IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
vs.	:	NO. 02-11,405
	:	
CHRISTIAN ZINK,	:	CRIMINAL ACTION - LAW
	:	
Defendant	:	

DATE: January 12, 2004

OPINION and O R D E R

Before the Court for determination is the Post Sentencing Motion – Motion for a New Trial of Defendant Christian Zink filed on August 13, 2003. The Court will deny the Defendant's Motion.

The Defendant was tried and convicted by a jury on June 18, 2003 of aggravated assault,[1] simple assault[2] and receiving stolen property.[3] On August 6, 2003, this Court sentenced the Defendant.[4] The Defendant received a sentence of a minimum of twenty-four months and a maximum of seventy-two months to be served in a State Correctional Institute for the aggravated

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[1] 18 Pa.C.S.A. §2702(a)(1).

[2] 18 Pa.C.S.A. §2701(a)(1).

[3] 18 Pa.C.S.A. §3925(a).

[4] The Court feels it necessary to discuss the procedural history of this Motion because of the length of time between when the filing of the Motion and the disposition. Pursuant to Pa.R.Crim.P. 720(3)(a), the Court had 120 days from the filing of the Motion to render a decision. The Motion was originally scheduled for a hearing and argument on October 16, 2003. That hearing and argument was rescheduled to November 3, 2003 by an Order of this Court dated September 4, 2003. The Defendant made a continuance request regarding the November 3, 2003 date. The request was granted on October 30, 2003 and the hearing and argument was scheduled for December 8, 2003.

At the December 8, 2003 hearing and argument, the Defendant made a motion pursuant to Pa.R.Crim.P. 720(3)(b) seeking a thirty day extension for the Motion to be decided. The Court granted the motion on the record. Therefore, the Court still has jurisdiction to render a decision on the Defendant's Motion.

assault.[5] The Defendant received a sentence of a minimum of one month and a maximum of twenty-three months to be served in a State Correctional Institute for the receiving stolen property conviction. The Court ordered the Defendant to serve the sentences concurrently.

Jury selection in this case occurred on June 6, 2003 before the Honorable Dudley N. Anderson. The Commonwealth had the first opportunity to question the venire. One of the questions asked by Assistant District Attorney Henry Mitchell, Esquire was the following:

> Now, the Commonwealth intends to call several witnesses, and I'm going to name them all at one time so we don't have to stretch this out, but if you know of any one of these, the please raise your hand. Trooper Joe Acres, Trooper Mark Ryder, Daniel Jordan, worked at the Finish Line Bar, Jordan Township, Brandy Swank, worked at the Finish Line Bar in Jordan Township, Clare Smith, 67 – year- old gentleman, Dr. Daniel Kerbacher, physician at Bloomsburg Hospital, Williams Jones from Muncy, Miles Betts, Jr. from Washingtonville, Bill – excuse me, Steven McGrade of Millville, Heather Betts from Washingtonville, Gerald Fry from Bloomsburg. Those are all possible witnesses. Now, is anyone familiar with any of those names?

Notes of Testimony, 13-14, June 6, 2003. There was no response from the venire indicating that anyone knew or was familiar with the named witnesses.

After the Commonwealth concluded its questioning of the jury panel, the Defendant's counsel, James Cleland, Esquire, questioned them. The Defendant's counsel asked whether anyone was acquainted with the Defendant, whether anyone would have difficulty following the judge's instructions on the law, whether anyone disagreed with the Commonwealth having the burden in the case to prove each element of each offense beyond a reasonable doubt, whether anyone could not find the Defendant not guilty if the Commonwealth failed to prove each element

[5] The Court determined at sentencing that the simple assault conviction merged with the aggravated assault conviction for the purposes of sentencing.

of the crimes charged beyond a reasonable doubt, and whether anyone believed that he could not give a fair verdict in the case. Most significantly, the Defendant asked the following question:

> Again, there was some reference to the fact that the incident which led to these charges is alleged to have occurred at a place called McCarty's Finish Line Bar, which happens to be in Jordan township on the eastern end of the county someone (sic) near Unityville. Anyone familiar with that establishment?

N.T., 30-31, June 6, 2003. Ms. Tina Butters responded affirmatively to that question.[6] The following exchange then took place between Defense Counsel and Ms. Butter:

Ms. Butters: I used to bartend there. Fourteen. Tina Butters.

Mr. Cleland: Thank you. You used to work there?

Ms. Butters: Yes.

Mr. Cleland: You are no longer employed there?

Ms. Butters: No.

Mr. Cleland: From approximately when to when? I don't need exact dates, but generally.

Ms. Butters: It's (sic) been quite a while. I used to live up there. Probably like '96.

Mr. Cleland: Would the fact that you worked in that bar cause you to have any particular bias for or against the Defendant in a case like this where the incident occurred in the bar where you used to work?

