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Commonwealth of Kentucky

Court of Appeals

NO. 2004-CA-002481-MR

MAXINE O'HAIR — APPELLANT

v. ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2007-SC-0050-DG

APPEAL FROM POWELL CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 00-CI-00200

CARL WELLS,
D/B/A WELLS FUNERAL HOME — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

STUMBO, JUDGE: This appeal has been remanded to this Court by the Kentucky Supreme Court in order for us to reconsider our earlier opinion in light of the recent case *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007). In *Shane*, the

[1] Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Kentucky Supreme Court overruled *Morgan v. Commonwealth*, 189 S.W.3d 99 (Ky. 2006), by holding that a trial court's failure to strike a juror for cause violated a substantial right, and thus, could never be harmless. *Shane* at 341. One issue in the present case was determined by *Morgan*, thus we must re-evaluate only that question. Maxine O'Hair, executrix of Jerry O'Hair's estate, argues that three jurors should have been removed for cause. We agree that two of the three should have been removed. We, therefore, reverse and remand for a new trial. As for the other issue presented on appeal, we adhere to the holdings of the previous panel of this Court.

The appeal comes from a judgment pursuant to a jury verdict in a wrongful death case finding that the owner of a funeral home, Carl Wells, was not liable for the decedent's fall down the stairs of the funeral home. The only issue for us to re-examine and determine anew is whether three jurors should have been removed for cause. The previous panel of this Court was bound by the rule in *Morgan*, and as such, found no error on the part of the trial court because the two jurors it felt should have been removed for cause did not sit on the jury due to the use of peremptory strikes.

The previous panel of this Court, even though it was bound by *Morgan*, still analyzed each of the jurors and found two should have been removed for cause. We adopt the analysis which was as follows:

> Maxine's first argument is that the trial court erred in failing to strike three prospective jurors for cause.

Maxine used peremptory challenges to strike two of the jurors, and the third served on the jury.

The first prospective juror Maxine wanted to strike was Wilson Hampton, who ultimately served on the jury. Maxine alleged Hampton was biased because he was friends with Carl Wells and had done business with Wells. Hampton stated during *voir dire* that he was friends with Wells and had bought headstones from him, including one for his wife in 2001. Hampton stated, however, that he was not a close friend of Wells and did not socialize with Wells. When asked if he thought he could be fair and impartial and make a decision on the case based solely on the evidence and the law, Hampton replied, "Well, I think I could, yeah, I think so." When the court pressed Hampton on whether he would rule just on the facts and the law, Hampton responded that he would.

Whether or not a juror should be stricken for cause is within the sound discretion of the trial court, and an appellate court will not reverse the trial court's decision absent an abuse of that discretion. *Maxie v. Commonwealth*, 82 S.W.3d 860 (Ky. 2002). Once a close relationship, either familial, financial, or situational, with any of the parties is established, the court should sustain a challenge for cause regardless of protestations of lack of bias. *Ward v. Commonwealth*, 695 S.W.2d 404 (Ky. 1985). However, a prospective juror is not automatically disqualified merely because he is acquainted with one of the parties. *Maxie*, 82 S.W.3d at 862. So long as reasonable grounds exist to believe the juror can render a fair and impartial verdict based solely on the evidence, the juror is qualified to sit on a case. *Id.* Juror bias "does not encompass a mere social acquaintanceship in the absence of other indicia of a relationship so close as to indicate the probability of partiality." *Sholler v. Commonwealth*, 969 S.W.2d 706 (Ky. 1998). In *Sanders v. Commonwealth*, 801 S.W.2d 665, 670 (Ky. 1990), *cert. denied*, 502 U.S. 831, 112 S. Ct. 107, 116 L. Ed.2d 76 (1991), it was held that a casual business relationship between the prospective juror and one of the victims did not compel a presumption of bias.

In the instant case, it was established that Hampton was not a close friend of Wells and that he had only a casual business relationship with him, buying headstones from him on occasion. We do not believe the trial court abused its discretion in not striking Hampton for cause.

