

RENDERED: JANUARY 12, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002207-MR

CHRISTOPHER E. BLEVINS

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NOS. 04-CR-00071 AND 04-CR-00215

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: TAYLOR, JUDGE; ROSENBLUM,¹ SENIOR JUDGE; MILLER,²
SPECIAL JUDGE.

TAYLOR, JUDGE: Christopher E. Blevins brings this appeal from
an October 7, 2005, judgment upon a jury verdict of guilty
convicting him of the offenses of second-degree robbery and
first-degree persistent felony offender. We affirm.

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
Kentucky Revised Statutes 21.580.

² Retired Judge John D. Miller sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

In February 2004, appellant was arrested while attempting to steal personal property from a tractor trailer located at a business in Catlettsburg, Kentucky. Appellant was subsequently indicted upon the offenses of second-degree robbery and first-degree persistent felony offender (PFO). The matter came before the trial court for a jury trial on September 12, 2005. During the trial, appellant elected to represent himself and was appointed standby counsel. Prior to trial, appellant had filed a *pro se* motion seeking recusal of the trial judge, Judge David Hagerman. Judge Hagerman, acting in his former role as the Boyd County Commonwealth's Attorney, had prosecuted appellant some fifteen years earlier. As a result of that prosecution, appellant was convicted of burglary. The trial judge denied appellant's *pro se* motion seeking recusal. A jury ultimately found appellant guilty of both charges, and appellant was sentenced to a total of twelve years' imprisonment. This appeal follows.

Appellant contends that the trial judge committed reversible error by failing to recuse. We disagree.

The undisputed facts indicate that Judge Hagerman did prosecute appellant while acting as the Boyd County Commonwealth Attorney for the crime of burglary approximately fifteen years prior to this case coming before Judge Hagerman. Appellant was convicted of burglary, and this offense was one of the charges

underlying appellant's current PFO I charge. The record also discloses that Judge Hagerman had some recollection of appellant and the burglary case.

Appellant alleges that Judge Hagerman's failure to recuse violated his constitutional rights to a fair trial and specifically violated Kentucky Revised Statutes (KRS) 26A.020.

KRS 26A.020(1) provides:

When, from any cause, a judge of any Circuit or District Court fails to attend, or being in attendance cannot properly preside in an action pending in the court, or if a vacancy occurs or exists in the office of circuit or district judge, the circuit clerk shall at once certify the facts to the Chief Justice who shall immediately designate a regular or retired justice or judge of the Court of Justice as special judge. If either party files with the circuit clerk his affidavit that the judge will not afford him a fair and impartial trial, or will not impartially decide an application for a change of venue, the circuit clerk shall at once certify the facts to the Chief Justice who shall immediately review the facts and determine whether to designate a regular or retired justice or judge of the Court of Justice as special judge. Any special judge so selected shall have all the powers and responsibilities of a regular judge of the court.

Appellant did not file an affidavit with the circuit clerk as required under KRS 26A.020(1). Rather, it appears that appellant's "motions" were directed at the trial judge and specifically requested relief from the trial judge. More

appropriately, we believe these motions were seeking relief under KRS 26A.015(2), which provides:

Any justice or judge of the Court of Justice or master commissioner shall disqualify himself in any proceeding:

- (a) Where 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;
- (b) Where in private practice or government service he served as a lawyer or rendered a legal opinion in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter in controversy, or the judge, master commissioner or such lawyer has been a material witness concerning the matter in controversy;
- (c) Where he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a pecuniary or proprietary interest in the subject matter in controversy or in a party to the proceeding;
- (d) Where he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - 1. Is a party to the proceeding, or an officer, director, or trustee of a party;
 - 2. Is acting as a lawyer in the proceeding and the disqualification is not waived by stipulation of counsel in the proceeding filed therein;
 - 3. Is known by the judge or master commissioner to have an interest that could be substantially affected by the outcome of the proceeding;

4. Is to the knowledge of the judge or master commissioner likely to be a material witness in the proceeding.
- (e) Where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.

However, we do not think that Judge Hagerman was required to recuse under KRS 26A.015.

We view the case of Commonwealth v. Carter, 701 S.W.2d 409 (Ky. 1985) as dispositive. In that case, appellee sought recusal of the trial judge because as county attorney he had previously prosecuted appellant upon two prior offenses; these offenses were also used for a current PFO charge. In reversing the Court of Appeals, the Supreme Court held:

[T]he fact that Judge Soyars was County Attorney at the time of the prior convictions in 1973 and 1977 does not affect his qualification to preside at the pleas of guilty herein for the simple reason that those convictions were not "the matter in controversy" as set out in KRS 26A.015(2)(b).

Id. at 410. Thus, the Supreme Court concluded that the prior convictions were not matters in controversy within the meaning of KRS 26A.015(2)(b) and recusal of the judge was not required.

In the case at hand, we, likewise, conclude that Judge Hagerman's prior prosecution of appellant for burglary did not require his recusal under KRS 26A.015. Moreover, appellant has not pointed to any evidence demonstrating that the trial judge was in any way biased or unfair in his case. Based upon these

circumstances, we are of the opinion that the trial judge did not commit reversible error by denying appellant's motions to recuse.

Appellant also asserts that the Commonwealth Attorney should have been disqualified because he had previously represented appellant as a juvenile. Appellant filed a *pro se* motion before the trial court seeking removal of the Commonwealth Attorney, the Honorable Jeffrey Preston. Appellant notes that Preston had represented appellant as a juvenile some twenty to thirty years prior. As a result of such representation, appellant argues that Preston may have gleaned confidential information that could have impacted the current case. Appellant made no effort to speculate as to what this confidential information was or how it could prejudicially impact the defense of his case. On appeal, appellant admits he has no knowledge of any specific confidential information that Preston may have possessed.

At this stage in the proceedings, appellant has simply failed to make an adequate showing to justify the disqualification of the Commonwealth Attorney based upon a conflict of interest under the Code of Professional Responsibility Rule 1.9 or under KRS 15.733. For this reason, we conclude that the circuit court properly denied appellant's motion to disqualify the Commonwealth Attorney.

For the foregoing reasons, the judgment of the Boyd
Circuit Court is affirmed.

ROSENBLUM, SENIOR JUDGE, CONCURS.

MILLER, SPECIAL JUDGE, DISSENTS.

BRIEFS FOR APPELLANT:

Linda Roberts Horsman
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General of
Kentucky
Frankfort, Kentucky