Ms. Butters: No.

[6] A second member of the venire, Robert Walters, also responded affirmatively. Mr. Walters indicated that he had been a customer of the Finish Line Bar on occasion. Mr. Walters was selected to sit on the jury; however, he is not the subject of any issue raised by the Defendant.

N.T., 31, June 6, 2003. The Defendant concluded his questioning of the venire by asking a catch-all question of whether there was anything that "troubles" them about becoming a juror the was not brought up by the Defense or the Commonwealth. N.T., 36, June 6, 2003. There was no response.

On December 8, 2003, an evidentiary hearing and argument was held on issues raised by this motion. At the December 8, 2003 hearing, Ms. Butters testified that her acquaintanceship with the Commonwealth's witnesses did not affect her ability to be impartial and had no impact on her ability to judge the credibility of the witnesses. Ms. Butters also testified that she did not inform her fellow jurors that she had prior knowledge regarding the Commonwealth's witnesses. Ms. Butters also testified she did not know any of the witnesses personally but that some of the witnesses were acquaintances either through her work or her ex-boyfriend. Two other trial jurors, Paul Santos and Dan Ditatio, testified that Ms. Butters never said that she had an acquaintanceship with any of the Commonwealth's witnesses or relayed any information about the witnesses. At this hearing, the Defendant also called some of the trial witnesses to testify as to their recognition of Ms. Butters at the trial. Specifically those trial witnesses were Gerald Fry, Daniel Jordan, Brandy Swank, Steven McBride and Heather Betts. Those names were among those stated by the Commonwealth during *voir dire* with the exception of Steven McBride (although the transcript shows the name of Steven McGrade being given). The witnesses all testified that at trial when they were outside the courtroom as the jury initially entered, they recognized juror Ms. Butters as a prior acquaintance either through her work or their being customers at the Finish Line bar or through seeing her in the community. Each witness testified that they told Defense Counsel and Defendant of this recognition almost immediately.

In the Motion, the Defendant asserts that his right to a trial by a fair and impartial jury has been violated. The Defendant avers that at trial juror, Tina Butters, failed to disclose during *voir dire* that she was acquainted with a number of the Commonwealth's witnesses, specifically those called to testify at the December 8, 2003 hearing. The Defendant asserts that this acquaintanceship with the Commonwealth's witnesses may have prejudiced not only Ms. Butters' verdict, but also the verdict of the entire jury. The Defendant contends that because of the acquaintanceship and possible prejudice he would have excused Ms. Butters either for cause or by using a preemptory challenge. In any case, the Defendant argues that Ms. Butters should not have been permitted to serve on the jury and a new trial is warranted.

A criminal defendant has the right be tried by an impartial jury. U.S. Const., amend. 6; Pa. Const. Art. I, §9; ***Commonwealth v. Jones***, 610 A.2d 931, 937 (Pa. 1992); ***Commonwealth v. Cornitcher***, 291 A.2d 521, 527 (Pa. 1971). A fair trial necessitates that a " 'defendant have a panel of impartial, indifferent jurors available to try his case.'" ***Commonwealth v. Mosley***, 637 A.2d 246, 248 (Pa. 1993) (quoting ***Commonwealth v. Richardson***, 387 A.2d 510, 514 (Pa. 1978)). The process of *voir dire* is used to achieve the goal of "empanelling of a fair and impartial jury capable of following the instructions of the trial court." ***Commonwealth v. Bridges***, 757 A.2d 859, 872 (Pa. 2000).

To ensure that the purpose of *voir dire* is fulfilled, the Defendant is given a duty to ascertain, by examination, whether there is a reason for objecting to one of the possible jurors. ***Commonwealth v. Aljoe,*** 216 A.2d 50, 55 (Pa. 1966); ***Commonwealth v. Didyoung***, 535 A.2d 192, 193 (Pa. Super. 1988). The failure to elicit information that could be obtained by questioning

results in a waiver of disqualifying the juror on the basis of that information. ***Commonwealth v. Griffin***, 684 A.2d 589, 595 (Pa. Super. 1996). Also, a defendant waives any objection for cause if it is not made before the jury is sworn. ***Ibid.***; ***Didyoung***, 535 A.2d at 193. However, this waiver can be overcome in a situation where the juror or the Commonwealth has intentionally misled the defendant. ***Didyoung***, 535 A.2d at 193.

The Court concludes that the Defendant has waived his objection to Ms. Butters serving on his jury. The Defendant had the opportunity to inquire of the venire whether there may have been an acquaintanceship with any of the witnesses. The Defendant failed to do this and has waived any challenge to a juror on this basis.

In ***Didyoung***, the defendant in an attempted murder trial learned that one of the members of his jury failed to disclose that the juror's uncle had been a police officer and that the cousin of the juror's wife was married to the arresting officer. 535 A.2d at 192. A question on the questionnaire asked prospective jurors:

> Are (have) you or any member of your immediate family: … presently (or in the past been) a member of any law enforcement agency?

