IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MARCH 18, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 4-8-04 ELIA GRAY, D.C.

2002-SC-0596-MR

DANA LLOYD NAPIER — APPELLANT

V.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
02-CR-00070

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant, Dana Lloyd Napier, was convicted in the Floyd Circuit Court for the May 2001 murder of his neighbor, Dairl Eddington, and sentenced to twenty-five years imprisonment. He appeals to this Court as a matter of right. Finding no error, we affirm.

On May 6, 2001, Eddington was shot and killed while mowing his yard in Perry County, Kentucky. The murder weapon, a .12-gauge shotgun, was recovered near Appellant's property. The investigation revealed that the gun belonged to Appellant's father-in-law, who stated he had loaned the gun to Appellant. Appellant's two sons both told authorities that Appellant confessed to shooting Eddington, and asked them to retrieve the gun and dispose of it after the authorities were gone. The motive for the

shooting appeared to be a boundary line dispute. Appellant was indicted the following week for capital murder.

In December 2001, trial commenced in the Perry Circuit Court. After court recessed for lunch during jury selection, the Commonwealth set up a display of four photographs of the victim. When the thirty-four potential jurors returned from lunch, they observed the photographs. Defense counsel immediately moved that the panel be discharged and the case rescheduled for trial with a new jury panel. The Commonwealth responded that it had set up the display for the victim's family to choose a photograph to be used during trial. The prosecutor explained that the courtroom was supposed to have been locked and the photographs removed prior to the jurors returning. Nonetheless, the trial court granted Appellant's motion and declared a mistrial. While there was a subsequent hearing concerning the mistrial and the Commonwealth's actions in causing such, the trial court did not make any specific finding of prosecutorial misconduct.

Prior to the second trial, a special judge was appointed since the Perry Circuit Judge had a scheduling conflict which precluded his availability on the date the trial was set. On the morning of trial in June 2002, the special judge entered an order moving the trial to Floyd County, his home county. All parties agreed to the change of venue since a defense witness was a member of the Perry County jury pool. Following a trial in the Floyd Circuit Court, Appellant was convicted of murder and sentenced to twenty-five years imprisonment. This appeal followed. Additional facts are set forth as necessary.

I.

Appellant first contends that because the mistrial was the result of prosecutorial misconduct, retrial is barred on double jeopardy grounds. Specifically, Appellant relies

on this Court's opinions in Commonwealth v. Deloney, Ky., 20 S.W.3d 471 (2000), and Tinsley v. Jackson, Ky., 771 S.W.2d 331 (1989), in arguing that the Commonwealth's act of creating a "shrine" to the victim, which it was aware the jurors would see upon reentering the courtroom, constituted bad faith and overreaching that barred any subsequent prosecution on the murder charge. We disagree.

The law is clear that in a jury trial, jeopardy does not attach until the jury is impaneled and sworn. Crist v. Bretz, 437 U.S. 28, 38, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). As we noted in Couch v. Maricle, Ky., 998 S.W.2d 469 (1999), "[t]he reason for attaching jeopardy at this point is to protect the accused's valued right to have his trial completed by a particular tribunal." Citing Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). Appellant's reliance on Deloney and Tinsley is misplaced since both cases involved the grant of a mistrial after the jury had been selected and sworn.

Here, jury selection was not completed at the time the thirty-four jurors returned to the courtroom and observed the photographs. Certainly, we appreciate Appellant's argument that the display was inappropriate and prejudicial. And, it is clear from the transcript of the hearing concerning the mistrial that the trial court was extremely incensed by the Commonwealth's conduct. However, because the jury was not impaneled and sworn, jeopardy had not attached and it was not necessary for the trial court to make a finding as to whether the prosecutor's conduct rose to the level of bad faith or overreaching. The appropriate remedy was to discharge the jury pool and reschedule the trial. As such, retrial simply was not barred by double jeopardy principles.

II.

Appellant next contends that the change of venue from Perry County to Floyd County did not comport with the statutory requirements of KRS 452.220(2). Appellant concedes that this error is not preserved but urges review under RCr 10.26. We find no error, palpable or otherwise.

Prior to the second trial, it was brought to the special judge's attention that the Perry County jury pool was tainted because it included a defense witness, Francis Nancy Haley, Appellant's sister-in-law. The trial court thereafter entered an order stating, in pertinent part, "the Commonwealth and the defendant being in agreement to change venue in this action to Floyd County, and the Court being sufficiently and otherwise well advised; IT IS HEREBY ORDERED that venue is hereby changed to Floyd County." The record does not contain a motion by either party requesting the change in venue, and it is unclear who advised the trial court of the problem with the jury pool. However, the court's order reflects that venue was changed with the agreement of the parties and the record contains absolutely no evidence to the contrary.

