IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

HUGH MACY FAVOR, *Appellant*.

No. 1 CA-CR 17-0104
FILED 11-15-2018

Appeal from the Superior Court in Maricopa County
No. CR2015-123722-001
The Honorable John Christian Rea, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Legal Advocate's Office, Phoenix
By Dawnese C. Hustad
Counsel for Appellant

Hugh Macy Favor, Winslow
Appellant

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge Maria Elena Cruz joined.

T H U M M A, Chief Judge:

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297 (1969). Counsel for defendant Hugh Macy Favor has advised the court that, after searching the entire record, she has been unable to discover any arguable questions of law and has filed a brief requesting this court conduct an *Anders* review of the record. Favor was given the opportunity to file a supplemental brief pro se and has done so. This court has reviewed the entire record and finds no reversible error. Accordingly, the convictions and resulting sentences are affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 In May 2015, City of Phoenix Police officers responded to a Days Inn hotel during an investigation of the driver of a tan Nissan Altima, later determined to be Favor. Upon arriving, the officers discovered the Altima parked in the parking lot, with Favor sitting in the driver's seat. Sergeant Kulwin and Officer Herrick approached in their vehicles to attempt "to block [the Altima] in." Both drove unmarked cars, but Sergeant Kulwin "ha[d] 'police' written on his car." Once the officers were within several feet of the Altima, Sergeant Kulwin activated his lights, and Officer Herrick "opened [his] door, stepped out, stood up." Favor then drove quickly through the narrow space between the cars, leading Officer Herrick to "jump[] back into [his] car and pull[] the door behind" him to avoid being hit by Favor.

[1] This court views the facts "in the light most favorable to sustaining the verdict, and resolve[s] all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89 (1997).

¶3 Favor drove quickly toward the entrance of the parking lot. Officer Ortega, stationed outside the lot in a "fully marked" car, heard about the interaction on his dispatch radio and drove toward the entrance, intending to stop Favor. As Officer Ortega turned "into the south entrance of the hotel," Favor approached at around "25, 30 miles-per-hour," "swerved" and drove "[r]ight into" Officer Ortega's vehicle.

¶4 Favor continued driving and left the parking lot; Officer Ortega pursued him, with lights and sirens activated. Favor ran multiple stop signs and signals, traveling at "around 70, 80 miles-per-hour" at times and at one point "almost collid[ing] with [a] van." Eventually Favor's car stalled near a residence. After trying, but failing, to enter through the main door, Favor ran into the detached laundry room of the residence. Officers at the scene approached and eventually arrested and handcuffed Favor, despite him "flailing [and] trying to hide his hands underneath him."

¶5 Officers searched Favor's car incident to arrest and found marijuana in the trunk and "scattered inside the car," methamphetamine "on the floors . . . in the carpet" and "a scale and some baggies." In a post-*Miranda* interview, Favor admitted to "ramming a marked patrol car" and knowing of the marijuana in his car.

¶6 The State charged Favor with thirteen separate charges, including six counts of aggravated assault, Classes 2, 4, and 5 felonies; unlawful flight from a law enforcement vehicle, a Class 5 felony; resisting arrest, a Class 6 felony; criminal trespass in the first degree, a Class 6 felony; possession or use of dangerous drugs, a Class 6 felony; possession or use of marijuana, a Class 6 felony; possession of drug paraphernalia, a Class 6 felony; and criminal damage, a Class 2 misdemeanor.

¶7 Before trial, the State filed several motions. The State moved to "preclude [Favor] from eliciting any testimony relating to the legitimacy of [his] stop, [his] lack of criminal history, and [his] belief that unarmed black men are targeted by police." Next, the State moved to dismiss without prejudice the aggravated assault charges where Sergeant Kulwin and Officer Herrick were the victims. The State also moved to find dangerousness inherent in the three Class 2 felony aggravated assault charges "using a car, a deadly weapon or dangerous instrument" (wherein Sergeant Kulwin and Officers Herrick and Ortega, respectively, were the listed victims). After argument from counsel, the court granted each motion.

¶8 Also before trial, Favor filed a motion seeking to suppress "any and all evidence derived from" the parking lot stop because the stop was "based on an anonymous tip which lacked reasonable articulable suspicion and [] probable cause." After hearing argument of counsel and watching video-recording of the incident, the court denied the motion.

¶9 At the close of the State's case in chief, the court granted Favor's motion for judgment of acquittal for the aggravated assault charge where Sergeant Kulwin was the victim. After completion of the five day trial, the jury found Favor guilty of Class 2 felony aggravated assault of Officer Ortega "using a car, a deadly weapon or dangerous instrument;" aggravated assault, "physical injury to [Officer] Ortega;" unlawful flight from a law enforcement vehicle; criminal trespass in the first degree; criminal damage; possession or use of dangerous drugs; possession or use of marijuana; and possession of drug paraphernalia. The jury found him not guilty of the remaining charges that went to the jury. At sentencing, the court found all counts to be "nondangerous [and] nonrepetitive" (other than the Class 2 felony aggravated assault of Officer Ortega "using a car, a deadly weapon or dangerous instrument," which the court earlier found inherently dangerous). After considering the presentence report and hearing from counsel, Favor, and several of Favor's family members, the court sentenced Favor to the minimum sentence of 10.5 years for the aggravated assault of Officer Ortega "using a car, a deadly weapon or dangerous instrument," concurrent with shorter sentences for the remaining convictions. Favor appropriately received credit for 50 days pre-sentence incarceration.

