

RENDERED: JULY 30, 1999; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court Of Appeals**

NO. 1996-CA-003084-MR

JIMMY MILLER

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT  
HONORABLE HON. PAUL BARRY JONES, JUDGE  
ACTION NO. 93-CR-022

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: GUDGEL, CHIEF JUDGE; COMBS AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Jimmy Miller (Miller) appeals from the judgment of the Adair Circuit Court entered on November 4, 1996, that sentenced him to prison for seven years and imposed a fine of \$10,000 for his conviction for trafficking in a controlled substance in the first degree in violation of Kentucky Revised Statutes (KRS) 218A.1412. Miller, an African-American, argues that the trial court erred (1) in not finding a constitutional violation when the Commonwealth used two peremptory challenges to

remove the only two African-Americans from the jury panel; (2) in refusing to admit into evidence photographs of the crime scene; and (3) in denying his motion for a directed verdict of acquittal. We affirm.

On April 16, 1993, Kentucky State Police (KSP) Detective Ben Hadley (Detective Hadley) received an anonymous drug tip regarding Miller. Detective Hadley, along with fellow KSP Detective J.D. Antle (Detective Antle) and KSP Trooper Bartley<sup>1</sup>, drove to Miller's automobile repair garage in Columbia in a marked state police cruiser. The police officers noticed Miller alone in a vehicle 50 to 100 yards away driving down a long, steep hill on Patterson Street, the dirt road where his residence was located. Trooper Bartley backed the police cruiser from a driveway and proceeded towards Miller's car. At that point, Miller attempted to back his vehicle up the hill. But, heavy rain had turned the dirt road into mud and deep ruts had developed. The mud-slicked road caused Miller's car to slide into a deep rut. Detectives Hadley and Antle testified that they saw Miller open the driver-side door, lean out, and throw something underneath the car. Miller was able to pull his car out of the rut and drove down the hill and stopped about 20 feet in front of the police cruiser. Trooper Bartley detained Miller while Detectives Hadley and Antle walked up the hill to the point where Miller had backed his car into the deep rut. In that rut,

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<sup>1</sup> The record does not disclose the first name of Trooper Bartley.

the detectives found ten small plastic bags which they suspected contained cocaine. Miller was arrested. The substance in the bags was subsequently tested and found to total 2.09 grams of cocaine, or approximately 0.209 gram per bag. The Commonwealth alleged that the cocaine was packaged for sale<sup>2</sup> at \$25 per bag.

The case finally went to a jury trial on September 27, 1996.<sup>3</sup> Following voir dire, the Commonwealth used two of its peremptory strikes to strike the only two black persons from the jury panel. Miller objected to the composition of the jury, and the Commonwealth volunteered to give race-neutral reasons for striking the two African-Americans as potential jurors. The trial court accepted the Commonwealth's reasons as being racially neutral.

Miller testified in his own defense and denied ever possessing the cocaine. Miller attempted to cast doubt as to whether the detectives were located where they could have seen him open his car door and toss something under his car. In support of this claim, Miller attempted to have admitted into evidence several aerial photographs of the area as well as a videotape of the area. Miller argued that it was logistically impossible for the detectives to have seen his car from the

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<sup>2</sup> KRS 218A.010(28) defines "traffic" as "to manufacture, distribute, dispense, sell, transfer, or possess with intent to manufacture, distribute, dispense, or sell a controlled substance".

<sup>3</sup> The record discloses that the trial date was changed at least six times from the initial trial date in November 1993, to the final trial date in September 1996.

location where they claimed to have been at the time. The Commonwealth objected to the admission of the June 1995 photographs on the grounds that they did not substantially represent the area as it existed in April 1993, at the time of the alleged offense. The trial court accepted the argument that much of the area had undergone change since 1993, and refused to admit the pictures into evidence. However, the trial court allowed Miller to give limited testimony regarding this issue. Miller testified that the area viewed in the 1995 photographs was not similar to the area in 1993. Several people who lived in the area also testified that the area had changed substantially between April 1993, and the time the photographs were taken in June 1995. They testified that as the area had existed in 1993, it would have been impossible for the detectives to have observed Miller from the detectives' position.

The jury convicted Miller of trafficking in a controlled substance and recommended a seven-year prison sentence and a fine of \$10,000, which the trial court imposed. This appeal followed.

Miller's first argument is that the trial court erred in ruling that the prosecutor offered race neutral reasons for striking the only two African-Americans on the venire as required by Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The Commonwealth stated that it struck the first black juror, Leona Ingram, because her husband was currently under indictment in the Casey Circuit Court for theft and that he was a

prosecutor in that case. The Commonwealth stated that it struck the second black woman, Jada Jones, because her first cousin, Robbie Jones, had recently been sent to prison because he violated the conditions of his parole when he tested positive for drugs. The Commonwealth Attorney stated that "...I think that it would - if not consciously then subconsciously affect her ability to consider some of the same issues that has [sic] directly affected a relative of hers." In his brief, Miller argues that "[t]he reasons cited by the Commonwealth merely paid lip service to Batson v. Kentucky....When a judge lets the Commonwealth get by with preemptory [sic] challenges in this fashion, it is merely winking at the law."

The United States Supreme Court's decision in Batson, supra, provides as follows:

[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of preemptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised preemptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that preemptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the

selection of the venire, raises the necessary inference of purposeful discrimination.

