

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001599-MR

NORBERT EDDIE MORRIS

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 01-CR-00057

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE: Appellant Norbert Eddie Morris entered a conditional plea of guilty, pursuant to RCr 8.09, to trafficking in a controlled substance in the third degree. His plea was conditioned on his right to appeal on the basis that his prosecution constituted double jeopardy.

Appellant was indicted on August 13, 2001, for trafficking in a controlled substance in or near a school. The charge was amended to trafficking in a controlled substance in

the third degree. On January 22, 2002, the case was called for jury trial.

The Commonwealth called Elbert Neace as a witness. Neace had assisted the police by making a drug buy from appellant while wired with a recording device. Neace testified on direct examination that he had started working with the Jackson Police Department after one of his friends overdosed. He testified that he approached the police and asked if he could help. He stated that they conducted transactions in which he would attempt to purchase drugs from people he knew were selling them. He testified that he went to appellant's home and bought two Xanax pills from him.

On cross-examination, appellant's counsel inquired into why Neace had gotten "into the snitch business." Neace responded that his friend had been found overdosed on drugs and there were also a lot of people in Jackson who were on drugs, including friends of his. Neace testified that the Jackson police did not pay him for being an informant, but he was given gas money since he had to drive around Jackson. The witness stated that he went on to work with the state police for which he was paid and in total received about \$2500. He testified that he had stopped working undercover with the police.

Defense counsel then asked: "All right; after you started in the snitch business, you caught some criminal charges

of your own, didn't you?" Neace responded, "Yes, sir." Counsel asked: "Right here in Breathitt County?" Neace answered, "Yes." The Commonwealth's Attorney asked to approach the bench, and moved for a mistrial. The Commonwealth asserted that pursuant to KRE 609, all that could be asked of the witness was whether he had been convicted of a felony. The Commonwealth argued that Neace had not been convicted of a felony, only of misdemeanors, and so the line of questioning was improper.

Defense counsel responded that there had not been a disposition of the case he was asking Neace about. He asserted, "[M]y position is if he has got - if he has got criminal charges since he has been snitching and nothing has happened on them, I think the jury gets to know that." After some further discussion, the court ruled that KRE 609 allows only a felony conviction to be elicited or inquired about in order to impeach a witness. The court thus granted the Commonwealth's motion for mistrial.

After the trial court reset the case for trial, appellant filed a petition for writ of mandamus and/or prohibition with this Court. The trial court continued the case while the petition was pending. Appellant argued that retrial was barred because jeopardy attached when the court declared a mistrial. This court denied the petition for writ of mandamus/prohibition, without comment on the merits of that

argument. On June 30, 2003, appellant entered a conditional plea to trafficking in a controlled substance in the third degree, reserving the right to appeal the double jeopardy issue.

On appeal, appellant's argument has three parts. First, he argues that the trial court's limitation of cross-examination was erroneous because appellant had a right to explore the bias of the witness. Second, if the questioning was proper, the declaration of a mistrial was not manifestly necessary and constituted an abuse of discretion. Third, if the mistrial was not manifestly necessary, the charges were required to be dismissed due to a violation of double jeopardy.

The Fifth Amendment of the Constitution of the United States and Section 13 of the Constitution of Kentucky guarantee that no person shall be tried twice for the same offense. Commonwealth v. Scott, 12 S.W.3d 682, 684 (Ky. 2000). Double jeopardy principles do not prevent retrial, however, if the proceedings are terminated because the trial court, in the exercise of its discretion, finds that the termination is manifestly necessary. Id.; KRS 505.030(4)(b). Manifest necessity is properly described as an "urgent or real necessity." Scott, 12 S.W.3d at 684. A trial court's grant of a mistrial will be overturned only if it is clearly erroneous or constitutes an abuse of discretion. Grimes v. McAnulty, 957 S.W.2d 223, 224 (Ky. 1997). Notwithstanding the trial court's

discretion to grant a mistrial, the power to do so ought to be used sparingly, with utmost caution, under urgent circumstances and for obvious causes. Scott, 12 S.W.3d at 685.

