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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002595-MR

ROBERT WHITTEMORE — APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE JOHN T. DAUGHADAY, JUDGE
ACTION NO. 02-CR-00178

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND MINTON, JUDGES.

GUIDUGLI, JUDGE: Robert Whittemore appeals from the judgment of the Graves Circuit Court reflecting a jury verdict of guilty on one count each of first-degree possession of a controlled substance (cocaine) and possession of marijuana. Whittemore argues that he was entitled to a change of venue, that the trial judge should have recused himself, that he should have received a directed verdict, and that he is entitled to a new trial. For the reasons stated below, we find no error and affirm the judgment on appeal.

On May 20, 2002, the Graves County grand jury indicted Whittemore on one count each of murder, possession of a controlled substance (cocaine) and possession of marijuana. The indictment came about as a result of a Mayfield police investigation conducted on October 12, 2001. Police officer Donald Worthem went to Whittemore's residence on that date as a result of a 911 call. After entering the residence, Worthem observed marijuana and marijuana paraphernalia, as well as pill bottles containing marijuana and crack cocaine. Whittemore was not present. Later that evening after the police were gone, Whittemore beat his wife, Teresa, to death.

The record indicates that the murder charge was severed from the drug charges, and trial on the murder charge was conducted in July 2003. Whittemore was found guilty of second-degree manslaughter and sentenced to ten years in prison.

Trial on the drug charges was conducted on September 30, 2003. Teresa's brother, Jeff Spraggs, testified that Whittemore called him on October 12, 2001, and asked him to come over and call 911. Spraggs complied, whereupon the police were summoned and ultimately discovered the marijuana and cocaine. Spraggs also testified that at the time, Whittemore was married to Spraggs' sister, Teresa, and Teresa no longer lived with Whittemore.

Officer Worthem testified that as part of his investigation resulting from the 911 call, he conducted a search of Whittemore's residence. In Whittemore's bedroom, Worthem discovered the drugs and drug paraphernalia. He noted that the bedroom contained male clothing but no female clothing, and that the door to the bedroom was padlocked. Whittemore was not arrested at the time, as he had fled before Worthem arrived.

At the conclusion of the Commonwealth's evidence, Whittemore moved for a directed verdict. The motion was denied, at which time the defense rested without presenting evidence. Whittemore renewed his motion for a directed verdict, which again was denied.

The jury returned a verdict finding Whittemore guilty on both counts of the indictment. Later, during the penalty phase, the Commonwealth presented evidence that Whittemore had been convicted of second-degree manslaughter arising from the beating death of Teresa.[1] The jury recommended a sentence of five years in prison on the cocaine charge, to be served consecutively to the manslaughter sentence, and one day in prison for marijuana possession, to be served concurrently.

On October 6, 2003, Whittemore filed a motion for a new trial. As a basis for the motion, he argued that the trial court improperly admitted evidence of prior bad acts at trial,

[1] The jury had been made aware of Teresa's death earlier in the trial when Spraggs stated that Whittemore killed her.

i.e., the events resulting in the manslaughter conviction. The motion was denied, and Whittemore was sentenced in accordance with the jury's recommendation. This appeal followed.

Whittemore first argues that the trial court improperly denied his motion for a change of venue. Prior to the trial on the drug charges, Whittemore moved for a change of venue, arguing that the publicity from the first trial made it impossible for him to receive a fair trial on the drug charges. He directs our attention to newspaper coverage of the first trial, which included descriptions of Teresa's fatal injuries and statements of her family's disbelief at the inadequacy of the 10-year sentence. He maintains that publicity of the first trial was so widespread and harmful to his reputation that he had no opportunity to receive a fair trial on the drug charges absent a change of venue. He seeks an order reversing the judgment on appeal and remanding the matter for a change of venue and new trial.

We have closely examined the record and the law on this issue, and find no error in the trial court's denial of Whittemore's motion for a change of venue. KRS 452.210 states,

> When a criminal or penal action is pending in any Circuit Court, the judge thereof shall, upon the application of the defendant or of the state, order the trial to be held in some adjacent county to which there is no valid objection, if it appears that the defendant or the state cannot have a fair

> trial in the county where the prosecution is pending. If the judge is satisfied that a fair trial cannot be had in an adjacent county, he may order the trial to be had in the most convenient county in which a fair trial can be had.

The mere fact that jurors may have read about a case is not sufficient to sustain a motion for change of venue, absent a showing that there is a reasonable likelihood that the accounts have prejudiced the defendant.[2] Prejudice must be shown unless it may be clearly implied in a given case from the totality of the circumstances.[3] On motion for change of venue based on pretrial publicity, the issue is whether public opinion is so aroused as to preclude a fair trial.[4]

In the matter at bar, Whittemore relies heavily on two newspaper articles in support of his claim that adverse pre-trial publicity prevented him from receiving a fair trial in Graves County. One of the articles was published a few weeks prior to trial in the matter at bar, and the other was published approximately two months before. It is uncontroverted that Whittemore's murder trial resulted in adverse publicity, and that this publicity occurred in the weeks preceding his drug

[2] Thurman v. Commonwealth, 975 S.W.2d 888 (Ky. 1998).

[3] Id.

[4] Foley v. Commonwealth, 942 S.W.2d 846 (Ky. 1996).

possession trial. Pretrial publicity, taken alone, however, is not a sufficient basis for requiring a change of venue.[5]

A more objective and telling indicator of alleged jury pool bias is found by polling the petit jury members. The record herein indicates that about 10 of 66 potential jurors indicated that they had heard of Whittemore's first trial, and 4 of 66 had formed an opinion as to Whittemore's guilt. These 4 members were dismissed, leaving 6 of 62 who were aware of Whittemore's first trial but who stated that they had not formed an opinion as to his guilt in the matter at bar. It is not clear if any of these prospective jurors went on to be seated as jury members at trial, but it is worth noting that Whittemore did not challenge any of the prospective jurors for cause.

