

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000532-MR

FREDERICK ASHER, JR.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 02-CR-00338

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND TACKETT, JUDGES.

EMBERTON, CHIEF JUDGE. Frederick Asher appeals from a judgment convicting him of criminal trespass and violation of an emergency protective order. The sole issue raised is whether the trial court was required to dismiss the indictment after it ruled that Asher was entitled to a mistrial because of inappropriate contact between a defense witness and a police officer. We find no error.

Asher was indicted for burglary, second degree, violation of an emergency protective order, terroristic threatening, and persistent felony offender, second degree. The terroristic threatening charge arose from an alleged incident between Elizabeth Hagan and Asher. The remaining charges arose from acts occurring at the apartment of Tracie Hagan, Asher's ex-girlfriend. Asher kicked in Tracie's door, damaged her furniture and attempted to open the bedroom door where Tracie was hiding. After Tracie called the police from her bedroom, Lexington Police Officers Jay Williams and Matt Greathouse responded and Asher, found in the apartment, was taken into custody. In Asher's possession were several items taken from Tracie's apartment.

On August 13, 2002, a trial was commenced and defense witness, William Webb, was subpoenaed to testify. It was anticipated that Webb would testify that on the night of the alleged crimes he and Asher saw two men at the entrance to Tracie's apartment and that Asher's intent in going into the apartment was to protect Tracie. Called to testify for the prosecution was Officer Jay Williams.

While waiting in a witness room, Williams and Webb engaged in conversation. During a break in the jury selection, Webb informed the court about his encounter with Williams. The court held a hearing to determine the impact, if any, the

conversation could have on Webb's testimony. Williams testified that Webb was aware that he was a police officer and told Asher not to discuss the case with him. Webb became argumentative and Williams asked the bailiff to remove Webb from the room. He also noted that he believed Webb was intoxicated. He denied that he threatened to arrest Webb or coerce him. Webb testified that he and Williams exchanged heated words and that Williams told him that he could arrest him for intoxication. Webb also stated that Williams told him that he should not testify for Asher because Asher was guilty. However, at the hearing, Webb told the court that he was not scared of Williams and that his testimony would not change because of the encounter.

Although the trial court did not make a specific finding that Williams intimidated Webb, it granted Asher's request for a mistrial. Subsequently, Asher filed a motion to dismiss the indictment arguing that Webb's testimony was forever tainted and that Asher could not obtain a fair trial. The court denied the motion but permitted Asher to submit a "proffer" of Webb's anticipated testimony to determine if his testimony at the second trial would differ. If so, Asher would be permitted to examine Webb and Williams regarding the conversation. No written proffer was filed.

The second trial was commenced and Webb refused to testify stating that he was afraid he would incriminate himself.

Asher then made a verbal proffer of Webb's anticipated testimony and the court placed Webb under oath to determine if he would testify consistent with the proffer. After Webb refused to answer any questions, the court decided to go forward with the trial but permitted Asher to explain the conversation between Williams and Webb to the jury and Webb's absence. A written stipulation of Webb's testimony was presented to the jury.

The courts have "an inherent supervisory power to protect the integrity of the judicial process from fraud and bad faith conduct."¹ It is a power vested in the sound discretion of the trial court and must be exercised with great caution.² Asher contends that the trial court was required to invoke its supervisory powers and dismiss his indictment as a sanction for Williams's misconduct.

The trial court, although it granted a mistrial, specifically stated that there was no finding that Williams had intimidated Webb. The granting of the mistrial, just after jury selection, was a judicial act of caution. Dismissing an indictment, however, is the ultimate sanction for the government's misconduct and is appropriate only when there is

¹ Commonwealth v. Baker, Ky. App., 11 S.W.3d 585, 589 (2000).

² Potter v. Eli Lily & Co., Ky., 926 S.W.2d 449, 453 (1996).

actual demonstrable prejudice caused by the conduct. As stated in Baker, supra:³

Dismissal of an indictment with prejudice is the most severe sanction possible. . . .

In this case, the facts do not justify a dismissal of the indictment. The trial court properly sought to avoid any possible prejudice by permitting the stipulation of Webb's testimony to be read to the jury and cross-examination of Williams regarding his conversation with Webb. The verdict itself establishes a lack of prejudice. Asher was not convicted of burglary, an element of which is entry into a dwelling with the intent to commit burglary. It was stipulated that Webb's testimony was that Asher entered the dwelling with the intent to protect Tracie. Thus, it is reasonable to conclude that the jury believed the stipulation and that Webb's absence as a witness did not prejudice Asher.

The judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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³ Baker, supra, at 11 S.W.3d 585, 590 (2000).