

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001131-MR

BOBBY WILLIAMS

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE PAUL BARRY JONES, JUDGE
ACTION NO. 96-CR-00069

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, HUDDLESTON, and KNOPF, Judges.

BUCKINGHAM, JUDGE. Bobby Williams (Williams) appeals from a judgment of the Monroe Circuit Court sentencing him to ten years in prison following his conviction for trafficking in cocaine. Finding no error, we affirm.

On the night of August 24, 1997, Tompkinsville City Police Officer Chan Brown (Officer Brown) pulled over a truck being driven by Williams because it had a broken taillight. Williams got out of his truck after Officer Brown asked him for his driver's license and insurance card. After Williams exited his truck, Officer Brown spotted some rolling papers on the seat.

Upon inquiry from Officer Brown, Williams consented to a search of the vehicle. Officer Brown noticed that Williams appeared nervous and that he kept his hands in his pants pockets. When Officer Brown asked him to take his hands out of his pockets, Williams ran from the scene.

Officer Brown and Officer Rickey Richardson, who had arrived at the scene shortly after Williams was stopped, pursued Williams. As Williams started to enter a wooded area, Officer Brown saw him throw away two small sandwich-type baggies. After the two police officers apprehended Williams and placed him under arrest, Officer Brown retrieved the two small plastic baggies, both of which contained several pieces of an off-white substance, and several loose pieces that had fallen out of one of the plastic baggies. Upon searching Williams's pockets, Officer Brown discovered a few more loose pieces of a similar hard off-white substance.

Officer Brown placed the unopened plastic baggie, the opened plastic baggie, and the loose pieces of suspected crack cocaine together in a larger plastic bag. A later chemical test confirmed that both the substance in the small plastic baggies and the loose pieces were cocaine. A separate laboratory analysis of Williams's pants pockets was negative for the presence of cocaine.

In December 1996, Williams was indicted on one felony count of first-degree trafficking in a controlled substance (cocaine) (KRS 218A.1412). Following a two-day trial, a jury found Williams guilty of the charge. In April 1998, the trial

court sentenced Williams consistent with the jury's recommendation to ten years in prison for first-degree trafficking in cocaine. This appeal followed.

Williams, who is African-American, raises three issues on appeal, including the Commonwealth's striking of an African-American venireman, the Commonwealth's failure to preserve physical evidence, and the trial court's failure to grant a directed verdict. Based on a review of the record and the applicable law, we believe none of these issues have merit.

First, Williams contends that the Commonwealth used a peremptory challenge to exclude the only African-American person from the jury in violation of his constitutional right to equal protection under the 14th Amendment as required by Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Prior to seating the jury, the court conducted a hearing on the Commonwealth's exercise of its peremptory challenge to strike Angela Mink. During the hearing, the prosecutor explained that he had received information from three Tompkinsville police officers that Ms. Mink's brother was under indictment in Monroe County for trafficking in cocaine. He stated that he believed Ms. Mink's close relationship to a relative facing trial on the same type of drug offense for which Williams was being tried would unduly affect her ability to be an impartial juror.

The prosecutor stated that he would have stricken any person, "black, white, green or purple" in a similar situation. Defense counsel objected to the exclusion of the juror, noting that the prosecutor had failed to explicitly ask her about the

situation with her brother during voir dire. Defense counsel did not question the validity of the fact that Ms. Mink's brother was under indictment. The trial court held that the Commonwealth had properly exercised its right to strike Ms. Mink.

In the seminal case of Batson v. Kentucky, supra, the United States Supreme Court set out a three-step process for evaluating an equal protection challenge to a prosecutor's use of a peremptory challenge to exclude a member of the venire: 1) the defendant must make a prima facie showing that the prosecutor has exercised a peremptory challenge based on race; 2) if the defendant makes the requisite prima facie showing, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the juror; and 3) the trial court must determine whether the prosecution satisfied its burden by rebutting the initial prima facie showing of discrimination. See id. at 96-98, 106 S. Ct. at 1722-24. In reviewing an equal protection challenge to the prosecutor's striking a member of the venire, an appellate court must give great deference to the trial court and apply a clearly erroneous standard to the court's decision on discriminatory intent. Hernandez v. New York, 500 U.S. 352, 364, 111 S. Ct. 1859, 1868, 114 L. Ed. 2d 395 (1991); McGinnis v. Commonwealth, Ky., 875 S.W.2d 518, 523 (1994), overruled on other grounds by Elliott v. Commonwealth, Ky., 976 S.W.2d 416 (1998).