When considering a motion for change of venue, the court must look to the totality of the circumstances surrounding the case to determine if a change of venue is required.[6] On appeal, our duty is not to examine the motion *de novo*, but to determine whether Whittemore has overcome the strong presumption that the trial judge's ruling was correct.[7] Having examined the totality of the circumstances as they existed prior to trial, and considering that the vast majority of the jurors evidenced

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[5] Thurmond, supra.

[6] Thurmond, supra.

[7] City of Louisville v. Allen, 385 S.W.2d 179 (Ky. 1964).

no knowledge of Whittemore's first trial, we cannot conclude that the Graves Circuit Court committed reversible error in denying Whittemore's motion for a change of venue.

Whittemore next argues that the trial court erred in failing to grant a new trial after Spraggs testified that Whittemore had engaged in trafficking in marijuana on the day of the charged offense and had killed Spraggs' sister. The parties had agreed not to elicit testimony regarding Whittemore's alleged drug sales, and Whittemore contends this testimony violated the agreement and entitles him to a new trial. As to Spraggs' statement that Whittemore killed Spraggs' sister, Whittemore concedes that the issue is not preserved but argues that the admission of this evidence constitutes palpable error. Whittemore maintains that there exists in the law a general prohibition against the use of evidence of other crimes or bad acts to prove the crime charged. He argues that the Commonwealth's violation of this principle, through Spraggs' testimony, entitles him to a new trial.

We find no error in the trial court's denial of Whittemore's motion for a new trial. A new trial should be granted only to avoid manifest injustice,[8] and should not be granted where the admission of impermissible evidence can be

[8] Gould v. Charlton Company, Inc., 929 S.W.2d 734 (Ky. 1996).

cured with an admonition.[9] While Spraggs' utterance that Whittemore sold marijuana to him arguably was improperly admitted, it occurred without the Commonwealth's solicitation. More importantly, when taken in the context of all of the evidence against Whittemore, including Spraggs' other testimony, the testimony of Worthem, and the physical evidence, we cannot conclude that Whittemore was subjected to manifest injustice by Spraggs' utterance.

Whittemore did not preserve the claim of error arising from Spraggs' statement that Whittemore killed Spraggs' sister, and it does not rise to the level of palpable error. "If upon a consideration of the whole case the Court of Appeals does not believe that there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial."[10] Again, considering the entire case against Whittemore, we do not believe that a substantial possibility exists that Whittemore would have been found not guilty but for Spraggs' utterance.

Whittemore's third argument is that he was denied due process and a fair trial when the trial judge improperly failed to recuse himself pursuant to KRS 26A.015. Whittemore notes that Judge John Daughaday not only presided over Whittemore's

[9] Graves v. Commonwealth, 17 S.W.3d 858 (Ky. 2000).

[10] Abernathy v. Commonwealth, 439 S.W.2d 949 (Ky. 1969).

murder trial, but made statements during the sentencing phase of the first trial that Whittemore contends demonstrates Judge Daughaday's bias against him. Specifically, Judge Daughaday stated that he found inconsistencies between Whittemore's testimony and the physical evidence. And in addressing whether probation was warranted, Judge Daughaday questioned Whittemore's truthfulness. In sum, Whittemore contends that Judge Daughaday should have recused himself and that Whittemore is entitled to a new trial.

Whittemore's argument on this issue is misplaced and not persuasive. We find nothing irregular or otherwise improper in the statements made by Judge Daughaday during sentencing. To the contrary, the trial judge is duty-bound to articulate a legal and factual basis to support the imposition of the sentence and the decision as to whether the sentence should be probated.[11]

The standard for finding judicial bias is very high. The United States Supreme Court has stated that,

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to

[11] KRS 533.010.

> make fair judgment impossible.[12] (Emphasis original.)

Nothing in the record suggests that the statements made by Judge Daughaday during sentencing reveal either an opinion that derives from an extrajudicial source or from a high degree of favoritism or bias. Whittemore's claim of error on this issue does not form a basis for tampering with the judgment on appeal.

Lastly, Whittemore argues that the trial court erred in denying Whittemore's motion for a directed verdict. Whittemore contends that the Commonwealth failed to offer any evidence that Whittemore possessed the cocaine found in the bedroom. He notes that Spraggs and Teresa Whittemore were present in the home on the date at issue, and suggests that the cocaine could have been placed in the bedroom by either of them.

We find no error on this issue. As the parties are aware, Commonwealth v. Benham[13] sets forth the standard for reviewing motions for a directed verdict. It states that,

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of

[12] Liteky v. United States, 500 U.S. 540, 555, 114 S.Ct. 1140, 127 L.Ed.2d 474 (1994).

[13] 816 S.W.2d 186 (Ky. 1991).

> ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
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> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.[14]

Under the evidence as a whole, it was not clearly unreasonable for the jury to conclude that Whittemore possessed the cocaine found in the bedroom. The cocaine was found at Whittemore's residence and in his bedroom, which had a padlock on the door and which contained only men's clothing. Drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, the trial court properly denied Whittemore's motion for a directed verdict. We find no error in this ruling.

For the foregoing reasons, we affirm the judgment of the Graves Circuit Court.

ALL CONCUR.

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[14] Id. at 187.