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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000146-MR

WILLIAM WILSON WARD

APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2008-SC-0045-D

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 02-CR-00246

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,¹ SENIOR JUDGE.

STUMBO, JUDGE: William Wilson Ward (hereinafter Appellant) appeals from a final judgment and sentence of the Pulaski Circuit Court convicting him of flagrant nonsupport and sentencing him to three-years' imprisonment. This case was

¹ Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

remanded to this Court from the Kentucky Supreme Court in order for us to reconsider it in light of *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007). In *Shane*, the Kentucky Supreme Court held that the use of peremptory strikes is a substantial right; therefore, when a defendant is forced to use one to remove a juror from the panel when that juror should have been removed for cause, it is a violation of that substantial right. *Id.* at 341.

Here, Appellant argues that he was denied a fair trial when the trial judge failed to strike certain jurors for cause. We find that one of the jurors should have been removed for cause due to his biased feelings toward the crime with which Appellant was charged. As such, we reverse and remand to the Pulaski Circuit Court for a new trial.

Appellant was indicted on flagrant nonsupport for having over nine thousand dollars in child support arrears. During *voir dire*, Appellant's attorney asked a number of questions regarding the jurors' feelings toward paying child support, a defendant's right not to testify, and a defendant's presumption of innocence. After *voir dire*, Appellant's attorney moved to strike six jurors for cause. The trial judge denied the motion. Subsequently, Appellant used peremptory strikes on all but two. Upon review, we find that of the six jurors Appellant sought to remove for cause, all but one were qualified to sit on the jury panel.

As mentioned above, during *voir dire*, counsel for Appellant asked the potential jury members questions about child support. One potential member,

Juror “A,” made it quite clear on multiple occasions that he had a problem with someone not paying child support.

At one point, Juror “A” stated that he had two brothers who were dealing with child support issues. Of them, he stated that “they wouldn’t take care of their kids so they got what they deserved.”

Later, another potential juror member indicated that he was raised to support a child no matter what and that there was no excuse not to do so. Counsel for Appellant then asked the entire panel if anyone agreed with that statement and Juror “A” indicated that he did.

Then, Appellant’s trial attorney indicated to the panel that Appellant might not testify on his own behalf during trial. He asked the panel if anyone would hold this against him. Juror “A” had a problem with this and asked, “Why would you not stick up for yourself?” Counsel then asked the panel whether Appellant’s not testifying would weigh on their minds. Juror “A” stated that it could and that “[he] wouldn’t want to sit up there and explain why [he] wasn’t taking care of the kids. It’s the kind of person I am, if you have it, you take care of it.”

The trial judge then questioned the juror, asking him specifically whether he could put aside his biases and follow the law and by asking the jury panel as a whole if they could follow the law as instructed. Juror “A” stated that he would listen to the evidence. However, Juror “A” later stated that his beliefs about supporting a child were ones he had held for a long time.

“When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified.” RCr 9.36(1). Additionally:

[e]ven 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. It is always vital to the defendant in a criminal prosecution that doubt of unfairness be resolved in his favor.

Randolph v. Commonwealth, 716 S.W.2d 253, 255 (Ky. 1986), *overruled on other grounds by Shannon v. Commonwealth*, 767 S.W.2d 548 (Ky. 1988). “A trial court’s decision whether a juror possessed ‘this mental attitude of appropriate indifference’ must be reviewed in the totality of circumstances. It is not limited to the juror’s response to a ‘magic question.’” *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1991).

Here, Juror “A” was adamant in his feelings about supporting one’s children and on multiple occasions voiced his opinion on the issue. Even after the trial judge specifically asked him if he could put aside his feelings and follow the law, he continued to state that he felt a person should take care of their children no matter what. “The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. . . .” *Montgomery* at 716 (quoting *Irvin v. Dowd*, 366 U.S. 717, 728, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751, 759 (1961)).

It is clear that Juror “A” had a clear bias against the crime with which Appellant was charged and should have been removed for cause. Because Appellant had to use a peremptory strike to remove Juror “A,” his right to have a fair and unbiased jury was violated.

While a party can reasonably expect to be given all the rights granted to him by state law or rule, he has a certain right to a trial that is fair in its entirety. This Court has granted the use of peremptory strikes to a party and made it mandatory for trial courts to excuse biased jurors for cause when a reasonable person would view the juror as biased. Not removing a biased juror from the venire, and thereby forcing a defendant to forfeit a peremptory strike, makes the defendant take on the duty of the court and prevents him from getting the jury he had a right to choose. This violates a substantial right accorded great weight in our legal history, and can never be harmless error.

Shane at 343.

Appellant made other arguments on appeal, but these were addressed by the previous panel of this Court. For the purposes of this opinion we were only concerned with the issues raised by the remand of this case from the Kentucky Supreme Court.

Accordingly, we reverse Appellant’s conviction and remand to the lower court for a new trial.

ALL CONCUR.

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