In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption--or his intuitive judgment--that they would be partial to the defendant because of their shared race. Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve a jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the

jurors' race. Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or "affirm[ing] [his] good faith in making individual selections." If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause "would be but a vain and illusory requirement." The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination. (citations omitted) (footnotes omitted).

Id. at 476 U.S. 79, 96-98, 106 S.Ct 1712, 90 L.Ed.2d 69, 87-89.

"[T]he trial court is in the best position to determine the intent of peremptory challenges." Wells v. Commonwealth, Ky., 892 S.W.2d 299, 303 (1995), "[T]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." Id. (quoting Hernandez v. New York, 500 U.S. 352, 364, 111 S.Ct. 1859, 1868, 114 L.Ed.2d 395[, 408-409] (1991)).

Our Supreme Court in Commonwealth v. Snodgrass, Ky., 831 S.W.2d 176, 179 (1992), stated as follows:

The sole determination by the trial court when it holds a Batson hearing is whether the prosecutor exercised a peremptory challenge on a venireman because of his race. Batson gives great deference to the trial court in determining whether the prosecutor's strike is racially motivated. A trial court should give appropriate weight to the disparate impact of the prosecutor's criterion in its decision, but this factor is not conclusive in the preliminary race-neutral inquiry. Hernandez, supra at 1863. The trial court may accept at face value the explanation given by the prosecutor depending upon the demeanor and credibility of the

prosecutor. Stanford v. Commonwealth, Ky., 793 S.W.2d 112 (1990). No additional inquiry or evidentiary hearing is required under Batson.

There will seldom be much evidence bearing on that issue and the best evidence often will be the demeanor of the attorney who exercised the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province."Hernandez, supra, 111 S.Ct. at 1869.

We cannot conclude that the trial court was clearly erroneous when it accepted the reasons the Commonwealth offered as being non-rationally motivated and not pretextual.

The second issue that Miller raises is whether the trial court erred in not allowing into evidence aerial photographs of the crime scene. Miller argues that these photos were vital to him in his effort to prove that the police could not have seen him from the driveway, that he had a direct view of the police from where his vehicle was located, and that because of the distance between the police and him he had ample time to have effectively disposed of any cocaine had it been in his possession. Since the road directions had remained unchanged since 1993, the trial court allowed into evidence a city map and a photograph of the map for the purpose of showing the direction of the roads involved. In an effort to lay a proper foundation for admitting the photographs into evidence, Miller testified for the limited purpose of describing changes made in the roads between 1993 and 1995. On direct examination, Miller stated that



the road had been widened, substantial bulldozing work had been performed, and the road had been graveled. On cross-examination, Miller testified that "the road here on June 28, 1995, don't look nothing like it looked in April --". Miller also called other witnesses who described the changes that had been made to the road. While all the witnesses testified that the 1995 photographs were not a substantial representation of the conditions as they existed in 1993, Miller nonetheless argues that since the witnesses accounted for every change since 1993, the 1995 photographs should have been admitted into evidence. The trial court denied the admission of the photographs because they were not a substantial representation of the conditions of the area as they existed in 1993.

Both parties cite Turpin v. Commonwealth, Ky., 352 S.W.2d 66 (1961), as the controlling authority in this case. In Turpin, the Court stated as follows:

The time at which a photograph offered in evidence was taken is important only with reference to the question of whether there has been a change in the condition of the person or object portrayed. The mere fact that a photograph was taken at a time different from the date of the incident in question does not render it inadmissible if it can be established as a substantial representation of the conditions as they then existed.

Id. at 67.

"Whether to admit or exclude evidence to ensure the fairness of a trial is within the discretion of the trial court, and its determination will not be overturned on appeal in the absence of a showing of an abuse of such discretion." Mullins v.

Commonwealth, Ky., 956 S.W.2d 210, 213 (1997). We do not believe the trial court abused its discretion by refusing to admit the photographs into evidence when they admittedly were not a substantial representation of the conditions at the time of the crime.

Miller's final claim of error is that the trial court erred in refusing to enter a directed verdict of acquittal. Our standard of review for this issue was stated by the Court in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), as follows:

On motion for a 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.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to directed verdict of acquittal. Sawhill. [Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983)].

Miller argues that the Commonwealth failed to meet its burden of proving that he possessed the ten bags of cocaine. As this Court held in Powell v. Commonwealth, Ky.App., 843 S.W.2d 908 (1992), the proper definition of "possession" for offenses under KRS Chapter 218A is the definition provided in KRS

500.080(14), as follows: "'Possession' means to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object."

The evidence of Miller's guilt included the following: three police officers in response to an anonymous drug complaint went looking for Miller; two detectives from a distance of 50 to 100 yards observed Miller alone drive down a road near them; the officers observed Miller stop his vehicle and attempt to back it up in the opposite direction from their police cruiser; after Miller's vehicle became stuck in the mud, two detectives observed Miller throw something under the car; when the two detectives searched that area, they discovered ten separate packets of cocaine in quantities believed to be packaged for sale at \$25 per package. While the detectives did not testify that they saw Miller throw ten bags of cocaine from his car, a reasonable inference that the jury could draw from the evidence was that the ten bags of cocaine found in the mud were thrown there by Miller. Clearly, all of the above evidence was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Miller possessed the cocaine and that he possessed it with the intent of trafficking.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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