

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002206-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v.

APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 96-CR-00007

LINZIE DOUGLAS RICE

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND SCHRODER, JUDGES.

BUCKINGHAM, JUDGE: The Commonwealth of Kentucky appeals from an order of the Leslie Circuit Court vacating Linzie Douglas Rice's conviction and sentence for murder and two counts of first-degree wanton endangerment. The circuit court entered the order vacating the judgment pursuant to Rice's RCr¹ 11.42 motion. We affirm.

As a result of a jury trial that was held in the circuit court on July 22, 1997, Rice was convicted of murder and

¹ Kentucky Rules of Criminal Procedure.

two counts of first-degree wanton endangerment. On September 4, 1997, the circuit court entered a judgment wherein it sentenced Rice to life in prison for the offenses pursuant to the jury's recommendation. His conviction and sentence was affirmed by the Kentucky Supreme Court on direct appeal in an unpublished opinion. See Rice v. Commonwealth, 97-SC-000750-MR, rendered April 22, 1999.

The incident which led to Rice's conviction occurred on March 12, 1996. On that date Rice was living with his girlfriend, Tammy Roberts, and her four-year-old son, Corey Roberts, in Leslie County, Kentucky. They were living in a house that belonged to Rice's family.

Late that evening David McAllister, a friend of Rice, stopped at the residence to get a rolling paper to smoke a marijuana joint. Rice was asleep in bed when McAllister arrived, but Roberts was in the living room and had been watching a movie while Corey slept on a nearby love seat. Rice awoke, arose from the bed, and entered the living room.

Various accounts of exactly what happened next were told to the jury by Rice, Roberts, and McAllister.² Rice testified that he fired a warning shot in McAllister's direction after he ordered McAllister to leave but he refused to do so.

² Rice gave three statements to the police in addition to testifying at trial. Two of those statements were different from his trial testimony.

The single shot fired by Rice in McAllister's direction hit Corey who was asleep on the love seat. The bullet struck Corey on the back, right side of his head near his right ear and killed him instantly.

Although Rice did not intentionally kill Corey, he was prosecuted for murder under KRS³ 507.020(1)(b) which states that "[a] person is guilty of murder when: (b) [i]ncluding, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person."

After he was convicted and sentenced and the judgment was upheld on direct appeal by the Kentucky Supreme Court, Rice filed a motion to vacate the judgment pursuant to RCr 11.42. The motion was filed on February 18, 2000, and supplemented on September 8, 2000. A hearing was held on May 23, 2002. Thereafter, Rice renewed his RCr 11.42 motion on September 27, 2003. In an order entered following a hearing on October 1, 2003, the circuit court granted Rice's motion and vacated the judgment. This appeal by the Commonwealth followed.

The circuit court gave no explanation for its ruling in its written order. However, the video record provides an

³ Kentucky Revised Statutes.

indication of the court's findings and conclusions. The issue involved three jurors who sat on this case and who had also served as jurors in a murder trial approximately two months prior to the trial herein.

The earlier trial involved the prosecution of a man named Merrill Pelphrey. Pelphrey was charged with killing another person in Rice's residence at a time when Rice was not at home. During the Pelphrey trial, Rice's name was mentioned several times. Specifically, a Kentucky State Trooper who investigated the Pelphrey case testified at the Pelphrey trial that he had discovered cocaine, guns, scales, spoons, and syringes at the Rice residence during his investigation. The trooper also told the jury that there had been two drug raids on the Rice residence and that two murders had been committed there in the past. He further told the Pelphrey jury that he had opened a new drug investigation against Rice while investigating the Pelphrey case.

Three of the jurors in the Pelphrey trial also served as jurors in Rice's trial. During the jury selection process in Rice's trial, neither the court nor the attorneys inquired concerning whether any of the jurors had been jurors in the Pelphrey case. However, Rice's attorney asked the jurors whether any of them had ever served as a juror on a criminal case in the past. Although one of the jurors responded that she

had served as a juror in a criminal case three or four years earlier, none of the three jurors who had served as jurors in the Pelphrey case responded in any manner.

After the prosecuting attorney and Rice's attorney completed their questioning of the prospective jurors, the court had the clerk call additional jurors. Several of the additional jurors were excused for various reasons, including two, Juanadean McKinney and Bobby Barrett, who approached the bench and stated to the court that they had served as jurors in the Pelphrey trial and had formed or expressed an opinion about this case. Those two jurors were excused, but neither the court nor the attorneys further inquired of the remaining prospective jurors as to whether any of them had served in the Pelphrey trial. At some point following this trial, Rice learned that three of the jurors had served as jurors in the Pelphrey case despite their failure to respond to Rice's attorney's question as to whether any juror had served in a criminal trial in the past.

