

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001465-MR

PAULA KAYE FRAZIER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE GARY D. PAYNE, JUDGE  
ACTION NO. 02-CR-00211

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Paula Kaye Frazier appeals from a judgment of the Fayette Circuit Court wherein she was convicted and sentenced to fifteen years in prison for the offense of theft by unlawful taking of property valued at over \$100 and for being a first-degree persistent felony offender (PFO I). We affirm.

Frazier was charged with stealing \$1,040 from her employer. The jury found her guilty of theft, and she received an enhanced sentence of fifteen years in prison due to PFO status. The sole issue on appeal is whether the trial court abused its discretion in not striking Juror No. 792 for cause.

During the *voir dire* proceedings, Juror No. 792 approached the bench and advised the court and the attorneys that his business had been robbed in the past and that the Commonwealth's attorney's office had successfully prosecuted the case. The juror stated that he had met Commonwealth's Attorney Ray Larson and stated that he thought he had met the assistant who was trying this case. The following questions were also asked and answered:

DEFENDANT'S ATTORNEY: Based on your dealings with the Commonwealth Attorney's office, sir, is it your belief that they wouldn't prosecute someone unless they were guilty?

A: Sure. Definitely.

DEFENDANT'S ATTORNEY: Okay. Thank you.

COMMONWEALTH: Let me ask one follow-up question.

JUROR: Although I knew Ray Larson prior to the case, also.

COMMONWEALTH: Okay. A follow-up question to what he was saying. You believe that we do not prosecute anybody who was not guilty. It is possible though, that if we don't prove the evidence beyond a reasonable doubt to you that you could find the defendant not guilty?

A: Ummmm, yes.

COMMONWEALTH: Okay. So you would require me to meet that burden?

A: Yes, I guess I misunderstood his terminology, the way he worded it.

DEFENDANT'S ATTORNEY: Let me just clarify, sir. Do you believe the prosecutor's office, Ray Larson's office, would prosecute someone who is innocent?

JUROR: No. No.

JUDGE: I think you've given two different answers; let me see if I can clarify. Do you think that everybody who's brought before the court is automatically guilty because Mr. Larson is bringing charges against them?

JUROR: No, I don't think that.

JUDGE: So when he said "do you think they'd prosecute somebody who is innocent," do you realize that a person may not be proven to be guilty, that they may not have evidence to convict the person?

JUROR: That's a possibility that they might due to the fact that the evidence does not present itself.

JUDGE: And, if they did that, would you find them guilty or not guilty, if they didn't have enough?

JUROR: I would find them not guilty.

JUDGE: You'd make them prove the case, in other words.

In her appeal, Frazier argues that the court abused its discretion in not striking Juror No. 792 and that she was prejudiced by having to use a peremptory challenge to strike the juror. In support of this argument, Frazier asserts that the juror indicated he believed the Commonwealth's attorney's office did not prosecute someone unless they were guilty. Frazier maintains that the juror's answer to the question was ground for

automatic disqualification and that the court improperly "rehabilitated" the juror by asking subsequent questions. In response, the Commonwealth argues that the juror never expressed any bias but simply misunderstood the question asked by Frazier's attorney. The Commonwealth contends that the juror's subsequent answers made it clear that he did not believe that everyone who was charged with a crime by the Commonwealth's attorney's office was automatically guilty and that he would require the Commonwealth to prove its case.

"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<sup>1</sup> 9.36(1). "A defendant has been denied the number of peremptory challenges procedurally allotted to him when forced to use peremptory challenges on jurors who should have been excused for cause." Thomas v. Commonwealth, Ky. 864 S.W.2d 252, 259 (1993). "[T]he decision of whether a juror should be excused for cause is a matter within the sound discretion of the trial court." Gamble v. Commonwealth, Ky., 68 S.W.3d 367, 373 (2002). A trial court's decision concerning whether a juror should be stricken for cause "must be viewed in the totality of circumstances. It is not limited to the juror's response to a 'magic question.'" Montgomery v. Commonwealth, Ky., 819 S.W.2d

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

713, 718 (1991). Furthermore, in the matter of selecting qualified jurors, "rehabilitation" is a "misnomer." Id.

We conclude that the trial court did not abuse its discretion in refusing to strike Juror No. 792 for cause. Frazier would have us focus on one single question<sup>2</sup> asked of the juror rather than the totality of the circumstances and all questions asked. It was apparent that the juror answered the questions in an inconsistent manner until the trial court intervened to determine whether the juror actually had bias or prejudice. The court's questioning of the juror was not "rehabilitation" but was merely an attempt to determine the juror's views. "[T]he question of the sound discretion of the trial judge must be given great deference." Fugate v. Commonwealth, Ky., 993 S.W.2d 931, 939 (1999). We give such deference to the trial judge in this case and conclude that he did not abuse his discretion in refusing to strike the juror.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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<sup>2</sup> The two questions asked by Frazier's trial counsel were basically the same.