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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002607-MR

GINGER NAVE — APPELLANT

v.

APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE FRANK ALLEN FLETCHER, JUDGE
ACTION NO. 07-CR-00052

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

THOMPSON, JUDGE: Ginger Nave appeals her conviction in the Breathitt Circuit Court for possession of a controlled substance and tampering with physical evidence. For the reasons stated herein, we vacate the judgment.

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On the morning of May 27, 2007, Nave drove into Jackson, Kentucky, from Wichita, Kansas, in search of her boyfriend, Gilbert. Unsure of Gilbert's location, Nave attempted to locate Gilbert's friend, Chris Mullins, in the Brewer's Trailer Park, where Gilbert said his friend resided. After arriving at the trailer park, Nave began approaching residences to ascertain Chris's address. As Nave searched, an anonymous tipster informed the Jackson Police Department that a woman was in the trailer park to sell drugs. The tipster further stated that the woman had three dogs in a car with a Kansas license plate.

Patty Barnett heard a woman yelling outside of her Brewer's Trailer Park residence. After walking to her door, she observed a disoriented woman on her door step and stepped outside to offer her assistance. As Barnett assisted Nave on the doorstep, Jackson Police Officer John Hollon responding to the anonymous tip, arrived in the trailer park and observed the suspect vehicle parked in the middle of the road. He noticed a "loud and obnoxious" woman speaking to another woman on a porch.

As Officer Hollon approached, Officer Elvis Noble arrived and accompanied him to the women. Nave was asked to walk to her vehicle and was informed about the anonymous tip. Nave responded that she could not believe that someone would attempt to "set her up." Nave then consented to the search of her vehicle. Upon searching the vehicle, police discovered a purse containing over $3,000 in cash. Police asked her about the purpose of the money. Nave's response was inconsistent regarding her planned use of the money.

After the search of the vehicle, police observed Nave reach into her clothing, obtain a package of cigarettes, drop the package, and kicked it over an embankment beside the road. Nave allegedly told the police that they should not touch the package because it contained methamphetamine. Subsequently, police inspected the package and discovered a "crystal-like substance," which was later identified as methamphetamine. Nave was then arrested.

Nave was indicted for trafficking in a controlled substance in the first degree; tampering with physical evidence; operating a motor vehicle without a license; failure to wear a seatbelt; and failure to maintain car insurance.

During Officer Noble's trial testimony, a recess was called during which Juror Boyd received permission to approach the bench and informed the court that she believed that her father-in-law, who resided with her and her husband, had called the police on May 27, 2007, regarding a woman who approached the gate of their residence. On that date, her father-in-law informed her that a loud woman approached the gate and appeared to be intoxicated. Juror Boyd was asleep at the time of her father-in-law's encounter with the woman. She explained that she and her husband were residents of Brewer's Trailer Park. Although her father-in-law did not tell her that he called the police, she believed that he did and that Nave was the woman who appeared at her residence. Juror Boyd further informed the court that she and her husband owned an impoundment business where a vehicle owned by Chris Mullins was impounded when Nave approached the gate on the morning in question. After Juror Boyd stated that she

could render a fair and impartial verdict based on the evidence, the trial court denied Nave's motion for a mistrial.

At the conclusion of the trial, Nave was found guilty of possession of a controlled substance in the first degree, tampering with physical evidence, and operating a vehicle without a license. After the jury repeatedly failed to reach a sentence, the trial court, after reviewing the presentence report and holding a hearing, sentenced Nave to five-years' imprisonment on each of her two felony convictions. These sentences were ordered to be consecutively served for a total of ten-years' imprisonment. The trial court sentenced her to a ninety-day sentence for the operating without a license conviction. This sentence was ordered to run consecutive to Nave's felony sentence. This appeal followed.

Nave first contends that the trial court erred by denying her motion to suppress the evidence obtained by police pursuant to an illegal stop. She argues that the anonymous tip did not provide reasonable suspicion to justify her detention and search and that the anonymous tip lacked the necessary "indicia of reliability" to permit police to detain her. Because Nave consented to the search of her vehicle and discarded the contraband, we disagree.

The Fourth Amendment of the United States Constitution and Section Ten of the Kentucky Constitution protect citizens from unwarranted and unreasonable searches and seizures by law enforcement. *Commonwealth v. Hatcher*, 199 S.W.3d 124, 126 (Ky. 2006). Notwithstanding these protections, every interaction between a police officer and a private citizen does not rise to the

level of constitutional significance. *Strange v. Commonwealth*, 269 S.W.3d 847, 850 (Ky. 2008). A police officer may approach anyone in a public area and ask a few general questions without implicating a private citizen's constitutional rights. *Fletcher v. Commonwealth*, 182 S.W.3d 556, 559 (Ky.App. 2005); *Commonwealth v. Banks*, 68 S.W.3d 347, 350 (Ky. 2001). Only if a reasonable person would have believed that she was not free to leave will constitutional scrutiny be triggered. *Henson v. Commonwealth*, 245 S.W.3d 745, 747-48 (Ky. 2008).

