RENDERED: April 24, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0681-MR

FRANK RATLIFF — APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JAMES A. KNIGHT, JUDGE
ACTION NO. 95-CR-000013

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: GUDGEL, CHIEF JUDGE; DYCHE, AND KNOX, JUDGES.

KNOX, JUDGE: Appellant was convicted by a Johnson Circuit Court jury of the offense of criminal possession of a forged instrument, second degree, with the jury recommending a sentence of 2 1/2 years. On February 28, 1997, the trial court entered its final judgment sentencing appellant to 2 1/2 years of incarceration.

Appellant was indicted for the offense of possession of a forged instrument, second degree, resulting from a business transaction with Hobert Williams. On December 9, 1992, appellant conveyed a 1991 John Deere backhoe to Mr. Williams in exchange

for title to a 1946 Ford Coupe and $2,500.00 in cash. The transaction was memorialized by a writing signed by both appellant and Mr. Williams.

The forged instrument appellant is accused of possessing is a document, dated October 23, 1993, which reads as follows:

> This written agreement is between Frank Ratliff and Hobert Williams and shows that Frank Ratliff has given back to Hobert Williams 1-1946 Ford Serial No 99A1358016 and 2,500 in cash money.
>
> Both the car and money being a finder's fee on a John Deer [sic] back hoe.
>
> This finder's fee is being returned only because the back hoe Hobert Williams purchased was an alleged illegal piece of property.
>
> Hobert Williams acknowledge's [sic] that this was not Frank Ratliff [sic] fault and that he is soley [sic] responsible for the purchase himself.
>
> Hobert Williams acknowledges that Frank Ratliff was not obligated to return his finder's fee.

That document, which has been variously called a release or receipt, purports to bear the signatures of both appellant and Mr. Williams, and further purports to be witnessed by a James Cook.

The backhoe which the appellant conveyed to Mr. Williams had been stolen. The record appears to reflect that appellant was indicted for the offense of receiving stolen property in conjunction with the theft of that backhoe, and was tried for that offense in Johnson Circuit Court on April 12,

1995. During that trial, appellant's counsel, Lowell Spencer, who is also appellant's counsel in this case, gave the Commonwealth the document dated October 23, 1993, and placed it into evidence. The issue was raised at that time whether the document was a forgery of Mr. Williams's signature. The trial judge in that case, the same judge who presided over the forgery proceedings in this case, declared a mistrial.

Prior to being tried on the charge of forgery, appellant moved to recuse the judge from presiding over the trial of that matter. Appellant argued that, because the judge had presided over appellant's previous trial, and because he had gained some personal knowledge from that trial of the circumstances of the case we now review, he should recuse himself. The trial judge denied that motion.

The Johnson County assistant commonwealth attorney tried this case in February 1997. He called the Commonwealth Attorney as a witness, who testified, without referring specifically to the previous trial, that she had received the document dated October 23, 1993, from appellant's counsel, Mr. Spencer. She further testified that Mr. Spencer told her that he had obtained the document from appellant.

First, appellant argues that error occurred when the trial judge did not recuse himself from trying the case. He bases that argument upon the judge's participation in appellant's trial on different charges two years earlier, when the document dated October 23, 1993, was introduced into evidence.

Ultimately, at that trial, the judge declared a mistrial when that document was alleged to be a forgery.

Appellant relies upon KRS 26A.015(2)(a) which states:

> (2) 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;

Appellant argues that, since the trial judge acquired personal knowledge of facts associated with the present case by virtue of his participation in the earlier trial, he should have recused himself.

While appellant relies upon Carter v. Commonwealth, Ky. App., 641 S.W.2d 758 (1982), we believe that the circumstances of that case are distinguishable from this case. There, the trial judge had served as an assistant to the commonwealth attorney who prosecuted the defendant. Under those circumstances, the court held that the trial judge should have disqualified himself as a matter of law.

The issue in this case is whether the trial judge's involvement in a prior criminal action, during which he heard evidence that appellant may have committed another criminal act, and where he recommended that the matter be referred to the grand jury for investigation, mandates his recusal from a subsequent trial involving that same evidence.

In Marlowe v. Commonwealth, Ky., 709 S.W.2d 424 (1986), the Kentucky Supreme Court held that a trial judge, who had presided over a guilty plea which had subsequently been withdrawn by the defendant, would not be required to recuse himself from a subsequent trial of that charge. In so ruling the court said, at page 428:

> We adopt the Ninth Circuit's view as expressed in United States v. Winston, 613 F.2d 221, 228 (1980):
>
> ". . .[R]ecusal is appropriate only when the information is derived from an extrajudicial source. Knowledge obtained in the course of earlier participation in the same case does not require that a judge recuse himself."