As it relates to this issue, Rice's RCr 11.42 motion asserted two separate grounds. First, it alleged that the jurors' failure to disclose that they had participated as jurors in the prior trial was implied bias and violated his right to a fair and impartial jury. Second, it alleged that he received ineffective assistance of counsel due to his counsel's failure

to determine that the three jurors had served in the prior case. It is unclear whether the circuit court based its ruling on the first or second argument.⁴ Regardless, we agree that the court properly granted Rice's motion and vacated his conviction and sentence.

In support of its argument in this appeal, the Commonwealth contends that Rice's attorney did not render ineffective assistance in connection with the jury selection process.⁵ Specifically, the Commonwealth notes that Rice's attorney conducted a thorough questioning of the prospective jurors, including inquiries as to whether any of them had previously served as a juror on a criminal case and whether there was any matter that would prevent any of them from judging the case fairly. Furthermore, the Commonwealth notes that the circuit court did not allow any additional inquiry by the attorneys regarding the issue after the two jurors came forward near the end of the selection process and that the court did not make further inquiry of its own. The Commonwealth states that

⁴ At the first hearing on Rice's motion, the court stated that counsel was "somewhat ineffective in his voir dire." He also stated that "there should have been a more extensive voir dire by defense counsel as to the question of publicity." However, the court also made reference to counsel's "trial strategy." He concluded by stating that the "likely result on guilt or innocence would not have been different." Nonetheless, in the second hearing on Rice's motion, the court stated that "[t]here should have been more work done on selecting that jury." The court made no specific statement concerning whether its decision was based on ineffective assistance of counsel or on violation of the right to a fair and impartial jury.

⁵ At the time of the hearing on Rice's RCr 11.42 motion, his trial counsel was deceased. Thus, there was no testimony from him in the record.

Rice's attorney had no way of knowing that the three jurors had previously served as jurors in the Pelphrey trial. The Commonwealth also contends that even if Rice's attorney rendered ineffective assistance in connection with the jury selection process, there was no prejudice that warranted relief from the conviction and sentence.

On the other hand, Rice contends that his attorney rendered ineffective assistance by not specifically questioning the prospective jurors concerning whether any of them had served as jurors in the Pelphrey case. Rice maintains that his attorney should have at least requested the judge to ask the jurors additional questions after gaining information near the end of the selection process that two jurors had served on a previous case that might have some relation to his case.⁶ Rice states that his "right to trial by impartial jury was denied when his trial attorney failed to conduct a reasonable voir dire that would have eliminated those jurors who had previously heard unfavorable testimony against appellee." He asserts that his attorney should have followed up "on a clear red flag warning about the jury pool." Finally, he contends that had counsel not rendered ineffective assistance in this regard, there was a

⁶ There is an indication in the record that Rice's attorney was aware of the Pelphrey trial and Rice's connection to it.

reasonable probability that the result in his trial or sentence would have been different.

We are hesitant to conclude that Rice's attorney rendered ineffective assistance during the jury selection process. His attorney asked the jurors a number of questions to determine whether there was any reason that any of them could not serve as a fair and impartial juror. He specifically asked whether any of the jurors had served on a criminal case in the past. Despite the fact that three jurors had served in the Pelphrey trial, none of the three responded so as to alert Rice's attorney of this fact.

In Moore v. Commonwealth, Ky., 983 S.W.2d 479 (1998), the Kentucky Supreme Court faced a similar, yet somewhat different, argument from a defendant who was convicted of murder and sentenced to death. The appellant in that case alleged that his trial counsel rendered ineffective assistance in the voir dire proceedings by failing to ask a list of several questions he believed counsel should have asked the prospective jurors. In rejecting the argument, the court stated:

Although Appellant would like it to be so, counsel could not possibly have asked every conceivable question which might reveal a potential bias of venire persons. The record reflects that counsel asked several thought-provoking questions directed at discovering any bias or inability to fairly judge the evidence presented. Counsel's

performance was well within the range of acceptable professional judgment.

Id. at 487. It is entirely conceivable that Rice's attorney asked whether any of the jurors had ever served in a criminal trial in the past without mentioning the Pelphrey trial as a matter of trial strategy so as not to inject that case into this one any more than was necessary. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Regardless of whether Rice's attorney rendered ineffective assistance of counsel in connection with the jury selection process, the circuit court correctly vacated the conviction and sentence. The Sixth Amendment to the U.S. Constitution gives an accused person in a criminal prosecution the right to a trial by an impartial jury. Likewise, Section 11 of the Kentucky Constitution gives an accused in a criminal prosecution the right to a trial by an impartial jury. "The right to an unbiased decision by an impartial jury in a criminal trial is a basic principle of due process." Hodge v. Commonwealth, Ky., 68 S.W.3d 338, 342 (2001).

We conclude that Rice was denied his constitutional right to an impartial jury. The three jurors who served in both the Pelphrey case and in Rice's case heard evidence extremely unfavorable to Rice in the Pelphrey trial that was not before them in Rice's trial and was not relevant to it. Specifically,

in the Pelphrey trial the jurors heard about another murder in the Rice residence as well as the presence of a considerable amount of cocaine, numerous guns, scales, spoons, and syringes.

In an attempt to defeat the argument of a violation of the right to an impartial jury, the Commonwealth cites Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997). The Commonwealth refers to the portion of the Bowling case where the Kentucky Supreme Court stated that "[b]ias is not automatically implied even where a juror has heard evidence at a previous trial of the same case." Id. at 299. Citing other authority, the Commonwealth states that there is also no implied bias when a juror has heard a witness speaking about a case prior to trial and when a juror is merely acquainted with a criminal defendant.

Regardless, the tainting of the three jurors in this case is clear. They had previously heard evidence that another murder had taken place in the Rice residence, that Rice was the subject of a drug investigation by the Kentucky State Police, and that a large bag of cocaine and drug paraphernalia indicating drug dealing had been found in his residence. We believe the implied bias was clear and that Rice was denied his right to an impartial jury. See Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 717 (1991), for discussion of implied bias.

Numerous cases have dealt with the situation where a prospective juror gave false information in the voir dire

proceeding. In Paenitz v. Commonwealth, Ky., 820 S.W.2d 480 (1991), the Kentucky Supreme Court reversed a first-degree rape conviction where a juror failed to disclose a pretrial conversation she had with a doctor who testified at trial as the examining doctor of the victim. The court stated that “[i]t was a flagrant abuse of juror responsibility for this juror to have failed to disclose the discussion during voir dire examination.” Id. at 481. Further, the court held that the denial of the right to impartial jury is so basic that it can never be treated as harmless error. Id. at 482, quoting Gray v. Mississippi, 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1977).

In Anderson v. Commonwealth, Ky., 864 S.W.2d 909 (1993), the Kentucky Supreme Court reversed a first-degree rape conviction because one of the jurors failed to disclose that he was related to the complaining witness’s boyfriend and lived in the same area of the county. The court noted that the information “may have justified a challenge for cause in and of itself on grounds of implied bias, and which, at the least, if truthfully given, would have enabled the appellants to exercise their peremptory challenges intelligently.” Id. at 911-12. Quoting from Sizemore v. Commonwealth, Ky., 306 S.W.2d 832 (1957), the Anderson court also stated as follows:

The right of challenge includes the incidental right that the information elicited on the voir dire examination shall

be true; the right to challenge implies its fair exercise, and, if a party is misled by erroneous information, the right of rejection is impaired; a verdict is illegal when a peremptory challenge is not exercised by reason of false information. [Emphasis added.]

864 S.W.2d at 912.

In the Sizemore case the court reversed a conviction in a homicide case where two jurors gave negative responses to questions in the jury selection process as to whether they had ever been "interested" in any other homicide prosecution. 306 S.W.2d at 834. Although the court stated that neither of the jurors had acted in bad faith, it nonetheless reversed the conviction on the ground that the defendant's attorney was deprived of the opportunity to exercise peremptory challenges. Id.

In Johnson v. Commonwealth, 311 Ky. 182, 223 S.W.2d 741 (1949), the court reversed a manslaughter conviction where the defendant was deprived of his right to make peremptory challenges based on false answers given by jurors during voir dire. See also Olympic Realty Co. v. Kamer, 283 Ky. 432, 141 S.W.2d 293, 297 (1940). Finally, in Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969 (1933), a judgment was vacated in a civil automobile accident case where four jurors failed to respond affirmatively when asked if any of them had ever been involved

in an automobile collision. The court reasoned that "[t]he information which was sought to be elicited by the question addressed to the jury panel was pertinent to enable the plaintiffs to intelligently exercise their challenges, a valuable right. If the truth had been learned, they might have challenged some of these jurors peremptorily." 57 S.W.2d at 984.

"To obtain a new trial because of juror mendacity, 'a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause.'" Adkins v. Commonwealth, Ky., 96 S.W.3d 779, 796 (2003), quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). There is no question that three jurors who served in this case failed to honestly answer a material question in the jury selection process concerning whether they had previously served as a juror in a criminal trial. Had they properly responded to the question, Rice's attorney could have learned that the three jurors had served in the Pelphrey trial. Due to the damaging testimony relative to Rice in that trial, there would have been a valid basis for challenging the jurors for cause. Furthermore, due to the failure of the jurors to affirmatively respond to the question, Rice's attorney was

without relevant information upon which he could exercise peremptory challenges in the event the court declined to excuse the jurors for cause. In short, the circuit court correctly determined that Rice is entitled to a new trial.

The order of the Leslie Circuit Court granting Rice's RCr 11.42 motion is affirmed.

ALL CONCUR.

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