While the anonymous tip prompted the investigation, police were free to approach Nave and ask her routine questions. In response, Nave gave police consent to search her vehicle which led to the permissible discovery of the $3,000 in her car. *Richardson v. Commonwealth*, 975 S.W.2d 932, 933 (Ky.App. 1998). Nave was then observed removing a package from her clothing and discarding it over an embankment which was permissibly retrieved and searched by police. *LaFollette v. Commonwealth*, 915 S.W.2d 747, 749 (Ky. 1996) (defendants have no reasonable expectation of privacy in discarded contraband). Accordingly, the trial court's denial of her motion to suppress was proper.

The second point of error alleged by Nave is more troublesome. Nave contends that the trial court erred when it failed to declare a mistrial after Juror Boyd informed the court that she believed her father-in-law to be the anonymous caller.

Our appellate review of the trial court's decision is limited by the abuse of discretion standard. *Martin v. Commonwealth*, 170 S.W.3d 374, 381 (Ky.

2005). The practical implications of granting a mistrial are that because the jury has been sworn and evidence presented, a mistrial often results in judicial delay and increased costs to the public and the parties. *Gould v. Charlton Co., Inc.*, 929 S.W.2d 734 (Ky. 1996). It has been frequently recited that the "occurrence complained of 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 738.

Yet, it is the cornerstone of our jury system that a party's case be heard by a fair and impartial jury: It is a right derived from the Sixth Amendment to the United States Constitution and guaranteed by Section 11 of the Kentucky Constitution. *Polk v. Commonwealth*, 574 S.W.2d 335, 337 (Ky.App. 1978). "[A] party charged with a criminal offense is entitled to a trial by a fair and impartial jury composed of members who are disinterested and free from bias and prejudice, actual or implied or reasonably inferred." *Tayloe v. Commonwealth*, 335 S.W.2d 556, 558 (Ky. 1960). Because of its importance to not only the individual litigants but also society, it is a right the courts must zealously protect. Thus, there is no magic question the answer to which can determine a juror's ability to render a verdict solely in conformity with the evidence. *Montgomery v. Commonwealth*, 819 S.W.2d 715 (Ky. 1991) (held applicable to motions for mistrials in *Gould*, 929 S.W.2d at 738-741). When ascertaining a juror's state of mind in a particular criminal case, the court must analyze the unique facts of each case and utilize its

experience and common sense to balance the interests of the public and those of the accused. *Id*.

Despite the strong admonitions against granting a mistrial and the discretion given the trial court, the appellate courts have recognized that a juror's knowledge of the case or relationship to pivotal parties in the case may be so significant that prejudice cannot be avoided. Although stated in the context of a challenge for cause to a juror, the principle stated in *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985), is no less viable in the present context:

> Irrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has such a close relationship, be it familial, financial or situational, with of the parties counsel, victims, or witnesses.

Id. at 407, (quoting *Commonwealth v. Stamm*, 286 Pa. Super. 409, 429 A.2d 4, 7 (1981)). The Supreme Court has consistently cautioned that even when a juror disclaims bias, the circumstances may be such that their connection to a case may subconsciously affect their decision in the case. *See e.g*., *Marsch v. Commonwealth*, 743 S.W.2d 830 (Ky. 1987); *Pennington v. Commonwealth*, 316 S.W.2d 221 (Ky. 1958). Recently, in *King v. Commonwealth*, 276 S.W.3d 270 (Ky. 2009), our Supreme Court reinforced its goal of preserving the integrity of our jury system when it held that the trial court erred when it did not infer juror bias where the juror and a witness were personal friends.

We are cognizant of the heavy case loads borne by our trial courts and the expenses incurred by society as a result of jury trials. Declaring a mistrial is

not to be done without reverence and caution and only when there is no alternative that will afford the defendant the fair and impartial jury that the law requires. However, the right to a fair and impartial jury is a basic right to which a criminal defendant is entitled. Despite our deference to the trial court's exercise of discretion, in this case, we cannot say that the defendant was given that to which she was entitled and, therefore, we vacate her conviction.

This case presents an unusual situation where prior to the commencement of the trial it was unknown to the court, the attorneys, the defendant, or Juror Boyd, that Juror Boyd not only had a close relationship to the anonymous tipster but that Nave had approached Juror Boyd's residence on the date in question in an agitated state searching for the owner of a car impounded by the Boyds. Thus, it was the disturbance at Juror Boyd's residence and her father-in-law's call to the police that precipitated Nave's arrest. Further, the statement by Juror Boyd's father-in-law that Nave was selling drugs was relevant to Nave's conviction for possession of drugs. Juror Boyd's situational relationship to Nave was sufficiently close so that bias should have been reasonably inferred. We conclude that the trial court erred when it did not declare a mistrial.

We would be remiss if we did not comment on the jury procedure utilized in this case. The court elected not to seat an alternate juror. When no alternate juror is seated, the court is left no alternative but to declare a mistrial when juror bias is discovered absent the parties' agreement to proceed with a jury of less than twelve members. This result seems nonsensical when the cost of

seating an alternate juror is *de minimus* when compared to the alternative of declaring a mistrial or, in the most deplorable scenario, proceeding to a verdict with a less than impartial juror on the panel. We urge our trial courts to avoid the result reached in this case by seating an alternate juror. The seating of an alternate juror would have easily resolved the present controversy at the trial level by simply removing Juror Boyd and proceeding with the alternate juror.

Because we vacate Boyd's convictions, the remaining issue in regard to sentencing is moot.

For the foregoing reasons, the judgment of the Breathitt Circuit Court is vacated.

ALL CONCUR.

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