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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001720-MR

JOHN WEST — APPELLANT

v.

APPEAL FROM WAYNE CIRCUIT COURT
HONORABLE WILLIAM T. CAIN, JUDGE
INDICTMENT NO. 06-CR-00080

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: On April 18, 2006, John West was indicted by the Wayne County Grand Jury on three counts, as follows: count one, possession of a handgun by a convicted felon; count two, receiving stolen property (a firearm); and

[1] Senior Judge Michael L. Henry, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

count three, being a persistent felony offender (PFO) in the first-degree. On June 7, 2007, West was convicted by a jury of one of those three counts, namely, possession of a handgun by a convicted felon. He was sentenced to ten years' imprisonment.

West now brings three issues to our attention on appeal: first, whether the trial court erred in failing to strike three prospective jurors for cause, second, whether he was entitled to a mistrial when the Commonwealth introduced testimony that he was on probation at the time of the alleged offense, and third, whether the trial court erred by failing to allow further cross-examination of the confidential informant's drug use. After a careful review of the entire record, we find no error and affirm the judgment and sentence of conviction.

Rusty Bertram provided information to the Monticello Police Department as a confidential informant (CI). The police paid the CI $100.00 each for two controlled transactions in which he bought first a handgun and then a .22 caliber rifle from West. These transactions resulted in the handgun possession and receiving stolen property charges against West.

At trial the jury convicted West of possession of a handgun by a convicted felon but acquitted him of receiving a stolen firearm. After the guilt phase of the trial the Commonwealth offered to West and his counsel that if West would plead guilty to an amended charge of PFO second-degree, the Commonwealth would recommend a total sentence of ten years' imprisonment on

the enhanced handgun possession conviction. West accepted the offer and was sentenced in accordance with the agreement. This appeal followed.

West first argues that the trial court committed reversible error by denying his motions to strike three jurors for cause. West later used peremptory challenges to excuse these three jurors, but ultimately used all eight of his peremptory challenges,[2] thereby precluding him from excusing other jurors who ultimately sat on the jury and whom states he would have challenged. West cites *Grooms v. Commonwealth*, 756 S.W.2d 131, 134-135 (Ky. 1988), for the proposition that such circumstances constitute reversible error.

In *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007), the Kentucky Supreme Court held that prejudicial error occurs when a trial court erroneously fails to strike a juror for cause and a defendant is forced to use a peremptory challenge to remove that juror, overruling *Morgan v. Commonwealth,* 189 S.W.3d 99 (Ky. 2006). In so holding, the *Shane* court precluded the need for inquiry into whether or not the defendant used all of his peremptory challenges and whether the defendant would have actually used additional peremptories had they been available. Thus, in this case, we must determine only whether the trial court erred in denying West's motions to strike any of these three jurors for cause.

The standard of review of the failure to strike a juror for cause was concisely delineated in *Caldwell v. Commonwealth*, 634 S.W.2d 405 (Ky. 1982):

[2] RCr 9.40 entitles each party in a criminal case to eight peremptory challenges; however, the rule provides that if the trial court desires one or two alternate jurors to be seated, the number of peremptory challenges is increased by one on each side.

> The determination of whether to exclude a juror for cause lies within the sound discretion of the trial court. Unless the action of the trial court is clearly erroneous, we will not reverse it. Bias and preconceived ideas must be proven by the party alleging it.

Id. at 407 (internal citations omitted).

Under Kentucky Rules of Criminal Procedure (RCr) 9.36(1), a juror shall be excused for cause "[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence . . . ." "The test is whether, after having heard all the evidence, the prospective juror can conform his views to the requirements of the law and render a fair and impartial verdict." *Mabe v. Commonwealth*, 884 S.W.2d 668, 670 (Ky. 1994). However, deference must be given to the trial judge, who sees and hears the juror, in reviewing determinations of impropriety for cause. *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 854-55, 83 L.Ed.2d 841 (1985).

During *voir dire*, both parties conducted extensive questioning of the jury panel. Particular attention was paid to the three jurors that form the basis of this appeal: Mr. Worley, Mr. Jones, and Mr. Ramsey. West's assignments of error on appeal fall into two general categories: the witnesses' status as victims of prior thefts (Worley, Jones) and the witnesses' ties to law enforcement personnel (Worley, Ramsey).

