

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000606-MR

THOMAS JOHNS, JR.

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 05-CR-00101

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: KELLER AND VANMETER, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Appellant, Thomas Johns, Jr., was convicted of one count of reckless homicide following a jury trial in Fayette Circuit Court. He received a sentence of five years' imprisonment. Johns asserts that the trial court erred by: (1) allowing his grand jury testimony to be introduced during the Commonwealth's case-in-chief; (2) and refusing to instruct the jury on the responsibility of pedestrians. We affirm.

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

On August 6, 2004, Johns spent the afternoon and evening consuming alcoholic beverages at various establishments in Lexington, Kentucky. At approximately 10:20 p.m., Johns left a restaurant in his automobile. As Johns was proceeding down Main Street, he accelerated his vehicle and struck Prescott Hoffman, who was crossing the street with two friends. Several witnesses testified that Johns continued accelerating as he approached the pedestrians. Hoffman was transported to the hospital, but died of severe brain and orthopedic injuries shortly after his arrival. The police officer who responded to the scene observed that Johns appeared to be intoxicated and noticed the odor of alcohol upon his person. Johns was unable to perform some of the field sobriety tests that were administered by the officer. The officer arrested Johns for driving under the influence (DUI). After his arrest, Johns refused to submit to a blood analysis. Another officer obtained a court order for the blood test, but it was not taken until approximately three hours after the arrest. Johns' blood-alcohol level was .07.

On January 24, 2005, Johns signed a waiver of immunity and testified before the Fayette County Grand Jury, which ultimately indicted him for reckless homicide and DUI. Trial was held over several days whereupon the jury found Johns guilty of reckless homicide and acquitted him of the DUI charge. Johns was sentenced to five years' imprisonment. This appeal follows.

Johns first argues that the trial court erred by permitting the Commonwealth to introduce his grand jury testimony during its case-in-chief. He claims that grand jury

testimony may only be used to impeach a witness for prior inconsistent statements in the event that they testify at trial.

In *U.S. v. Sloan*, 833 F.2d 595, 601 (6th Cir. 1987), the court discussed the principles underlying the admissibility of a defendant's grand jury testimony as follows:

As a general rule, testimony given by a grand jury witness suspected of wrongdoing may be used against him in a later prosecution for a substantive criminal offense. *See United States v. Washington*, 431 U.S. 181, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977); *United States v. Reed*, 631 F.2d 87 (6th Cir. 1980) (per curiam). This is in accord with the familiar rule of evidence that any statement by a party may be offered against him by his opponent. 2 C. Wright, *Federal Practice and Procedure* § 413 (1982). The Federal Rules of Evidence treat these statements as not within the hearsay concept. Fed.R.Evid. 801(d)(2). Therefore, unless some other rule is violated, defendant's out of court statements may be offered against him as an admission.

Kentucky Rules of Evidence (KRE) 801A(b) provides that:

A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:

- (1) The party's own statement, in either an individual or a representative capacity . . .

KRE 801A(b)(1) is worded identically to FRE 801(d)(2)(A). We are further convinced of the propriety of admitting this evidence because of the waiver Johns signed prior to testifying before the grand jury. The form was titled "Waiver of Immunity Before the Grand Jury of the Fayette Circuit Court" and specifically provided that "anything I say may be used against me in this or any investigation or prosecution at any time." There was no error.

Next, Johns argues that he was entitled to a jury instruction on the responsibility of pedestrians to yield to oncoming traffic when not at a crosswalk. Johns admits that he did not tender a proposed instruction nor did he object to the instructions as given. This issue was first raised in a motion for a new trial. However, “[a]n objection to a jury instruction raised for the first time in a motion for a new trial is not timely and will not be considered by this Court.” *Burgess v. Taylor*, 44 S.W.3d 806, 814 (Ky.App. 2001).

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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