¶10 Favor timely appeals his convictions and sentences. This court has jurisdiction over his appeal pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and -4033(A)(1) (2018).[2]

DISCUSSION

¶11 The court has reviewed and considered defense counsel's brief and has searched the entire record for reversible error. *See State v. Clark*, 196 Ariz. 530, 537 ¶ 30 (App. 1999) (providing guidelines for briefs when counsel has determined no arguable issues to appeal). In his supplemental brief, Favor asserts the following errors: (1) the State exercised its preemptory strikes in violation of *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986); (2) the court erred by failing to choose the alternate jurors

[2] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

in open court; (3) the court erred by failing to hold an evidentiary hearing on his motion to suppress; (4) the State committed perjury by "withholding material facts by editing the audio tape of [his] interview" with Officer Slivka; (5) the court erred by failing to properly inquire into his request for change of counsel and (6) ineffective assistance of counsel.

I. Preemptory Strikes

¶12 Favor argues the State exercised its preemptory strikes in violation of *Batson*. When reviewing the superior court's ruling on *Batson* challenges, this court defers to the superior court's findings of fact unless clearly erroneous, but reviews *de novo* that court's application of the law. *State v. Newell*, 212 Ariz. 389, 400-01 ¶ 52 (2006).

¶13 *Batson* challenges involve a three-step analysis. First, the defendant must make a prima facie showing of discrimination. *Id.* at 401 ¶ 53. If shown, the prosecutor must then provide a race-neutral explanation for the strike. *Id.* Finally, if such an explanation is provided, the defendant must demonstrate to the court that the reasons are pretextual and the strike was, in fact, based on race. *Id.*

¶14 At voir dire, Favor challenged two of the State's preemptory strikes, arguing they "eliminated two minorities from the 26. And the vast majority of [the jury was] white." Upon request by the court, however, the State provided valid, race-neutral reasons for each strike. As to one, the State noted the juror "had talked about his close family members who are involved in drug offenses, including his son and some nephews that had either taken plea agreements, gone to trial [or] gone to prison." As to the other, the State noted he had "expressed that he was favorable to the idea that marijuana should not be illegal." Favor failed to argue that the reasons were pretextual, and the superior court found "the State ha[d] given race neutral reasons." This exchange satisfied the three-part test required under *Batson* and its progeny. Accordingly, Favor has not shown that the superior court erred in determining that the preemptory strikes did not violate *Batson*.

II. Alternate Juror Procedure

¶15 Favor suggests the alternate jurors were not "randomly picked . . . [by] a drawing out of a box in open court" as required and as jury instructions before trial indicated they would be chosen. Transcripts of the trial show the judge announced, in open court, that "[t]he clerk ha[d] 14 slips of paper in a box . . . [and] dr[e]w two of those slips out and those two jurors [were] the alternates." Although Favor states he is unsure [h]ow the

words got to the transcript when this process wasn't done," he has provided no evidence either contradicting the transcript or showing the process was not completed or was completed improperly. Accordingly, this claim fails.

III. Lack Of An Evidentiary Hearing

¶16 Favor argues the court erred in failing to hold an evidentiary hearing on his pre-trial motion seeking to suppress evidence involving the parking lot stop, suggesting the court did not hold one "because the judge felt he was too busy to squeeze the hearing in before the trial date."[3] In his motion, Favor sought to suppress "any and all evidence derived from" the parking lot stop because the stop was "based on an anonymous tip which lacked reasonable articulable suspicion and [] probable cause."

¶17 The court heard arguments of counsel to determine whether an evidentiary hearing was necessary, which included the court viewing video-recording of the interaction. For purposes of argument, the court assumed the facts at issue were true, assuming as a result that the initial stop was "just junk" and the officers lacked reasonable suspicion to stop Favor. Even so, the court determined the "intervening illegality involved with the run and the chase and the evading law enforcement . . . attenuate[d] the Fourth Amendment violation." Accordingly, the court "[did not] see a basis to have an evidentiary hearing" and denied Favor's motion to suppress based on attenuation. Because the "legal claims [did] not turn on disputed facts," *State v. Hidalgo*, 241 Ariz. 543, 549 ¶ 11 (2017), but instead were resolved as a matter of law, the court did not err in refusing to hold an evidentiary hearing on the matter. *Id.*

[3] In his pro se brief, Favor cites *People v. Duvall*, 886 P.2d 1252 (1995) and *Townsend v. Sain*, 372 U.S. 293 (1963) for the proposition that an evidentiary hearing was required. The quote Favor credits to *Duvall* comes from Rule 8.386(f)(1) of the California Rules of Court. That Rule, as well as *Duvall* and *Townsend* (which relate to federal habeas corpus proceedings) are inapplicable here.

