

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-002106-MR

JOAN MARIE BRAUTIGAN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 05-CR-00074 & 05-CR-00074-0

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, DIXON AND KELLER, JUDGES.

ACREE, JUDGE: Joan Brautigan appeals from the judgment of the Kenton Circuit Court finding her guilty of receiving stolen property, over \$300.00, and setting a three year probated sentence. On appeal, she raises three issues: the first concerning a witness for the Commonwealth, the second challenging the trial judge's denial of her request to recuse himself, and the third alleging juror misconduct. Finding no merit to any of these complaints, we affirm.

At the time of the offense, Lacy Cain, a friend of Brautigan, was employed at a local K-Mart. A few days prior to the offense, Cain told Brautigan she wanted to help her get some Christmas gifts for her children. When they met prior to committing the offense Cain furnished Brautigan with a K-Mart gift card having a balance of less than two dollars. She instructed Brautigan to select her merchandise and then bring her cart to Cain's checkout where Cain would engage in a practice known as "free bagging." As Cain explained it to Brautigan, free bagging requires a conspiracy between a customer and a store clerk. Cain would pretend to scan all the items, but would in fact only scan a few, while placing all the merchandise in bags. Then, Brautigan would present her gift card to create the appearance for surveillance cameras that she was paying for all the merchandise. She would then walk away with merchandise that no one paid for.

On December 16, 2004, Cain arrived at K-Mart to work her shift. While she was working, she free bagged some items for another friend. The personnel manager spotted Cain's suspicious behavior. Accompanied by the store manager, she went to the loss prevention office to investigate whether Cain had charged her customer for all of the items she bagged. Using the surveillance cameras and store computer system, they verified that Cain had bagged a few items without scanning them.

While the managers were in the security area reviewing the video tapes, they noticed Cain in the electronics department talking to a pair of customers. It turns out that these customers were Brautigan and her then-fiancé Eli Farmer. Cain returned to her register, and Brautigan and Farmer brought their shopping carts to Cain's checkout lane.

Between them, they had three carts with eighty-seven items. Cain only scanned four items, bagging the others without charging Brautigan or Farmer. The items scanned totaled \$49.99. Brautigan presented the gift card, and Farmer paid the remaining charge with a fifty dollar bill. Outside the store, the pair were apprehended by local police, while Cain was escorted to the loss prevention office. The shopping carts contained merchandise valued at just over \$1,000.00. Brautigan, Farmer, and Cain were all charged with receiving stolen property over \$300.00, a Class D felony. Cain pled guilty and received pretrial diversion, while her co-defendants opted to go to trial.

At trial, Cain testified against Brautigan and Farmer. The Commonwealth introduced testimony from other store personnel, as well as the videotape from the store's surveillance cameras showing Brautigan and Farmer at Cain's register. The jury convicted them both. Brautigan was sentenced to three years, sixty days to serve, with the balance probated for three years. This appeal followed.

Brautigan raises several arguments concerning Cain's testimony, contending the trial judge should have recused himself, and alleging juror misconduct. Prior to trial, Brautigan made a motion to have Cain declared an incompetent witness. She claimed Cain was incompetent to testify by Kentucky Rule of Evidence (KRE) 601(b)(4), which precludes testimony by a witness who cannot understand her obligation to testify truthfully. At the time of her arrest, Cain gave police a written statement describing her call to Brautigan where she asked her friend to come to K-Mart and pick out Christmas gifts for her children. Cain told Brautigan she would only pretend to scan

the items Brautigan selected. When she pled guilty, Cain initially recited this abbreviated version of events to the trial court. The Commonwealth's summary included the fact that videotape showed Cain free bagging for an earlier customer, that she spoke with Brautigan a few days before the incident and gave her a gift card, and that Cain took a break to point out possible items that Brautigan and Farmer could put in their carts. Cain agreed this version of events was accurate, and the trial court included a condition that she testify truthfully against her co-defendants in order to receive diversion.

