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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002234-MR

EDWARD C. SELF

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 99-CR-002405

COMMONWEALTH OF KENTUCKY

APPELLEE

AND:

NO. 2005-CA-002564-MR

ELDON L. SELF

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 99-CR-002405

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR AND WINE, JUDGES; PAISLEY,¹ SENIOR JUDGE.

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

WINE, JUDGE: Appellants, Edward Self (Edward), and Eldon Self (Eldon), are brothers who were tried as co-defendants in the Jefferson Circuit Court. After the trial had begun, but before the jury was sent to deliberate, one of the jurors approached the trial judge and stated he was not comfortable deciding guilt or innocence in the case because he believed he recognized Eldon as the person who owned a car lot in his neighborhood. The Commonwealth moved for a mistrial. Over both Appellants' objections, the trial court granted a mistrial as to both Edward and Eldon. Edward and Eldon filed separate motions to dismiss the indictment based on double jeopardy grounds. After the trial court denied their motions, both Eldon and Edward entered conditional guilty pleas to amended charges. This appeal followed.

Briefly, Edward and Eldon were charged, as principals, with trafficking in more than five pounds of marijuana and possession of drug paraphernalia near Valley Station Road, Louisville, Kentucky. After the mistrial, Eldon entered a conditional guilty plea, pursuant to RCr 8.09, to trafficking in marijuana, more than eight ounces, less than five pounds (as amended), illegal possession of drug paraphernalia (subsequent offender), and being a persistent felony offender in the second degree (PFO II). The trial court sentenced Eldon to five years on the trafficking count, enhanced by PFO II to ten years, and to one year for possession of drug paraphernalia. The trial court directed all sentences to run consecutive for a total of eleven years. Similarly, Edward entered a conditional guilty plea to illegal possession of drug paraphernalia. The trial court sentenced Eldon twelve months, conditionally discharged for two years.

Thereafter, Edward and Eldon filed separate appeals from the trial court's denial of their separate motions to dismiss the indictment. While Edward's and Eldon's appeals vary somewhat, we will consider both in this opinion. Both Edward and Eldon argue that the trial court lacked manifest necessity to grant a mistrial, and therefore retrial is barred on double jeopardy grounds. Edward further argues the trial court only considered the arguments made in Eldon's motion to dismiss but failed to consider the basis in his motion for relief. For the following reasons, we agree that the trial court lacked the manifest necessity to grant a mistrial as to both Edward and Eldon and remand the case to the trial court with directions to grant their motions to dismiss.

The relevant facts of this action are not in dispute. During the jury trial on March 2, 2004, and following a recess after the Commonwealth's second witness had testified, one of the jurors advised the trial court that he could not reach a decision on the case because he thought he recognized Eldon as a person who owned a car dealership in his neighborhood. Upon questioning by the court, the juror stated that he was not comfortable proceeding in the case if in fact Eldon was the person he recognized from his neighborhood.

Specifically, the juror stated that he did not know Eldon personally but thought that he recognized him. The juror told the trial court, "I really do not feel comfortable being in here, I mean if that is him [Eldon]." (Tape 2, 3/3/04, 15:33:20). The trial court asked the juror if the fact that he was uncomfortable would affect his ability to be fair and impartial. The juror responded that it probably would not but now that he recognized Eldon, he would just not feel comfortable being on the jury. However,

the juror did indicate that prior to him recognizing Eldon, he had no problem serving on the jury.

Since there were only twelve jurors on the panel, the trial court could not simply exclude the juror and proceed with the trial. The Commonwealth argued that manifest necessity required a mistrial. The trial court agreed, noting the juror's statement that, "I really couldn't say whether I think he'd be guilty or innocent, really. . . . If he is proven guilty or proven innocent, I don't think I could." Thus, the trial court granted the Commonwealth's request for a mistrial as to both defendants.

The United States Constitution, Fifth Amendment, and the Kentucky Constitution, Section 13, guarantee that no person shall be tried twice for the same offense. However, double jeopardy does not prevent retrial if the trial is terminated because the trial court, in exercise of its discretion, finds that the termination is manifestly necessary. KRS 505.030(4)(b). The decision to grant a mistrial is within the sound discretion of the trial court, and such a finding will not be disturbed by another court without an abuse of that discretion. *Woodard v. Commonwealth*, 147 S.W.3d 63, 68 (Ky. 2004). But given the circumstances in this case, we conclude that the trial court abused its discretion by granting a mistrial.

Manifest necessity has been described as an "urgent or real necessity." *Commonwealth v. Scott*, 12 S.W.3d 682, 684 (Ky. 2000), citing *Miller v. Commonwealth*, 925 S.W.2d 449, 453 (Ky. 1995). Although a trial court is vested with discretion in granting a mistrial, the power to grant a mistrial ought to be used sparingly and only with the utmost caution, under urgent circumstances, and for very plain and obvious causes.

