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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-000867-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW C. SELF, JUDGE
ACTION NO. 10-CR-00163

ANTWAN D. ROUSE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, COMBS, AND VANMETER, JUDGES.

COMBS, JUDGE: The Commonwealth of Kentucky appeals an order of the Christian Circuit Court which granted a new trial to Antwan Rouse. After our review, we affirm.

On January 14, 2011, Rouse was convicted of wanton murder resulting from operating a motor vehicle while intoxicated. He received a sentence of twenty-

years' incarceration of which he must serve eighty-five percent before becoming eligible for parole. Following the trial, two jurors came forth with affidavits asserting that their guilty votes had been based on incorrect parole information which had been provided by another juror on the panel. And so, Rouse filed a motion for a new trial on March 2, 2011.

The trial court granted Rouse's motion, and the Commonwealth appealed. In *Commonwealth v. Rouse*, 2013 WL 132580 (Ky. App. Jan. 11, 2013), this Court reversed and remanded with instructions for the trial court to conduct an evidentiary hearing before ruling on the motion for a new trial. That hearing was held on March 15, 2013, at which multiple jurors testified about the deliberations. Once again, on May 7, 2013, the trial court granted Rouse's motion for a new trial. This appeal by the Commonwealth followed.

We review a trial court's decision of a motion for a new trial based upon juror misconduct for abuse of discretion. *Riley v. Commonwealth*, 271 S.W.2d 882, 884 (Ky. 1954); *Doyle ex rel. Doyle v. Marymount Hosp., Inc.*, 762 S.W.2d 813, 816 (Ky. App. 1988). Our Supreme Court has defined "abuse of discretion" as a court's acting arbitrarily, unreasonably, unfairly, or in a manner "unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). When evaluating claims of juror misconduct, courts may "consider juror testimony concerning any overt acts of misconduct by which extraneous and potentially prejudicial information is presented to the jury[.]" *Doan v. Commonwealth*, 237 F.3d 722, 732-33 (6th Cir. 2001) (*overruled on other grounds*

by *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).¹ The trial court in this case carefully followed the *Doan* directive.

The two jurors who presented the affidavits, K.L. and S.P., testified that they did not agree with the others that Rouse was guilty of murder. They relayed that they were intimidated by the majority of the panel and knew that they would not prevail. Both averred that they did not want to convict Rouse of murder. K.L. conveyed that she did not believe that Rouse had the requisite intent to commit murder. S.P. declared that she believed that a manslaughter conviction would have been appropriate.

Both K.L. and S.P. recounted the same reason for acquiescing to pressure from the majority of the panel. Additionally, each expressed concern regarding the length of the sentence that would result from a murder verdict. One of their fellow jurors, A.B., had recently served on a juror panel in the case of *Commonwealth v. Manchouck*, which was also a homicide case. A.B. informed K.L. and S.P. that Manchouck had received a sentence of twenty-years' incarceration but that he would be eligible for parole after serving only four years. K.L. and S.P. both contended that A.B.'s assurance about the sentence was the only reason that they agreed to the guilty verdict. Because they believed that the majority would never agree with them, they compromised in order to return a verdict.

¹ *Doan* relied on an old but pertinent case, *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892). It has recently been used by our Supreme Court in *Commonwealth v. Abnee*, 375 S.W.3d 49 (Ky. 2012).

Their claims were confirmed by A.B. When she testified, she openly admitted that she had been part of a discussion about Manchouck's sentence. In that case, he was sentenced to serve twenty percent of twenty years – four years. Other members of the jury panel also recalled conversations about the light sentence which Manchouck had received. Some of the jurors were not aware of the discussion regarding Manchouck, but they also testified that panel members engaged in several side conversations during the deliberations.

The Commonwealth discredits A.B.'s testimony as an ambiguous reference to the *Manchouck* disposition. However, we have reviewed all the testimony taken by the trial court during the evidentiary hearing. It is impossible for anyone listening to conclude that A.B. was not knowingly making reference to and relying upon *Manchouck*. She was specific in her testimony.

The Commonwealth argues that the trial court did not have competent evidence to support its decision to grant Rouse's motion for a new trial. However, we believe that this case is analogous to *NeCamp v. Commonwealth*, 225 S.W.2d 109 (Ky. 1949), a murder case in which the defendant faced the death penalty. During jury deliberations, one of the jurors held out against the death penalty for religious reasons. Another juror comforted her by telling her that she had consulted with a priest, who had assured her that imposing the death penalty would not necessarily constitute a sin. NeCamp was then sentenced to death.

In spite of overwhelming evidence of NeCamp's guilt, the court held that this discussion constituted juror misconduct rising to the level of reversible error.

It ruled that “[t]he misconduct is obvious.” *Id.* at 112. The error occurred when a “juror during the trial had conferred with another and carried the advice into the jury room.” *Id.* Nearly forty years later, our Supreme Court alluded to *NeCamp* as supporting the proposition that jurors are prohibited from consulting with others and then carrying “their advice into the jury room.” *Gall v. Commonwealth*, 702 S.W.2d 37, 44 (Ky. 1985).

In the case before us, a juror brought outside information from a previous trial into the jury deliberations. She had obtained the information by her own experience; however, it is substantively similar to the factual scenario entailed in *NeCamp*. Her observations focused on sentencing information. Juries are permitted to consider the parole eligibility aspect of a sentence **only** during the sentencing phase. Kentucky Revised Statute[s] (KRS) 532.055. Our Supreme Court has stressed that this information **may not** be considered **until after** a finding of guilt by the jury. *Huff v. Commonwealth*, 763 S.W.2d 106, 107 (Ky. 1988). Thus, we conclude that the trial court did not err in ordering a new trial.

We affirm the ruling of the Christian Circuit Court to grant a new trial.

ALL CONCUR.

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