Brautigan argues that Cain was faced with a dilemma. If she told the “truth” as Brautigan understood it and as it was contained in her written statement that Brautigan did not know what was going on, she would lose her deal for diversion. Thus, Cain chose to tell the Commonwealth's “truth” which implicated her friend as a knowing participant. There are several problems with this argument. The first is that Cain stated, at the time of her guilty plea, that the Commonwealth's summary was more accurate than her previous written statement to police. The second, and certainly more significant, is that the record on appeal does not contain a copy of Cain's written statement. Consequently, we are unable to compare the contents of Cain's written statement with her testimony at trial. Finally, the existence of a prior inconsistent statement is grounds for impeachment under KRE 613, but not disqualification of the witness on grounds of incompetency under KRE 601.

During cross-examination, Brautigan thoroughly explored the discrepancies between Cain's written statement to police, the Commonwealth's summary of the

evidence on the day of her guilty plea, and Cain's testimony the day of trial. She also pointed out that Cain was obligated to testify a certain way in order to receive diversion. “Whether a witness is competent is a question for the sound discretion of the trial court. Unless that discretion is abused, it will not be disturbed on appeal.” *Pendleton v. Commonwealth*, 685 S.W.2d 549, 551 (Ky. 1985). We are unable to detect any abuse of the trial court's exercise of its reasonable discretion on this issue.

Brautigan also contends the trial judge should have recused himself from presiding over her trial after his participation in Cain's guilty plea. During her guilty plea colloquy, Cain agreed that the Commonwealth's summary of proof was more accurate than the version of events contained in her prior written statement. The trial court reminded her that the Commonwealth was not obligated to recommend diversion and that she was expected to offer something in return. He concluded that Cain's truthful testimony against her co-defendants was a requirement of her diversion agreement. Brautigan subsequently filed a motion for the judge to recuse himself from presiding over her trial. In it she argued that the judge had shown a preference for the Commonwealth's version of events and had inadvertently intimidated Cain into agreeing with it. The trial court directed Brautigan to transmit her motion and affidavit to the Chief Justice of the Kentucky Supreme Court, in accordance with Kentucky Revised Statute (KRS) 26A, where it was denied without prejudice.

“Every litigant . . . is entitled to nothing less than the cold neutrality of an impartial judge, and the law maintains that no judge shall preside in a case in which he is

not wholly free, disinterested, impartial and independent.” *Commonwealth v. Murphy*, 174 S.W.2d 681, 685 (Ky. 1943), quoting 30 *Am.Jur.*, Judges, Sec. 53. Consequently, KRS 26A.015(2)(a) requires a trial judge to recuse from any proceeding “[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding” Nevertheless, recusal is not required merely because a trial court is exposed to some of the facts about a case through presiding over a co-defendant's guilty plea.

The burden of proof required for recusal of a trial judge is an onerous one. There must be a showing of facts “of a character calculated seriously to impair the judge's impartiality and sway his judgment.” *Foster v. Commonwealth*, Ky., 348 S.W.2d 759, 760 (1961), cert. denied, 368 U.S. 993, 82 S.Ct. 613, 7 L.Ed.2d 530 (1962); see also *Johnson v. Ducobu*, Ky., 258 S.W.2d 509 (1953). The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal. *Webb v. Commonwealth*, Ky., 904 S.W.2d 226 (1995).

Stopher v. Commonwealth, 57 S.W.3d 787, 794-5 (Ky. 2001). The trial judge in this case presided over Cain's colloquy, listened to a summary of the evidence against Cain and her co-defendants, and enjoined her to testify truthfully – technically, a redundancy later repeated in her oath before testifying. We do not agree with Brautigan's contentions that he endorsed a specific version of the facts or influenced Cain to be an untruthful witness, but quite to the contrary. Neither did he express any view about the guilt of either of

Cain's co-defendants. In short, Brautigan simply fails to provide proof that would meet the onerous standard requiring the trial judge's recusal.

In addition, Brautigan raises issues concerning Cain's actual testimony at trial. First, she claims the trial court erroneously permitted the Commonwealth to introduce evidence of Cain's guilty plea as substantive evidence of her co-defendants' guilt. The Commonwealth introduced evidence of Cain's guilty plea during its direct examination of her. Brautigan's objection to that testimony and motion for a mistrial were overruled.