IV. Interview Editing

¶18 Favor argues the state committed perjury by "withholding material facts by editing the audio tape of [Favor's] interview" with Officer Slivka. The interview, however, had been edited to remove Favor's statements about the reasons he visited the hotel, which were precluded from admission by pretrial motion. Officer Slivka, who conducted the interview, testified the recording as edited was "a fair and accurate representation of the interview," and Favor did not object to its admission at trial. In fact, after Favor repeatedly commented on the editing during direct and cross-examination, it was the State who sought to admit the tape in its entirety, arguing Favor had "tainted [the] jury saying that [the State] . . . tampered with evidence" and had "opened the door to the entire recording" by making that claim. The court denied the State's request, instead offering to include "a jury instruction about incomplete evidence." Favor failed to request such an instruction. Nonetheless, Favor spoke repeatedly about the alleged missing portions during direct and cross-examination and explained the meaning behind his words played for the jury. Thus, the jury heard both parties' conflicting testimony and it was "the jury's function to weigh the evidence as a whole, to resolve any inconsistencies therein, and then to determine whether or not a reasonable doubt exist[ed]." *State v. Money*, 110 Ariz. 18, 25 (1973). On this point, Favor has shown no error.

V. Request for Change of Counsel

¶19 Favor argues the superior court erred by failing to properly inquire into his request for change of counsel. This court reviews a trial court's decision to deny a request for new counsel for abuse of discretion. *State v. Gomez*, 231 Ariz. 219, 224 ¶ 18 (2012). Although the Sixth Amendment right to counsel requires a trial judge to "inquire as to the basis of a defendant's request for substitution of counsel . . . [t]he nature of the inquiry will depend upon the nature of the defendant's request." *State v. Torres*, 208 Ariz. 340, 343 ¶¶ 7, 8 (2004). "A trial judge is not required to hold an evidentiary hearing on a motion for change of counsel if the motion fails to allege specific facts suggesting an irreconcilable conflict or a complete breakdown in communication, or if there is no indication that a hearing would elicit additional facts beyond those already before the court." *Gomez*, 231 Ariz. at 225-226 ¶ 29.

¶20 Here, Favor made an oral motion for change of counsel, stating he and counsel had "a disagreement of interests" and that counsel was "not protecting [his] interests;" had "already given up and admitted defeat;" had advised Favor to "plea to something that I have no interest in pleading to;" and was not "accurately representing [him] in this trial." Favor's statements failed "to allege specific facts suggesting an irreconcilable conflict or a complete breakdown in communication," instead offering "generalized complaints about differences in strategy" and his lack of confidence in appointed counsel. *Id.* at 225 ¶ 25. Favor likewise failed to "indicat[e] that a hearing would elicit additional facts beyond those already before the court." *Id.* at 225-26 ¶ 29. Moreover, the superior court did and properly could consider the timing of the motion. *Id.* at 225 ¶ 25. Accordingly, the court was "not required to hold an evidentiary hearing on [the] motion for change of counsel" and did not abuse its discretion by not doing so. *Id.* at 225 ¶ 29.

VI. Ineffective Assistance of Counsel

¶21 Favor argues ineffective assistance of trial counsel, but such a claim can only be raised in post-conviction proceedings pursuant to Rule 32 and not on direct appeal. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415 ¶ 20 (2007). Therefore, this court will not consider Favor's ineffective assistance of counsel arguments in this direct appeal.

VII. Additional Claims

¶22 Favor raises several peripheral issues, none of which show reversible error. The court sustained Favor's objection to the statement Favor claims was prejudicial and improperly admitted. The court denied Favor's request for a *Willits* instruction addressing the allegedly missing evidence (Favor's car); the court noted there was no "real likelihood that the evidence will have a tendency to exonerate," as required for submission of such an instruction. Favor has not shown that these rulings, on this record, were reversible error. Finally, counsel represented Favor and was present at trial at all critical stages.

CONCLUSION

¶23 This court has read and considered the briefs filed by defense counsel and Favor and has searched the record provided for reversible error. *Leon*, 104 Ariz. at 300; *Clark*, 196 Ariz. at 537 ¶ 30. From the court's review, the record reveals no reversible error. Instead, the record indicates all proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure; Favor was represented by counsel at all stages of the proceedings and the jury was properly instructed. Accordingly, Favor's convictions and resulting sentences are affirmed.

¶24 Upon filing of this decision, defense counsel is directed to inform Favor of the status of his appeal and of his future options. Defense counsel has no further obligations unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 585 (1984). Favor shall have thirty days from the date of this decision to proceed, if he desires, with a pro se motion for reconsideration or petition for review.

AMY M. WOOD • Clerk of the Court
FILED: AA