

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky

FINAL

2004-SC-0337-MR

9-15-05 EWA Grant, D.C.

JEFFREY LEE BOYD

APPELLANT

V. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
2003-CR-0237

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Jeffrey Lee Boyd, was convicted of trafficking in a controlled substance in the first-degree and received the statutory maximum ten-year sentence for that charge. After finding Boyd guilty of being a first-degree persistent felony offender, the jury enhanced his punishment to twenty years' imprisonment. He appeals to this Court as a matter of right. Ky. Const § 110 (2)(b). Boyd assigns two errors to the trial court proceedings: (1) improper denial of his motion for recusal, and (2) substantial prejudice arising from his appearance before the jury in shackles. Finding no merit to either of Boyd's arguments, we affirm the judgment of the trial court.

Facts

In September 2003, a grand jury indicted Boyd for first-degree trafficking in a controlled substance for selling two Oxycontin pills to a police informant. The grand jury also indicted Boyd with being a first-degree persistent felony offender (PFO) for having

prior convictions for rape, theft by unlawful taking, and sexual abuse. Trial of this case began in December 2003, but ended abruptly after jury selection. A mistrial was declared after Boyd arose from his chair, overturned his defense table, and disobeyed court orders to sit down. Boyd's disruptive conduct concluded after he was shot with a taser gun by courtroom officers.

A second trial was held in March 2004. Prior to this trial, Boyd moved for the trial judge's recusal because the judge had served previously as Commonwealth's Attorney and had prosecuted Boyd in a prior, unrelated trial. Boyd argued that under these circumstances, the judge could not assure him of receiving a fair and impartial trial. The judge denied Boyd's motion for recusal.

Also, prior to the beginning of Boyd's trial, the judge held a hearing to consider whether shackling Boyd would be necessary in light of his previous outburst in the courtroom. The judge heard testimony from two jailers that Boyd had made comments that he planned to disrupt the second trial in a violent way if he did not like its outcome. After a thorough hearing on the matter, the judge decided that the possibility of danger outweighed any potential prejudice to Boyd. Accordingly, the judge ordered Boyd to be shackled at all times while in the courtroom.

Because of Boyd's large size, the use of leg shackles, which would have been less visible to the jury, was not possible. Instead, Boyd was placed in handcuffs. To reduce the possibility of prejudice to Boyd, the judge ensured that Boyd's shackles were not easily visible to the jury and allowed Boyd to testify from defense counsel's table. He also offered to admonish the jury not to consider the shackles as an indication of guilt, but this was rejected by Boyd's defense counsel, who did not want to draw attention to the situation.

Motion to Recuse

Boyd claims that the trial court erred in denying his motion to recuse because the trial judge could not have been impartial as required by KRS 26A.015. The statute, in pertinent part, specifically states that:

- (2) Any justice or judge of the Court of Justice . . . shall disqualify himself in any proceeding:
 - (a) Where he has a personal bias or prejudice concerning a party . . .
 - (b) Where in private practice or government service he served as a lawyer or rendered a legal opinion in the matter in controversy . . .
 -
 - (e) Where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.

Boyd focuses on the language of the statute which states that a judge should disqualify himself when he previously served as a lawyer in the "matter in controversy." He argues that because the trial judge had previously served as Commonwealth's Attorney when one of Boyd's convictions needed to create the PFO charge was attained, it is the same "matter in controversy." To support this position, Boyd relies on Small v. Commonwealth, 617 S.W.2d 61 (Ky. App 1981).

In Small, the trial judge had previously served as Commonwealth's Attorney and secured a conviction of the defendant through a plea bargain. Id. at 62. Three months later, while still serving as a prosecutor in that case, he recommended shock probation, which was granted. Id. Subsequently, the defendant was arrested and charged with DUI, which violated his probation conditions and resulted in a probation revocation hearing. The Commonwealth's Attorney that had previously prosecuted the defendant

presided over the hearing as a newly elected judge. Id. The Court of Appeals held that the trial judge should have recused himself because he, "in his role as Commonwealth's Attorney, participated in the plea bargaining" of the original sentence. Id. at 63.

Contrary to Boyd's assertions, this case is distinguishable from Small. Unlike the present case, the trial judge in Small had previously acted as a lawyer in the same "matter in controversy" because he had actively participated in the original plea bargain discussions. The Court of Appeals found that probation or possible parole revocation, although not part of a criminal prosecution, is sufficiently related to the underlying criminal action to require disqualification. Id. Here, however, the trial judge presided over an entirely different matter than the one in which he acted as a prosecutor. Boyd's prior conviction is not the "matter in controversy" in this case, even though it formed the basis of the PFO charge. The matter in controversy herein was Boyd's guilt or innocence as to the first-degree controlled substance trafficking charge.

This case is analogous to Commonwealth v. Carter, 701 S.W.2d 409 (Ky. 1985). In Carter, the defendant accepted a plea bargain and pled guilty to several charges, including a PFO charge. Id. at 409. He received the statutory minimum ten-year sentence for the PFO charge. Id. at 410. On appeal, Carter argued that the judge should have recused himself because he had prosecuted the charges underlying Carter's PFO enhancement. According to Carter, it was the same "matter in controversy" and the judge should have been disqualified under KRS 26A.015(2)(b). Id.

We disagreed with this argument on the grounds that the new trial was not the same "matter in controversy," despite the fact that the previous convictions were used to support the PFO charge. Id. The previous convictions had already been fully and

properly adjudicated. Additionally, we also recognized that when a criminal defendant challenges the impartiality of the judge under KRS 26A.015, the burden of proof rests with the defendant to show that the judge, as reflected by the record, was not impartial. Id. See also Jenkins v. Bordenkircher, 611 F.2d 162, 166 (6th Cir. 1979). No such showing was made in Carter.

