

RENDERED: JULY 29, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000749-MR

JOSHUA R. ABNEE

APPELLANT

v.

APPEAL FROM NICHOLAS CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 06-CR-00017

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: COMBS AND MOORE, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, SENIOR JUDGE: Joshua R. Abnee appeals from an order of the Nicholas Circuit Court entered on December 17, 2008, denying his motion for a new trial filed pursuant to Kentucky Rule[s] of Criminal Procedure (RCr) 10.06.

We reverse and remand for an evidentiary hearing.

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Abnee was convicted by a jury of one count of second-degree sodomy. He was sentenced to serve five years in prison. While his direct appeal was pending,² he filed a motion for a new trial under RCr 10.06(1). Attached to the motion was a photocopy of a typewritten letter purportedly drafted by a member of the jury panel. The letter was signed and dated. The salutation indicated that the correspondence was meant for Hon. Robert McGinnis, the presiding judge. However, there was no inside address, and there is no indication that the trial court ever received the letter. Instead, it was delivered to Abnee's trial counsel.

The correspondence indicated that this juror and unnamed others doubted that Abnee was guilty of the crimes charged. The juror indicated that she felt pressured to return a guilty verdict and believed that "Josh's reputation convicted him." She indicated that "Josh's criminal record was already in the room and other members of the Jury started looking through it and before anything was said a couple Jury members said guilty from the get go."

On September 15, 2008, the trial court conducted a hearing on the motion. Abnee's counsel indicated that he had not spoken to the subject juror regarding the contents of the letter. However, he believed that her testimony was critical to a resolution of the motion. The Commonwealth indicated that Abnee's jury had been polled in open court and contended that his motion constituted an improper attempt to impeach the verdict. The Commonwealth also stated that it had contacted the bailiff who had served at Abnee's trial, who told him that there was

² Abnee's conviction and sentence were subsequently affirmed. *See Abnee v. Commonwealth*, 2010 WL 985313 (Ky.App. 2010).

nothing on the table when he took the jury back to deliberate. The bailiff did not, however, testify at the hearing. The Nicholas Circuit Court denied Abnee's motion for a new trial.

On appeal, Abnee contends that he was denied a fair trial because extrinsic influences tainted the jury's deliberations. He argues that the trial court erred by denying his motion for a new trial and by failing to grant him an opportunity to present the testimony of the complaining juror.

We review the trial court's denial of the motion for a new trial for an abuse of discretion. *Brown v. Commonwealth*, 174 S.W.3d 421 (Ky. 2005).

The right to an unbiased decision by an impartial jury is essential to due process. *Hodge v. Commonwealth*, 68 S.W.3d 338 (Ky. 2002). The Commonwealth argues that, with the sole exception of showing that the verdict was reached by lot, we must reject any attempt by a juror to impeach a verdict by alleging that misconduct occurred during deliberations. RCr 10.04 ("A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot.")

RCr 10.04 may not, however, be used to deny the accused his constitutional right to confront the witnesses and the evidence against him. The apparent conflict between the restrictive scope of RCr 10.04 and the constitutional right to a jury untainted by extrinsic influences was discussed by this Court in *Commonwealth v. Wood*, 230 S.W.3d 331 (Ky.App. 2007), where it was noted that

the Kentucky Supreme Court has twice recognized that in *Doan v. Brigano*, 237 F.3d 722 (6th Cir.2001), *abrogated on other grounds as recognized by Maples v. Stegall*, 340 F.3d 433 (6th Cir.2003), the Sixth Circuit Court of Appeals declared unconstitutional an Ohio rule which is similar to our RCr 10.04. *See Brown v. Commonwealth*, 174 S.W.3d 421, 429 (Ky.2005); *Bowling v. Commonwealth*, 168 S.W.3d 2, 7 (Ky. 2004).

230 S.W.3d at 332.

In Abnee's case, a juror has alleged that extrinsic evidence was available to the jury and that it was relied upon in reaching a verdict in the guilt phase of the deliberations. An alleged trial irregularity such as this, which may rise to the level of a constitutional violation, must at least be subject to a meaningful evidentiary hearing by the trial court.

In *Wood*, this Court affirmed the trial judge's order for a new trial, based upon a finding that jurors were exposed to extrinsic evidence when they consulted a dictionary during their deliberations. The *Wood* court distinguished the holdings in *Brown* and *Bowling*, in which the Kentucky Supreme Court determined that prohibiting juror affidavits concerning misconduct was proper because in those cases, there was no evidence of outside influence. In the *Wood* case, as in this case, the allegations involved extrinsic evidence. The *Wood* court concluded that the key distinction was the fact that an allegation of extrinsic influence could be verified. It adopted the following passage from *Doan v. Brigano*, 237 F.3d 722 (6th Cir. 2001) *abrogated on other grounds as recognized by Maples v. Stegall*, 340 F.3d 433 (6th Cir. 2003) *citing Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50,

36 L.Ed. 917 (1892), in which the Sixth Circuit Court of Appeals delineated between those jury matters that can and those that cannot be used to set aside a verdict:

In sharp contrast to the secret thoughts of jurors, the [*Mattox*] Court held that juror testimony as to “overt acts” of misconduct can be considered because the remaining members of the jury can testify as to whether or not those acts of misconduct actually occurred. *Id.* at 148–49, 13 S.Ct. 50. The Court recognized that, by drawing this distinction, verifiable evidence of a jury’s consideration of extraneous prejudicial information could be considered by courts while still respecting the finality of jury verdicts by disallowing testimony as to the unverifiable thoughts of jurors. *See id.* at 148–49, 13 S.Ct. 50.

