or demand that any juror serve on both a grand and petit jury within a twenty-four-month period.

However KRS 29A.130 is not the only relevant statute in this case. Additionally, KRS 29A.080(2)(g) must be considered, which states:

(2) A prospective juror is disqualified to serve on a jury if the juror . . . ;

(g) Has served on a jury within the time limitations set out under KRS 29A.130.<sup>6</sup>

When read together, these two statutes form a bar disqualifying any juror from serving on both the grand jury and the petit jury within a twenty-four-month period. Furthermore, KRS 29A.080(3) states that the limitations on jury service contained in that statute may not be waived.

The Commonwealth responds by claiming that the Appellant did not properly preserve for appeal the argument that juror number nine was barred by statute from serving on the petit jury in this case. However, this argument is without merit.

At trial, Appellant's counsel clearly and repeatedly challenged juror nine for cause citing the fact that juror nine had served on the grand jury recently, and this is one of the specific reasons a juror may be "disqualified" under KRS 29A.080 and 29A.130. The Commonwealth's position would require Appellant to cite with specificity the statute or section upon which he was relying in order to remove juror number nine. This simply cannot be so, and the Commonwealth offers no case law or statutory authority to support its position. It is enough that Appellant moved to strike juror nine for cause because he had served on both the grand jury and petit jury in close proximity. Therefore, Appellant's position that KRS 29A.130 and KRS 29A.080 disqualified juror nine was sufficiently preserved in this case.

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<sup>6</sup> KRS 29A.080(2)(g).

The Commonwealth's second position is that even if Appellant's statutory argument was properly preserved for appeal, Appellant received all that he was entitled to receive by having a fair and impartial jury. The Commonwealth argues that because Appellant used a peremptory strike to remove juror nine, the trial court's failure to remove juror nine was harmless error. In making this argument, the Commonwealth cites to authority which states that a defendant's right to be tried by an impartial jury is infringed upon only if an unqualified juror participates in the decision.<sup>7</sup>

Additionally, after the briefs had been filed in this appeal, the Commonwealth filed a motion to cite subsequent authority; namely Morgan v. Commonwealth.<sup>8</sup> In Morgan, the Supreme Court recently stated that as long as the jury that actually hears and decides the case is impartial, there is no constitutional violation, and even if a juror should have been removed for cause, such error does not violate the constitutional right to an impartial jury if the person did not actually sit on the jury.<sup>9</sup>

However, Morgan and the cases cited by the Commonwealth involved jurors who were biased or otherwise prejudicial to the defendants, and the defendants in those cases

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<sup>7</sup> See Morgan v. Commonwealth, 189 S.W.3d 99 (Ky. 2006); Sanders v. Commonwealth, 801 S.W.2d 665, 669 (Ky. 1990); Wilson v. Commonwealth, 836 S.W.2d 872, 890 (Ky. 1992), *overruled on different grounds by St. Clair v. Roark*, 10 S.W.3d 482 (Ky. 1999).

<sup>8</sup> 189 S.W.3d 99 (Ky. 2006).

<sup>9</sup> Morgan, 189 S.W.3d at 107.

were forced to use peremptory strikes. Morgan held that a trial court's decision not to remove a biased juror from service is not reversible error when the juror does not sit on the panel which convicts the defendant.<sup>10</sup> None of the cases upon which the Commonwealth relies involved jurors who were disqualified from service by statute. Because the juror in this case was disqualified by statute and should not have been permitted to serve on a petit jury, the holding in Morgan is not controlling.

This case is easily distinguished from Morgan. During voir dire in Morgan, a juror disclosed that he was "good friends" with the victim's ex-husband, and that as a result, he had heard a great deal about the alleged crimes. When asked whether he could find the defendant not guilty if the Commonwealth failed to prove its case, the juror stated he would feel like he would be betraying his friend and that he was probably not the defense's best choice as a juror. The defense moved to strike this juror for cause, but the trial court denied this motion, and the defense was forced to use one of its peremptory challenges to remove this juror. The defendant was later convicted at trial.

On appeal, the Supreme Court stated that the trial court abused its discretion in not striking the juror for cause because his answers during voir dire established a strong inference of bias.<sup>11</sup> It then stated that this was harmless error

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<sup>10</sup> Id.

