RENDERED: AUGUST 19, 2011; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000362-DG

JOSHUA CROMER — APPELLANT

ON DISCRETIONARY REVIEW FROM
FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 09-XX-00034

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KELLER AND VANMETER, JUDGES.

DIXON, JUDGE: Appellant, Joshua Cromer, entered a conditional guilty plea in the Fayette District Court to charges of operating a motor vehicle while under the influence of alcohol, first offense, and carrying a concealed deadly weapon. Appellant thereafter appealed to the Fayette Circuit Court the denial of his motion

for a choice of evils instruction, as well as motions to suppress evidence and to disqualify the Fayette County Attorney's office. The circuit court affirmed the district court's rulings and this Court thereafter granted Appellant's motion for discretionary review. Having reviewed the record and proceedings below, we now affirm.

In the early morning hours of June 13, 2008, Lexington Metro Police Officer Anthony Bottoms was dispatched to the Shillito apartment complex to investigate a report of a hit and run collision. Upon arriving at the scene, Appellant, who was working as a security guard[1] at the complex, told Officer Bottoms that he witnessed a vehicle being driven recklessly through the parking lot and that it had hit another parked car. Appellant, believing that the car had been stolen, proceeded to get into his own vehicle and chase the other car, eventually blocking it in an alley of the parking lot. The occupants thereafter fled on foot.

Although Appellant was not a suspect in the hit and run, witnesses told Officer Bottoms and Sergeant Greg Marlin, who had also arrived on the scene, that Appellant had been recklessly speeding through the parking lot after the suspect's vehicle. When further investigation revealed that Appellant's blood alcohol level was .147, he was arrested for driving under the influence of alcohol. During a search of Appellant's vehicle, Officer Bottoms discovered a ballistics vest similar to those worn by police officers in the front passenger seat of the car. After being notified of the vest, Sergeant Marlin conducted the remainder of the search, during

[1] Appellant is a former Lexington Metro Police Officer.

which he discovered a loaded Glock 40-caliber handgun beneath the vest, as well as a preliminary breath test (PBT) device. Appellant was unable to produce a permit for the handgun and was also charged with carrying a concealed deadly weapon.

On July 1, 2008, Appellant filed a motion in the Fayette District Court to suppress the evidence of the gun because the search of his vehicle was unconstitutional. Appellant subsequently filed motions for an instruction on the choice of evils defense and to disqualify the Fayette County Attorney's office. Following the denial of all motions, Appellant entered a conditional guilty plea to both charges and thereafter appealed the denial of his motions to the circuit court. The Fayette Circuit Court affirmed the lower court and this Court thereafter accepted discretionary review. Additional facts are set forth as necessary.

Appellant first argues that the trial court erroneously denied his request for an instruction on choice of evils under KRS 503.030. On the night of his arrest, Appellant admitted to Officer Bottoms that he drove his vehicle after having consumed alcoholic beverages and that as a former police officer he was aware that such was illegal. However, he deemed his actions to be necessary to stop an alleged car thief from potentially endangering the public while fleeing the scene of a hit-and-run. Thus, Appellant argues that his actions were legally justified by virtue of the fact that he was preventing a greater evil. The Commonwealth counters that there is no evidence in the record to support

Appellant's claim that the car was, in fact, stolen. In calling police on the night of the incident, Appellant only reported a hit-and-run, not a vehicle theft.

Pursuant to KRS 503.030(1), illegal conduct may be justifiable where an offender "believes it necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged." However, as noted by a panel of this Court in *Beasley v. Commonwealth*, 618 S.W.2d 179, 180 (Ky. App. 1981), *overruled on other grounds in LaPradd v. Commonwealth*, 334 S.W.3d 88 (2011),[2] a choice of evils instruction is only proper if the following contingencies are met: (1) the offender has an objectively reasonable belief that the necessity of his action is mandated by a "subjective value judgment;" (2) the offender's action is contemporaneous with the danger of injury sought to be avoided; (3) the injury is imminent, requiring an immediate choice if to be avoided; and (4) the injury sought to be avoided outweighs the charge warranted by the action of the offending party.

