

RENDERED: May 6, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002434-MR

JOHN R. FUSTON

APPELLANT

v. APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 03-CR-00063

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING

** ** * * * **

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: John R. Fuston brings this appeal from an October 17, 2003, judgment of the Bell Circuit Court convicting him upon two counts of criminal possession of a forged instrument in the second degree and sentencing him to four years' imprisonment. We reverse.

¹ 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 Kentucky Revised Statutes 21.580.

In March 2003, appellant was indicted upon two counts of criminal possession of a forged instrument in the second degree (Kentucky Revised Statutes (KRS) 516.060). Following a jury trial, appellant was convicted of both offenses and sentenced to a total term of four years' imprisonment.² This appeal follows.

Appellant argues the trial court committed reversible error by failing to strike Juror No. 48 for cause. While defense counsel was conducting voir dire, Juror No. 48 volunteered that she was employed by the bank where the forged checks were drawn and that she knew the owner of one of the local stores where one of the checks was cashed. In particular, appellant cites to the following exchange between defense counsel and Juror No. 48:

Venireperson: I don't know him, but I would like to say that I work at the same bank, at the financial institution.

DC: Which financial institution?

Venireperson: First State Bank.

DC: Okay. So you have some knowledge of this case?

² At trial the evidence established that appellant received two checks stolen from Ullis Baker that had been forged by his friend Penny Elliott. The evidence established that appellant cashed the two checks at local grocery stores, Teresa's Market and Caldwell's Market. One of the checks was written to Sam Jackson from Baker's account in the amount of \$100.00 and the other was made payable to Caldwell's Market in the amount of \$150.00.

Venireperson: I don't know anything about the case. No. But I worked at First State Bank and I know Teresa.

DC: Okay. Do you think that your having worked at a bank, and I guess knowing something about forged instruments in the process, do you think that, that might keep you from listening to the evidence of a crime and making a determination?

Venireperson: Yes I do.

DC: I ask that she be excused.

The judge then called Venireperson No. 48 up to the bench and the conversation continued:

Judge: You'll have to explain that further.

Venireperson: Can I come up there?

Judge: Yes ma'am.

Venireperson: I remember when those checks came through, I was in at, at branch and I do remember seeing it on the cash item report that we had and seeing David. And the more I sat there the more I listened to it. You know, the more it came back to me.

Judge: So, you, you know something about the facts of this case?

Venireperson: I see Teresa about every day.

Judge: You know something about the facts in this case?

Venireperson: No. No, I don't know anything about it. I just know Teresa from seeing her at the bank.

Judge: But you said that you remembered the checks coming . . .

Venireperson: No, I, the cash item report. I remember seeing his name written in it. And seeing businesses names but as far as knowing anything, I don't know anything. I just, I mean, you know a basic amount of memory and you know and I don't, I . . .

Judge: Has it caused you to form an opinion about the defendants?

Venireperson: No. No. I just wanted to state that I did know him. You know? He didn't ask if I knew Teresa. He asked if we knew _____. I did know her. So . . .

Judge: Uh hum. Thank you.

Venireperson: Okay.

Judge: Thank you.

The decision to excuse a juror for cause is within the discretion of the trial court and such discretion will not be disturbed on appeal absent an abuse thereof. Merriweather v. Commonwealth, 99 S.W.3d 448 (Ky. 2003). Appellant argued that Juror No. 48 should have been excused because of her personal relationship with the owner of Teresa's Market and her "implied"

bias in favor of the bank where she was employed.³ It is evident that Juror No. 48 would hold a bias in favor of her employer, the bank, and would also hold a bias in favor of the owner of Teresa's Market by reason of friendship. We believe these circumstances warranted disqualification of Juror No. 48. Also, we are mindful of the limited circumstantial evidence introduced to prove appellant's knowledge of the checks being forged and of his intent to defraud and/or injure as required under KRS 516.060. Considering these unique circumstances, we are compelled to conclude that the trial court abused its discretion by failing to excuse Juror No. 48 for cause. Accordingly, we reverse the October 17, 2003, judgment of conviction. Having reversed on this ground, appellant's remaining contentions are moot.

For the foregoing reasons, the judgment of the Bell Circuit Court is reversed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR
APPELLANT:

Astrida L. Lemkins
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky

³ The risk of loss for a forged check as between the drawer Baker and the drawee bank is on the bank. Kentucky Revised Statutes (KRS) 355.4-401 and KRS 355.3-403(1).

ORAL ARGUMENT FOR APPELLEE:

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky