IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

FILED
June 26, 2002
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OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30433

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee,

V.

THOMAS E. GRIFFIN,
Defendant Below, Appellant.

Appeal from the Circuit Court of Kanawha County
Honorable James C. Stucky, Judge
Criminal Action No. 00-F-394

REVERSED AND REMANDED

Submitted: June 11, 2002
Filed: June 26, 2002

Michael J. Del Giudice
Diana Leigh Johnson
Ciccarello, Del Giudice & LaFon
Charleston, West Virginia
Attorneys for Appellant

Darrell V. McGraw, Jr.
Attorney General
Scott E. Johnson
Senior Assistant Attorney General
Charleston, West Virginia
Attorneys for Appellee

The Opinion of the Court was delivered PER CURIAM.

JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

CHIEF JUSTICE DAVIS and JUSTICE MAYNARD dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary." Syllabus point 4, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).

2. "Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair." Syllabus point 5, *O'Dell v. Miller*, ___ W. Va. ___, ___ S.E.2d ___ (No. 29776 May 24, 2002).

Per Curiam:

This appeal was filed by Thomas E. Griffin, appellant/defendant below (hereinafter referred to as "Mr. Griffin"), from an order of the Circuit Court of Kanawha County convicting and sentencing him for committing the crime of attempted burglary.[1] Before this Court, Mr. Griffin contends that the circuit court committed error in refusing to excuse a prospective juror for cause.[2] Based upon the parties' arguments on appeal, the record designated for appellate review, and the pertinent authorities, we reverse the decision of the Circuit Court of Kanawha County.

I.

FACTUAL AND PROCEDURAL HISTORY

On March 18, 2000, two police officers from the Cedar Grove Police Department responded to a 911 call concerning a possible breaking and entering of a residence in Cedar Grove. When the officers arrived at the residence, they observed Mr. Griffin and his girlfriend, Kimberly Daniels, attempting to run away from the back of the house. The officers commanded them to stop. They stopped. When the officers approached Mr. Griffin, they observed that he was wearing latex gloves. Mr. Griffin initially stated that he was wearing the gloves to keep his hands warm. Later, he stated he had worn the gloves to prevent his skin from breaking out. Mr. Griffin also stated that he was checking on the residence as he knew the

[1]Mr. Griffin was given a sentence of not less than two, nor more than three years imprisonment.

[2]Mr. Griffin's petition for appeal also assigned other errors. However, this Court granted the petition solely on the issue of juror disqualification.

homeowner was hospitalized. Mr. Griffin also stated that the homeowner was his uncle. The officers eventually looked around the house and discovered that insulation on a window in the back of the house had been pried loose. The back screen door also appeared to have been broken.

The officers did not arrest Mr. Griffin and Ms. Daniels at the crime scene. After an investigation was conducted, the officers learned that Mr. Griffin was not related to the homeowner and that he did not have permission to be on the property. Consequently, Mr. Griffin and Ms. Daniels were arrested subsequent to the investigation.

During the September 2000 term of the circuit court, a grand jury returned an indictment against Mr. Griffin charging him with attempted burglary.[3] A two day jury trial was held in March of 2001. During voir dire, it was discovered that a prospective juror, Sharon Young, worked as a criminal grand jury coordinator for the United States Attorney General's Office.[4] Mr. Griffin motioned the trial court to strike Ms. Young for cause after the court questioned her. The trial court denied the motion after concluding that Ms. Young would fairly

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[3]The indictment contained three other charges that are not before this Court. The record does not indicate the disposition of the case against Ms. Daniels.

[4]Ms. Young failed to initially inform the trial court of her employment with a federal law enforcement agency. The State brought the matter to the attention of Mr. Griffin and the trial court was thereafter informed. The trial court stated on the record that it believed Ms. Young did not understand the earlier question by the court, regarding whether any member of the jury panel was employed by a law enforcement agency.

and impartially decide the facts in the case.[5] The jury found Mr. Griffin guilty of attempted burglary. On August 29, 2001, the trial court sentenced Mr. Griffin to a term of not less than two, nor more than three years in prison. From this sentence, Mr. Griffin now appeals.

