

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001614-MR

LONNEY B. SELF

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NOS. 96-CR-899 AND 97-CR-582

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

*** **

BEFORE: BUCKINGHAM, GUIDUGLI and HUDDLESTON, Judges.

HUDDLESTON, JUDGE: Lonney B. Self was convicted of Bail Jumping in the First Degree and of the status offense of being a Persistent Felony Offender in the Second Degree (PFO), and was sentenced to imprisonment for five years. He appeals asserting that the trial court erred in refusing to grant his motion to continue the trial of these charges and that it erred in excluding testimony as to what he had been told by his attorney with regard to his obligation to appear in court.

In 1994, Self was charged in an indictment with the crime

of Theft By Unlawful Taking over \$100.00. He was arraigned on December 2 of that year. Following his arraignment, Self was ordered to appear for both a pre-trial conference scheduled for December 6, 1994, and a status hearing scheduled for December 9, 1994. Since Self's co-defendant had not been arrested at the time of the pre-trial conference, the trial court continued the status hearing until January 6, 1995.

Self failed to appear for the status hearing and did not contact the court to notify it of his whereabouts. The trial court, however, was advised by Self's counsel that Self was in Georgia and had been unable to return to Kentucky because he had experienced automobile trouble. Self's counsel's motion for a one-week continuance of the status hearing was denied. Because of Self's failure to appear, the trial court revoked his bond and issued a bench warrant for his arrest.

A bond forfeiture hearing was scheduled for June 9, 1995, but again Self failed to appear. One and a half years later, in December 1996, Self was apprehended and extradited to Kentucky. He was subsequently indicted for Bail Jumping in the First Degree for "failing to appear in Fayette Circuit Court on a felony charge."

A status hearing was held on January 10, 1997, at which the trial court assigned the bail jumping and theft charges for trial on May 29, 1997. On May 20, 1997, Self was indicted as a Second-Degree Persistent Felony Offender. At his arraignment on

that charge, the PFO charge was consolidated with the earlier bail jumping and theft charges and likewise scheduled for trial on May 29, 1997.

On the day of trial, Self's counsel moved the court to continue the trial on the ground that he had just received notice of Self's taped confession relating to the theft charge. The trial court sustained the motion in part and continued the trial of the theft charge. Self's counsel explained to the court that a continuance was required for the bail jumping and PFO charges because Self wanted to testify and counsel had not prepared Self as a witness. The trial court denied the motion, but gave Self's counsel an opportunity to confer with his client before trial.

At trial, Self attempted to testify about statements made to him by his attorney. The trial court sustained the Commonwealth's objection on hearsay grounds. See generally Ky. R. Evid. (KRE) 801 and 802. After Self was found guilty of bail jumping and of being a PFO, he brought this appeal.

Self asserts that the trial court abused its discretion when it declined to continue his trial. He argues that his counsel focused his trial preparation on the theft charge and not the bail jumping charge and consequently needed additional time to prepare for trial on the bail jumping and PFO charges. In response, the Commonwealth points out that the trial court scheduled a trial on the bail jumping charge five months in advance, thus giving Self

and his counsel more than adequate time to prepare for trial. Furthermore, Self's motion for a continuance was not filed until the day the trial was scheduled to commence.

Whether to grant or deny a continuance is a matter within the discretion of the trial court; and its decision will not be reversed absent an abuse of discretion. Johnson v. Commonwealth, Ky., 883 S.W.2d 482, 485 (1994). The refusal to grant a motion for continuance has been found to be an abuse of discretion, for example, when a defendant accused of rape was assigned counsel only two days before trial, Taylor v. Commonwealth, Ky., 545 S.W.2d 76 (1976), or when the Commonwealth's attorney misled the defendant and failed to provide him with exculpatory evidence. Stump v. Commonwealth, Ky. App., 747 S.W.2d 607 (1987). There is no similarity between those and similar cases and the case at bar. Inasmuch as Self and his counsel were informed of the trial date over five months in advance we detect no abuse of discretion in the denial of Self's motion for a continuance.

The second issue raised by Self relates to the trial court's refusal to permit testimony regarding statements allegedly made to him by his counsel. Self failed to put the proposed testimony in the record by way of avowal, leaving us to speculate as to its admissibility and materiality. Ky. R. Crim. Proc. (RCr) 9.52, entitled "Avowals," provides, in pertinent part, that:

In an action tried by a jury, if an objection to a

question propounded to a witness is sustained by the court, upon request of the examining attorney the witness may make a specific offer of his answer to the question. The court shall require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon.

In Cain v. Commonwealth, Ky., 554 S.W.2d 369, 375 (1977), the Supreme Court said that:

The one other point made by Cain and Morrow was not preserved for review. When the trial court would not permit counsel to cross-examine William Hayes on the subject of what kind of a deal had been made with the Commonwealth in his son Robert's case, the proper procedure was to move that the examination be conducted by way of avowal outside the hearing of the jury. Cf. RCr 9.52. The inquiry was, of course, admissible to discover possible bias on the part of the witness, and the trial court erred in disallowing it, but without an avowal to show what a witness would have said an appellate court has no basis for determining whether an error in excluding his proffered testimony was prejudicial.

Because Self failed to offer the evidence by way of avowal, we are unable to determine whether the trial court's refusal to let him testify as to what his counsel had told him was hearsay or whether it falls within some exception to the rule precluding the introduction of hearsay evidence. In like manner, we cannot determine whether the exclusion of the evidence prejudiced Self's defense. See RCr 9.24 (harmless errors are to be disregarded and are not a ground for disturbing a judgment of conviction). Therefore, this claimed error cannot form the basis for reversal of the judgment of conviction.

The judgment is affirmed.

ALL CONCUR.

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