The Commonwealth argues that Williams has failed to make a prima facie showing that the prosecutor exercised his peremptory challenge on the basis of race. In order to establish a prima facie case, a defendant must show that he is a member of

a cognizable racial group, that the prosecutor used a peremptory challenge to remove members of the venire that corresponded to the defendant's race, and that these facts and any other relevant circumstances raise an inference that the prosecutor struck the venireman on account of his or her race. Batson, 476 U.S. at 96-97, 106 S. Ct. at 1723.

Generally, the fact that a prosecutor used his peremptory challenge(s) to remove the only black juror(s) on a panel is not sufficient in and of itself to create an inference of discrimination. As the court indicated in Commonwealth v. Hardy, Ky., 775 S.W.2d 919, 920-21 (1989), numbers alone do not establish a prima facie showing of discrimination, and the mere allegation that the prosecutor struck a certain number of blacks from the jury panel would not satisfy the requirements of Batson. An inference of discrimination arises primarily when a black juror is treated differently than prospective white jurors under similar circumstances. See Wells v. Commonwealth, 892 S.W.2d 299, 303 (1995).

Nevertheless, while it is questionable whether Williams ever established a prima facie showing of discrimination, because the trial court relied on the prosecutor's proffered rationale for exercising a peremptory challenge to remove Ms. Mink, we will address the other prongs of Batson. See, e.g., United States v. Tucker, 90 F.3d 1135, 1142 (6th Cir. 1996) (defendant's burden to make prima facie case becomes moot if trial court rules on prosecutor's explanation for strikes).

Williams contends the Commonwealth did not satisfy its burden in articulating a race-neutral reason for striking Ms. Mink because the prosecutor's action was based on neither information elicited during voir dire nor information within the personal knowledge of the prosecutor. The Kentucky Supreme Court, however, has rejected these types of challenges to a prosecutor's use of peremptory strikes. In Commonwealth v. Snodgrass, Ky., 831 S.W.2d 176, 179 (1992), the court stated:

We find no fault with the prosecutor for exercising a peremptory challenge against a juror where the decision to strike is based upon information which the prosecutor has received from a source other than information received from voir dire. Batson does not require the neutral explanation for peremptorily striking a potential juror to be derived from voir dire. Neither does the explanation have to rise to a level sufficient to strike for cause. Batson, supra. A prosecutor may utilize his own personal knowledge concerning a juror and information supplied from outside sources. Whether the information is true or false is not the test. The test is whether the prosecutor has a good-faith belief in the information and whether he can articulate the reason to the trial court in a race-neutral manner which is not inviolate of the defendant's constitutional rights. The trial court, as the final arbiter, then decides whether the prosecutor has acted with a forbidden intent.

In the case sub judice, the prosecutor explained that he had exercised his peremptory challenge to Ms. Mink because her brother was under indictment in the same county for the same offense for which Williams was on trial, trafficking in cocaine. The prosecutor indicated that his knowledge of this circumstance

was based on information received from three local police officers, and he submitted a written statement from the officers to support his action. In addition, the prosecutor stated that Ms. Mink failed to reveal the fact of her brother's indictment when he asked the potential jurors during voir dire if cocaine had affected any family member.

In Wells v. Commonwealth, supra, involving a prosecution for murder and theft surrounding a drug deal, the Kentucky Supreme Court affirmed the trial court's finding that no Batson violation had occurred where the prosecutor had stricken a black juror because her sister had been arrested for a drug crime. In the present case, we cannot say the trial court erred in finding the prosecutor provided a sufficient race-neutral explanation for using a peremptory challenge to strike Ms. Mink from the jury panel.

