

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000655-MR

JAMES D. LAWSON

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 05-CI-00940

EDDIE SWORD, SGT.; JOHN HUNT,
OFFICER; AND PIKEVILLE CITY
POLICE DEPARTMENT

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: ACREE, CAPERTON, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: James D. Lawson appeals from an order and judgment of the Pike Circuit Court granting a directed verdict against him in his action for malicious prosecution against Eddie Sword, John Hunt, and the Pikeville City Police Department. For the reasons stated herein, we affirm.

On November 16, 2003, Pikeville Police Officer John Hunt was notified that Lawson had driven into the parking lot of a gas station. Officer Hunt drove to the gas station to question Lawson about his possible involvement in a recent robbery and to determine if Lawson was wanted for outstanding warrants. After arriving and questioning Lawson, Officer Hunt smelled a strong odor of alcohol on Lawson's person. Lawson was then subjected to field sobriety tests.

Officer Hunt testified that Lawson failed every sobriety test that was given to him and was arrested for driving under the influence (DUI). After making the arrest, Officer Hunt searched Lawson and discovered rolling papers and what he believed to be a small quantity of marijuana and a marijuana roach. Suspecting that Lawson was under the influence of drugs and alcohol, Officer Hunt transported him to the Pikeville Medical Center for blood and urine testing. When he arrived at the hospital, Lawson allegedly refused testing. Subsequently, he was charged with possession of marijuana, possession of drug paraphernalia, and a DUI.

During the jury trial, the Commonwealth did not introduce the rolling papers or the alleged marijuana and marijuana roach. Detective Sue Hayes, the police department's evidence custodian, testified that the seized substances were not tested because it was a misdemeanor case which often ended in a guilty plea. Officer Hunt testified that he knew he recovered marijuana from Lawson because he knew what marijuana was from his eleven years in law enforcement. After the evidence was submitted to the jury, they returned a not guilty verdict on all counts.

On July 6, 2005, Lawson filed an action alleging that police had subjected him to harassment, criminal conversation, conspiracy, false arrest, illegal search, and malicious prosecution. After the defendants filed a motion for summary judgment, Lawson's action was dismissed in its entirety. This Court, in Case No. 2005-CA-002214-MR, reversed the trial court's decision dismissing Lawson's claim for malicious prosecution but affirmed in all other respects.

Subsequently, a jury trial was conducted regarding Lawson's claim for malicious prosecution against Sergeant Eddie Sword, Officer Hunt, and the Pikeville City Police Department. During the jury trial, Officer Hunt's testimony was consistent with his testimony given during Lawson's criminal trial. Further, evidence was introduced that Lawson did indeed possess marijuana when arrested. Lawson did not testify nor did he produce any witness to contradict the officers' testimony regarding the events leading up to his arrest for the DUI. However, Lawson did call witnesses to show that police were biased against him.

Following the close of Lawson's case, the defendants moved for a directed verdict on the basis that Lawson failed to establish malicious prosecution. The trial court granted the defendants' motion by determining that Lawson presented no evidence to negate the finding of probable cause for his arrest established by the testimony of Sergeant Sword and Officer Hunt. This appeal followed.

Lawson contends that the trial court erred by granting the police's motion for directed verdict. He argues that the police engaged in a conspiracy to

falsely accuse him of robbery so they could search his car and person for contraband. He further contends that police fabricated his DUI charge only after their robbery conspiracy failed to materialize because the items in his car were not identified as stolen. Therefore, Lawson concludes that his claim for malicious prosecution should have been submitted to the jury.

When granting a directed verdict, a trial court must draw all fair and rational inferences that the evidence can support in favor of the party opposing the motion. *Kroger Co. v. Willgruber*, 920 S.W.2d 61, 64 (Ky. 1996). The trial court further must accept the evidence of the party opposing the motion as true. *Burgess v. Taylor*, 44 S.W.3d 806, 811 (Ky.App. 2001). Before a motion is granted, the trial court must find that a reasonable jury could only conclude that the moving party was entitled to a verdict. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 775 (Ky.App. 2000). “On appeal the appellate court considers the evidence in the same light.” *Lovins v. Napier*, 814 S.W.2d 921, 922 (Ky. 1991).

Kentucky has long recognized malicious prosecution actions where the suit was instituted with malice and without probable cause. *Hill v. Willmott*, 561 S.W.2d 331, 334 (Ky.App. 1978). “Although actions for malicious prosecution are not favored, they do deter the utilization of the legal process for the purpose of vexation or injury.” *Id.* In *Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981), providing the elements of a malicious prosecution claim, the court wrote the following:

Generally speaking, there are six basic elements necessary to the maintenance of an action for malicious prosecution, in response to both criminal prosecutions and civil action. They are: (1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

After reviewing the record, we conclude that the trial court did not err by granting the police's motion for directed verdict. Officer Hunt testified that he approached Lawson in a gas station parking lot and smelled alcohol on his person. Officer Hunt further testified that Lawson was then subjected to field sobriety tests and failed these tests. According to Officer Hunt, Lawson was arrested for DUI and contraband was then discovered on his person. Lawson did not present any evidence contradicting this testimony and produced no witness who was present at his arrest. Therefore, the trial court's conclusion that Lawson failed to establish an absence of probable cause supporting his arrest and prosecution was not erroneous.