<sup>11</sup> Id. at 104.

because the defendant used one of his peremptory challenges to make sure that a fair and impartial jury decided his case.<sup>12</sup> The Supreme Court quoted Dunbar v. Commonwealth and stated “[a] defendant’s right to be tried by an impartial jury is infringed only if an unqualified juror participates in the decision, and as long as the jury that actually hears and decides the case is impartial, there is no constitutional violation.”<sup>13</sup> The Court upheld the conviction because the biased juror was removed by peremptory challenge and the error of the trial court in failing to strike the biased juror was harmless since he did not play a part in the conviction.

Morgan involves a different fact situation from the case at hand. There was no statutory basis for the juror in Morgan to be deemed “disqualified,” meaning nothing would have prevented this juror from being present at voir dire. However, in the case at hand, statutory law clearly “disqualified” juror nine from serving on a petit jury since he had recently served as a grand juror. If the Morgan holding was controlling in this case, it would render KRS 29A.080 and 29A.130 meaningless. The Court does not possess this power. Because the legislature deemed it necessary to place limitations on one’s qualifications as a juror, this Court is bound to follow the statutes because

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<sup>12</sup> Id. at 106.

<sup>13</sup> Id. at 107, citing Dunbar v. Commonwealth, 809 S.W.2d 852 (Ky. 1991).



procedural rules and statutes are not to be significantly deviated from.<sup>14</sup>

Had juror nine not been disqualified under the statutes and merely been biased, Morgan would be controlling and the trial court's failure to remove him would have been harmless error. However, in this case juror nine was disqualified from service by statute and was not permitted to serve on a petit jury. Appellant should not have had to use a peremptory challenge to remove this juror. This creates reversible error.

It must be noted that this case presents peculiar facts. Normally, during jury orientation, the trial court would ask questions as to why a prospective juror could not serve on a jury or would be disqualified. During this orientation process, any disqualified jurors would be excused and would never be empanelled. However, at the time of orientation in this case, juror nine had not yet sat on the grand jury and was not disqualified. He was empanelled on the petit jury and was later pulled off the petit jury and placed on the grand jury. Once he was pulled off the petit jury and placed on the grand jury, he became a disqualified juror by statute. Because he had not sat on the grand jury prior to the orientation process he was not excused prior to voir dire in Appellant's case. This was the only reason juror nine was present for voir dire in the first place. However, once a proper objection was raised, juror nine

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<sup>14</sup> Fitzgerald v. Commonwealth, 148 S.W.3d 817 (Ky. App. 2004).

should have been excused from the voir dire process due to the statutory disqualification.

When a juror who is disqualified pursuant to KRS 29A.080 is permitted to remain in the jury pool following a timely and properly made objection, the defendant's due process rights have been violated and he is entitled to a new trial. In Anderson v. Commonwealth,<sup>15</sup> the defendant filed a motion for a new trial following a jury verdict convicting him of second-degree assault. The motion alleged that one of the jurors in his trial was a prior felon and thus disqualified pursuant to KRS 29A.080 and Johnson v. Commonwealth.<sup>16</sup> The trial court agreed and granted the defendant's motion.<sup>17</sup> On appeal, the Supreme Court upheld the trial court's order because KRS 29A.080 disqualified the juror from service and remanded for a new trial.<sup>18</sup>

The case before us is similar to Anderson in that juror nine should have been stricken pursuant to KRS 29A.080. Juror nine was statutorily ineligible to serve on Appellant's jury, and the trial court's refusal to remove him for cause was error. We must reverse and remand for a new trial.

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<sup>15</sup> Anderson v. Commonwealth, 107 S.W.3d. 193 (Ky. 2003).

<sup>16</sup> Johnson v. Commonwealth, 311 Ky. 182, 223 S.W.2d. 741 (1949).

<sup>17</sup> Anderson, 107 S.W.3d at 194-95.

<sup>18</sup> Id. at 197.

For the foregoing reasons, the final judgment and sentence of the McCreary Circuit Court is reversed and the case is remanded for a new trial.

ALL CONCUR.

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