

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000657-MR

RICHARD SCOTT MERRIFIELD

APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
INDICTMENT NO. 03-CR-00097

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TACKETT AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: Richard Scott Merrifield was convicted by a jury of various drug-related offenses, and sentenced to serve a total of ten years in prison. On appeal, he claims that he was entitled to a mistrial because one of the jurors, who was dismissed as an alternate, failed to reveal during *voir dire* that he was acquainted with one of the witnesses and with Merrifield's father. We affirm the judgment

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and sentence of Grayson Circuit Court on the ground that the issue was waived for failure to make a proper or timely objection. Furthermore, if the case is reviewed under the palpable error standard, Merrifield has failed to demonstrate sufficient potential bias on the juror's part to warrant the inference that he would have been subject to a strike for cause.

Merrifield was indicted on August 5, 2003, for trafficking in a controlled substance (methamphetamine) in the first degree; possession of marijuana; possession of drug paraphernalia, second or subsequent offense; and possession of a controlled substance not in an original container. The latter charge was dismissed prior to trial on the Commonwealth's motion, and Merrifield stipulated that it was his second or subsequent offense for possession of drug paraphernalia.

A jury trial was held on February 25, 2004. At the close of all the evidence, a session was held in chambers to discuss the jury instructions. At that time, the court was told by a bailiff that one of the jurors, Mike Houchins,² had spoken to one of the witnesses, Tracey Moutardier, a police officer, during the court recess. The court interviewed Moutardier and Houchins individually, in the presence of Merrifield, his

² The juror's last name is spelled "Houchins" by the appellant, and "Houchens" by the appellee. The name appears as "Houchin" in the record. We have adopted the appellant's spelling.

defense counsel, and the Commonwealth's attorney, to determine what had happened.

Houchins and Moutardier informed the court that their conversation was brief and confined solely to the topic of horses. Specifically, Houchins had asked Moutardier whether she was still showing horses. Moutardier had replied that she was; in response to Houchin's further question, she told him that she was showing horses in Ohio and in Murfreesboro. Houchins also told the court that he had sold horses to Moutardier in the past. When he was asked to explain why he did not reveal this during *voir dire*, he said that Moutardier was not a close friend but just an acquaintance.

During his interview, Houchins also told the court that, after the trial had started, he realized that he knew Merrifield's father. Houchins believed that Merrifield's father, who is a heavy equipment operator, might once have done some work for him. Houchins explained that he had been an automobile dealer and that there were very few people in the county that he did not know.

The court discussed what to do about Houchins with the two attorneys, and ultimately decided that Houchins would be dismissed after closing arguments as if he had been selected as the alternate juror.

After the verdict against Merrifield was rendered, he filed a motion for a new trial, in which he argued that Houchins deliberately concealed his ties to Moutardier and Merrifield during *voir dire*. As a result, Merrifield contended that he was prevented from exercising his right to strike Houchins for cause, and ultimately deprived of his due process right to an unbiased jury. The motion was denied and this appeal followed.

We have reviewed the record and agree with the Commonwealth that this issue was not properly preserved for our review. The trial court gave defense counsel every opportunity to ask for a mistrial at the time Houchins' acquaintance with Moutardier and Merrifield's father was revealed, yet defense counsel chose not to do so. Merrifield's counsel did raise the hypothesis that the jury panel might have been completely different if they had known from the start that Houchins was acquainted with Merrifield's father and he had consequently been stricken for cause. He also stated, however, that he preferred to reserve his right to object to Houchins remaining on the jury panel until after the jury had rendered its verdict, and to reserve any motions he might want to make until after the jury's deliberations. The judge expressed some misgivings about this approach, commenting that he was "not sure you can keep preserving it if you know there's a chance he should be stricken."

Defense counsel made no further objections regarding this issue, and acquiesced in the court's decision to dismiss Houchins as an alternate juror. At no time before the verdict was rendered did defense counsel seek a mistrial.

