

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000854-MR

HARRY GULYARD, JR.

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 02-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE;¹ GUIDUGLI AND KNOPF, JUDGES.

KNOPF, JUDGE: On January 31, 2002, a Hardin County grand jury returned an indictment charging Harry Gulyard, Jr. with theft by unlawful taking,² first degree fleeing or evading police,³ operating a motor vehicle while under the influence of alcohol, fourth or subsequent offense,⁴ operating a motor vehicle on a

¹ Judge Emberton concurred in this opinion prior to his retirement effective June 2, 2004.

² KRS 514.030.

³ KRS 520.095.

⁴ KRS 189A.010.

suspended operator's license,⁵ four counts of disregarding a stop sign,⁶ reckless driving,⁷ two counts of disregarding a traffic control device,⁸ first degree criminal mischief,⁹ and two counts of first degree wanton endangerment.¹⁰ Gulyard pleaded not guilty to these charges, and he proceeded to trial with appointed counsel. At the conclusion of the trial, the jury found Gulyard guilty of theft, DUI 4th offense, operating on a suspended license, the traffic violations, and the lesser-included offenses of second degree fleeing or evading police, second degree criminal mischief, and second degree wanton endangerment. The jury fixed his sentence at five years each on the theft and DUI 4th charges, along with various terms and fines for the misdemeanor offenses and violations. The trial court imposed the jury's sentence, directing that the felony sentences be served consecutively with each other and concurrently with the misdemeanor sentences for a total of ten years. We affirm Gulyard's conviction.

⁵ KRS 186.620(2).

⁶ KRS 189.330.

⁷ KRS 189.290.

⁸ KRS 189.231(2).

⁹ KRS 512.020.

¹⁰ KRS 508.060.

On direct appeal, Gulyard first asserts that a conflict developed between him and his appointed counsel which adversely affected the adequacy of counsel's performance at trial. From the record, it appears that Gulyard was incarcerated in Grayson County while awaiting trial on the Hardin County charges. At a pre-trial conference on May 21, 2002, Gulyard informed the trial court that his appointed counsel had not contacted him to prepare for trial. Counsel contradicted Gulyard, replying that she had interviewed him. After a brief argument, the trial court suggested that the two discuss the matter privately and scheduled the case for trial. On July 29, Gulyard sent a letter to the trial court, again asserting that his counsel had not met with him to discuss the case since the prior hearing. However, Gulyard did not raise this issue in any later appearances before the trial court.

Gulyard argues that he was deprived of effective assistance of counsel because his attorney failed to meet with him and adequately prepare the case for trial. As a general rule, a claim of ineffective assistance of counsel will not be reviewed on direct appeal from the trial court's judgment, because there is usually no record or trial court ruling on which such a claim can be properly considered. Appellate courts review

only claims of error which have been presented to trial courts.¹¹ A claim of ineffective assistance of counsel will only be considered on direct appeal where there is a trial record, or an evidentiary hearing is held on motion for a new trial, and the trial court rules on the issue.¹² Because Gulyard did not raise his claim of ineffective assistance of counsel to the trial court, it is not preserved for review in this appeal.

Nevertheless, Gulyard argues that the trial court has a duty to hold a hearing when it becomes aware of a conflict between a defendant and counsel. Such a duty has been recognized when the possibility of a conflict of interest between counsel and the client becomes apparent before or during trial.¹³ However, Gulyard does not identify any clear conflict of interest or irreconcilable conflict with his trial counsel that became apparent to the trial court before or during trial. At most, he expressed some concerns to the court about his counsel's preparation, but he never followed up on these concerns. Although Gulyard may be entitled to raise this issue in a proper

¹¹ Humphrey v. Commonwealth, Ky., 962 S.W.2d 870, 872 (1998).

¹² Id. at 872-73. See also Hopewell v. Commonwealth, Ky., 641 S.W.2d 744 (1982); and Wilson v. Commonwealth, Ky., 601 S.W.2d 280, 284 (1980).

¹³ Wood v. Georgia, 450 U.S. 261, 272, 101 S. Ct. 1097, 1104, 67 L. Ed. 2d 220 (1981).

collateral proceeding,¹⁴ it is not properly presented in this appeal.

Gulyard next argues that the trial court erred when it denied his motion to strike a prospective juror for cause. During *voir dire* Juror No. 585 informed the court that she is an employee of the Hardin County Attorney's office in the child support division. Juror 585 also stated that she had no connection to the office's criminal division. However, Juror 585 admitted that she knew the Commonwealth Attorney (not the assistant Commonwealth attorney who was prosecuting Gulyard) from when he previously worked in the county attorney's office. On further questioning, Juror 585 stated that she did not have any bias in favor of the prosecution and she believed she could be fair and impartial in this matter. Based on this information, the trial court denied Gulyard's motion to strike Juror 585 for cause. Subsequently, defense counsel exercised all nine of Gulyard's peremptory challenges, including one to exclude Juror 585 from the jury panel.