Here, any knowledge acquired by the trial judge was not of an extrajudicial nature, but rather, was obtained during the course of a judicial proceeding. Further, even though the proceeding in which the trial judge acquired that knowledge was not the same case as the present one, we do not believe that constitutes a valid argument for his recusal. In Marlowe, 709 S.W.2d at 424, the Kentucky Supreme Court ruled that a trial judge who had accepted a guilty plea from a defendant who later withdrew his plea, was not required to recuse himself merely because he had acquired certain information when the defendant pleaded guilty. Likewise, in the present case, while the trial judge acquired certain knowledge in an earlier trial indicating suspicious circumstances surrounding the document dated October 23, 1993 (the document at issue in the present case), we do not believe that the knowledge he acquired was sufficient to justify

his recusal. As noted in Marlowe, any other conclusion on our part would require the judge to recuse himself "from subsequent proceedings whenever he presided over suppression hearings, guilty pleas, or trials." Marlowe, 709 S.W.2d at 428 (emphasis added).

Appellant argues that the trial court committed error when it permitted the Commonwealth Attorney to testify that appellant's counsel, Mr. Spencer, told her during the previous trial that he had received the document dated October 23, 1993, from appellant. Appellant argues that the introduction of that statement violates both the attorney-client privilege and the hearsay rule.

Addressing appellant's argument that the introduction of the document violates the attorney-client privilege, we believe that argument to have no merit. The record reflects that appellant himself sought to introduce that document into evidence during his previous trial in an effort to deflect culpability from himself. Since he voluntarily sought to introduce that document into evidence, we believe that KRE 509 applies to waive any argument that the document was privileged: "A person upon whom these rules confer a privilege against disclosure waives the privilege if he . . . voluntarily discloses or consents to disclosure of any significant part of the privilege matter."

We note here that appellant objected to the Commonwealth Attorney's testimony solely on the grounds that introduction of the statement made by appellant's counsel during

the previous trial violated the attorney-client privilege, rather than on the grounds of hearsay. While the Commonwealth argues that the hearsay grounds for objection were not advanced at trial, and should not be addressed at this point in time, we will nevertheless consider this issue.

We believe that any error in permitting this statement was harmless. While appellant argues that his counsel's statement that he received the document from appellant was the only evidence of appellant's possession of that document, we believe that substantial other evidence existed. The jury heard that appellant himself sought to introduce the document into evidence at his prior trial. We believe that evidence, in and of itself, is sufficient to confirm appellant's possession of the document, and his willingness to avail himself of its benefits. The document further bore his name, a fact which we believe creates a strong inference of possession.

Next, appellant argues that the trial court committed error by permitting the introduction of evidence of other crimes. At trial, appellant argued that no mention should be made before the jury of the stolen backhoe, nor of the previous trial concerning charges of receiving stolen property. This issue arose when appellant sought to prohibit any reference as to how the Commonwealth Attorney came into possession of the document dated October 23, 1993, even though the Commonwealth Attorney obtained it at the previous trial, and even though appellant sought to introduce it into evidence. The trial court ruled

that, although the Commonwealth's witnesses could testify that the document was obtained from appellant's counsel, they could not mention the previous trial. The record reflects that only slight reference was made to the previous proceeding as a trial, and no reference was made of it as a criminal matter. We believe that no error occurred.

Appellant next argues that the document dated October 23, 1993, is not the kind of written instrument which comes within the purview of KRS 516.060. That statute reads:

> (1) A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in KRS 516.030.

KRS 516.030(1)(a) reads:

> (1) A person is guilty of forgery in the second degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument which is or purports to be or which is calculated to become or to represent when completed:
>
> (a) A deed, will, codicil, contract, assignment, commercial instrument, credit card or other instrument which does or may evidence, create, transfer, or terminate or otherwise affect a legal right, interest, obligation or status;

We note here that while the indictment refers to the written document as being a receipt, the trial court's instructions, to which no objection was made, refers to the written document as a release.

The document in question relates to a business transaction between appellant and Hobert Williams involving the exchange of goods and cash. As things turned out, the backhoe which appellant conveyed to Mr. Williams was stolen. The document purports to (1)-Memorialize a re-exchange of the backhoe and the automobile; (2)-Give appellant the right to retain the cash as a "finder's fee"; and (3)-Fix any liability for the purchase of the "illegal" backhoe upon Mr. Williams.

We believe the document, which is styled as a "written agreement," is a contract which purports to affect the legal rights of appellant and Mr. Williams with respect to the sale and exchange of the items addressed in their original agreement, and is therefore a written contract affecting their rights and obligations with respect to that transaction, within the purview of KRS 516.030 and KRS 516.060.

Appellant next argues that there was insufficient probative evidence that he ever had possession of the document in issue. However, we disagree. Notwithstanding the statement by appellant's counsel heard by the jury that he received the document from appellant, the record reflects that the document was introduced into evidence by appellant's counsel during appellant's previous trial addressing his charges of receiving stolen property, with appellant present in court when the document was introduced. Further, the document bore appellant's signature, and was intended to demonstrate Mr. Williams's acknowledgment that appellant was somehow not culpable. Under

those circumstances, we believe that the jury had before it sufficient evidence of the intent of possession.

Next, appellant argues that the trial court erred in denying his motion for a new trial. Since it appears to us that the grounds cited in support of that motion are identical to those which we have already addressed in this opinion, we do not believe that the trial court erred in denying appellant's motion for a new trial.

For the foregoing reasons, we affirm the judgment of the Johnson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lowell E. Spencer
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BRIEF FOR APPELLEE:

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