The Kentucky Supreme Court previously held evidence of one co-defendant's conviction under the indictment inadmissible at the trial of other co-defendants. *Tipton v. Commonwealth*, 640 S.W.2d 818, 820 (Ky. 1982).

To make such a reference and to blatantly use the conviction as substantive evidence of guilt of the indictee now on trial is improper regardless of whether the guilt has been established by plea or verdict, whether the indictee does or does not testify, and whether or not his testimony implicates the defendant on trial.

Id. at 820. However, more recent cases have recognized that evidence of the disposition of one defendant's charges may not be prejudicial to her co-defendants. *Askew v. Commonwealth*, 768 S.W.2d 51, 54 (Ky. 1989), *Commonwealth v. Gaines*, 13 S.W.3d 923, 925 (Ky. 2000). This is particularly true when there is no attempt by the Commonwealth to use one defendant's conviction to establish another defendant's guilt by inference. *Askew*, 768 S.W.2d at 54.

In the case before us, Brautigan's opening statement referred to the inducements offered by the Commonwealth in exchange for Cain's testimony. She told the jury that Cain's story had changed after she got into trouble and the Commonwealth offered her assistance. Brautigan mentioned that Cain's testimony at trial had to satisfy the Commonwealth in order for her to avoid going to prison. Brautigan made repeated references to Cain's changing story and her motivation for testifying. Afterwards, the Commonwealth asked Cain on direct examination whether she had been charged with a crime as a result of her interaction with Farmer and Brautigan and what the disposition of the charge had been. Cain replied that she was on felony diversion probation.

As noted, Brautigan's objection and request for a mistrial were overruled. The trial court held that Brautigan had opened the door to the Commonwealth's question by her comments in her opening statement, citing *Commonwealth v. Gaines, supra*. We agree. Brautigan's challenge of Cain's veracity necessarily rested upon the ability to demonstrate to the jury that Cain was convicted and that she cut a deal with the Commonwealth to reduce her sentence. In essence, if the Commonwealth had not introduced that testimony, Brautigan would have, and, in fact, she did. During cross-examination, Brautigan questioned Cain in detail about her original statement to police, her guilty plea, and her motivation to testify favorably to the Commonwealth in order to receive diversion. We do not find error in the trial court's admission of the testimony or in its denial of Brautigan's motion for a mistrial

Next, Brautigan complains that the trial court limited her cross-examination of Cain regarding her previous criminal record. During cross-examination, Brautigan asked Cain to explain the terms of her diversion to the jury. Cain explained that, after five years, the conviction would be rescinded and she would have a clean record, as long as she complied with the terms. Next, Cain was asked whether her familiarity with diversion stemmed from a prior diverted charge. The Commonwealth's objection was sustained. The trial court also sustained an objection to a question about Cain's probationary status for a misdemeanor shoplifting charge. Brautigan now argues that her right to confront Cain was impermissibly restricted and that she was entitled to demonstrate Cain's bias as a witness. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

We believe Brautigan thoroughly cross-examined Cain about her diversion agreement in the case at hand. Further, the trial court permitted Cain to be questioned about a felony she was charged with a week after the free bagging incident, even though the grand jury returned a no true bill. Nevertheless, Brautigan contends that she should have been permitted to question Cain about her previous diversion because Cain did not receive the benefit of the diversion statute until after her completion of the diversion period. *Thomas v. Commonwealth*, 95 S.W.3d 828, 830 (Ky. 2003). Thus, Brautigan argues the prior diverted charge counted as a felony conviction. This argument fails in two respects. First, in the case referred to by Brautigan, Cain pleaded guilty to third-degree criminal possession of a forged instrument, a misdemeanor. KRS 516.070.

Second, Cain completed diversion and the charge was dismissed on November 11, 2004, prior to the commission of the offense in this case. Therefore, the trial court properly found that evidence of Cain's prior diversion was inadmissible.

Brautigan also sought to cross-examine Cain about her current probation on a misdemeanor shoplifting charge. The trial court upheld the Commonwealth's objection and expressed its opinion that Brautigan was attempting to impeach Cain's credibility by proving her criminal disposition, a ploy forbidden by the Kentucky Rules of Evidence. Brautigan argues this evidence should have been placed before the jury since it “was not introduced to impeach the Commonwealth's witness because [she] was convicted of a crime, . . . rather it was offered to show [Cain's] possible bias.” *Commonwealth v. Cox*, 837 S.W.2d 898, 901 (Ky. 1992)(citation omitted). We disagree.