"The general rule is that objection to a juror because of his disqualification is waived by a failure to object to such juror until after verdict."³ "A party is under a duty to make 'known to the court the action [he] desires the court to take' . . . '[F]ailure to move for a mistrial following an objection and an admonition from the court indicates that satisfactory relief was granted.'"⁴ Finally, "[a] defendant cannot await the verdict of the jury before presenting an objection to improprieties that occurred during the trial[.]"⁵

Although Merrifield has proceeded under the assumption that the alleged error was preserved, "[a]n appellate court may consider an issue that was not preserved if it deems the error to be a 'palpable' one which affected the defendant's 'substantial rights' and resulted in 'manifest injustice.'"⁶

In order "[t]o obtain a new trial because of juror mendacity, 'a party must first demonstrate that a juror failed

³ Pelfrey v. Commonwealth, 842 S.W.2d 524, 526 (Ky. 1992) (citation omitted).

⁴ Howell v. Commonwealth, 163 S.W.3d 442, 447 (Ky. 2005) (citations omitted).

⁵ Patrick v. Commonwealth, 436 S.W.2d 69, 74 (Ky. 1968).

⁶ Licklitter v. Commonwealth, 142 S.W.3d 65, 70 (Ky. 2004), citing Ky. R. Crim. Proc. (RCr) 10.26.

to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause.'"⁷

The evidence provided by Merrifield simply does not meet this standard. There is absolutely no indication that Houchins' acquaintanceship with Moutardier or Merrifield's father would have provided a valid basis for a challenge for cause. The facts of the case on which Merrifield relies, Paenitz v. Commonwealth,⁸ are clearly distinguishable. The Kentucky Supreme Court remanded that case (which involved sexual abuse of an infant) for a new trial because there was evidence that a juror had withheld the fact that she had discussed graphic medical details of the child's injuries with the government's expert witness before the trial.⁹ Merrifield's vague and speculative allegations about Houchins' acquaintance with Merrifield's father do not approach this level of potential prejudice. Moreover, unlike the juror in Paenitz, Houchins did not participate in the jury deliberations.

⁷ Adkins v. Commonwealth, 96 S.W.3d 779, 796 (Ky. 2003), quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 850, 78 L. Ed. 2d 663 (1984)).

⁸ 820 S.W.2d 480 (Ky. 1991).

⁹ Id. at 481.

A situation more analogous to Merrifield's was addressed by the Supreme Court in Miller v. Commonwealth.¹⁰ In that case, the appellant argued that she was denied a fair trial by the trial court's refusal to strike a juror who came forward during the course of the proceedings and informed the court that she had suddenly remembered that she and her husband lived next door to the apartment where the events at issue were alleged to have occurred, and that her husband had had dealings with the appellant's brother, a contractor, regarding water drainage problems. Although the appellant insisted that her defense counsel had called for a mistrial by requesting that the juror be removed, the record showed no such objection. The Court held that the issue was not properly preserved, and that even if it had been, the relationship appeared so tenuous that it could not have affected the impartiality of the juror.¹¹

Similarly, in Sanders v. Commonwealth,¹² the Supreme Court found no error in defense counsel's failure to question a juror who had a passing acquaintance with the father of the victim, where the appellant presented no information indicating bias that would have been revealed through further questioning. The Court concluded "that this allegation of bias on the part of

¹⁰ 925 S.W.2d 449 (Ky. 1996), overruled on other grounds by Garrett v. Commonwealth, 48 S.W.3d 6 (Ky. 2001).

¹¹ Id. at 453.

¹² 89 S.W.3d 380 (Ky. 2002).

the juror is merely speculative, and that it does not establish any prejudice toward Sanders [the appellant]. The casual acquaintance was not the close relationship needed to imply bias on the part of the juror[.]”¹³

By contrast, in Marsch v. Commonwealth,¹⁴ the Supreme Court did find a reasonable inference of prejudice on the part of jurors that it described as follows: “second or third cousins of the victim who had visited the funeral home to express condolences to the victim’s family, or who had known the victim since he was a teenager and through work with him at church;” and “jurors [who] demonstrated considerable knowledge of the facts of the case, and had earlier formed opinions as to appellant’s guilt.” This latter group included the wife of a deputy coroner, and she and her husband had discussed the case and read several newspaper articles about the crime.¹⁵

The facts of Merrifield’s case are much more similar to those in Sanders and Miller, and he has failed to demonstrate that a correct answer from Houchins during *voir dire* would have provided a valid basis for a challenge for cause.

For the foregoing reasons, the judgment is affirmed.

ALL CONCUR.

¹³ Id. at 388.

¹⁴ 743 S.W.2d 830 (Ky. 1987).

¹⁵ Id. at 832.

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