Id. at 193. During voir dire, the Commonwealth asked the following questions:

> Is there anyone here who knows Chief [Thomas] Mase and, because of their knowledge of Chief Mase, would feel they could not decide the case solely on the evidence?
>
> Does anybody in this prospective panel have family members who are involved in law enforcement?

Ibid. The Superior Court held that the Defendant had waived any challenge to the juror on the basis that his uncle had been a police officer or that his wife's cousin was married to the arresting officer, Chief Mase.

The Superior Court noted that the questions were posed by the court and the Commonwealth, but the defense counsel did not ask questions related to this area of inquiry. The Superior Court stated that defense counsel had an opportunity to do so, but failed to "elicit information pertaining to the juror's relatives or to his or her knowledge of persons engaged in law enforcement." ***Id***. at 195. The Superior Court noted that the defendant could not complain that a "juror failed to divulge information not specifically requested of him during *voir dire*." ***Ibid***.

In the case *sub judice*, the Defendant did not fulfill his duty of questioning the venire to determine if any of the prospective jurors should have been challenged. The Defendant became aware through *voir dire* that McCarty's Finish Line Bar had employed Ms. Butters as a bartender. As soon as it was determined that Ms. Butters had been an employee of the Finish Line Bar, a red flag should have gone up and caused the Defendant to inquire about Ms. Butters negative response to the Commonwealth's question regarding knowledge of its witnesses.

The Commonwealth identified two witnesses, Daniel Jordan and Brandy Swank, that had worked at the Finish Line Bar. It would have been prudent for the Defendant to inquire as to why Ms. Butters indicated that she did not know individuals who had worked at the same bar she had. It could be that she was employed there at a different time. It could be that she did not recognize the names. It could be that she actually did not know the witnesses. Regardless of Ms. Butters' reason for not responding affirmatively to the Commonwealth's earlier question, the fact that she

did not respond to the question despite working at the same bar should have caused the Defendant to inquire into this area.

But, the inquiry should not have been limited just to these two witnesses. If Ms. Butters had been mistaken as to these two witnesses, then there is a real possibility that she was mistaken as to her acquaintanceship with other witnesses. This danger should have caused the Defendant to follow up and ask questions of a more specific nature to see if Ms. Butters' memory could be jogged and determine if there was any relationship, on whatever level, that Ms. Butters had with the witnesses. But this never happened. All of the witnesses who were acquainted with the juror, Ms. Butters, although called as Commonwealth witnesses, were friends of and well known to the Defendant. Certainly in this case given the Defendant's knowledge of the witnesses and the community and this particular bar the Defendant knew that anyone who had worked at the Finish Line bar might recognize the witnesses when they appeared in the courtroom.

The Defendant had an opportunity during *voir dire* to inquire as to the nature of acquaintanceship that prospective jurors may have had with the Commonwealth's witnesses. However, the Defendant made no inquiry into this area. As a result of this, the Defendant has waived his challenge to Ms. Butters.

While the foregoing is certainly an adequate reason to deny the Defendant's Motion, this court nonetheless feels compelled to point out that the Motion must also be denied because Defendant deliberately chose to proceed to verdict without raising an objection to Ms. Butters knowledge of some of the witnesses. When witnesses disclosed recognition of Ms. Butters to Defendant, the Defendant needed to raise any objection he had to her continuing on the jury. At

that time an alternate juror could have replaced Ms. Butters or possibly even a mistrial considered.

Instead, Defendant considered that this recognition and acquaintanceship, whatever it might be, would work to his advantage and he chose to not raise these known issues during trial. This was improper. A Defendant may not ignore a trial matter well known to him until he sees if the verdict is in his favor or not and then upon conviction seek to set aside the trial result because of that matter.

The reason for Ms. Butters disqualification – if any did exist – was not statutory and did not arise to the level of being challenged for cause. The removal of Ms. Butters would have been as a preemptory challenge. The Defendant had the opportunity to raise this issue as to whether she did or did not know certain witnesses once she saw them called at trial. Recognition of a witness at trial by face although not previously recognized by a name is a matter that while not frequent is not novel in a criminal trial. When that happens and is disclosed, the court usually excuses the juror and moves an alternate juror into the panel. This could have been easily accomplished in this case as there were two alternate jurors who served until excusal when deliberations commenced.

Accordingly, the Defendant's Motion must be denied.

ORDER

It is hereby ORDERED that the Post Sentencing Motion – Motion for a New Trial of Defendant Christian Zink filed on August 13, 2003 is DENIED.

BY THE COURT,

William S. Kieser, Judge

cc: District Attorney – Henry Mitchell, Esquire
Public Defender - James Cleland, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber. Esquire (Lycoming Reporter)