Cain was on probation for a misdemeanor. Thus, the Commonwealth had no ability to promise her any particular outcome, since any decision regarding her probationary status was within the authority of the district court. Further, as Brautigan already pointed out, a diverted charge is still considered a felony conviction for the duration of the diversion. If we assume that conviction of a criminal offense would be a violation of Cain's misdemeanor probation, then her agreement with the Commonwealth did nothing to mitigate the consequences of such a violation. Finally, the trial court has the discretion to limit cross-examination designed to show bias, as long as the witness' motivation to please the Commonwealth by coloring her testimony is still reasonably apparent. *Davenport v. Commonwealth*, 177 S.W.3d 763, 768 (Ky. 2005). Brautigan

cross-examined Cain extensively regarding her diversion agreement with the Commonwealth, dwelling in particular on Cain's motivation to testify in accordance with the Commonwealth's summary of the evidence stated in court on the date of her guilty plea. We agree with the trial court that there was sufficient evidence to demonstrate Cain's bias to the jury without admitting her misdemeanor probationary status.

Brautigan's final argument alleges misconduct by a member of the jury. Some time after her trial, the prosecutor was at a local bar where he ran into a male juror. A little while later, the juror asked the prosecutor why he looked familiar. After the prosecutor stated his occupation, the juror remarked that he had just served on a jury and began to talk about the case. As the prosecutor remembered the conversation, the juror said he had previously had sexual relations with Lacy Cain and asked whether he should have said something at trial. The prosecutor brought the incident to the trial court's attention and a hearing was held.

Both the prosecutor and the juror testified that they had consumed alcohol on the night in question and that the bar was crowded and noisy. According to the prosecutor, the juror said he knew of Brautigan or, at least, least knew what kind of person she was and that he previously had sexual relations with Cain. The juror testified that he was unacquainted with Brautigan and did not know of her before the trial. According to the juror, he did not recognize Cain's name during *voir dire*, but during the second day of the trial, he realized that she had dated one of his friends in high school about nine years prior. He adamantly denied ever having a romantic or sexual

relationship with Cain and said his prior acquaintance with her did not influence his decision about her co-defendants' guilt. The trial court found no evidence of juror misconduct or perjury, either during *voir dire* or during the post-trial hearing.

The Commonwealth contends Brautigan did not adequately preserve this issue. Nevertheless, we have elected to review her claim of juror misconduct and find it to be without merit. Kentucky Rule of Criminal Procedure (RCr) 9.36(1) provides for the disqualification of any juror who “cannot render a fair and impartial verdict on the evidence. . . .” Brautigan cites a previous opinion wherein the Kentucky Supreme Court held

[I]rrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has such a close relationship, be it familial, financial or situational, with any of the parties, counsel, victims or witnesses.

. . . .

Once that close relationship is established, without regard to protestations of lack of bias, the court should sustain a challenge for cause and excuse the juror

Marsch v. Commonwealth, 743 S.W.2d 830, 833 (Ky. 1987). The trial court refused to find the juror offered perjurious testimony during the hearing when he stated that he recognized Cain because she dated a friend of his almost a decade prior to the trial. Such a relationship, remote in time and not of a close nature to begin with, would not have furnished grounds for a challenge for cause, even if it had been publicized during *voir dire*. “The casual acquaintance was not the close relationship needed to imply bias on

the part of the juror” *Sanders v. Commonwealth*, 89 S.W.3d 380, 388 (Ky. 2002).

Moreover, there was substantial evidence of Brautigan's guilt independent of Cain's testimony, including a videotape from store security cameras and the fact that she was apprehended with three shopping carts of merchandise and a receipt that showed only four items were purchased. Consequently, Brautigan is unable to prove that the juror's failure to mention his acquaintance with Cain until after the trial prejudiced her.

For the foregoing reasons, the judgment of the Kenton Circuit Court is
AFFIRMED.

ALL CONCUR.

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