

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002708-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 1999-SC-1004-DG

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 98-CR-00165

JAMES BAILEY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, CHIEF JUDGE; COMBS AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. The Supreme Court, in Commonwealth v. Bailey, Ky., 71 S.W.3d 73 (2002), rendered March 21, 2002, has remanded this matter for the Court to consider the merits of the Commonwealth's appeal. The Supreme Court determined that KRS 22A.020(4) authorizes this Court to consider the Commonwealth's appeal of the Christian Circuit Court's order which granted a new trial pursuant to RCr 10.02. Pursuant to the opinion of the Supreme Court and other applicable case law, we review the circuit court's order under the abuse of discretion standard.

In April of 1998, Bailey was indicted by a Christian County Grand Jury for: 1) receiving profit of public funds in violation of KRS 61.190; (2) theft by failure to make required disposition of property in violation of KRS 514.070; and 3) tampering with public records in violation of KRS 519.060. The trial court dismissed Count I of the indictment, (receiving profit of public funds) on Bailey's motion. The trial court held that Count I and Count II of the indictment would subject Bailey to double jeopardy.

On May 21 and 22, 1998, Bailey was tried before a Christian County jury. The trial resulted in a not guilty verdict on Count II of the indictment and a guilty verdict on Count III of the indictment. On May 26, 1998, Bailey moved the trial court for a JNOV or in the alternative a new trial. On October 15, 1998, the trial court granted what it described as a JNOV, but it ordered a new trial. Specifically, the order stated, "A judgment n.o.v. is granted and a new trial ordered which will deal only with whether or not KRS 519.060 was violated as it regards how the money was handled and receipted going out of the box." From this order, the Commonwealth appealed.

On appeal, the Commonwealth argues that the Christian Circuit Court order appealed should be considered as a JNOV. The Commonwealth's argument throughout its briefs can be summarized in its initial brief to this Court on page four as follows:

Preliminary Matters: Reviewability and
Standard of Review

Kentucky law recognizes that a trial
judge's ruling on a motion for judgment
notwithstanding the verdict is a reviewable

issue by appellate courts. Commonwealth v. Brindley, 724 S.W.2d 214.

In addition, the standard of review to be applied is the same standard employed when an appellate court examines a claim that a motion for a directed verdict should have been granted. This is the Benham standard. Commonwealth v. Runion, Ky.App., 873 S.W.2d 583 (1993). This means an appellate court should look at a judge's ruling on a defense motion for JNOV, using the same standard as it would if it were examining a defense claim that a motion for directed verdict should have been granted. Id., at 585, quoting Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991). In other words, would it be clearly unreasonable for a jury to find guilt when viewing the totality of the evidence? Id.

_____ However, the Supreme Court in its opinion remanding this case determined that the circuit court's order granted a new trial and not a JNOV. Specifically, the Court held:

III. CHARACTERIZATION OF TRIAL COURT'S ORDER

We agree with the Court of Appeals that the trial court's order granted a new trial pursuant to RCr 10.02 rather than a JNOV pursuant to RCr 10.24. Although certain language in the order purports to grant JNOV, we find the language that orders a new trial dispositive as to the trial court's clear intent. A JNOV would constitute an acquittal of the charge that would leave nothing to be decided at a subsequent trial under the indictment. In other words, to grant both a JNOV and a new trial is a conflict in the use of the terms because a trial court could grant one or the other, but not both because "[a] motion for JNOV raises the single question: whether the evidence is sufficient to sustain a conviction. However, "RCr 10.02 permits a trial court to grant a new trial for any cause which prevented the defendant from having a fair trial, or if required in the interest of justice. Under RCr 10.02, therefore, absent a cause that does not appear from the record of the trial, "the trial judge's authority would not differ from that of this court in reviewing the case on appeal.... Stated otherwise, a motion for a new trial is generally directed towards alleged errors committed during the course of the trial, while a motion for JNOV is directed towards the sufficiency of the evidence. In the case sub judice, the trial court's order reflects the court's belief that certain evidence admitted at Appellee's trial affected the fairness of the proceedings, but the court clearly did not determine that the evidence presented was insufficient to support the jury's guilty verdict. We agree with the Court of Appeals that the trial court did not intend to acquit Appellee of the offense by granting a JNOV, but rather granted him a new trial at which a jury could again deliberate the evidence. [Footnotes and citations omitted].

Commonwealth v. Bailey, 71 S.W.3d at 75, 76.

The standard of review of a trial court's order vacating a conviction and granting a new trial is whether or not there was an abuse of discretion by the trial court. Id. A

trial judge has broad discretion in granting or denying a new trial, and a reviewing court will not interfere, except when that discretion has been clearly abused. The reviewing court will be particularly loath to interfere with the trial court's decision where discretion has been exercised in favor of a new trial. Commonwealth ex rel. City of Richmond v. Shelton, Ky., 248 S.W.2d 895 (1952). An abuse of discretion occurs when a trial judge's decision is arbitrary, unreasonable, unfair or unsupported by sound legal principles. Farmland Mutual Ins. Co. v. Johnson, Ky., 36 S.W.3d 368 (2000).

In the present case there is no evidence that the trial court abused its discretion. The Christian Circuit Court grounded its order on fairness issues for the appellee. The trial court indicated in its order that after presiding over the trial it was concerned that the jury's verdict had been influenced by irrelevant testimony concerning other office practices in the county clerk's office. As the reviewing Court, we shall not overturn the trial court's order to vacate and set for a new trial unless there is a clear abuse of discretion. The Christian Circuit Court Judge was in the best position to make the decision of whether to order a new trial or not. It is the trial court that is most familiar with the proceedings leading to such motions. While there remains a question of guilt for the trier of fact, it was clearly not an abuse of discretion of the trial court to vacate the jury's decision and order a new trial.

For the foregoing reasons, the order of the Christian Circuit Court granting a new trial is affirmed.

ALL CONCUR.

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