

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001553-MR

ALLEN HODGE

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE THOMAS WALLER, JUDGE  
ACTION NO. 95-CR-00084

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Allen Hodge appeals from a judgment of the Bullitt Circuit Court sentencing him to two years' imprisonment following conviction by a jury for trafficking in a controlled substance. After reviewing the record and the arguments of counsel, we affirm.

Between October 1994 and January 1995, the Kentucky State Police participated in several undercover purchases of methamphetamine during which the seller was observed going to the residence of Allen Hodge. On February 1, 1995, Detectives Thomas Johnson and Harold Miller, along with ten other police officers, executed a search warrant at Hodge's residence. When the police arrived, Hodge and his wife, Joyce, plus four other persons were

in the residence. Prior to beginning the full search, the police advised the Hodges of their Miranda<sup>1</sup> rights. During a search of the master bedroom, the police recovered a brown leather purse under the bed that had a white wallet inside that contained \$3,000.00 in cash and two small paper squares wrapped in aluminum foil and clear plastic wrap. Based on their experience, the police believed the paper squares were "hits" of LSD. The purse also contained various personal items with the name of Joyce Hodge on them including a check book, bank receipts, and government AFDC cards.

Following seizure of various items of evidence, Detective Miller asked Joyce Hodge if the purse belonged to her, and she responded that it did not. At this point, Allen Hodge stated that the two samples of suspected LSD were his. Detective Miller then read Hodge his Miranda rights again and continued to question him. Hodge again indicated the LSD belonged to him and that he had placed it in the purse. Hodge was placed under arrest and charged with possession of a controlled substance. Laboratory analysis later confirmed that the wrapped paper was impregnated with LSD.

In April 1995, Hodge appeared in Bullitt District Court for a probable cause hearing. Judge John Laun waived the case to the grand jury for further consideration. In July 1995, the Bullitt County grand jury indicted Hodge on one felony count of possession of a Schedule I controlled substance (LSD), first

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<sup>1</sup>Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

offense. KRS 218A.1415. At some point, John Laun left the district court bench and became employed as an Assistant Commonwealth's Attorney assigned to the prosecution of Allen Hodge. On June 3, 1999, the trial in circuit court began. Following voir dire and opening statements, Hodge's attorney made an oral motion for a mistrial on the basis that the prosecuting attorney, John Laun, had presided over the probable cause hearing and had waived the case to the grand jury while he was serving as a district court judge. The trial judge denied the motion as untimely.

During the trial, the Commonwealth called Detectives Johnson and Miller as witnesses, who testified that Hodge stated the LSD belonged to him. At the end of the prosecution's evidence, defense counsel moved for a directed verdict and renewed his motion for a mistrial. The trial court denied both motions. The defense witnesses included Allen Hodge, his son, two daughters, and his sister. All of the witnesses testified that the police had damaged the house and furnishings while conducting the search. They all stated that they were frightened by the police conduct. Hodge admitted having told the police that the LSD was his, but he said that he did so only to protect his wife and family. He testified that the LSD did not belong to him. His son, daughter, and sister testified that Hodge had claimed ownership of the LSD at the time of the search, but they stated that they had never seen the appellant use drugs. At the conclusion of the evidence, defense counsel renewed his motions for mistrial and directed verdict, which the trial court denied.

The court stated that Hodge was not prejudiced by the fact that the prosecutor had waived the case to the grand jury while serving as district court judge.

At the end of the trial, the jury found Hodge guilty of possession of a controlled substance, first offense, and recommended a sentence of two years. On June 21, 1999, the trial court sentenced Hodge to serve two years in prison consistent with the jury's recommendation. This appeal followed.

Hodge argues that the trial court erred by failing to declare a mistrial because the prosecuting attorney had been responsible for waiving the case to the grand jury while serving as a district court judge. Hodge relies on the Kentucky Rules of Professional Conduct, Supreme Court Rule (SCR) 3.130-1.12, which provides in pertinent part:

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.

He contends that the prosecutor's act of waiving the case to the grand jury, while he was a judge, represented a substantial step in the criminal prosecution. Therefore, he asserts that the prosecutor should have been disqualified from participating in the criminal prosecution in circuit court. We disagree.