The foregoing principles lead us to conclude that there was no manifest necessity for a mistrial in this case. Appellant is correct in asserting that a party may impeach a witness for bias irrespective of their ability to impeach the witness's credibility under KRE 609. Indictments are admissible to show bias when it tends to show that a witness's testimony may have been influenced by a desire to seek the favor or leniency of the prosecuting officer. Bowling v. Commonwealth, 80 S.W.3d 405 (Ky. 2002). Similarly, the fact that a witness has charges pending may be exposed by a defendant to show a motivation to curry favor with authorities. Williams v. Commonwealth, 569 S.W.2d 139 (Ky. 1978); Lawson, *The Kentucky Evidence Law Handbook*, § 4.10(2) at 280 (4th ed. 2003).

A witness may be cross-examined generally on any facts which tend to show bias, interest, or motive which might affect the credibility of the witness's testimony. Keller v. Commonwealth, 572 S.W.2d 157, 159 (Ky. 1978). The jury is entitled to hear all relevant facts calculated to influence a witness so as to enable the jury to properly estimate the weight to be given the testimony of the witness. Id.

Thus, the court erred in ruling that the only information on criminal charges the witness could be asked about were felony convictions under KRE 609. If the evidence was not prohibited, a mistrial was not necessary. The Commonwealth, however, maintains the court acted properly because the charges were incurred *after* the drug transaction. The Commonwealth claims the questions asked by appellant were not relevant, and thus would have been merely prejudicial.

The only details provided to this Court on the charges pending against Neace came from the Commonwealth at the entry of the guilty plea. The Commonwealth's Attorney stated that the charge against Neace did not exist at the time Neace set up the drug buy with appellant. He explained that an individual had brought an assault charge against Neace, and he recalled that it occurred after Neace concluded his drug investigation work with the Jackson Police Department. He further recalled that before the drug cases were prosecuted by his office, the office had already been unsuccessful in inducing the complaining witness on the assault charge to appear before the grand jury. He said the case was not investigated by police. The Commonwealth's Attorney stated that his office was not involved in the prosecution of appellant's case at the time of Neace's case.

The fact that the charge against Neace was not pending at the time of the buy did not render the evidence inadmissible.

While the charge could not have been incentive for Neace to become a drug informant, the jury still might have believed that Neace wanted to testify favorably to the prosecution because of the new charge. Thus, the time of the assault charge affected the weight to be given the evidence, but not whether appellant could ask Neace about it. The trial court, moreover, had the power to limit cross-examination if it determined that the charges were too remote or not relevant or the evidence was too prejudicial or confusing. Moore v. Commonwealth, 771 S.W.2d 34 (Ky. 1988); Dunbar v. Commonwealth, 809 S.W.2d 852, 855 (Ky. 1991). Limiting cross-examination would have been a preferable alternative to granting a mistrial. A mistrial should be granted only when no other remedy will provide relief to the moving party. Gould v. Charlton Co., Inc., 929 S.W.2d 734, 740 (Ky. 1996).

Additionally, the trial court did not explore the possibility of giving an admonition once it believed the evidence to have been improper. The Commonwealth suggests in its brief that an admonition would have been appropriate, but asserts it was necessary for appellant to request one as an alternative to the granting of a mistrial. We do not agree that appellant had to ask for an admonition. It was sufficient that appellant objected to a mistrial. The requirement to exhaust all other means to have an error rectified before a mistrial is

sought is directed toward the party requesting the mistrial, not the party in opposition. See Romans v. Commonwealth, 547 S.W.2d 128, 131 (Ky. 1977). In this case, the Commonwealth asked for the mistrial.

In conclusion, a mistrial was not a manifest necessity in this case. The grant of a mistrial therefore was clearly erroneous. Appellant's retrial is barred by double jeopardy principles. We vacate appellant's conviction and remand for dismissal of the indictment.

ALL CONCUR.

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