Williams also challenges his conviction based on the Commonwealth's failure to preserve his pants or provide in discovery the results of forensic tests performed on the pants. First, we note that this issue was not properly preserved by a contemporaneous objection at trial, and therefore generally is not subject to appellate review. See, e.g., Tucker v. Commonwealth, Ky., 916 S.W.2d 181 (1996); West v. Commonwealth, Ky., 780 S.W.2d 600 (1989). Williams maintains, however, that his inability to perform independent tests on the pants or to review the Commonwealth's test reports prejudiced the outcome of the trial and violated his right to due process. Generally, the Commonwealth is required to provide only material exculpatory

evidence in discovery. See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); Wilson v. Commonwealth, Ky., 836 S.W.2d 872 (1992), cert. denied, 507 U.S. 1034, 113 S. Ct. 1857, 123 L. Ed. 2d 479 (1993). In order to establish a due process violation based on the prosecution's failure to preserve even potentially exculpatory evidence, the defendant must show that the prosecution acted in bad faith. See, e.g., Collins v. Commonwealth, Ky., 951 S.W.2d 569 (1997); Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 159 (1995), cert. denied, 519 U.S. 855, 117 S. Ct. 151, 136 L. Ed. 2d 96 (1996).

Williams has not demonstrated that the Commonwealth's failure to preserve the pants resulted from bad faith. Moreover, Williams has not shown how he was prejudiced by a lack of access to the pants or the test report. Officer Brown testified on cross-examination that the test results were negative for cocaine residue in the pants pockets. Any independent testing by Williams could not have provided any more favorable information than that already disclosed by Officer Brown.

Williams's final issue involves the trial court's denial of his motion for a directed verdict. In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the Kentucky Supreme Court delineated the approach for handling a criminal defendant's motion for directed verdict as follows:

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the

motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

816 S.W.2d at 187 (citing Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983)). See also Commonwealth v. Collins, Ky., 933 S.W.2d 811, 815 (1996). The standard for appellate review of a denial of a motion for directed verdict alleging insufficient evidence dictates that if, under the evidence as a whole, it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Benham, 816 S.W.2d at 187; Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998).

In the case sub judice, Officers Brown and Richardson testified that they saw Williams throw away two plastic baggies while he was being chased. Officer Brown retrieved the two baggies and some loose pieces of an off-white hard substance. Three police officers testified that Williams made a statement to them that the substances retrieved by the police belonged to him. The Kentucky State Laboratory forensic drug chemist who performed several tests on the substances recovered by Officer Brown testified that the two samples contained a total of 100.2 grams of cocaine, worth approximately \$8,000 to \$9,000. Williams challenges the sufficiency of the evidence and the chemist's failure to indicate that he had tested all of the material contained in the two baggies. He contends that the jury could have harbored a reasonable doubt that the entire amount of the physical evidence recovered was crack cocaine.

In the recent case of Taylor v. Commonwealth, Ky. App., 984 S.W.2d 482 (1998), the defendant was convicted of trafficking in more than eight ounces of marijuana. During a search, the police found 98 plants they believed to be marijuana. The sheriff sent samples from only six of the plants to the forensic laboratory for testing. The forensic chemist testified that the samples tested positive for marijuana and weighed a total of .5 grams. The court in Taylor held that the state is not required to test samples from all individual portions of a controlled substance, even when an offense involves a specified amount of a controlled substance. In determining whether the prosecution presented sufficient reliable evidence to hold a defendant responsible for the full quantity of a substance, the court stated that it must look to the following factors:

[1] a proper random selection procedure was employed; [2] the tested and untested substances were contemporaneously seized at the search scene; [3] the tested and untested substances were sufficiently similar in physical appearance; [4] the scientific testing method conformed with an accepted methodology; [5] all of the samples subjected to scientific analysis tested positive for the same substance; and [6] the absence of evidence that the untested substance was different from the tested substance.

Id. at 485.

Applying these factors in the present instance, the Commonwealth presented sufficient evidence to attribute the entire 100.2 grams of cocaine to Williams. Given the other evidence linking Williams to the tested cocaine, and taking all the evidence in the light most favorable to the Commonwealth, we

believe there was sufficient evidence for a reasonable juror to believe that Williams was guilty of trafficking in cocaine. See, e.g., Dawson v. Commonwealth, Ky., 756 S.W.2d 935 (1988); Brown v. Commonwealth, Ky. App., 914 S.W.2d 355 (1996). Thus, the trial court did not err in denying Williams's motion for a directed verdict.

For the foregoing reasons, we affirm the judgment of the Monroe Circuit Court.

ALL CONCUR.

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