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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000180-MR

BETTY HAMBY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES SHAKE, JUDGE
ACTION NO. 98-CR-002257

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BARBER AND SCHRODER, JUDGES.

BARBER, JUDGE: Appellant Betty Hamby (Hamby) was arrested and charged with trafficking in a controlled substance. The Appellee Commonwealth of Kentucky (Commonwealth) charged that Hamby ran a "crack house" at 5413 Ilex Avenue in Louisville. Hamby denied the assertion, and stated that she did not reside at that address, but merely visited her mother there on occasion. Detective Mark Watson, the witness for the Commonwealth, testified at trial that he had kept the house under surveillance on June 11, and that Hamby had been opening the door to the residence and admitted persons for short visits. Hamby denied the Commonwealth's assertion, and stated that she was not at the

house on the date that the Commonwealth had the residence under surveillance.

The jury was instructed as to the charge of trafficking in a controlled substance, pursuant to KRS 218A.1412, and the lesser included offense of possession of a controlled substance, under KRS 218A.500. The jury returned a guilty verdict on the trafficking charge, but no verdict on the paraphernalia charge. The parties then reached an agreement in which Hamby waived jury sentencing and agreed to a sentence of seven years to serve, or ten years probated. Hamby was sentenced to ten years, probated for five years.

Hamby asserts that she was forced to use peremptory challenges to remove jurors who should have been stricken for cause. Hamby was granted nine peremptory challenges, and used all of them during jury selection. Five jurors provided responses to voir dire indicating that they might draw an adverse inference from the defendant's failure to testify at trial. Juror Number 7 stated that he would believe a defendant was holding something back if she didn't testify. Juror Number 57 stated that he would think a non-testifying defendant was guilty. Juror Number 43 agreed with that statement. Juror Number 66 said that if the defendant did not testify, she would think that the defendant was guilty. Juror Number 105 stated that she thinks that a defendant who was not guilty would want to testify and say something on her behalf. Jurors No. 138 and 99 agreed with this statement by Juror Number 105. Juror Number 138 also stated that if the defendant did not testify and he heard evidence against

her, he would think she was guilty. The discussion between counsel and the prospective jurors went as follows:

> Juror 57: If she didn't testify I would think that she was guilty.
>
> Counsel: You would think that she was guilty?
>
> Juror 57: I would think so.
>
> Counsel: Anyone else?
>
> Juror 43: I feel the same way.
>
> Counsel: So if the defendant testified you would think she was holding something back?
>
> Juror 43: If she didn't testify.
>
> Counsel: If she did not testify, yes. And would you think she was guilty if she testified?
>
> Juror 43: It would enter my mind.
>
> Counsel: Okay, now that's two different things. It would enter your mind, but would you think if she didn't testify that she was probably guilty?
>
> Juror 43: Yes.

The discussion between counsel and Juror Number 105 also showed that the prospective juror was inclined to ignore the required presumption of innocence:

> Juror 105: I believe that if she plead not guilty I believe that she would want to say something in her behalf.
>
> Counsel: So if you think that if she was pleading not guilty and that she didn't want to testify you would think that she would want to testify? You would think that if she didn't testify that she was hiding something? Or are you thinking that maybe she is guilty if she didn't want to testify?
>
> Juror 105: Yes.

Following voir dire, defense counsel made a motion to strike all five prospective jurors who had indicated that the defendant's failure to testify would affect their decision in the case. One of the jurors, Number 138, was struck for cause by the trial court, who found that the juror had indicated he would ignore the presumption of innocence if the defendant did not testify. The Commonwealth avers on appeal that Juror Number 43 was not qualified to sit, but argues that Juror Number 138, who was stricken for cause by the trial court, may have been qualified to sit. No cross-appeal was filed by the Commonwealth.

The trial court denied the motion to strike for cause regarding the other four jurors, Numbers 43, 66, 105 and 7. The Commonwealth struck Juror Number 66. Hamby used one peremptory challenge to strike Jurors Numbers 43, and 105. The remaining potentially biased juror, Number 7, sat on the jury in this case. Hamby argues that the trial court erred in failing to remove Jurors No. 43 and 105 for cause. The Commonwealth agrees that Juror Number 43 was not qualified, and states that "Clearly the circuit court would have struck Juror 43 if Hamby had correctly stated Juror 43 was the juror who could not honor the defendant's presumption of innocence."

Juror Number 43 should have been stricken for cause, and was not properly qualified to serve on the jury panel. The record also reflects that Jurors No. 7, 66, 105, and 138 should also have been stricken for cause due to their failure to observe the fundamental rule that the defendant's election not to testify should not be taken as evidence of guilt or innocence.