Similarly, Boyd's trial for trafficking in a controlled substance was the same "matter in controversy" as his previous convictions, and he has not shown any evidence in the record that the trial judge was biased or unfair to his cause. In fact, the record reflects that the judge made repeated efforts to ensure that Boyd received a fair trial, as for example, during the pre-trial hearing on the issue of shackles. The trial judge did not err in denying Boyd's motion for recusal, because he had not previously served as a lawyer in the same matter in controversy and there was no evidence that he could not be impartial.

Restraining a Defendant in the Presence of the Jury

Boyd next argues that the trial judge's decision to place him in shackles while in the jury's presence violated his right to a presumption of innocence under RCr 8.28(5), which provides that "except for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for his physical restraint." See Taylor v. Commonwealth, 551 S.W.2d 813 (Ky. App. 1977), rev'd on other grounds, sub nom. Taylor v. Kentucky, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). Boyd maintains that the trial judge did not have "good cause" for his actions.

As a general rule, "[t]his court has long held that the practice of shackling a defendant during a trial is to be condemned." Commonwealth v. Conley, 959 S.W.2d 77 (Ky. 1997). This rule comes from the common law right of the accused "to be free

from all manner of shackles or bonds . . . in the presence of the jury, unless in exceptional cases where there is evident danger of his escape or in order to protect others from an attack by the prisoner." Hill v. Commonwealth, 125 S.W.3d 221, 233 (Ky. 2004) (citing Marion v. Commonwealth, 269 Ky. 729, 108 S.W.2d 721, 723 (1937)).

The decision to place a criminal defendant in shackles even while in the presence of the jury, however, is within the "sound and reasonable discretion" of the trial judge.

Conley, 959 S.W.2d at 78.

Boyd argues that the trial judge did not have any justification for placing him in shackles because there was no evidence that he presented evident danger of escape or violence. He distinguishes the facts of this case from two other cases in which the use of shackles was held to be reasonable. In Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970), the United States Supreme Court allowed a criminal defendant to be shackled before the jury only because of his consistently unruly behavior in the courtroom, not just an isolated incident. Id. at 339-41. The defendant in Allen also made direct threats of violence to the judge while in the courtroom, which Boyd argues further justified the use of shackles. Id. Secondly, Boyd maintains that in Hill, supra, this Court held that the use of shackles was only reasonable under the exceptional circumstances of the case, which involved organized crime.

In making these arguments, Boyd ignores the fact that many of the same factors present in Allen and Hill are present in this case. For example, in both Allen and the present case, the defendant was placed in shackles during trial because of potentially dangerous conduct during previous courtroom outbursts. While the outburst in this case was limited to a single incident, it is relevant that the outburst was so severe that courtroom officers found it necessary to subdue Boyd by shooting him with a taser gun.

A jailer also testified that he reviewed one of Boyd's taped telephone conversations wherein he related that a bad trial outcome would "give me license to kill them." Both Allen and the present case contained reasonable suspicions of violent behavior by the accused.

In Hill, the trial court cited the risk that the defendant would flee as one of the factors in its decision to place the defendant in shackles. 125 S.W.3d at 233 (citing Commonwealth v. Conley, 959 S.W.2d 77 (Ky. 1997)). Here, the jailer related the contents of one of Boyd's recorded telephone conversations while in jail, in which he said if things did not go "according to what he liked, that he was going to show or act out." Boyd was also recorded as saying that he would flee if his father secured his release from jail on bond.

We also note the great care used by the judge in making the decision to place Boyd in shackles. He began the hearing on this issue by noting his concern for prejudice. The judge wanted to have Boyd placed in leg restraints instead of handcuffs because it would be less visible to the jury, but did not do so only because Boyd's large size would not allow it. Furthermore, the judge offered to admonish the jury on three separate occasions throughout the trial, but Boyd's counsel declined the offer. Finally, Boyd's handcuffs were not easily visible to the jury because he was restrained behind his back, and the judge allowed him to testify while remaining seated at counsel's table, thus lessening their visibility to the jury.

Normally, when a defendant is placed in shackles in front of a jury, the trial judge should give an admonishing instruction to the jury to reduce the possibility of prejudice. Hill, 125 S.W.3d at 236. Here, however, the judge did not give the instruction because Boyd's counsel declined it on three separate occasions during the trial. As we have

noted many times, a party cannot decline such an offer and then later complain that the judge's failure to admonish the jury is reversible error. Allen v. Commonwealth, 302 Ky. 546, 195 S.W.2d 96; 98 (1946).

In sum, the trial judge had reasonable grounds to find that Boyd was either a flight risk or presented a threat of violence to himself or others. Given his previous outburst and the testimony of the jailers regarding potential dangerous conduct at trial, the trial judge did not abuse his discretion in shackling Boyd. Accordingly, we affirm the decision of the trial court.

In view of the foregoing, we affirm the judgment of the Muhlenberg Circuit Court.

All concur.

COUNSEL FOR APPELLANT:

Randall L. Wheeler
Assistant Public Advocate
Department of Public Advocacy
Suite 302, 100 Fair Oaks Lane
Frankfort, KY 40601

COUNSEL FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Dennis W. Shepherd
Assistant Attorney General
Office of Criminal Appeals
Office of the Attorney General
1024 Capital Center Drive
Frankfort, KY 40601-8204