Affirmed and Opinion filed November 24, 1999.

In The

Fourteenth Court of Appeals

———————————

NO. 14-97-01195-CV

———————————

WESTERN AUTO SUPPLY, Appellant

V.

VALCO AUTOMOTIVE PRODUCTS, INC., Appellee

On Appeal from the 164th District Court
Harris County, Texas
Trial Court Cause No. 90-27904

O P I N I O N

The issue for this appeal is whether the trial court abused its discretion in dismissing *sua sponte* a juror whose father had been rushed to the emergency room of a Houston hospital two days into trial. We find there was no abuse of discretion, and affirm.

The facts of the underlying case itself are not at issue, and only the procedural aspects surrounding the juror's dismissal are of significance to this appeal. On May 1, 1997 the trial court impaneled twelve jurors to sit on the contribution and indemnity action between appellant Western Auto Supply Co. and appellee Valco Automotive Products, Inc. On the morning of May 5, 1997, two days into trial, the trial court received word that the father of one of the jurors had suffered a heart attack and that the juror was

with him at the hospital. The trial court called the hospital and verified with hospital personnel that the juror's father was a patient at the hospital. The court then informed the parties on the record that the juror was being dismissed and trial would continue with eleven jurors. Both sides objected to the dismissal. Trial continued until May 7, 1997 when the remaining jurors returned a 10-1 verdict in favor of appellee Valco. Appellant Western Auto filed motions for mistrial and for new trial, which were overruled. Appellee Valco's responses to the motions had included an affidavit from the juror, stating that on the morning of May 5, 1997, his father had been in critical condition and that he had informed the court he would not be able to continue as a juror because of his inability to concentrate on anything except his father's health.

The Texas Constitution and the Texas Rules of Civil procedure require a district-court jury to consist of twelve original jurors, but as few as nine may return a verdict if the others die or become "disabled from sitting." TEX. CONST. Art. V, § 13; TEX. R. CIV. P. 292. Trial courts have broad discretion in determining whether a juror is disabled from sitting when there is evidence of constitutional disqualification. *McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995). But not just any inconvenience or delay is a disability. A disability must be in the nature of "an actual physical or mental incapacity." *McDaniel*, 898 S.W.2d at 253. Our supreme court recently expanded this to include "emotional disability" in *Yanes v. Sowards*, 996 S.W.2d 849 (Tex. 1999). A court abuses its discretion in dismissing a juror if it acts without reference to any guiding rules or principles or acts arbitrarily or unreasonably. *McDaniel*, 898 S.W.2d at 253.

Our supreme court's views on the issue of dismissal of an impaneled juror in a civil case for family illness reasons goes back over a century to *Houston & Texas Central Ry. Co. v. Waller*, 56 Tex. 331 (1882). In *Waller*, a juror received word from his wife that their child was sick and for him to come home if possible. The trial court dismissed the juror based on the juror's belief that it was necessary for him to be at home. In reversing the ensuing judgment, the supreme court held that the disability must be more in the nature of a physical or mental incapacity, not mere mental distress over the illness of a family member.

Subsequent appellate court cases addressed the issue of juror disability arising from the illness of a family member, and upheld dismissal of the jurors. *See Barker v. Ash*, 194 S.W. 465 (Tex. Civ. App. – Dallas 1917, writ ref'd) (no abuse of discretion in dismissing juror whose child was dangerously ill and

about to die); *Schebesta v. Stewart*, 37 S.W.2d 781 (Tex. Civ. App. – Fort Worth 1930, writ dism'd w.o.j.) (juror properly dismissed where physically unable to sit after being told to "come at once if he wished to see his father alive"); *Southern Pacific v. Peralez*, 546 S.W.2d 88 (Tex. Civ. App. – Corpus Christi 1976, writ ref'd n.r.e.) (juror properly excused where family illness caused her to worry and not be able to serve as a juror). Mere physical inconvenience, on the other hand, is insufficient to allow dismissal of a juror. *See McDaniel v. Yarbrough*, 898 S.W.2d 251, 253 (Tex. 1995) (juror temporarily detained by flooding from heavy rain was not "disabled").

Our supreme court recently revisited this issue in *Yanes v. Sowards*, 996 S.W.2d 849 (Tex. 1999), and held that if the death or serious illness of a family member renders a juror unable to discharge his responsibilities, trial may proceed with fewer than twelve jurors. The Court distinguished this from the century-old *Waller* decision in that although the juror in *Waller* had been mentally distressed over his child's illness, there was no evidence that the distress prevented him from discharging his duties as a juror, contrary to the facts in *Yanes*. In the case before us, the trial court received a message that the juror's father had suffered a heart attack and was in the hospital. The court verified that the juror's father was indeed a patient at the hospital. While the record does not establish that the court actually spoke with the juror, we note that this is not essential. *See Barker*, 194 S.W. at 467, cited by the supreme court in *Yanes*, stating that "the intelligence received was so serious as to disable and disqualify the juror from a fair consideration of the case."

Under the circumstances and evidence shown, we hold there was no abuse of discretion by the trial court in dismissing the juror *sua sponte* where the juror's father had suffered a heart attack and was hospitalized. Appellant's sole point of error is overruled.

The judgment is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed November 24, 1999.

Panel consists of Justices Sears, Cannon, and Sondock.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Ross A. Sears, Bill Cannon and Ruby K. Sondock sitting by assignment.