Gulyard argues that an employee of the county attorney should be presumed to have a bias in favor of the prosecution, and therefore the trial court committed reversible error by denying his motion to strike Juror 585. It has been held that an

¹⁴ Humphrey, 962 S.W.2d at 872.

assistant county attorney has an implied bias in a criminal case in circuit court "because his position as a prosecutor for the Commonwealth gives rise to a loyalty to his employer, the Commonwealth, that would imply bias."¹⁵ Likewise, a former county attorney who held said position at the time of the preliminary hearing in the case was determined to have an implied bias in the case in circuit court and, thus, should have been stricken for cause.¹⁶ It has further been held that a secretary for the commonwealth attorney's office had an implied bias in a case being prosecuted by said office because of her loyalty to her employer and the fact that she was in a position to have known about the case prior to trial.¹⁷

However, we disagree with Gulyard that an implied bias should be presumed for all employees of the county attorney. Although the record is not entirely clear on this point, it is apparent that Juror 585 is not employed as an attorney or on the legal staff of the Hardin County Attorney's office. Furthermore, her position is entirely unrelated to the criminal division of

¹⁵ Farris v. Commonwealth, Ky. App., 836 S.W.2d 451, 455 (1992), *overruled on other grounds by* Houston v. Commonwealth, Ky., 975 S.W.2d 925 (1998).

¹⁶ Godsey v. Commonwealth, Ky. App., 661 S.W.2d 2, 4-5 (1983).

¹⁷ Randolph v. Commonwealth, Ky., 716 S.W. 2d 253 (1986), *overruled on other grounds by* Shannon v. Commonwealth, Ky., 767 S.W.2d 548 (1988).

the county attorney's office. Thus, we have no reason to assume that she would have independent knowledge of the case from any previous involvement with the case by the county attorney's office.

Moreover, we are hesitant to extend an automatic presumption of bias beyond that which is strictly necessary.¹⁸ RCr 9.36 provides that "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." The standard of review for a trial court's decision on a challenge for cause is whether there was an abuse of discretion.¹⁹ In order to find reversible error, Gulyard must demonstrate a probability of bias or prejudice based on the particular facts of the case. In this case, the trial court concluded that Juror 585 was not biased in favor of the prosecution, but would be able to impartially decide the case based only on the evidence presented at trial. The trial court's

¹⁸ See Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 299 (1997) *U.S. cert. denied*, 522 U.S. 986, 118 S. Ct. 451, 139 L. Ed. 2d 387 (1997), holding that a person will not be automatically disqualified even if he or she is a law enforcement officer, has been a victim of a similar crime, or has some knowledge of the participants acquaintance with the participants and their possible testimony.

¹⁹ Bolen v. Commonwealth, Ky., 31 S.W.3d 907, 910 (2000).

conclusion in this regard was supported by the testimony of Juror 585 and therefore was not an abuse of discretion.

Lastly, Gulyard argues that the trial court erred in denying his motion for a directed verdict to dismiss the two wanton-endangerment charges. The Commonwealth responds that Gulyard failed to properly preserve this issue for review. At the close of the Commonwealth's case, defense counsel moved generally for a directed verdict on all charges, and specifically for a directed verdict on the wanton-endangerment charges. The trial court denied the former motion, but indicated that it would reserve its final ruling on the latter motion until the close of proof. At the close of proof, defense counsel generally renewed the motion for a directed verdict on the same grounds as previously asserted. The trial court denied the motion without specifically ruling on the wanton-endangerment issue.

It is well-established that a motion for a directed verdict made at the close of the Commonwealth's case is not sufficient to preserve error unless renewed at the close of all the evidence.²⁰ Although Gulyard's counsel renewed the general directed-verdict motion at the close of proof, counsel did not request a specific ruling regarding the wanton-endangerment

²⁰ Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998).

charges. Accordingly, the error is not properly preserved for review.

Furthermore, the trial court did not commit palpable error by submitting the second-degree wanton endangerment charges to the jury.²¹ At trial, the Commonwealth presented evidence that two Hardin County Sheriff's deputies pulled over a Chevrolet Tahoe sport-utility vehicle during the night of December 18-19, 2001. The vehicle had no license plate, its windows were frosted over, and the deputies later learned it had been stolen from a dealership in Elizabethtown, Kentucky. After briefly stopping, the vehicle drove away, and the deputies pursued. Deputy Watts estimated that he had to drive at speeds of 90 miles per hour to keep the Tahoe in sight. He also observed the vehicle run numerous stop signs and red lights, cross the yellow line of the road, and leave the road to drive through a culvert. Eventually, the vehicle came to a stop at an apartment complex, and the driver fled from the vehicle. Deputy Watts identified Gulyard as the person leaving the vehicle and no other persons were observed. After a search of the apartment complex, the officers found Gulyard hiding beneath a parked car.

Testifying in his own defense, Gulyard denied that he stole or drove the Tahoe in question. He stated that he had

²¹ RCr 10.26.

received a ride from two acquaintances that night, and that he was merely a hapless passenger during the chase. For purposes of the directed-verdict motion, however, Gulyard concedes that there was sufficient evidence to warrant a conclusion that he was driving the vehicle. However, he asserts that there was insufficient evidence to support the jury's finding that his actions "created a substantial danger of physical injury to another person", as required by KRS 508.070(1).

We disagree. Deputies Watts and Sallee both testified that they had to engage Gulyard in a high speed chase to keep up with him. Deputy Sallee further testified that when Gulyard left the road and drove through a culvert, he narrowly avoided running his police car into the culvert. When viewed in the light most favorable to the Commonwealth, the jury could reasonably conclude that Gulyard's reckless driving created a substantial danger of physical injury to the pursuing police officers. Consequently, we conclude that the trial court properly denied the motion for a directed verdict.²²

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

²² See Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), citing Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 5 (1983).

ALL CONCUR.

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