

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001454-MR

KEVIN HINKLE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 08-CR-002512

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER, MOORE, AND STUMBO, JUDGES.

KELLER, JUDGE: Kevin Hinkle (Hinkle) appeals from his conviction of escape in the second degree, arguing that the jury instructions were faulty and that the Commonwealth impermissibly struck African-American jurors. Having reviewed the record and the arguments of the parties, we affirm.

FACTS

The facts are not in dispute. Hinkle appeared in court under a felony indictment, and, by agreement of the parties, the court released Hinkle on his own recognizance under home incarceration, apparently in lieu of \$500.00 bond. Hinkle violated the terms of his release by leaving his home without permission. As a result, the Commonwealth charged him with escape in the second degree and with being a persistent felony offender. Hinkle rejected a plea offer by the Commonwealth and the parties tried this case to a jury.

Following *voir dire*, the Commonwealth exercised peremptory challenges to strike three of four African-American jurors. Hinkle did not object to the Commonwealth's peremptory strikes of two of the jurors. However, he did challenge the Commonwealth's peremptory strike of juror number 43401, the only remaining African-American male in the jury pool. In support of his challenge, Hinkle noted that juror number 43401 had not said anything during *voir dire* and that he did not seem "any more or less bored or excited" than any of the other jurors. Hinkle also noted that a significant number of white jurors acted similarly to juror number 43401. The court, agreeing with Hinkle, stated that it could discern no obvious racially-neutral reason for the Commonwealth to peremptorily strike juror number 43401. Therefore, the court ordered the Commonwealth to provide a racially neutral reason for striking juror number 43401.

In response to the court's order, the Commonwealth's attorney stated that, if possible, he routinely strikes students and the unemployed, and that juror

number 43401 was both. As to students, the Commonwealth's attorney stated that he believes that they lack real world experience or are so opinionated that they do not listen to the evidence or follow the law. The Commonwealth's attorney did not provide a reason for routinely striking the unemployed; however, he did state that he had stricken all of the other unemployed jurors. Hinkle then noted that the Commonwealth did not strike a white male juror who had been "laid off." The Commonwealth's attorney stated that he considered a person who had been laid off to be different from a person who is unemployed, but he did not state why he made that distinction. After hearing the arguments of counsel, the court found that the reasons expressed by the Commonwealth's attorney were "cogent" and consistent with the Commonwealth's other peremptory strikes. Therefore, the court overruled Hinkle's objection.

As to the jury instructions, Hinkle asked the court to include the entire definition of "custody" contained in KRS 520.010(2), which is "restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes, but does not include supervision of probation or parole or constraint incidental to release on bail" The court denied Hinkle's request and instructed the jury that custody only "[m]eans restraint by a public servant pursuant to a lawful arrest, detention, or an order of court for law enforcement purposes." The court excluded the later portion of the definition based on the holding by the Supreme Court of Kentucky in *Weaver v. Commonwealth*, 156

S.W.3d 270 (Ky. 2005) that violation of home incarceration may result in a charge of second-degree escape.

On appeal, Hinkle argues that the court erred when it permitted the Commonwealth to remove juror number 43401 by peremptory challenge. Hinkle also argues that the Supreme Court reached the wrong conclusion in *Weaver* and that the trial court should have included the entire definition of custody in the jury instructions.

STANDARDS OF REVIEW

In evaluating the explanation for striking a juror of color, the trial court must determine if the race-neutral explanation offered by the Commonwealth was merely a pretext for racially motivated use of a peremptory strike. *Thomas v. Commonwealth*, 153 S.W.3d 772, 777-78 (Ky. 2004). This Court defers to the trial court's finding in that regard unless it is clearly erroneous. *Id.* at 778.

“Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review.” *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006).

ANALYSIS

Applying the above standards of review, we first address the alleged jury instruction error. Hinkle does not dispute the Supreme Court's holding in *Weaver* that a person who violates the terms of home incarceration may be charged

with escape in the second degree.¹ However, Hinkle argues that *Weaver* was not correctly decided and that, despite the Supreme Court's holding in *Weaver*, the trial court should have given the requested instruction. We disagree.

Initially, we note that we are “bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court.” SCR 1.030(8)(a). Therefore, even if we disagree with the Supreme Court's holding in *Weaver*, we cannot alter it.

Furthermore, we agree with the trial court that, in light of *Weaver*, inclusion of the requested jury instruction language would not have been appropriate. The function of jury instructions is to set forth what the jury must believe from the evidence in order to return a verdict in favor of the party bearing the burden of proof. *Webster v. Commonwealth*, 508 S.W.2d 33, 36 (Ky. 1974). Based on the Supreme Court's holding in *Weaver* that a charge of escape in the second degree “may arise from a violation of home incarceration that was imposed as a condition of pretrial release,” 156 S.W.3d at 271, whether Hinkle was constrained incidental to release on bail was irrelevant and not necessary for the jury to find for the Commonwealth. Therefore, the trial court correctly excluded the additional jury instruction language requested by Hinkle.

We next address the jury selection issue. As noted above, Hinkle argues that the Commonwealth impermissibly excluded juror number 43401 from the jury because of his race. A party may not strike African-American jurors

¹ Hinkle argued at trial that he did not fall within the category of persons subject to *Weaver*; however, he does not make that argument here.

without articulating a race-neutral explanation. *Batson v. Kentucky*, 476 U.S. 79, 97, 106 S. Ct. 1712, 1723, 90 L. Ed. 2d 69 (1986).

The Commonwealth stated that it struck juror number 43401 because he was both unemployed and a student. As justification, the Commonwealth stated that it generally strikes potential jurors with either characteristic and that juror number 43401 had both. The Commonwealth did not state why it generally strikes the unemployed, but it did state that it generally strikes students because of a belief that students do not make reliable jurors. Hinkle argues the Commonwealth's argument is mere pretext because the Commonwealth did not strike a potential white male juror who had been laid off. However, Hinkle has not pointed to any other juror not stricken by the Commonwealth who was both a student and unemployed. The Commonwealth offered a racially-neutral reason for striking juror number 43401. Granting the trial court its due deference, we discern no error in its acceptance of the Commonwealth's reasons for striking juror number 43401.

CONCLUSION

Based on the preceding, and noting again that we are bound to follow Supreme Court precedent, we hold that the trial court correctly defined custody in the jury instructions. Furthermore, we hold that the trial court correctly determined that the Commonwealth's reason for peremptorily striking an African-American juror was not simply pre-text. Therefore, we affirm.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Annie O'Connell
Louisville, Kentucky

BRIEF FOR APPELLEE:

Jack Conway,
Attorney General of Kentucky

Todd D. Ferguson,
Assistant Attorney General
Frankfort, Kentucky