

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002588-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM SIMPSON CIRCUIT COURT  
HONORABLE WILLIAM HARRIS, JUDGE  
ACTION NO. 97-CR-00212

TERRY ANDERSON

APPELLEE

OPINION  
VACATING AND REMANDING  
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BEFORE: COMBS, GUIDUGLI, and SCHRODER, Judges.

COMBS, JUDGE: The appellant, the Commonwealth of Kentucky (the Commonwealth), appeals from an order of the Simpson Circuit Court granting the appellee, Terry Anderson (Anderson), a new trial. Anderson filed a motion for a new trial on the ground that one of the jurors was disqualified pursuant to KRS 29A.080. Having reviewed the record on appeal, we vacate the order of the circuit court.

On December 17, 1997, the Simpson County Grand Jury indicted Anderson on one count of attempted murder. The case proceeded to trial. At the conclusion of a two-day trial, the jury found Anderson guilty of assault in the second degree and

recommended that he be sentenced to five years' imprisonment. On July 22, 1998, the court entered its final judgment, setting out Anderson's conviction of second-degree assault in the case and sentencing Anderson to five years' imprisonment. However, the court postponed imposition of his sentence pending the Presentence Investigation Report. Anderson filed a motion for a new trial on July 23, 1998, on the ground that one of the jurors, James Thomas Stanley, had been convicted of a felony and was therefore statutorily disqualified from serving on a jury under KRS 29A.080. The Commonwealth argued that Stanley was not disqualified from serving on a jury because his civil rights had been restored by executive order issued by the Governor of the Kentucky on June 30, 1997. The court entered a bench order on September 29, 1998, granting Anderson's motion for a new trial and setting aside his conviction and sentence. This appeal followed.

We will first address Anderson's argument that the Commonwealth lacked authority to seek appellate review of the circuit court's order granting him a new trial. He contends that the Commonwealth can seek appellate review of an order granting a new trial only for purposes of certifying the law. We disagree. In Commonwealth v. Brindley, Ky., 724 S.W.2d 214 (1986), the Supreme Court addressed this issue and held:

It is our opinion that Section 115 of the Kentucky Constitution, founded in the prohibition against double jeopardy, does not prevent an appeal by the Commonwealth when a jury has returned a verdict of guilty which has been set aside by a ruling of law to a postverdict motion. If error was made in

such ruling as determined on appeal, the verdict is simply reinstated.

Id. at 216. Thus, the Commonwealth has the right to one appeal in all criminal cases except in cases where an appeal would violate double jeopardy principles. “[T]he Commonwealth has the same right unless the appeal of a defendant’s sentence should be considered an “appeal from a judgment of acquittal.” Collins v. Commonwealth, Ky., 973 S.W.2d 50, 53 (1998). The Commonwealth’s appeal is properly before this court.

We now turn to the issue of whether the court erred in granting Anderson’s motion for a new trial. The Commonwealth contends that the court abused its discretion in setting aside the jury’s verdict and in ordering a new trial. It argues that Juror Stanley was qualified to sit on the jury because his civil rights had been restored to him by executive order and that there is not a distinguishable difference between a “pardon” and a “restoration of civil rights.”

KRS 29A.080 sets out the impediments disqualifying one from jury service. This statute provides in pertinent part that a prospective juror is disqualified from serving on a jury if he “[h]as been previously convicted of a felony and has not been pardoned by the Governor or other authorized person of the jurisdiction in which he was convicted.” (Emphasis added.) KRS 29A.080(2)(e). In the case before us, it is undisputed that Stanley had been previously convicted of a felony and that he failed to disclose this information on his jury qualification form. However, in 1997, his civil rights were restored by an executive order of the Governor. Thus, the dispositive issue on

appeal is whether that restoration has removed Stanley's disability to serve as a juror.

Section 77 of the Kentucky Constitution vests the Governor with the power to "remit fines and forfeitures, commute sentences, grant reprieves and pardons." A pardon relieves a person of all penal consequences of his criminal act: "the effect of the pardon is that, so far as the violation of the criminal law, the offense against the public, is concerned, he is to be looked upon as innocent thereof." Nelson v. Commonwealth, 128 Ky. 779, 109 S.W. 337, 338 (1908). Furthermore, "[t]he pardoning power of a Governor of a state or territory is confined in its operation to offenses against the laws of that state or territory." Arnett v. Stumbo, 287 Ky. 433, 153 S.W.2d 889, 891 (1941).

\_\_\_\_\_A person convicted of a felony is excluded from voting (Section 145 of the Kentucky Constitution) or from seeking and holding public office (Section 150 of the Kentucky Constitution) unless his civil rights have been restored by executive pardon. Thus, the Governor is empowered by Sections 145 and 150 "to lift the disabilities prescribed in them from the shoulders of the convict and to restore him to full and complete rights of citizenship." Arnett, supra at 891. (Emphasis added). The power of restoration of civil rights is separate and distinct from the cancellation or expunging of culpability contained in Section 77 of the Constitution. Arnett, supra at 890.

The executive clemency provided for in Sections 145 and 150 allows the chief executive to restore the lost rights of

citizenship to a convicted felon so that he or she may thereafter possess such rights as though no conviction had ever occurred.

Id. However, unlike a pardon pursuant to Section 77, a restoration of civil rights under Sections 145 and 150 does not remove the guilt of the offender or the penalty for the offense. An executive order issued pursuant to Section 145 and 150 only restores an individual's rights under Kentucky Law without expunging all record of the fact of his guilt.

KRS 29A.080 disqualifies a convicted felon from serving on a jury unless he has been pardoned by Governor. This statute does not specify or require that a pardon be issued pursuant to Section 77 of the Constitution to remove a convicted felon's disqualification from serving on a jury. We hold that "pardon" as used at KRS 29A.080 encompasses an executive order restoring an individual's civil rights. By executive order issued pursuant to Sections 145 and 150, Juror Stanley was restored to the full and complete rights of citizenship in this jurisdiction. As a full citizen of the Commonwealth of the Kentucky, he was qualified to serve as a juror. Accordingly, we find that the court – no doubt exercising an abundance of caution – nonetheless erred in granting Anderson's motion for a new trial. We reinstate his conviction and sentence.

Based upon the foregoing reasons, we vacate the order of the Simpson Circuit Court and remand this case for reinstatement of the conviction of Terry Anderson.

SCHRODER, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT ONLY.

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