During voir dire, an additional two jurors, Numbers 222 and 97 stated that they believed that police officers were more credible than other witnesses. Defense counsel made a motion to strike these jurors for cause. Defense counsel also argued that Juror Number 222 knew many police officers personally and had long been acquainted with Detective Watson, the Commonwealth's main witness at trial. The juror stated that she had met Detective Watson, but assured the Commonwealth that having met Detective Watson was not "going to cause a problem" for her. Juror Number 222's husband had also been a police officer for 23 years. The trial judge knew Juror Number 222 from his work in the Justice Administration Department at the University of Louisville, stated that he knew that she was "extremely pro-prosecution", and initially indicated that the challenge for cause was appropriate. Nevertheless Hamby's motion was ultimately denied by the trial court, with the Commonwealth's encouragement. The trial court held that the jurors had answered the questions in such a way that they were qualified to sit. Hamby was forced to use two peremptory challenges to strike these jurors.

The discussion between the Commonwealth and the trial court indicates that the trial court suspected he should strike Juror Number 222 for cause, but was dissuaded from doing so by the prosecution. Defense counsel requested that Juror Number 222 be stricken for cause due to her familiarity with the prosecution's main police witness, her job in justice administration, and her stated belief that police officers were

more credible than other witnesses. The following colloquy ensued:

> Judge: You know, I don't think your entitled to it [striking the juror for cause]for that reason, but I do know Ms. Friar because I am on the Board out there at Justice Administration and I'm gonna grant your motion only because I know her situation, she's extremely pro-prosecution. . . .
>
> Commonwealth: Your honor, that's unfair, you using your knowledge of her as to anything she expressed here in court. She never once expressed an opinion that she stated that she would be unfair to the defendant in this case. I think you can be extremely pro-prosecution and still be fair to the defendant. I think I could still be a fair juror even though I'm pro-prosecution. I think that it is truly unfair for the Commonwealth to be placed now to have to argue against what you know from this woman as to what she expressed in court.
>
> Judge: You're probably right on that. I probably shouldn't take into account what I know.

Following denial of the motion to strike, Hamby exercised a peremptory challenge to remove Juror Number 222 from the panel. Hamby argues that where the judge has personal knowledge about a juror, this knowledge should play a part in the court's ruling on a motion to strike for cause.

The Commonwealth argues that police officers and their families are not automatically disqualified to serve as jurors in criminal cases. See: Sanders v. Commonwealth, Ky., 801 S.W.2d 665 (1990). The law requires that the defendant show something more than a casual acquaintance between the juror and the police to support a motion to strike for cause. Sholler v. Commonwealth, Ky., 969 S.W.2d 706, 708 (1998). The Commonwealth

asserts that Juror 222 did not express any substantial bias during voir dire, and for this reason the trial court was correct in denying the motion to strike her for cause. However, in light of the totality of the challenged juror's circumstances, as well as the trial court's personal knowledge of bias on the part of the witness, whether or not she admitted such bias or was even aware of it while under questioning, the proper course of action is to strike the juror for cause. Failure to do so was in error. No such significant showing of bias or prejudice was made with regard to Juror Number 97. In absence of additional evidence, we cannot hold that denial of the motion to strike that juror for cause was in error.

The Commonwealth argues that where a prospective juror has stated that he can decide the case impartially, any bias suggested by previous answers is erased. This argument is not in accordance with Kentucky law. The Courts have held that it makes no difference whether jurors claim they can act in an unbiased fashion. "It is the probability of bias or prejudice that is determinative in ruling on a challenge for cause. . . ." Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 718 (1992).

The Kentucky Supreme Court has stated that:

> The voir dire examination plays a critical role in securing the right to an impartial jury . . . While the peremptory challenge and the challenge for cause serve the same end, that of securing an impartial jury, they offer the parties two distinct, although complementary, methods of challenging biased jurors. Both types of challenges are important to the effort to obtain a fair tribunal.

Thomas v. Commonwealth, Ky., 864 S.W.2d 252, 259 (1993), citing Betelsman & Phillips, Kentucky Practice, (Civil Rules) 4th Ed., Vol. 7, Rule 47.01(2) (1984). As the Thomas Court went on to say, "[t]he object of voir dire is to start the trial on a level playing field; it is not a level playing field if there are jurors on the panel who are predisposed to decide one way or the other." Thomas v. Commonwealth, supra at 259 (emphasis in original).

A challenge for cause should be made where "there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence . . . ." Humble v. Commonwealth, Ky. App., 887 S.W.2d 567, 570 (1994). The "determination of whether to exclude a juror for cause lies within the sound discretion of the trial court." Caldwell v. Commonwealth, Ky., 634 S.W.2d 405, 407 (1982). The trial court has discretion to determine whether to excuse a juror for cause, and must make this decision based upon the particular facts and circumstances in each case. Tayloe v. Commonwealth, Ky., 335 S.W.2d 556, 558 (1960). We note that the trial court's decision will not be reversed on appeal unless it is clearly erroneous or constitutes an abuse of discretion. Foley v. Commonwealth, Ky., 953 S.W.2d 924, 932 (1997).

