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OPINION RENDERED JUNE 10, 2005 WITHDRAWN

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000608-MR

LOWELL FRAILEY, JR. — APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 03-CR-00078

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: KNOPF, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Lowell Frailey, Jr. brings this appeal from a March 23, 2004, judgment upon a jury verdict finding him guilty of first-degree burglary and sentencing him to ten years' imprisonment. We vacate and remand.

In this appeal, we are faced with a particularly troublesome legal issue. Appellant raises as error the admission of testimony from the sitting trial judge's paralegal, Sandra Bryant. After having been identified as the trial judge's paralegal, Bryant testified regarding a phone call she

received from appellant on February 3, 2004, at the judge's office. Appellant requested to speak with the trial judge, but Bryant informed him that the judge could not speak to a party outside the courtroom. Thereafter, Bryant testified that she and appellant carried on a conversation for sometime. In fact, Bryant testified that the conversation went on "at great length." Bryant also testified that appellant told her about his problems with his trial counsel, and she apparently gave him some advice on how to proceed. Of particular importance, Bryant testified that appellant told her that he was guilty of the crime alleged and thus, needed good trial counsel. Additionally, a substantial portion of this conversation was recorded on the judge's answering machine.

After the conversation, Bryant immediately prepared and signed an affidavit regarding the conversation and filed the affidavit in the court record. Bryant advised the court of the conversation and the parties by way of a copy of her affidavit. At trial, Bryant referred to the affidavit during her testimony. In the affidavit, Bryant affirmed that part of the conversation was recorded upon the trial judge's answering machine and that "[w]e have saved that portion of the telephone call that was recorded and it is in our office." Appellant testified at trial and vigorously denied admitting guilt to Bryant. He testified

that he was talking fast during the conversation, and she must have misunderstood him.

Appellant alleges as error the introduction of Bryant's testimony. As this error was not preserved, our review shall proceed under the palpable error standard. Ky. R. Crim. P. (RCr) 10.26. For reasons hereinafter elucidated, we conclude the admission of Bryant's testimony constituted palpable error.

Although not bound by Kennedy v. Great Atlantic & Pacific Tea Co. Inc., 551 F.2d 593 (5th Cir. 1977), we view it as both instructive and persuasive. In Kennedy, the Court was faced with a similar issue - whether the district court erroneously admitted the testimony of the district judge's law clerk during trial. The trial involved injuries allegedly suffered by plaintiff as a result of a slip and fall on a slick floor at a grocery store. Upon his own initiative, the district judge's law clerk went to the grocery store to view the actual location where the fall allegedly occurred. The law clerk observed standing water on the floor at the accident site. During trial, the law clerk testified about his observation of standing water on the floor at the grocery store.

In determining whether the testimony of the law clerk constituted reversible error, the Court concluded:

> Any challenge of [the law clerk's] credibility or reliability as a reporter of facts would probably be totally unavailable,

but more particularly, under our adversary system of justice, it was unacceptable that the most damaging evidence against the defendants in this case was brought about by the intervention of a court official in the accumulation of evidence. The law clerk learned of the litigation and of the disputed issues by virtue of his employment as law clerk to the trial judge. It was his duty as much as that of the trial judge to avoid any contacts outside the record that might affect the outcome of the litigation. This we perceive to be the basis, so far as related to the judge himself, of the existing Canon 3(A)(4) of the Code of Judicial Conduct for United States Judges which provides: "A judge should . . . neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. . . . "

. . . .

By clearest analogy, a private view of the site of an accident in litigation resulting in testimony thereabout would seem to be ex parte communication.

. . . .

Appellants also cite as support for their argument Rule 605 of the new Federal Rules of Evidence. This Rule states: "Competency of Judge as Witness: the judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." Although dealing, as it does, with the matter of the judge himself being disqualified, rather than his law clerk, appellants point to some of the language of the Advisory Committee's Notes to Rule 605 which they say is equally applicable to the giving of testimony by a law clerk of the presiding judge during a trial before a jury. . . .

> . . . .
>
> It is impossible to believe that the jury must not have attached some special significance to this testimony of the judge's law clerk . . . .
>
> In addition, there was the imprimatur of character, credibility and reliability that was automatically implied as coming from the court itself when the trial judge introduced the witness as his present law clerk.

Id. at 595-598.

In the case at hand, it is axiomatic that the jury did "attach some special significance" to Bryant's testimony.[1] It is also reasonable to assume that the jury transferred the "character, credibility and reliability . . . [of] the court itself" to Bryant. Id. at 598. We are also struck by the fact that the most incriminating evidence admitted against appellant was the testimony of Bryant concerning appellant's alleged confession of guilt. Taken together, it is difficult to conceive of testimony with a more compelling and with a more prejudicial effect upon a jury. Thus, the admission of Bryant's testimony affected the substantive rights of appellant and resulted in manifest injustice to appellant. See Chumbler v. Commonwealth, 905 S.W.2d 488 (Ky. 1995).

[1] The Commonwealth clearly placed special significance on Bryant's testimony. She was identified to the jury as the trial judge's paralegal. Her affidavit was emphasized throughout her testimony, especially as pertained to the appellant's alleged admission of guilt. She was also recalled as a rebuttal witness to reemphasize appellant's alleged admission of guilt.