As further explained in *Senay v. Commonwealth*, 650 S.W.2d 259 (Ky. 1983), for this defense to be available, it must be shown that defendant's conduct was necessitated by a specific and imminent threat of injury to his person under circumstances which left no reasonable and viable alternative other than the violation of the law for which he stands charged. In other words, the danger

[2] Relying on *Hager v. Commonwealth*, 41 S.W.3d 828, 833 (Ky. 2001), the Court in *LaPradd* held that once a defendant produces evidence to justify a choice of evils instruction, the burden is on the Commonwealth to disprove the defense. *Beasley* was overruled to the extent it held otherwise.

presented to the defendant must be "compelling and imminent, constituting a set of circumstances which affords him little or no alternative other than the commission of the act which otherwise would be unlawful." *Id.* at 260. The commentary to KRS 503.030(1) notes that practical examples of this necessity include where an individual speeds through a school zone to get a dying person to a hospital or where someone destroys the property of another to prevent the spread of fire.

We conclude that the district court properly found that the *Beasley* contingencies were not met in this case. The record belies Appellant's claim that he believed driving under the influence was necessary to prevent a possible theft. Indeed, when Appellant initially called police, he only reported a hit-and-run, not a theft. Notwithstanding, we agree with the district court that it was simply unreasonable to believe that operating a motor vehicle under the influence of alcohol was justified under the circumstances presented. Likewise, there is no evidence in the record that the risk of injury was so compelling or imminent as to leave Appellant with no alternative to avoid the injury other than driving under the influence. A general fear or threat is too speculative and anticipatory. *Senay*, at 261. Appellant's claim that he was preventing imminent peril to other unidentified motorists was certainly speculative at best. Finally, we agree with the district court that the injury sought to be avoided did not outweigh the offending charge of DUI. "Where a defendant fails to produce evidence which would support him in choosing the commission of an otherwise unlawful act over other lawful means of protecting himself, the trial court is not required to instruct the jury on the choice

of evils defense." *Id.* at 260-261. Accordingly, the district court did not err in denying the instruction on choice of evils.

Next, Appellant claims that the search of his vehicle violated the United States Supreme Court's decision in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 1723-24, 173 L.Ed.2d 485 (2009). Appellant contends there were actually two searches of his vehicle. The first occurred when Officer Bottoms searched for signs of alcohol use and found none. He did, however, observe the ballistics vest and reported such to Sergeant Marlin. As a result, Sergeant Marlin continued the search during which he removed the vest to check for a serial number and discovered the firearm located underneath it. It is Sergeant Marlin's "second" search that Appellant claims violated *Gant*. We disagree.

In *Gant*, the Court stated:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

129 S.Ct. at 1723-24. However, we believe that *Gant* is distinguishable from the case herein. After the suspect in *Gant* was arrested for driving with a suspended license, he was handcuffed and placed into the back of a patrol car. Police officers thereafter searched his vehicle and found cocaine in the pocket of a jacket located in the backseat. The United States Supreme Court ultimately found that the search

was unreasonable because the suspect was already handcuffed, not within reaching distance of the passenger compartment, and, importantly, had been arrested on an offense for which no evidence of such would have been found in the vehicle. *Id.* at 1719.

Here, although there is no dispute that Appellant was not within reaching distance of the passenger compartment, he was arrested for an offense for which evidence might reasonably be found in his vehicle. Further, we simply do not believe that two separate searches occurred. Officer Bottoms stated that upon discovering the ballistics vest, he immediately halted his search because he believed Sergeant Marlin needed to be informed of the vest given Appellant's former employment as a police officer. Thereafter, Sergeant Marlin finished the search of Appellant's vehicle, and discovered the handgun and PBT.

On appeal, the circuit court herein observed that the officers' probable cause to search Appellant's vehicle for evidence of DUI did not end upon discovery of the ballistics vest, and it was proper for Sergeant Marlin to pick up the vest to see if anything was located beneath it. We agree. As such, we cannot conclude that the search violated *Gant*. The district court properly ruled that it was reasonable for officers to believe that Appellant's vehicle contained evidence of the DUI offense.