The next juror challenged by Maxine was Russell Strange. Maxine used a peremptory strike to excuse Strange. When asked on *voir dire* if he was a close personal friend of Carl Wells, Strange responded that he was. Strange stated that he has known Wells since 1961 and likes him very much. He explained that they were in the Lions Club together and they would see each other once or twice a month. He also stated that he had been to Wells' house two times and that his wife had worked for Wells hanging wallpaper in his house around 15 years ago. Finally, Strange stated that Wells had provided funeral services for his family, most recently four or five years ago. Strange assured the court, however, that he could be fair and impartial in the case and that he would not let his friendship with Wells affect his consideration of the evidence.

With Strange's admission that he is a close personal friend of Wells, that they are in a social club together and that he likes Wells very much, we believe the trial court abused its discretion in failing to strike Strange for cause. Given the fact that Strange considered Wells a close personal friend, bias must be implied, despite Strange's contention that he could be impartial. *See Ward*, 695 S.W.2d 404.

The last juror challenged by Maxine was Kenneth Hall. A peremptory challenge was used by Maxine to strike Hall when the trial court would not strike him for cause. Hall stated on *voir dire* that he had been up and down the stairs at Wells Funeral Home lots of times, most recently a year ago. When asked if he had successfully navigated the stairs, Hall responded, "I have been able to travel them up and down without getting hurt – yes." When asked if he had formed an opinion about the safety of the stairs, Hall answered, "Well, you know, I have – I figured they were safe. I never had no problems getting

> up and down them." Hall stated, however, that he would decide the case solely on the evidence and would disregard outside knowledge of the case. Hall also admitted that he had heard "ordinary talk" about the case, had read the article in the newspaper about the case, had known Wells for 20 years, and had done business with Wells when he buried his mother 7 years ago.
>
> It is not required that jurors be totally ignorant of facts and issues in a case in order to satisfy the requirement of a fair trial by impartial jury. *Jacobs v. Commonwealth*, 870 S.W.2d 412 (Ky. 1994). However, where jurors demonstrate considerable knowledge of the facts of the case such that they have formed an opinion about the main issue in the case, they must be excused for cause. *Marsch v. Commonwealth*, 743 S.W.2d 830 (Ky. 1987). Kenneth Hall had been up and down the stairs in question in this case lots of times and admitted that he had formed the opinion that they were safe. Because Hall's personal knowledge of the facts of the case went to the ultimate issue in the case – whether the defendant failed in his duty to keep the stairs in a reasonably safe condition – and he had formed an opinion on this ultimate issue, we believe it was error for the court to fail to strike Hall for cause in this case.

Under *Morgan v. Commonwealth*, *supra*, the fact that Hall and Strange did not ultimately sit on the jury settled the issue. There was no reversible error even though they should have been removed for cause. However, *Shane v. Commonwealth*, *supra*, has overruled *Morgan*. *Shane* holds that forcing a party to use a peremptory challenge to remove a juror when the juror should have been removed for cause is a violation of a substantial right. If the juror should have been removed for cause, but was not, it is reversible error. We agree with the previous panel of this Court that two of the jurors should have been removed for cause.

> [T]he defendant was tried by a jury that was obtained by forcing him to forgo a different peremptory strike he was entitled to make. If he had been allowed that strike, he may well have struck one of the jurors who actually sat on the jury. He came into the trial expecting to be able to remove jurors that made him uncomfortable in any way except in violation of *Batson v. Kentucky;* this was a right given to him by law and rule. Depriving him of that right so taints the equity of the proceedings that *no* jury selected from that venire could result in a fair trial. No jury so obtained can be presumed to be a fair one.

Shane at 340.

As for the other issues appealed, since they may arise during the new trial, we adopt the opinion of the previous panel of this Court.

For these reasons, we reverse the trial court and remand back for a new trial to be held in accordance with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

David R. Marshall
Lexington, Kentucky

BRIEF FOR APPELLEE:

R. Craig Reinhardt
Katherine J. Hornback
Lexington, Kentucky