Lawson next contends that the trial court erred by permitting the jury to hear that he was charged with DUI, third offense. He contends that the implicit use of his prior convictions only served to prejudice the jury against him. Notwithstanding Lawson's contention, we believe that this issue is rendered moot by our decision regarding Lawson's directed verdict claim. Regardless of the admission of his DUI, third offense charge, Lawson failed to establish a *prima facie* case to permit his case to go forward. The admission of his criminal charge

had no effect on Lawson's failure to establish his malicious prosecution claim.

Louisville Trans. Co. v. Department of Motor Transp., 286 S.W.2d 536 (Ky. 1956).

Lawson next contends that the trial court erred by precluding the admission of the lab test results from his urine sample following his arrest. According to Lawson, his probation and parole officer collected Lawson's urine sample six hours after his arrest. He contends that his urinalysis test results, indicating the absence of illegal drugs in his system, would have established that his arrest was fabricated by police and he was innocent of his charges.

When a trial court rules on the admission of evidence, it is well settled that such evidentiary rulings will not be disturbed absent an abuse of discretion. *Commonwealth v. King*, 950 S.W.2d 807, 809 (Ky. 1997). Discretion is abused only when a ruling was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

After reviewing the record, we conclude that the trial court did not abuse its discretion by excluding the results of his urinalysis results. The police stated that they arrested Lawson because he smelled of alcohol and failed multiple field sobriety tests. Lawson focuses on the fact that he did not use marijuana on the night of his arrest, but he does not argue that his arrest for DUI was not supported by probable cause. Thus, we cannot say that the trial court abused its discretion by excluding the drug test results.

Lawson next contends that the trial court erred by precluding him from making a malicious prosecution claim against the City of Pikeville for a

violation of his Fourth Amendment rights under the U.S. Constitution. Lawson further argues that he was prevented from establishing that the City of Pikeville had an insufficient training program for its police officers.

During his civil trial, Lawson was permitted to question city officials, including police and elected officials, about the practices and training of police. Lawson was permitted to question the officers who arrested him and was permitted to call any other witness that had relevant testimony regarding his arrest. Thus, we conclude that the trial court did not abuse its discretion.

Lawson next argues that the trial court erred by precluding him from introducing the trial court's summary judgment and from informing the jury that this summary judgment had been reversed on appeal. According to Lawson, he should have been permitted to introduce the trial court's summary judgment and the fact that it was reversed because the judgment contained findings which were inconsistent with the civil trial testimony of Officer Hunt and Sergeant Sword.

The trial court has broad discretion regarding the introduction of evidence during a jury trial. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577-78 (Ky. 2000). Even relevant evidence may be excluded if its probative value is substantially outweighed by other considerations, including that the offering is cumulative to other evidence. *Ford Motor Co. v. Zipper*, 502 S.W.2d 74, 78 (Ky. 1973). Here, Lawson was permitted to play the officers' recorded testimony from his criminal trial and then introduced their affidavits which Lawson contends were factually inconsistent. Lawson was also permitted to

cross-examine these officers regarding the alleged inconsistencies. Therefore, we conclude that the trial court did not err by preventing Lawson from discussing the reversal of its summary judgment order and the facts contained therein because this evidence was cumulative to other evidence.

Lawson next contends that the trial court erred when it denied Lawson's motion to recuse Judge Eddy Coleman from presiding over his civil trial. He contends that (1) Judge Coleman ruled against him on multiple occasions; (2) made derogatory remarks about Lawson to Lawson's girlfriend in 2004; (3) made "egregious rulings" against him in previous proceedings; and (4) was directly involved in local political activities bringing his impartiality into question. We disagree.

Every litigant is entitled to a neutral and impartial judge and should be able to feel that his case has been presided over by a judge who is disinterested, impartial, and independent. *Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467, 471 (Ky. 2010). When an individual alleges that a trial judge should recuse from his case, he must move for recusal immediately after discovering the facts upon which the disqualification rests. *Bailey v. Bailey*, 474 S.W.2d 389, 391 (Ky. 1971). Even when a timely motion for recusal is not made, a trial judge must recuse himself when presiding over a case that would violate statutory mandates for impartiality. *Carter v. Commonwealth*, 641 S.W.2d 758, 759-60 (Ky.App. 1982).

Lawson's first and third arguments on this issue are not meritorious because a judge's participation in previous judicial proceedings and his rendering

of adverse rulings, without more, does not mandate recusal. *Poorman v. Commonwealth*, 782 S.W.2d 603, 605 (Ky. 1989). Regarding Lawson’s second argument, he did not move for Judge Coleman’s recusal until four years after he allegedly called Lawson a “mental deviant.” He has stated no basis for the four-year delay in filing his motion to recuse, and it was his affidavit, not his girlfriend’s, which contained her allegation. Moreover, this type of hearsay evidence is generally inadmissible. KRE 802. In Lawson’s fourth argument, he has failed to state how Judge Coleman’s local political involvement prejudiced his case.

While recognizing Lawson’s frustration with the outcome of his case, we observe that the burden to require the recusal of a judge is onerous. *Bissell v. Baumgardner*, 236 S.W.3d 24, 28-29 (Ky.App. 2007). A party must make a showing of facts of such a character that seriously impair the judge’s impartiality. *Id.* at 29. Here, Lawson has not met his burden to require a recusal.

For the foregoing reasons, the order and judgment of the Pike Circuit Court directing a verdict against Lawson is affirmed

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEES:

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