RENDERED: June 27, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-1288-MR

NICKY QUARLES — APPELLANT

v. APPEAL FROM McCRACKEN CIRCUIT COURT
HONORABLE JAMES RON DANIELS, JUDGE
CRIMINAL ACTION NO. 95-CR-000296

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, GUIDUGLI and MILLER, Judges.

GUIDUGLI, JUDGE. Nicky L. Quarles (Quarles) appeals from an order of the McCracken Circuit Court entered March 27, 1996, finding him guilty of first-degree trafficking in a controlled substance and trafficking in a controlled substance within 1,000 yards of a school. We affirm.

Quarles' trial was held on March 25, 1996. Testimony was presented all morning, and the trial court recessed for lunch at 11:55 a.m. Before releasing for lunch, the trial court admonished the jury, stating, "[r]emember not to discuss what you've heard about the case with each other or with other persons and do not form any opinions until you've heard all of the evidence." The trial resumed at approximately 1:15 p.m. The

jury found Quarles guilty later that afternoon and recommended a six-year sentence. In a trial order entered from the bench by the trial court on March 25, 1996 and dated and formally entered on March 27, 1996, the trial court noted the findings and recommendations of the jury and scheduled a sentencing hearing for April 29, 1996. No mention of juror misconduct was made when the trial resumed after lunch, and the trial court's order does not indicate that juror misconduct occurred during the trial.

On April 24, 1996, Quarles filed a motion to declare a mistrial alleging that a juror approached him and his wife and invited them to eat lunch with them in his home. In his motion, Quarles stated that the juror discussed the case with him and his wife in direct violation of the trial court's admonition.[1] Quarles alleged that he was entitled to a new trial on the ground that he was prejudiced by his contact with the juror. In its response, the Commonwealth alleged that Quarles' motion was not timely because it was not filed within five days after the return

[1] Quarles attached an undated newspaper article which appeared in the Paducah Sun to his brief. The article contained interviews with the juror, the Commonwealth Attorney, and the trial judge regarding this incident. However, the newspaper article was not a part of the record of the trial court and thus cannot be taken into consideration by this Court as evidence of what transpired between Quarles and the juror or as evidence of when the Commonwealth Attorney and the trial court were notified as to the juror's conduct. Croley v. Alsip, Ky., 602 S.W.2d 418, 420 (1980). See also, Odley v. Wilson, Ky., 218 S.W.2d 17 (1949) (holding that facts contained in brief but not in record cannot be considered on appeal). Thus, in reaching our decision, we have not considered either the article or any reference thereto in Quarles' brief. Wemyss v. Coleman, Ky., 729 S.W.2d 174, 180 (1987). We would also point out that the Commonwealth did not object to the inclusion of the article in its brief.

of the verdict pursuant to Kentucky Rules of Criminal Procedure (RCr) 10.06. The Commonwealth further alleged that Quarles' attorney was notified about the incident the day after the trial. The Commonwealth argued that even if the motion was timely, an evidentiary hearing would be necessary to determine whether Quarles initiated contact with the juror or vice-versa.

At the sentencing hearing on April 29, 1996, Quarles' motion for mistrial was addressed. The trial court pointed out that under RCr 10.06, Quarles' motion was required to have been filed within five days from the return of the verdict, but recognized that under RCr 10.02 it could order a new trial on its own initiative within ten days from the return of the verdict. The trial court also pointed out and counsel for Quarles agreed that the information relied upon as grounds for a new trial was within Quarles' knowledge on the date it occurred but no action was taken by Quarles at that time. Speaking on his own behalf, Quarles pointed out and the trial court agreed that both the Commonwealth Attorney and the trial court knew about the incident the day after it occurred. However, the trial court denied Quarles' motion, stating:

> [T]here may or may not have been misconduct on the behalf of a juror in this case. I have also taken into account the consideration that that misconduct, if any, was, if not--if not encouraged by you was agreed to by you.
>
> And I think you have a responsibility as well as the juror not to engage in conversation or communication with one of the jurors involved in your case.

The trial court sentenced Quarles to six years, and this appeal followed.

On appeal, Quarles does not attack the trial court's denial of his motion for mistrial. Instead, Quarles argues that the trial court erred in failing to order a new trial sua sponte pursuant to RCr 10.02 when it learned of the contact between Quarles and the juror the day after the trial. Under RCr 10.02(2):

> Not later than ten days after return of the verdict, the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a defendant, and the order shall specify the grounds therefor.

The decision as to whether a new trial is warranted due to jury misconduct is left to the trial court's discretion and is not to be reversed on appeal unless clearly erroneous. Colwell v. Commonwealth, Ky., 320 S.W.2d 116, 119 (1958). See also, Commonwealth v. Littrell, Ky., 677 S.W.2d 881 (1984) (trial court's decision as to granting of new trial not to be reversed unless clearly erroneous).

Although we find the trial court's failure to investigate the incident of juror misconduct which occurred during Quarles' trial puzzling,[2] we find that the trial court's refusal to grant a new trial sua sponte in this matter was not an abuse of discretion. Although there is nothing in the record which indicates whether contact was initiated by Quarles or the

[2] Under KRS 29A.310(2), parties to a pending action are clearly prohibited from speaking to jurors after they have been sworn without permission from the court. Violation of this provision is a Class A misdemeanor.

juror, the record does support the fact that not only the juror but Quarles as well violated the trial court's admonishment. It has long been the rule in the Commonwealth that an appellant who has knowledge of juror misconduct must immediately bring such knowledge to the trial court's attention. Davidson v. Commonwealth, Ky., 555 S.W.2d 269, 272 (1977). Here, Quarles clearly had notice of the juror's misconduct at the moment it occurred since, whatever the circumstances were, he was a willing participant. Had this been a situation where Quarles brought the incident immediately to the trial court's attention, the trial court's refusal to act would have been an abuse of discretion. However, not only did Quarles not inform the trial court of the juror's conduct immediately, he waited until after a verdict was returned to bring the matter to light. Such conduct on behalf of Quarles amounts to a waiver of the error as was noted in Arnett v. Commonwealth, Ky., 470 S.W.2d 834 (1971), where the Court held:

> When a defendant with knowledge of [juror misconduct] elects not to call it to the attention of the court in timely fashion before submission of the case to the jury, he in effect waives the error and takes his chance with the jury verdict. Upon being disappointed with the verdict, it is too late to come in the back door with a complaint about the alleged error.

Arnett, 470 S.W.2d at 838. Despite the fact that the trial court learned of the juror misconduct the day after the trial, it did not abuse its discretion in failing to undertake an investigation pursuant to RCr 10.02(2) to determine sua sponte if a new trial

was warranted because of Quarles' failure to inform the court immediately after the incident. Having been found guilty at trial, Quarles cannot be rewarded for concealing information of a juror's misconduct which was known to him by allowing him to use that information to obtain the proverbial second bite at the apple.

Having considered the parties' arguments on appeal, the order of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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