

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-002261-MR

DONALD WAYNE CROWE, JR.

APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE KELLY MARK EASTON, JUDGE  
ACTION NO. 05-CR-00355

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,<sup>1</sup> SENIOR JUDGE.

TAYLOR, JUDGE: Donald Wayne Crowe, Jr. brings this appeal from a September 29, 2006, judgment of the Hardin Circuit Court sentencing Crowe to fifteen years' imprisonment upon conviction by jury of sundry offenses. We reverse and remand for a new trial.

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<sup>1</sup> Senior Judge Michael L. Henry 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.

Crowe was indicted upon the offenses of first-degree evading police, driving under the influence, operating a motor vehicle without a license, speeding, failing to operate motor vehicle on proper side of highway, failure to wear seatbelt, and with being a first-degree persistent felony offender. A jury trial ensued. Crowe was found guilty of all offenses except failure to wear a seatbelt. On September 29, 2006, the trial court sentenced Crowe to a total of fifteen years' imprisonment. This appeal follows.

Crowe argues that the trial court committed error by denying his motion for a continuance. Crowe moved for a "short continuance" on the first day of trial, August 11, 2006; that motion was denied. However, for other reasons, the trial was delayed until August 14. On that date, Crowe again moved for a continuance, and the court again denied the motion. In both instances, counsel maintained that she was unprepared for trial. Counsel explained that she had three trials that week with the last trial ending on August 10. Moreover, counsel stated that she needed additional time to secure an expert witness to testify on Crowe's behalf.

Ky. R. Crim. P. (RCr) 9.04 provides as follows:

The court, upon motion and sufficient cause shown by either party, may grant a postponement of the hearing or trial. A motion by the defendant for a postponement on account of the absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it. If the motion is based on the absence of a witness, the affidavit must show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true. If the attorney for the Commonwealth consents to the reading of the affidavit on the hearing or trial as the deposition of the absent witness, the hearing or trial shall not be postponed on account of the witness's absence. If the Commonwealth does not consent to

the reading of the affidavit, the granting of a continuance is in the sound discretion of the trial judge.

In the case *sub judice*, the record indicates that Crowe did not file an affidavit detailing the expert witness's expected testimony. Without such a supporting affidavit, the trial court and this Court are simply without a basis for determining whether the witness's absence at trial was prejudicial. *See Pennington v. Com.*, 371 S.W.2d 478 (Ky. 1963). As such, we do not believe Crowe was entitled to a continuance based upon the absence of the expert witness. *See id.*

As concerns Crowe's inability to prepare for trial, it is well-established that the decision to grant a continuance is within the sound discretion of the trial court and will not be disturbed on appeal absent clear abuse of that discretion. *See Stump v. Com.*, 747 S.W.2d 607 (Ky.App. 1988). Crowe was arrested on June 17, 2005, and was indicted by the grand jury on July 15, 2005. It appears that this case was originally set for jury trial on February 13, 2006, and the actual jury trial commenced on August 14, 2006. From these facts, it seems to this Court that trial counsel had ample time to prepare a defense. Some seven months passed between the original trial date and the actual trial date and over a year had passed from the date of indictment. Trial counsel could easily have prepared a defense within that time period. Considering the circumstances of this case, we are unable to conclude that the trial court abused its discretion by denying Crowe a continuance. *See id.*

Crowe also argues that the trial court committed error by denying his motion to strike Juror 382 for cause. During *voire dire*, Juror 382 informed the trial court she was personally acquainted with the state trooper who arrested Crowe and who would be a

witness for the Commonwealth at trial. Also, Juror 382 had relatives previously convicted of driving under the influence and was excused from jury service a week earlier after expressing her inability to be impartial in such cases. Crowe points out that Juror 382 had also expressed the belief that “a person who 'gets caught drinking and driving are [sic] usually guilty’”. Crowe's Brief at 10. Ultimately, Crowe was forced to exercise a peremptory challenge to strike Juror 382 from the jury.

The Commonwealth cites to *Morgan v. Commonwealth*, 189 S.W.3d 99 (Ky. 2006) for the proposition that any error in failing to strike a juror for cause is harmless if defendant used a peremptory challenge to strike such juror. However, our Supreme Court has recently overruled *Morgan* in *Shane v. Commonwealth*, \_\_\_\_\_ S.W.3d \_\_\_\_\_ (Ky. 2007). In *Shane*, the Court held that prejudicial error occurs when a trial court erroneously fails to strike a juror for cause and a defendant is forced to use a peremptory challenge to remove that juror. *Id.* In this case, we must determine whether the trial court erred by denying Crowe's motion to strike Juror 382 for cause.

Under RCr 9.36, a juror shall be excused for cause “[w]hen there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence . . . .” When determining partiality or bias, the trial court is vested with broad discretion. *Bowling v. Com.*, 942 S.W.2d 293 (Ky. 1997); *Wood v. Com.*, 178 S.W.3d 500 (Ky. 2005). However, any doubt regarding the competency of a juror should be resolved in favor of the defendant. *Calvert v. Com.*, 708 S.W.2d 121 (Ky.App. 1986).

Considering Juror 382's acquaintance with the state trooper who arrested Crowe and who was a primary witness for the Commonwealth and Juror 382's prior expression of bias in relation to defendants who are charged with a DUI offense, we are

of the opinion that reasonable grounds existed to believe that Juror 382 could not render a fair and impartial verdict. In other words, the juror was biased. In *Shane*, the Supreme Court made the following legal conclusion regarding biased jurors:

Not removing a biased juror from the venire, and thereby forcing a defendant to forfeit a peremptory strike, makes the defendant take on the duty of the court and prevents him from getting the jury he had a right to choose. This violates a substantial right accorded great weight in our legal history, and can never be harmless error.

*Shane*, \_\_\_\_ S.W.3d \_\_\_\_.

In light of the Supreme Court's mandate in *Shane*, we reverse Crowe's conviction and remand for new trial. *See Shane v. Commonwealth*, \_\_\_\_\_ S.W.3d \_\_\_\_\_ (Ky. 2007).

For the foregoing reasons, the judgment of the Hardin Circuit Court is reversed and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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