West's first objection to juror Worley stems from the fact that Worley's nephew worked with UNITE, an Eastern Kentucky drug task force. Worley was aware that CIs were used by his nephew's organization with regards to

suspected drug traffickers. Worley stated in *voir dire* that he did not favor the use of CIs because he believes CIs should not get "a break" on their charges by virtue of their assistance to police. This suggests, if anything, that Worley would be skeptical of the Commonwealth's key witness. Worley went on to say that he would not give a police officer's testimony any extra weight or credit simply because the testimony was given by a police officer.

West's second objection to Worley derives from the fact that Worley admitted to being the victim of an unrelated theft. West argues that this means that Worley "identified with victims of such crimes" and would be biased against theft defendants. However, this argument is misplaced. Although the jurors heard testimony regarding the theft of a handgun (the same gun that was later sold to the CI), West was never charged with this crime. Therefore, West's claim that he faced an implied bias from juror Worley is without merit. Even assuming Worley was a victim of the same type of crime with which West was charged, a victim of a separate similar crime is not automatically excluded from the jury panel. *See, e.g., Butts v. Commonwealth*, 953 S.W.2d 943, 945 (Ky. 1997).

Absent a greater showing of individual prejudice, both of West's objections to Worley must fail. The trial judge is vested with broad discretion in determining juror partiality or bias following a challenge for cause. *See, e.g., Wood v. Commonwealth*, 178 S.W.3d 500, 515-516 (Ky. 2005). Under this set of facts, West has failed to demonstrate that the trial court abused its discretion.

West also moved to strike juror Jones based on Jones' responses during *voir dire*. Jones informed the court that his car had been broken into two days prior to trial. Jones stated that he was hoping to find out who had done it and that he wished a CI would work with police on his behalf.

Once again, West was not charged with burglary or theft. Therefore, the suggestion that juror Jones would take out his anger on West is tenuous at best. Jones never indicated that he had an opinion concerning West's case or that he would be anything but impartial. Giving due deference to the trial court, who heard Jones' statements and viewed his demeanor in response to questions asked by counsel, we find no indication of an abuse of discretion.

West's basis for moving to strike juror Ramsey for cause was that Ramsey served two years in the military, during which time he worked with the military police. He indicated that the military police used CIs on occasion, but stressed that the military system was different from the civilian system. Ramsey stated that he never had to vouch for a CI's credibility and that he would not be partial during West's trial.

Kentucky courts have consistently held that law enforcement personnel are not automatically excluded from the jury panel for cause. *See, e.g., Young v. Commonwealth*, 50 S.W.3d 148, 163 (Ky. 2001). If present law enforcement personnel are fit to sit on a jury absent a showing of individual bias, it follows that veterans who worked with the military police must demonstrate

individual biases to be excluded from the venire. Ramsey never indicated such a bias, and so his inclusion on the jury panel was not an abuse of discretion.

In his appellate brief, West requests appellate review of the inclusion of an additional juror (determined to be Mr. O. Gossage) on the jury panel. West concedes that this matter was not properly preserved as his counsel never challenged juror Gossage for cause. Nevertheless, he asks this Court to review inclusion of Gossage in the venire as palpable error under RCr 10.26.

Under RCr 9.36(3), all challenges to prospective jurors "must be made before the jury is sworn." Furthermore, "[c]ounsel's decisions during *voir dire* are generally considered to be matters of trial strategy." *Hodge v. Commonwealth*, 17 S.W.3d 824, 837 (Ky. 2000) (citation omitted). Accordingly, it would take an extraordinary set of circumstances to constitute the "manifest injustice" required for reversal under RCr 10.26.

West's basis for challenging juror Gossage on appeal is that Gossage worked and had hunted with the CI's father. An acquaintance with the father of a witness is not the type of "close relationship" that might normally exclude a juror from service under *Ward v. Commonwealth*, 695 S.W.2d 404, 407 (Ky. 1985). The trial court was well within its discretion to retain juror Gossage. Thus, the failure of the trial court to excuse juror Gossage *sua sponte* does not constitute palpable error.[3]

[3] Gossage ultimately did not serve on the jury panel, as both West and the Commonwealth used a peremptory strike to excuse him.

West next claims that the trial court erred by failing to grant a mistrial following a statement made by the Commonwealth's key witness: the CI who purchased the guns from West. Because the indictments against the defendant concerned two separate transactions, West was entitled to an individual trial for each offense. Instead, West, against the advice of his counsel, insisted upon consolidation of the offenses for trial. During pretrial proceedings in which his counsel had requested severance of the offenses for trial, West was informed by both his own attorneys and the trial court that consolidation would allow the jury to know that he was a convicted felon. West nevertheless opted to consolidate the offenses for trial.

