

RENDERED: August 6, 2004; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2003-CA-000628-MR

GEORGE J. RILEY

APPELLANT

v. APPEAL FROM CALDWELL CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
ACTION NO. 02-CR-00084

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: GUIDUGLI AND KNOPF, JUDGES; AND EMBERTON, SENIOR JUDGE<sup>1</sup>.

KNOPF, JUDGE: On November 8, 2002, a Caldwell County grand jury returned an indictment charging George J. Riley with four counts of first degree trafficking in a controlled substance (cocaine),<sup>2</sup> and with being a persistent felony offender in the first degree.<sup>3</sup>

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> KRS 218A.1412.

<sup>3</sup> KRS 532.080(1).

The Commonwealth alleged that, on April 26, 2002, Riley sold cocaine to a police informant, Wendell Knight, Jr.<sup>4</sup> Following a trial, the jury found Riley guilty of the charged offenses. Prior to the commencement of the sentencing phase, the parties reached an agreement as to the punishment, and Riley entered a plea of guilty to the charge of being a PFO I. The trial court sentenced Riley to a total of fifteen years' imprisonment. On appeal, Riley asserts that his trial was tainted due to the participation of one juror who may have known the informant and by the Commonwealth's exclusion of another member of the venire from the jury. Finding no error, we affirm.

After the trial but before the trial court entered the judgment of conviction and final sentencing order, Riley's counsel moved for a new trial. Attached to the motion was a statement from a Marty McKinney, who alleged that the step-mother of Juror Bell was in a relationship with the informant. But while McKinney's statement was styled an "affidavit", it was not notarized. The trial court initially questioned whether Riley's plea agreement on the PFO I charge precluded his motion for a new trial. The trial court also found that there was no evidence that the juror knew of his step-mother's relationship with Knight

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<sup>4</sup> The indictment separately charged that Riley had also sold cocaine on May 3 and 8, 2002, but the Commonwealth only presented evidence regarding the April 26 transaction.

or that he even knew Knight. Consequently, the trial court denied the motion for a new trial.

As an initial matter, the burden is on the defendant to make a showing that a juror would have been subject to a challenge for cause.<sup>5</sup> Generally, the motion must be accompanied by an affidavit setting forth facts warranting a new trial.<sup>6</sup> Unsworn statements do not constitute sufficient evidence to support a motion for a new trial.<sup>7</sup>

Moreover, even discounting the lack of a sworn affidavit, McKinney's unsworn statements do not support the conclusion that Juror Bell was unqualified to serve on the jury. "To obtain a new trial because of juror mendacity, 'a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause.'"<sup>8</sup> As the trial court noted, the prospective jurors were never asked if they knew the informant Knight. Furthermore, McKinney's statement does not allege that

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<sup>5</sup> Hicks v. Commonwealth, Ky., 670 S.W.2d 837, 839 (1984).

<sup>6</sup> Wheeler v. Commonwealth, Ky., 395 S.W.2d 569, 571 (1965).

<sup>7</sup> Thomas v. Commonwealth, Ky. App., 574 S.W.2d 903, 910 (1978).

<sup>8</sup> Adkins v. Commonwealth, Ky., 96 S.W.3d 779, 796 (2003); quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 850, 78 L. Ed.2 d 663 (1984).

Juror Bell knew Knight or was even aware of his step-mother's relationship with Knight. Consequently, the trial court properly denied Riley's motion for a new trial.

Riley next asserts that the trial court improperly granted the Commonwealth's motion to remove Juror Tinsley for cause. During *voir dire*, the prosecutor asked whether any member of the panel knew Riley. Juror Tinsley answered that she had known Riley since he was a child and considered him a friend, albeit not a close friend. Tinsley added that she did not see Riley regularly and she believed she could consider the evidence impartially despite her long acquaintance with Riley. The prosecutor moved to strike her for cause because of her relationship with Riley and because he believed that he had recently prosecuted several of Tinsley's relatives. The trial court granted the motion and excluded Tinsley.

Riley asserts that the Commonwealth failed to set forth sufficient grounds to challenge Tinsley for cause. Riley also argues that the Commonwealth's attempt to exclude Tinsley from the jury was racially motivated, in violation of Batson v. Kentucky,<sup>9</sup> However, a Batson objection must be raised before the swearing of the jury, or at least as soon as practically

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<sup>9</sup> 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

possible.<sup>10</sup> In this case, we find no indication that Riley raised this objection to the trial court at any time. Therefore, any Batson issue is not preserved for appellate review.

Furthermore, a trial court has considerable discretion in determining whether a juror should be stricken for cause.<sup>11</sup> "[U]nless clearly erroneous, the exercise of such discretion is a judicial prerogative and is not subject to review by an appellate court."<sup>12</sup> We agree with Riley that the prosecutor's belief that he may have prosecuted some of Tinsley's relatives was not sufficient grounds to support a challenge for cause. Nevertheless, Tinsley admitted that she had known Riley since she was a child and while they were not close friends, she had significant social contacts with him. Although Tinsley did not think that her relationship with Riley would affect her impartiality, the trial court was within its discretion to conclude otherwise. Therefore, the trial court did not abuse its discretion by granting the Commonwealth's motion to strike Tinsley for cause.

Accordingly, the judgment of conviction by the Caldwell Circuit Court is affirmed.

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<sup>10</sup> Washington v. Commonwealth, Ky., 34 S.W.3d 376, 378 (2000).

<sup>11</sup> Campbell v. Commonwealth, Ky., 788 S.W.2d 260 (1990).

<sup>12</sup> Scruggs v. Commonwealth, Ky., 566 S.W.2d 405, 410 (1978), *U.S. cert. denied*, 439 U.S. 928, 99 S. Ct. 314, 58 L. Ed. 2d 321 (1978).

ALL CONCUR.

BRIEF FOR APPELLANT:

Richard Hoffman  
Assistant Public Advocate  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo  
Attorney General of Kentucky

Janine Coy Bowden  
Assistant Attorney General  
Frankfort, Kentucky