The Constitution entitles a defendant to a hearing by a jury panel which is fair and impartial. Dunbar v. Commonwealth, Ky., 809 S.W.2d 852, 853 (1991). The jury panel must be free from bias and prejudice, actual, implied or inferred. "This principle of justice is as old as the history of the judicial

system." Tayloe v. Commonwealth, supra at 558. Where questions arise about the composition of a jury panel, "doubt about unfairness is to be resolved in [the defendant's] favor." Fugate v. Commonwealth, Ky., 993 S.W.2d 931, 939 (1999), citing Randolph v. Commonwealth, Ky., 716 S.W.2d 253, 255 (1986). "Even where jurors disclaim any bias and state that they can give the defendant a fair trial, conditions may be such that their connection would probably subconsciously affect their decision in the case." Farris v. Commonwealth, Ky. App., 836 S.W.2d 451, 455 (1992), citing Randolph v. Commonwealth, supra. Due to her close connection with law enforcement, her stated belief that police officers were more credible than private citizens, and the trial court's personal knowledge of her "extremely pro-prosecution" bias, Juror Number 222 should have been stricken for cause. The trial court's denial of the motion to strike that juror for cause was in error.

Hamby argues that because she was forced to use her peremptory strikes to challenge jurors who should have been stricken for cause, and because she was unable to strike one of the unqualified jurors, who actually served on the panel, the trial court's actions were prejudicial. As Hamby used all her peremptory challenges during jury selection, including the four used to eliminate jurors who should have been found unqualified to sit, she argues that this establishes reversible error. Thomas v. Commonwealth, Ky., 864 S.W.2d 252, 259 (1994). Hamby argues that there is no need to show prejudice because prejudice is presumed by the Court. Humble v. Commonwealth, Ky. App., 887

S.W.2d 567 (1994). This Court has held that "[t]o obtain a reversal of a judgment based on failure of a trial court to grant a challenge for cause, prejudice from the failure to strike the challenged juror must be shown. Prejudice is not demonstrated unless the party challenging the juror is forced to exercise all his peremptory challenges." Hicks v. Commonwealth, Ky. App., 805 S.W.2d 144, 147 (1990). In contrast with the laws of some other states, Kentucky law presumes prejudice where a defendant is forced to exercise all her peremptory challenges to excuse jurors who should have been stricken for cause. Humble v. Commonwealth, supra at 570. This Court held that "The longstanding rule in Kentucky requires only that a party must exercise all of his peremptory challenges in order to sustain a claim of prejudice due to the failure of the court to grant a requested challenge for cause." Id. Hamby argues that at least one of the disputed jurors, Juror Number 7, served on the jury which convicted Hamby due to her lack of any additional peremptory strikes. She asserts that she was unable to fairly use her peremptory strikes because all the strikes were used to remove jurors who should have been stricken for cause. Failure to remove a juror for cause where implied or subconscious bias or prejudice has been shown can constitute reversible error where the use of a peremptory challenge to remove that juror "resulted in a subsequent inability to remove further unacceptable jury panel members." Farris v. Commonwealth, Ky. App., 836 S.W.2d 451, 455 (1992), citing Smith v. Commonwalth, Ky., 734 S.W.2d 437, 444 (1987)

The Commonwealth relies upon Ross v. Oklahoma, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988), and United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) as holding that requiring a defendant to remove prospective jurors with peremptory strikes when the jurors should have been stricken for cause does not rise to the level of a constitutional violation. The defendants in the above-referenced cases failed, however, to argue that an incompetent juror was selected for the panel due to the exhaustion of their peremptory challenges. The United States Supreme Court indicated that such factual circumstances might well have affected its ruling.

In the present case, Hamby has argued that incompetent jurors were placed on the panel, or that the outcome of the case was affected by the fact that she exhausted her peremptory challenges on jurors who should have been stricken for cause. Further, extensive citation to Kentucky law by Hamby shows that, in this Commonwealth, the fact that a defendant has used all her peremptory challenges to remove jurors who were unfit to serve creates a presumption of prejudice. See, e.g., Humble v. Commonwealth, supra at 570. As Hamby properly objected to the failure to strike unfit jurors for cause, exhausted her peremptory challenges before she could remove the final biased juror, and was subsequently convicted of the felony offense, she has met the burden of demonstrating prejudice. Under such circumstances, we hold that the failure to strike Jurors Number 7, 43, 105 and 222 for cause constitutes reversible error.

Therefore, we reverse Jefferson Circuit Court's judgment and remand this matter for a new trial.

ALL CONCUR.

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