Prior to trial, West agreed to stipulate to the jury that he was a convicted felon.[4] The trial court then instructed the jury regarding this fact. During questioning by the Commonwealth, the CI stated that arranging the gun buys with West had been difficult because "probation and parole were looking for (West)." Defense counsel immediately objected and approached the bench. Counsel stated that because of the prior stipulation, further discussions concerning West's parole status were irrelevant. The trial judge then immediately admonished the jury to disregard the CI's last statement and not consider it for any purpose.

West argues on appeal that upon hearing the CI's statement, jurors would have drawn the inference that West was "hiding from officials even as he

[4] Under count one, possession of a handgun by a convicted felon, the Commonwealth was required to prove that West was a convicted felon. West stipulated that he was a convicted felon so that the Commonwealth would not have to discuss West's prior felony convictions before the jury, thereby eliminating a source of potential prejudice.

was committing further crimes," and that only a mistrial can correct such error. We disagree.

In *Bray v. Commonwealth*, 177 S.W.3d 741 (Ky. 2005), the Kentucky Supreme Court stated the standard of review for a decision on mistrial:

> Whether to grant a mistrial is within the sound discretion of the trial court, and such a ruling will not be disturbed absent an abuse of that discretion. A mistrial is an extreme remedy and should be resorted to only when there appears in the record a manifest necessity for such an action or an urgent or real necessity. The error 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 . . . .

Id. at 752 (internal citations and quotations omitted).

The harmful effect of telling the jury that West was on probation was that the jury was reminded of West's conviction for a prior offense. But the jury already had this information by virtue of the consolidation of the offenses and the stipulation of West's status as a convicted felon. What minimal prejudice there may have been was eliminated when the trial judge immediately admonished the jury to disregard the CI's last statement. A jury is presumed to follow an admonition to disregard evidence; thus, the admonition cures any error. *See Mills v. Commonwealth*, 996 S.W.2d 473, 485 (Ky. 1999).

In *Graves v. Commonwealth*, 17 S.W.3d 858 (Ky. 2000), a witness similarly made reference to the defendant's prior criminal conviction by stating, "I knew he wasn't supposed to have a gun." *Id.* at 865. The Supreme Court held that

an evidentiary error of that type was curable by an admonition. *Id.* A mistrial was unwarranted. We find no error.

West's final contention is that the trial court erred in sustaining the Commonwealth's objection to a line of questioning involving the CI's substance abuse. Specifically, West argues on appeal that the questioning would have addressed whether the CI was able to accurately observe and recall the weapons transactions to which he testified.

An essential aspect of the Sixth Amendment Confrontation Clause is the right to cross-examine witnesses. *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934, 937 (1965). "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674, 683 (1986) (emphasis in original). It is well established that the trial court may place restrictions upon the scope and subject of a defendant's cross-examination of the Commonwealth's witnesses. *Davenport v. Commonwealth*, 177 S.W.3d 763, 767-768 (Ky. 2005). "So long as a reasonably complete picture of the witness' veracity, bias and motivation is developed, the judge enjoys power and discretion to set appropriate boundaries." *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky. 1997), *quoting U.S. v. Boylan,* 898 F.2d 230, 254 (1st Cir.1990).

Contrary to the argument West makes on appeal, a review of the trial record shows that defense counsel never sought to determine whether the CI's substance abuse impaired his perception or memory. Instead, counsel asked the CI about pending charges for trafficking, with what frequency he was drug tested, and whether he ever had a substance abuse problem.[5] Counsel sought to demonstrate that the CI assisted the police with West to reduce his own criminal liability, and that he therefore had a reason to be untruthful on the witness stand. Character, not perception, was the focus of this cross-examination, and the trial court did not abuse its discretion in limiting such questioning. Again, we find no error.

The judgment of the Wayne Circuit Court is affirmed.

VANMETER, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING: With reluctance, I concur with the majority opinion.

In light of our Supreme Court's recent decision in *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007), the failure of the trial court to strike these jurors for cause strays dangerously close to an abuse of discretion.

I encourage all trial judges to be more liberal in their usage of strikes for cause of jurors. Our goal is to afford the defendant a fair and impartial jury without the appearance of bias.

[5] The latter issue being the specific line of questioning to which the Commonwealth objected.

However, after review of the totality of the evidence against this defendant, I vote with the majority.

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