Scott, 12 S.W.3d at 685. In the present case, the juror's statements that he would be uncomfortable sitting for the remainder of the trial were ambiguous at best. The trial court's further examination of the juror confirmed that the juror did not know Eldon personally. Unlike in *Stewart v. Commonwealth*, 497 S.W.2d 226 (Ky. 1973), where the juror was married to the defendant's first cousin and had known the defendant for 12 or 13 years, the juror in this case did not know Eldon personally, and the juror remained unsure whether Eldon was actually the person he knew from his neighborhood.

More on point with this case is the holding in *Scott, supra*, in which the jury laughed along with a juror who made a disparaging comment to the prosecutor, who had passed a BB gun similar to the alleged murder weapon over to the jury for viewing but was unaware it was loaded. The trial court in *Scott* granted the Commonwealth's motion for a mistrial, concluding that the jury's laughter showed the juror's hostility had influenced the entire jury panel. The Supreme Court reversed the defendant's conviction after retrial, holding that in the first trial the prosecutor had "failed to demonstrate the high degree of necessity required for granting a mistrial." *Scott*, 12 S.W.3d at 684. The Court held that "[t]he trial court should not have assumed that because Juror B. objected to being handed a loaded gun that he was prejudiced against the Commonwealth." *Scott*, 12 S.W.3d at 685.

Similarly, while the juror in this case thought Eldon might be a person he recognized from his neighborhood, there is nothing in the record indicating that the juror could not be fair and impartial regarding his ability to judge the evidence. The juror simply revealed to the trial court that he might know Eldon. However, the juror made it

clear to the trial court that he did not fear retribution if Eldon was found guilty but that he was just uncomfortable. It is unlikely that anyone sitting on a jury is comfortable assessing the evidence and determining the guilt or innocence of another in a criminal trial. That being all, an admonition to the juror against partiality would have been the most suitable way to proceed in the case. Consequently, there was no manifest necessity warranting a mistrial in Eldon's case.

Likewise, we find no manifest necessity which warranted a mistrial in Edward's case. The trial court did not separately address the issues presented in Edward's post-trial motion to dismiss. It appears in the trial court's order, entered September 3, 2004, that the trial court refers to "defendants' motion to dismiss" as if to address the defendants' motions together.

However, the trial court's order makes no finding of manifest necessity for the mistrial as against Edward. Indeed, while the trial court's order does conclude that an admonition would not have been sufficient in the case due to the undisclosed connection between Eldon and the juror, there is no mention of Edward in the order. The Commonwealth argues the trial court granted the mistrial to Edward because it had no way of knowing, due to the vagueness of the juror's comments, if his "impartiality" was related to Eldon only or to Edward as well.

But this reason still would not be a sufficient basis for finding manifest necessity as to Edward. Even if the mistrial against Eldon was justified, there was no evidence that the trial could not proceed against Edward alone. Furthermore, the juror

never mentioned Edward's name, and there is no evidence whatsoever that the juror could not reach a verdict as to Edward.

“Although a trial court is vested with discretion in granting a mistrial, the power to grant a mistrial ought to be used sparingly and only with the utmost caution, under urgent circumstances, and for very plain and obvious causes.” *Scott*, 12 S.W.3d at 685. In this case, there was no manifest necessity warranting a mistrial as to Edward and Eldon. Edward and Eldon had the right to see their trial to a verdict from the jury they helped select and who had sworn to be impartial. Therefore, the trial court abused its discretion by granting the mistrial, and the constitutional prohibitions against double jeopardy preclude their retrial.

For the foregoing reasons, we find that the trial court abused its discretion in granting a mistrial. Accordingly, the judgments of conviction by the Jefferson Circuit Court are reversed, and this matter is remanded to the Jefferson Circuit Court with directions to dismiss the indictment as to Edward and Eldon.

TAYLOR, JUDGE, CONCURS.

PAISLEY, SENIOR JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

PAISLEY, SENIOR JUDGE, CONCURRING IN PART AND DISSENTING IN PART: While I agree fully with the majority as its opinion relates to Edward Self, I respectfully dissent with respect to the matter of Eldon Self. Clearly, the juror's statements that he would be uncomfortable sitting in the case are not sufficient to justify granting a mistrial. However, the juror also stated to the trial court:

I mean, I really couldn't say whether I think he'd be guilty or innocent, really If he is proven guilty or proven innocent, I don't think I could

The trial judge was in the best position to observe the demeanor of the juror during the colloquy with him and make a judgment as to whether the juror could continue in the case. I do not believe the trial court abused its discretion in finding that there was manifest necessity requiring the granting of a mistrial in the case against Eldon Self. I would affirm the Jefferson Circuit Court with respect to Eldon and reverse and remand with respect to Edward.

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