

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000674-MR

FREDERICK DAMRON

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE KELLEY ASBURY, JUDGE
ACTION NO. 98-CR-00055

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, EMBERTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from a conviction of two counts of second-degree wanton endangerment. Because the trial court did not err in denying appellant's motion for a mistrial and motion for a new trial, we affirm.

On April 1, 1998, Deputy Sheriff Patrick Boggs was attempting to serve a civil summons on appellant, Frederick Damron. Deputy Boggs waited in a parking lot near appellant's workplace, and spotted a Toyota MR2 automobile which he believed belonged to appellant, and recognized appellant as the driver. Deputy Boggs made eye contact with appellant, after which appellant sped off. Deputy Boggs followed appellant to the

highway. A high speed chase ensued down I-64, during which a car and a tanker truck had to swerve to avoid the MR2. When the MR2 reached West Virginia, Deputy Boggs was ordered over the police radio to terminate the pursuit. At one point during the chase, Deputy Boggs was able to get the MR2's license plate number, which was registered to appellant.

A warrant was issued for appellant's arrest, and he turned himself in to the Boyd County sheriff's department on April 3, 1998. On June 11, 1998 appellant was indicted on two counts of first-degree wanton endangerment resulting from his causing the car and truck to swerve. A jury trial was held on March 10, 1999. Appellant's defense at trial was that he was not driving his MR2 that day, rather he was driving a green Oldsmobile that he borrowed from a friend. The jury received instructions on both first- and second-degree wanton endangerment. The jury deliberated for approximately two hours, and returned a verdict of guilty on both counts of second-degree wanton endangerment, recommending a sentence of 12 months in jail and a \$500 fine. Defense counsel requested that the jury be polled. The trial judge then asked each juror individually if this was their verdict. Each of the jurors responded yes, until the court asked juror Donald Dulan, who replied "No". The court asked juror Dulan again, and he again replied in the negative. The foreperson told the court "Your Honor, I understood we all voted in agreement." Defense counsel moved for a mistrial. The court noted that the verdict must be unanimous, and sent the jury back to deliberate further. The jury returned after several

minutes, with the same verdict. This time, when the jurors were polled, all of the jurors, including Dulan, responded "yes" when asked if that was their verdict. On March 17, 1999, appellant filed a motion for new trial, on the grounds that the jury verdict was not unanimous. The trial court denied the motion on March 22, 1999, and this appeal followed.

On appeal, appellant argues that the trial court committed reversible error in denying appellant's motion for mistrial and motion for a new trial, because the jury verdict was not unanimous. When a jury verdict is announced, RCr 9.88 allows either party to require that the jury be polled, which is done by the clerk's or court's asking each juror if it is his verdict. If, upon the poll, there is not unanimous concurrence, the verdict cannot be received. RCr 9.88.

In Hart v. Commonwealth, Ky. App., 768 S.W.2d 552 (1989), a poll of the jury following their initial return of a guilty verdict revealed that one juror was ambiguous in her position. The defendant moved for a mistrial after this juror gave her ambiguous response. The court denied the motion and sent the jury back for further deliberations, after which the jury returned a second guilty verdict. The second poll of the jury revealed no lack of unanimity. This Court held that under KRS 29A.320(3)(e), the trial court was authorized to send the jury back for further deliberations after the initial jury poll revealed the juror's ambiguous opinion. Id. at 555.

KRS 29A.320(3)(e) states that when the jury is polled, "If more than the number of jurors required by KRS 29A.280, as

appropriate to the type of case being tried, answers in the negative, the jury must be sent out for further deliberation." As the instant case was a criminal case, requiring a unanimous verdict, the trial court could not receive the verdict when juror Dulan responded "No". RCr 9.88; KRS 29A.280(3). Per KRS 29A.320(3)(e), when juror Dulan answered in the negative, it was appropriate for the trial court to send the jury back for further deliberation.

Appellant incorrectly cites Coomer v. Commonwealth, Ky., 238 S.W.2d 161 (1951) and Johnson v. Commonwealth, 308 Ky. 709, 215 S.W.2d 838 (1948), for the proposition that, unlike in Hart, in which a juror merely expressed misgivings, when a juror states a definite "No", that there must be a mistrial, because the jury verdict is not unanimous. Coomer and Johnson are readily distinguishable from Hart and the instant case. In Coomer, the trial court erred by accepting a guilty verdict, in spite of the fact that during the poll of the jury, one juror stated that he was forced to sign the verdict. In Johnson, the trial court erred when it received the verdict without conducting a poll of the jury, over defendant's objection.

In the instant case, the trial court did not receive the verdict after the poll revealed it was not at that point unanimous, but properly sent the jury back for further deliberations. KRS 29A.320(3)(e). When the jury returned the second time, the poll of the jury was unanimous, with the previously dissenting juror, Dulan, answering "Yes". To establish an absence of unanimity, upon being polled, the juror

must connote that the verdict was given involuntarily, or was forced upon him, or against his will. Fleming v. Commonwealth, Ky., 419 S.W.2d 754 (1967). When juror Dulan replied "Yes" in the second poll, he did not indicate that the verdict was in any way involuntary or against his will.

Appellant further argues, that, at the very least, juror Dulan should have been examined to determine whether his change in vote was influenced by coercion or threats. However, in Hart, this Court indicated that such an inquiry is not always necessary. In Hart, the second poll of the jury revealed no lack of unanimity, however, the defendant alleged that the trial court erred by not interviewing at length the juror who had misgivings after the first poll, to determine whether the second guilty verdict was, in fact, unanimous. Hart, 768 S.W.2d at 554-555. This Court held that as none of the jurors had indicated any coercion, the trial court had no duty to interrogate the juror at length simply because she had previously expressed misgivings as to the initial guilty verdict. Id. at 555. Similarly, in the instant case, the trial judge had no duty to make such an inquiry of Dulan, as the second poll revealed no lack of unanimity, and neither Dulan nor any of the other jurors indicated any coercion.

Absent an abuse of discretion, a trial court's decision whether or not to grant a mistrial will not be disturbed. Miller v. Commonwealth, Ky., 925 S.W.2d 449, 453 (1996). The granting of a new trial is a matter of judicial discretion, and unless there has been an abuse of discretion, an appellate court will not reverse. Jillson v. Commonwealth, Ky., 461 S.W.2d 542, 545

(1970); Carwile v. Commonwealth, Ky. App., 694 S.W.2d 469, 470 (1985). Having determined that the trial court properly sent the jury back for further deliberation, and as the second poll revealed no lack of unanimity, we adjudge the trial court did not abuse its discretion in denying appellant's motions for mistrial and a new trial.

The judgment of the Boyd Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rodney S. Justice
Ashland, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

John E. Zak
Assistant Attorney General
Frankfort, Kentucky