As appellant acknowledges, there are no Kentucky cases directly on point. However, the Commentary to Rule 1.12 states: "the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from

acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits." (Emphasis added). Laun's act of waiving the case to the grand jury had absolutely no effect on the merits of the case. Additionally, Hodge admits having claimed ownership of the LSD at the time of the search, so there is no dispute that probable cause existed for waiver to the grand jury. Hodge's claim that Rule 1.12 creates an absolute, blanket prohibition on subsequent participation by a former judicial officer is contradicted by the Commentary and the language of the rule itself.

Another factor in the present case is that it involves a motion for mistrial made after the jury had been empaneled and sworn. See Couch v. Maricle, Ky., 998 S.W.2d 469, 470 (1999) (jeopardy attaches when jury is empaneled and sworn); Commonwealth v. Ray, Ky., 982 S.W.2d 671, 673 (1998) (same). A trial court may declare a mistrial based on a manifest or urgent necessity. Skaggs v. Commonwealth, Ky., 694 S.W.2d 672, 678 (1985), cert. denied, 476 U.S. 1130, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986); Miller v. Commonwealth, Ky., 925 S.W.2d 449, 453 (1996). "'A defendant may move for a mistrial where there is a legitimate claim of seriously prejudicial error,' such that the defendant is unable to obtain a fair trial." United States v. Phibbs, 999 F.2d 1053, 1066 (6th Cir. 1993) (quoting United States v. Marks, 917 F.2d 215, 220 (6th Cir. 1990)), cert. denied, 510 U.S. 1119, 114 S. Ct. 1070, 127 L. Ed. 2d 389 (1994). As the

Court stated in Gould v. Charlton Co., Inc., Ky., 929 S.W.2d 734, 740 (1996):

It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.

A trial court has discretion in weighing the competing interests of society and the parties and deciding whether a particular situation constitutes sufficient manifest necessity to justify declaring a mistrial. Id. at 737; Sharp v. Commonwealth, Ky., 849 S.W.2d 542, 547 (1993); Miller, 925 S.W.2d at 453.

Hodge has demonstrated no prejudice from the fact that the prosecutor waived his case to the grand jury while serving as a district court judge. He has not shown and does not even contend that the prosecutor acquired any special or confidential information while acting on the case in district court. He has failed to show that this situation negatively affected the trial or rendered it fundamentally unfair. As a result, the trial court did not abuse its discretion in denying Hodge's motion for mistrial.

Hodge also argues that the trial court erred by denying his motions for a directed verdict. In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the Kentucky Supreme Court delineated the standard for handling a criminal defendant's motion for directed verdict as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable

inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Id. at 187 (citing Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983)). See also Estep v. Commonwealth, Ky., 957 S.W.2d 191, 193 (1997). A court must be mindful of the rule that “[c]redibility and weight of the evidence are matters within the exclusive province of the jury.” Commonwealth v. Smith, Ky., 5 S.W.3d 126, 129 (1999) (citations omitted). The standard for appellate review of a denial of a motion for directed verdict alleging insufficient evidence dictates that if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Benham, 816 S.W.2d at 187; Fugate v. Commonwealth, Ky., 993 S.W.2d 931, 940 (1999).

In the current case, the police recovered two “hits” of LSD inside a purse in Hodge’s bedroom. Detective Miller testified that Hodge told him that he had put the two drug items in the purse. Hodge argues that because the purse obviously belonged to Joyce Hodge, it is unreasonable to believe the LSD was his. However, it is undisputed that Hodge had access to the purse. “Possession” need not be exclusive. “Two or more persons may be in possession of the same drug at the same time and this possession does not necessarily have to be actual physical possession.” Houston v. Commonwealth, Ky., 975 S.W.2d 925, 927

(1998) (quoting Franklin v. Commonwealth, Ky., 490 S.W.2d 148, 150 (1972)). Several defense witnesses, including Hodge himself, confirmed that he claimed ownership of the drugs at the time of the search. While Hodge disavowed his earlier statements and attempted to explain his change of positions, the jury was not obligated to accept his explanation. The police witnesses disputed the defense testimony of mistreatment during the search. The jury was free to determine the relative credibility of the conflicting aspects of the testimony. This Court is not entitled to second-guess the jury's resolution of the credibility and weight given to the evidence.

Considering the evidence in the light most favorable to the Commonwealth, we find that there was sufficient evidence to support the jury's verdict. Consequently, the trial court did not err in denying the appellant's motions for directed verdict.

For the foregoing reasons, we affirm the judgment of the Bullitt Circuit Court.

BUCKINGHAM, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS.

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