II.

STANDARD OF REVIEW

The issue presented in this case involves the trial court's ruling denying a motion by Mr. Griffin to strike a prospective juror for cause. We have held that "[i]n a criminal case, the inquiry made of a jury on its *voir dire* is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused." Syl. pt. 2, *State v. Beacraft*, 126 W. Va. 895, 30 S.E.2d 541 (1944). *See also State v. Phillips*, 194 W. Va. 569, 588, 461 S.E.2d 75, 94 (1995) ("A trial court's ruling on a challenge for cause is reviewed under an abuse of discretion standard."). This Court has also indicated that "[a]n appellate court . . . should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law." Syl. pt. 6, in part, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).

[5]Mr. Griffin exercised a peremptory strike to remove Ms. Young from the panel.

III.

DISCUSSION

Mr. Griffin contends that Ms. Young was biased based upon the following exchange with the trial court:

> THE COURT: Do you believe that when somebody has been indicted, they are most likely to be guilty than not, based on your experience when you were with grand juries?
>
> JUROR YOUNG: Probably.

Mr. Griffin argues, and we agree, that the above exchange clearly indicated a bias by Ms. Young towards indicted criminal defendants.

We held in syllabus point 4 of *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996) that:

> The relevant test for determining whether a juror is biased is whether the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary.

Miller also stated that "the challenging party bears the burden of persuading the trial court that the juror is partial and subject to being excused for cause." *Miller*, 197 W. Va. at 606, 476 S.E.2d at 553.

Mr. Griffin has cited our decision in *State v. Bennett*, 181 W. Va. 269, 382 S.E.2d 322 (1989), as grounds for striking Ms. Young for cause. In *Bennett*, a prospective juror was asked during voir dire, "Do you think that there's a probability or a greater chance that [the defendant] did it than didn't do it?" 181 W. Va. at 271, 382 S.E.2d at 324. The prospective juror responded, "Yeah." *Id.* We concluded in *Bennett* that it was error for the trial court not to strike the prospective juror for cause. We also set out the following principle of law in syllabus point 1, in part, of *Bennett*:

> When individual voir dire reveals that a prospective juror feels prejudice against the defendant . . . the defendant's motion to strike the juror from the panel for cause should ordinarily be granted.

Mr. Griffin has also pointed out that our decision in *State v. Nett*, 207 W. Va. 410, 533 S.E.2d 43 (2000) (per curiam) required Ms. Young to be stricken for cause. In *Nett*, a prospective juror "made clear to the trial court that there was a possibility that he could not fairly and impartially decide the case, due to having two friends killed in drunk driving incidents, as well as knowledge of Mr. Nett's prior DUI offenses." *Nett*, 207 W. Va. at 414, 533 S.E.2d at 47. We found this admission by the prospective juror to be grounds for the trial court to strike the juror for cause.

The prior decisions of this Court have made clear that "[a] prospective juror who admits a prejudice to an issue central to the outcome of the case cannot negate the prejudice

merely by stating [he or she] would follow the law as instructed by the court." Syl. pt. 2, in part, *Davis v. Wang*, 184 W. Va. 222, 400 S.E.2d 230 (1990). We recently held in syllabus point 5 of *O'Dell v. Miller*, ___ W. Va. ___, ___ S.E.2d ___ (No. 29776 May 24, 2002), that "[o]nce a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair."

In the instant case, the trial court attempted to rehabilitate Ms. Young's bias toward indicted defendants. However, we are not convinced that Ms. Young could have put aside her stated prejudice. Moreover, as a result of our holding in *O'Dell*, the trial court should not have attempted to rehabilitate Ms. Young. Consequently, we find that it was error to deny Mr. Griffin's motion to strike Ms. Young for cause.

IV.

CONCLUSION

The conviction and sentence in this case are reversed and a new trial is awarded.

Reversed and Remanded.