Finally, Appellant contends that the trial court erred in refusing to disqualify the Fayette County Attorney's office. Appellant is a former Lexington Metro

Police Officer who was charged with misconduct regarding his involvement in the 2006 DUI arrest of country music singer John Michael Montgomery. Following an investigation, Appellant was terminated, and thereafter brought lawsuits against the Lexington-Fayette Urban County Government, the Lexington Police Department, and Mr. Montgomery. Mr. Montgomery's attorney at that time, Brent Caldwell, is the father of the Fayette County prosecutor assigned to this case, Noel Caldwell. Noel Caldwell clerked for his father's former law firm, McBrayer, McGinnis, Leslie and Kirkland, PLLC[3], from May 2006 until December 2006. Although Noel was employed by the firm during the time his father was representing Mr. Montgomery in the DUI case, both Brent and Noel Caldwell testified that Noel did not participate in any matters involving Mr. Montgomery. As such, the district court ruled that Appellant failed to demonstrate actual prejudice. Nevertheless, Appellant argues that disqualification is warranted because of the perception that the Fayette County Attorney's office has a special interest in his prosecution, as a conviction might benefit Brent Caldwell's success in the civil action involving Mr. Montgomery. We conclude that Appellant is mistaken on the law and the facts.

KRS 15.733(2) statutorily defines instances where a prosecuting attorney must disqualify himself from prosecuting a case on the basis of a conflict of interest. Among those enumerated disqualifications is when the prosecutor has knowledge that a member of his immediate family has "an interest that could be substantially affected by the outcome of the proceeding." KRS 15.733(2)(c).

[3] The record shows that Brent Caldwell is no longer a member of the McBrayer Law Firm and, does not still represent Mr. Montgomery.

Further, KRS 15.733(3) governs instances where the accused contends that the prosecutor is biased against him. In order for a court to disqualify a prosecutor under KRS 15.733(3), the accused must demonstrate actual prejudice. A showing beyond "the mere appearance of impropriety" is generally required to justify the disqualification of prosecutorial staff. *Summit v. Mudd,* 679 S.W.2d 225, 226 (Ky. 1984), *holding modified by Whitaker v. Commonwealth*, 895 S.W.2d 953 (Ky. 1995); *see also Barnett v. Commonwealth*, 979 S.W.2d 98 (Ky. 1998) (the conflict-of-interest statute provides that a court may disqualify a prosecuting attorney upon a showing of actual prejudice).

Relying on *Whitaker v. Commonwealth*, 895 S.W. 2d 953 (Ky. 1995) and *Commonwealth v. Maricle*, 10 S.W.3d 117, 121 (Ky. 1999), Appellant argues that he is not required to make a showing of actual prejudice for the prosecutor's staff to be disqualified. In *Whitaker* and *Maricle*, the Kentucky Supreme Court modified the requirement of a showing of actual prejudice in certain instances. The modified rule provides that a movant need not demonstrate actual prejudice where a prosecuting or defense attorney has previously engaged in "substantial and personal participation" in the opposing party's case that involved an "exchange of confidential information." *Whitaker*, 895 S.W.2d at 956. Conversely, where an attorney's involvement in an opposing party's case was merely "brief and perfunctory" and did not entail an exchange of confidential information, disqualification will not be appropriate without a showing of actual prejudice. *Id*. Accordingly, based on *Whitaker*, Appellant argues that he was not required to

show actual prejudice, only the appearance of impropriety. Further, he asserts that "a public perception of bias" can have an effect on the statements of witnesses and compromises the public's respect for the judicial system. *Maricle*, 10 S.W.3d at 121.

Appellant's reliance on *Whitaker* and *Maricle* is misplaced as the modified rule only applies to the specific facts of those cases regarding the exchange of confidential information. Here, Appellant simply cannot show that any member of the Fayette County prosecutorial staff, including Noel Caldwell, conducted "substantial and personal preparation" involving an "exchange of confidential information" in connection with his case. As previously noted, Noel Caldwell did not participate in Mr. Montgomery's defense in the DUI case. Moreover, he was no longer employed with the McBrayer Law Firm at the time Appellant filed the civil action against Mr. Montgomery. We fail to perceive how Appellant's conviction would somehow benefit Mr. Montgomery as the record clearly indicates that not only had Brent Caldwell not been involved in the civil case since leaving the McBrayer Law Firm, but also that Appellant's civil action against Mr. Montgomery was dismissed by the Fayette Circuit Court[4] in October 2007, before the instant charges even arose. We conclude that the district court properly held that Appellant failed to demonstrate actual prejudice under KRS 15.733. *See Summit* and *Barnett.*

The orders of the Fayette District and Circuit Courts are affirmed.

[4] The dismissal was affirmed by a panel of this Court in *Cromer v. Montgomery*, 2007-CA-002389-MR (February 27, 2009).

ALL CONCUR.

BRIEF FOR APPELLANT:

Fred E. Peters
Rhey Mills
Lexington, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Carlos A. Ross
Special Assistant Attorney General
Frankfort, Kentucky