

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000965-MR

CARL JUSTICE

APPELLANT

v. APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 96-CR-119

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: DYCHE, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE: Carl Justice appeals from an order of the Knox Circuit Court overruling his CR 60.02 motion for a new trial. We affirm.

On June 4, 1996 appellant was found guilty of first-degree assault and driving under the influence of intoxicants, first offense, after a trial by jury. The jury recommended and the trial court imposed a sentence of twenty (20) years in the penitentiary. His conviction was affirmed by the Supreme Court of Kentucky in a published opinion rendered December 17, 1998.

Thereafter on March 13, 1999, appellant filed a pro se, motion pursuant to CR 60.02 whereby he sought a new trial. In

his CR 60.02 motion Justice alleged that, subsequent to his conviction, he learned by way of a local newspaper article¹ that the trial court judge in his case, Honorable Lewis B. Hopper, Knox Circuit Judge, had been a Judge Advocate General (JAG) in the Kentucky National Guard reserves at the time of his trial. Appellant alleged in his motion that the judge's JAG service violated both ethical and constitutional prohibitions against the practice of law by a judge. On March 16, 1999, the trial judge summarily denied Justice's motion. This appeal followed.

The question presented on appeal is whether a judge may serve in the Kentucky National Guard reserves as a JAG. Appellant maintains that such service to our country violates section 123 of the Kentucky Constitution, and Supreme Court Rule (SCR) 4.300, dealing with judicial conduct, (Specifically Canon 5(F.)). Each of the above sets forth the proposition that a judge should not practice law. Appellant further relies on the case of IN RE Kenton County Bar Association, Ky., 236 S.W.2d 906 (1951). In that the above styled case pre-dates the constitutional amendment establishing the Court of Justice (effective January 1, 1976) we believe it has little or no relevancy to the pending allegation. Rather we believe the present constitutional provisions, statutory enactments and the SCR control. Under these provisions the question presented in the case has been previously addressed. In Judicial Ethics

¹An article entitled "Hopper Honored by National Guard" appeared in The Barbourville Mountain Advocate on Thursday, August 13, 1999.

Opinion JE-16 rendered October, 1980, the Ethics Committee of the Kentucky Judiciary set forth the following:

JUDICIAL ETHICS OPINION JE-16

Formal

QUESTION: Is it proper for a judge to participate in a National Guard or Reserve Unit as a Judge Advocate Officer?

ANSWER: Yes.

REFERENCE: Canon 5F

OPINION: (October, 1980)

We do not regard service in the Judge Advocate Division as the practice of law contemplated by the prohibition of Canon 5F. Like other citizens, judges owe a duty to their country. If they perform that duty by way of military service, they must serve in whatever capacity they are assigned. If a judge is assigned to the Judge Advocate General department, his work is outside the scope of our Canons because of its special nature and because the judge is, in effect, on leave from his judgeship during his military service.

This is not taken to mean that a judge on military duty may engage generally in the practice of law.

We believe the judicial ethics opinion referenced above adequately and sufficiently answers the issue presented in the appeal. There was no basis for appellant's CR 60.02 motion and it was properly denied.

On appeal appellant also raises the issue that the trial judge "failed to disqualify himself in (a) proceeding where he had personal bias or prejudice concerning himself". In that the issue was never properly raised at the trial level it will

not be reviewed on appeal. Commonwealth v. Duke, Ky., 750 S.W.2d
432 (1988).

The order of the Knox Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Carl Justice
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BRIEF FOR APPELLEE:

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