Thus, the Supreme Court in *Mattox* held that, when addressing a motion for a new trial, courts should consider juror testimony concerning any overt acts of misconduct by which extraneous and potentially prejudicial information is presented to the jury, including juror testimony showing that a newspaper article relevant to the case was read aloud in the jury room. 237 F.3d at 732–33 (internal footnote omitted).

Wood, 230 S.W.3d 331 at 333.

In this case, the allegation does not concern statements made by a juror to his fellow jurors nor does it concern a matter resting in the personal consciousness of a juror. Instead, it involves an allegation that extrinsic evidence in the form of the accused’s criminal record was left in the jury room during the guilt phase and was read and discussed by the jurors.

This case must be remanded for an evidentiary hearing in which testimony is taken from all witnesses involved, including the bailiff and the jury panel. The

trial court can then determine whether the allegations are true and, if so, the defendant must thereafter show that he was prejudiced by the events. However, there is a strong presumption that such an irregularity would be prejudicial.

Criminal cases are bifurcated into separate guilt and sentencing phases precisely because of the inherent prejudice of providing a jury with evidence of a defendant's prior convictions. If the juror's claims in this case are true, Abnee may have been convicted based on evidence that was inadmissible in the guilt phase of the trial and of which he had no knowledge or ability to challenge. If that occurred, he is entitled to a new trial.

The order denying Abnee's motion for a new trial is therefore reversed and the matter is remanded for further proceedings in accordance with this opinion.

MOORE, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: The critical issue before us on appeal is whether the juror's letter, unsupported by any affidavit or any independent corroboration, qualified as a proper attempt to impeach the verdict. As I believe that it failed to meet the precedents calling for an evidentiary hearing, I dissent from the majority opinion.

I need not reiterate the narrow criteria under which a verdict can be impeached. They are thoroughly set out and well analyzed by the majority.

It is beyond dispute that due process requires an unbiased opinion by an impartial jury. *Hodge v. Commonwealth*, 685 S.W.3d 338 (Ky. 2002).

Nevertheless, with the sole exception of showing that the verdict was reached by lot, we must reject any attempt by a juror to impeach a verdict by alleging that misconduct occurred during deliberations. RCr 10.04. We cannot entertain a challenge to a final verdict by speculating upon or examining the **internal dynamics** of a jury. “It has long been the rule that jurors ... may not impeach the verdict by stating that they acted wrongfully or irregularly.” *Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky. 2005).

In this case, the juror who wrote the letter expressly ratified the jury’s verdict in open court when the jury was polled. When she wrote the letter after the trial, she sent it to trial counsel rather than to the trial judge. She later refused to verify its contents by signing an affidavit.

Pursuant to RCr 10.06(1), Abnee filed a motion for a new trial. The court then conducted a hearing and found insufficient evidence of the use of extrinsic evidence by the jury and also found that the motion for a new trial constituted an improper attempt to impeach the verdict.

On appeal, Abnee seeks yet another hearing to impeach again the integrity of the verdict. “The duty to investigate arises **only** when the party alleging misconduct makes **an adequate showing** of extrinsic influence to overcome the presumption of jury impartiality.” *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990). (Emphasis added.) In order to justify a post-trial hearing involving the trial’s jurors, the defendant must do more than accuse or allege; he must show “**clear, strong, substantial and incontrovertible evidence ...** that a

specific, nonspeculative impropriety has occurred.” (Emphasis added.) *United States v. Ianniello*, 866 F.2d 540(2d Cir. 1989). The public purpose underlying this rule of specificity is clear: the opportunity to taint a jury verdict by flimsy allegations after the fact would constitute both a mischief and a menace to the orderly administration of justice.

In this case, Abnee’s motion is wholly unsupported by credible evidence – or indeed by **any** evidence at all. He offered no affidavits, and he **conceded** that his criminal record was properly admitted into evidence during the penalty phase of the trial. A defendant will not be allowed to engage the trial court in post-verdict inquiries of jurors “merely to conduct a fishing expedition.” *United States v. Moten*, 582 F.2d 654, 667 (2d Cir. 1978).

I am persuaded that the trial court did not abuse its discretion by denying the motion for a new trial. Furthermore, because of the **lack of any evidence** surrounding the allegation concerning Abnee’s criminal record, the trial court did not err by declining to conduct any additional investigation concerning the jurors as no additional investigation was warranted. The court protected the integrity of the verdict based on all precedents and rules currently in effect.

As there was no abuse of discretion, I would affirm.

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