

RENDERED: JANUARY 11, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-000738-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE ANDREW SELF, JUDGE
ACTION NO. 10-CR-00163

ANTWAN D. ROUSE

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: The Commonwealth of Kentucky is appealing the granting of a new trial after a jury verdict of guilt. The Commonwealth argues that it was improper for the trial court to grant a new trial based on information provided by members of the jury. We reverse and remand for a hearing before the trial court.

On February 16, 2010, Antwan Rouse was involved in a motor vehicle accident resulting in the death of Joshua Rogers. Officers at the scene believed Rouse might have been under the influence of alcohol or a controlled substance. He was arrested for DUI.

Rouse was indicted for murder, operating a motor vehicle under the influence of alcohol, and a sundry of other offenses. At trial, evidence was presented that at the time of the accident, Rouse's blood alcohol level was in the range of 0.10 to 0.14g/ml. Rouse was convicted on all counts and sentenced to 20 years imprisonment.

Following the trial, an investigator for the defense made contact with some of the jurors who sat on Rouse's trial. It was during these interviews that two jurors indicated that during the guilt phase deliberations, another member of the jury discussed incorrect parole eligibility requirements with the jury panel. This juror had apparently sat on another criminal panel and discussed what he believed Rouse's parole eligibility would have been if he was convicted of murder. These two jurors signed affidavits stating that it was this incorrect parole eligibility information that led them to vote guilty to the murder charge.¹

Following these interviews, Rouse filed a motion for a new trial based on this information. The circuit court heard argument regarding the motion on

¹ The affidavits stated that a juror told the panel that if Rouse was convicted of murder, he would be eligible for parole after 4 years (20% of his sentence). In fact, Rouse would not be eligible for parole until he served 85% of his sentence.

March 17, 2011. The motion was granted and a new trial scheduled.² The Commonwealth moved to vacate the order, but the motion was denied. This appeal followed.

The decision to grant a new trial

is largely within the discretion of the trial judge, and the standard of review is whether there has been an abuse of that discretion. The evidence must be of such decisive value or force that it would, with reasonable certainty, change the verdict or probably change the result if a new trial was granted.

Caldwell v. Commonwealth, 133 S.W.3d 445, 454 (Ky. 2004)(citations omitted).

A judge abuses his or her discretion if the decision was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The Commonwealth’s first argument is that Rouse waived any objection to the makeup of the jury because he did not strike any of the members who had previously sat on criminal trials. This argument is without merit. The issue before us is whether the discussion of incorrect parole eligibility during the guilt phase of trial amounts to juror misconduct; in other words, whether there was improper extraneous information given to the jury. The makeup of the jury is not at issue.

The Commonwealth also argues that the trial court should not have considered the affidavits because they contained hearsay. This issue has merit.

² The order granting a new trial was made by a notation on a docket list. The trial court’s reasoning in granting the new trial is not mentioned; however, a video recording of the hearing shows that the trial court is basing its decision on Kentucky Rules of Criminal Procedure (RCr) 10.02(1) which allows a trial court to grant a new trial in the interest of justice.

Hearsay is inadmissible as evidence in support of a motion for a new trial. *Brown v. Commonwealth*, 174 S.W.3d 421, 428 n.2 (Ky. 2005); *Brown v. Commonwealth*, 490 S.W.2d 731, 732 (Ky. 1973). In the case at hand, the Commonwealth objected to the hearsay statements in the affidavits.

Generally, RCr 10.04 does not allow for the examination of jurors to “establish a ground for a new trial, except to establish that the verdict was made by lot.” This rule has changed over the years to allow for the examination of jurors when there are allegations of external influences that cause jury misconduct. See *Commonwealth v. Wood*, 230 S.W.3d 331 (Ky. App. 2007); *Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky. 2004); *Doan v. Brigano*, 237 F.3d 722 (6th Cir. 2001), *overruled on other grounds by Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

In the case at hand, the trial court seemingly found external influences caused jury misconduct, but did so using affidavits containing hearsay.³ This was improper. As noted by our Supreme Court in *Wood, supra*, in adopting language from the U.S. Supreme Court’s decision in *Mattox v. United States*, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892), “juror testimony as to ‘overt acts’ of misconduct can be considered because the remaining members of the jury can testify as to whether or not those acts of misconduct actually occurred.” *Wood* at 333 (citations omitted). We therefore reverse and remand this case in order for the trial court to

³ Again, there were no written findings explaining why a new trial was granted.

conduct an evidentiary hearing to consider testimony or other evidence of overt misconduct.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jack Conway
Attorney General of Kentucky

Whitney Westerfield
Special Assistant Attorney General
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Shannon Dupree
Assistant Public Advocate
Frankfort, Kentucky