Notwithstanding Appellant's apparent agreement to the change in venue, he now asserts that such was improper because the requirements of KRS 452.220 were not observed. Specifically, he argues that subsection (2) mandates a petition in writing, verified by the defendant, and two affidavits from credible persons "not kin to or of counsel for the defendant" stating essentially that Appellant cannot receive a fair trial in the county objected to. See also Whittler v. Commonwealth, Ky., 810 S.W.2d 505 (1991), and Bryant v. Commonwealth, Ky., 467 S.W.2d 351 (1971). However, KRS 452.220(2) is applicable only when the motion for change of venue is made by the

defendant. Subsection (1) governs a motion made by the Commonwealth and requires only that it file a signed petition stating the reasons for a change of venue. Regardless of which party moves for a change of venue, KRS 452.220(3) provides that "[a]pplications under this section shall be made and determined in open court, and the court shall hear all witnesses produced by either party and determine from the evidence whether the defendant is entitled to a change of venue." In making its determination, the trial court has wide discretion which will not be disturbed if supported by substantial evidence. See Stopher v. Commonwealth, Ky., 57 S.W.3d 787 (2001), cert. denied, 535 U.S. 1059 (2002).

In Morris v. Commonwealth, 306 Ky. 349, 208 S.W.2d 58 (1948), our predecessor court held that constitutional and statutory provisions governing an accused's right as to the place of trial are mandatory. However, that right, as with other constitutional rights, is personal to the accused and may be waived either by failure to object to improper venue or by agreement of the parties to a venue other than that specified by statute. United States v. Rodriguez, 67 F.3d 1312 (7th Cir. 1995), cert. denied, 517 U.S. 1174 (1996).

In Commonwealth v. Hampton, Ky., 814 S.W.2d 584 (1991), the Commonwealth and the defense agreed to a change of venue from Knox County to Madison County. The Madison Circuit Court thereafter ordered, sua sponte, the retransfer of the case to Knox County on the grounds that "venue is not a matter that may be agreed on by the participants in a criminal proceeding; but rather, once a request for change has been made, it is a matter of judicial determination." Id. at 585. In affirming the Madison Circuit Court's retransfer order, the Court of Appeals ruled that under the venue removal statute, KRS 452.210, the Knox Circuit Court was required to change venue to an

adjacent county to which there was no valid objection. Only upon a finding that the defendant could not receive a fair trial in an adjacent county, would the trial court have the authority to move the case to another convenient county. The Court of Appeals concluded that there was no such determination made.

In reversing the Court of Appeals, this Court relied on the decision in Commonwealth v. Kelly, 266 Ky. 662, 99 S.W.2d 774 (1936), wherein the parties had also entered into an agreement to change venue to a nonadjoining county. In upholding the change of venue, our predecessor court held that "in lieu of hearing evidence the court has the right to approve the agreement of the parties and authorize the change of venue to the county agreed upon." Id. at 775. See also Sturgill v. Commonwealth, Ky., 516 S.W.2d 652, 653 (1974). Thus, in Hampton, supra, we concluded that venue may be waived by the parties in a criminal action by agreement or otherwise, and that an agreement by the parties dispenses with the statutory requirements of the trial court to conduct an evidentiary hearing. Id. 814 S.W.2d at 587.

Here, Appellant not only failed to object to the change of venue from Perry to Floyd County, but he specifically agreed to such. Thus, he cannot now complain on appeal about any alleged improper procedure by the trial court. We find no error occurred in transferring venue to Floyd County.

III.

Appellant's last allegation of error concerns two alleged improper contacts with jurors. The first occurred when a juror approached one of the police officers present at trial and asked a question unrelated to the case, namely the legality of turning on red at a traffic signal. The officer declined to answer the question and the Commonwealth thereafter immediately informed the trial court of the incident. The trial court declined to

grant Appellant's motion for a mistrial, finding that no prejudice resulted from the incident. The second alleged improper contact occurred during the defense case when the Commonwealth informed the trial court that a juror had asked one of the investigators whether the gun would be returned to Appellant's father-in-law. The investigator did not respond. The trial court again denied Appellant's motion for a mistrial finding no prejudice had occurred.

Other than citing Hamilton v. Poe, Ky., 473 S.W.2d 840 (1971), for the proposition that improper contact with jurors is grounds for a mistrial, Appellant fails to explain how he was prejudiced by either one-sided and brief incident. Neither the police officer nor the investigator responded to the juror questions, and the Commonwealth immediately informed the trial court of both contacts. In Talbott v. Commonwealth, Ky., 968 S.W.2d 76, 86 (1998), we held that innocent contacts involving light and insubstantial matters between a witness and a juror are harmless violations of KRS 29A.310(2)[1] and do not deprive a defendant of a fair trial. We simply fail to perceive how either isolated incident prejudiced Appellant or created a manifest necessity warranting a mistrial. No error occurred.

The judgment and sentence of the Floyd Circuit Court are affirmed.

Lambert, C.J., Cooper, Graves, Johnstone, Keller, and Wintersheimer, J.J., concur. Stumbo, J., not sitting.

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[1] KRS 29A.310(2) provides:

> No officer, party, or witness to an action pending, or his attorney or attorneys shall, without leave of court, converse with the jury or any member thereof upon any subject after they have been sworn.

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