We liken Bryant's role and position to that of a law clerk. She testified that her duties included legal research, drafting court orders and traveling with the trial judge when he was in court. The role of the law clerk is one of close confidant, legal researcher and advisor to the judge. Although never explicitly recognized in this Commonwealth, we are persuaded that "a law clerk is probably the one participant in the judicial process whose duties and responsibilities are most intimately connected with the judge's own exercise of the judicial function." Oliva v. Heller, 839 F.2d 37, 40 (2nd Cir. 1988). And, we likewise recognize that a law clerk is forbidden to engage in any conduct that is prohibited a judge. Id.[2] See Hall v. Small Bus. Admin., 695 F.2d 175 (5th Cir. 1983); Price Bros. Co. v. Philadelphia Gear Corp., 629 F.2d 444 (6th Cir. 1980); *In re* Chandler's Cove Inn, Ltd., 97 B.R. 752 (Bankr. E.D.N.Y. 1988).

Kentucky Rules of Evidence (KRE) 605 reads:

> The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

As a presiding judge is prohibited from testifying at trial, we, likewise, believe his law clerk, or in this case, his paralegal,

[2] We note that "[a]nyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions . . . is a judge for the purpose of this Code." Rules of the Supreme Court 4.300, APPLICATION OF THE CODE OF JUDICIAL CONDUCT ¶ 1. And, Bryant testified that she considered herself an officer of the court.

is also prohibited from testifying at trial. Our interpretation of KRE 605 is supported not only by common sense but by common law, which recognizes that prohibitions applicable to the judge are equally applicable to his law clerk. See Hall, 695 F.2d 175; Price Bros. Co., 629 F.2d 444; *In re* Chandler's Cove Inn, Ltd., 97 B.R. 752. Even though the error is unpreserved, KRE 605 is clear that an objection is unnecessary for appellate review; thus, we conclude that admission of Bryant's testimony violated KRE 605 and constituted palpable error.

Bryant's testimony also raises numerous ethical conundrums for the trial judge. See Rules of the Supreme Court (SCR) 4.300 Canon 3, §B(5), §B(9), §E(1) and §F. For example, SCR 4.300 Canon 3 Sections E and F state, in relevant part, as follows:

> E. Disqualification
> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
> (a) the judge has . . . personal knowledge of disputed evidentiary facts concerning the proceeding;
> . . . .
> F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice

> concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

The record discloses that Bryant immediately informed the trial court of her conversation with appellant. Additionally, it is clear that a portion of the phone conversation was recorded upon the judge's answering machine in his office. All of this occurred two weeks prior to trial. At trial, it was a disputed fact whether appellant admitted guilt to Bryant. Bryant testified that he did; appellant testified that he did not. Under these circumstances, it is reasonable to conclude the trial judge possessed "personal knowledge" of a disputed evidentiary fact prior to trial, and the recusal provisions of Canon 3 were triggered.[3] Under Canon 3, the onus was upon the judge, rather than appellant, to disclose knowledge of the disputed evidentiary fact, and if disqualification were to be thereafter waived, the remittal procedure of Section F should have been followed.[4]

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[3] Disqualification may also be required under Kentucky Revised Statutes 26A.015(2)(a) and (e).

[4] Following the initial rendition of this opinion on June 10, 2005, the Commonwealth filed a petition for rehearing and/or modification, and a motion to supplement the record. The Commonwealth attempted to submit affidavits from the prosecutor, the trial judge and the paralegal, each asserting that the trial judge offered to recuse himself prior to trial and that Frailey's

In sum, we conclude Bryant's testimony should have been excluded because of its obvious prejudicial effect upon the jury and by reason of KRE 605. Although we express no opinion upon whether the trial judge violated any specific provision of SCR 4.300 Canon 3, we believe the facts of this case, at a minimum, may raise the appearance of impropriety. For the above stated reasons, we hold the admission of Bryant's testimony constituted palpable error. See RCr 10.26.[5]

We also conclude that no additional grounds exist to reverse appellant's convictions based on the other issues raised in this appeal. We have thoroughly reviewed the record and believe that the trial court did not abuse its discretion or clearly err in its evidentiary rulings. The propriety of appellant's motion for a directed verdict and his request for an instruction on the lesser-included offense will depend on the evidence presented at a new trial.

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trial counsel expressly declined the offer. However, the applicable rules do not allow a party to introduce new evidence to the record following rendition of the opinion. Moreover, this Court's review is limited to matters of record. Fortney v. A.J. Elliott's Administrator, 273 S.W.2d 51, 52 (Ky. 1954). The alleged waiver of this issue took place in an off-the-record discussion outside of the courtroom and was not memorialized on the record. Hence, we cannot consider the waiver asserted in the Commonwealth's affidavits.

[5] Our ruling is simply that Bryant could not testify before the trial judge for whom she worked. We express no opinion on whether her testimony would have been admissible if the trial judge had recused or disqualified himself and a special judge presided over the trial.

For the foregoing reasons, the judgment of the Rowan Circuit Court is vacated and this cause is remanded for a new trial or other proceedings consistent with this opinion.

ALL CONCUR.

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