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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002857-MR

MICHAEL DRURY EVANS APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 97-CR-00277

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, EMBERTON, and JOHNSON, JUDGES.

JOHNSON, JUDGE: Michael Drury Evans (Evans) has appealed from the judgment of the Christian Circuit Court entered on November 3, 1997, which found him guilty of the crime of escape in the second degree, Kentucky Revised Statutes (KRS) 520.030, and being a persistent felony offender in the first degree, KRS 532.080(3), and which sentenced him to serve a term of eighteen years in prison. We reverse and remand for a new trial.

On April 19, 1997, Evans was sentenced to serve a six-month sentence in the Christian County Jail. While so incarcerated, he was allowed to participate in a work-release program and to go to work each day at a local restaurant. On May

5, 1997, Evans did not return to the jail after work as required. At trial, Evans testified that the reason he did not return to the jail was that his girlfriend needed to be taken to the hospital for emergency treatment. After she was released from the hospital, he testified that he was needed to care for his girlfriend and her children. On May 23, 1997, Evans was arrested and charged with escape in the second degree. On June 20, 1997, Evans was indicted on the escape offense, as well as for being a persistent felony offender in the first degree. He was tried on September 4, 1997, and sentenced, pursuant to the jury's recommendation, on November 3, 1997.

Evans raises two issues for our consideration in this appeal. First, he argues he is entitled to a reversal of his conviction and a new trial because the trial court refused to find a constitutional violation, pursuant to Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). During jury selection, the Commonwealth exercised two of its peremptory challenges to removed the only African-Americans from the jury. The trial court apparently found that Evans established a prima facie case of discrimination as it required the Commonwealth to explain its reasons for the strikes. In chambers, the prosecutor stated that it struck Gertie Jackson because she had failed to list her marital status on her jury qualification form. The prosecutor feared she may be a single mother and, for that reason, might have been sympathetic to Evans' girlfriend. The prosecutor stated that he struck the other remaining African-American juror, Timothy Johnson, because he was a young male,

serving in the military and that a soldier had recently caused a hung jury in another case. The prosecutor also stated that Johnson had an unpleasant demeanor and appeared to be angry about something.

The trial court gave Evans' counsel an opportunity to argue that these purported reasons were pretextual. However, instead of determining whether the reasons given by the prosecutor were sufficiently race-neutral to survive Evans' Batson challenge, the trial court stated as follows:

> Well, let the record reflect that this is not a case where [the defendant] is charged with an offense against a white person, or against a black person. It's really a status offense, either he was in custody or he was not in custody. So, ah, the record is protected and the motion is denied. We're going to try this today.

Evans argues that the prohibition against discrimination in the selection of jurors is not restricted to trials of persons charged with crimes against others. Further, he contends that "the reasons given did not amount to a racially neutral explanation for the challenge." In response, the Commonwealth argues that its justifications for using its peremptory strikes were race-neutral. In a footnote, the Commonwealth, citing Entwistle v. Carrier Conveyor Corp., Ky., 284 S.W.2d 820, 822-23 (1955), argues that if this Court should disagree with the trial court's application of Batson, it should hold that the trial court's result was right but for the wrong reason. Apparently, the Commonwealth would agree that the nature of the offense with which a defendant is charged would not impact the application of Batson, or alter the trial court's duty to

determine whether the Commonwealth has engaged in purposeful discrimination.

Batson and its progeny have established a three-step process to be undertaken when there is a challenge to a peremptory strike: (1) the party opposing the peremptory strike must make a prima facie showing that the proposed peremptory strike is racially discriminatory; (2) the burden then shifts to the proponent of the strike to come forward with a race-neutral explanation for the strike; and (3) if a race-neutral explanation is given, the trial court must determine whether the moving party has established purposeful racial discrimination. Batson, 476 U.S. at 96-98, 106 S.Ct. at 1722-24, 90 L.Ed.2d at 87-89; See also Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995); Hernandez v. New York, 500 U.S. 352, 358-59, 111 S.Ct. 1859, 1865-66, 114 L.Ed.2d 395 (1991); and Commonwealth v. Snodgrass, Ky., 831 S.W.2d 176, 178 (1992). Clearly, it is incumbent on the trial court to determine whether the reasons, proffered by the proponent of the strikes in step two of the analysis, are credible or merely a pretext for unconstitutional discrimination. Our review of the trial court's findings in this regard are governed by the clearly erroneous standard. McGinnis v. Commonwealth, Ky., 875 S.W.2d 518, 523 (1994). And, the trial court's findings of fact on the issue of discriminatory intent are "accorded great deference on appeal." Hernandez, supra, 500 U.S. at 364.

In applying these principles to the case sub judice, it is readily apparent that the trial court erred in failing to

perform the required third step of the process. The trial court stated that since Evans was charged with a status offense it did not matter whether the prosecutor used its peremptory strikes in a discriminatory manner. The holding in Batson is not so limited. The evil the Court attempted to remedy in Batson was not limited merely to the harm caused to a criminal defendant by the prosecution's striking of a member of the defendant's race from the jury, and it was certainly not to remedying the harm caused a defendant charged with a certain type of crime. In addition to the equal protection rights of the accused, Batson addressed the rights of racial minorities to serve as jurors and the harm to entire communities caused by their exclusion from service due to discrimination.[1]

The trial court's failure to make a determination as to whether the prosecutor's purported reasons for striking the only

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[1]The Supreme Court in Batson, 476 U.S. at 87, citing Thiel v. Southern Pacific Co., 328 U.S. 217, 223-24, 227, 66 S.Ct. 984, 90 L.Ed.2d 1181 (1946), reasoned as follows:

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try. Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at a trial. A person's race simply "is unrelated to his fitness as a juror."
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> . . . .
>
> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice (citation omitted).

two African-American jurors were racially neutral requires reversal of Evans' conviction. The Commonwealth's insistence that the reasons offered by the prosecutor were race-neutral ignores the fact that the trial court made no findings concerning the credibility of the prosecutor's explanations given in the second step. This finding by the trial court of whether there has been established purposeful racial discrimination is essential. The Supreme Court in Purkett, observed that the "focus" is not on the "reasonableness of the asserted nonracial motive," but on the "genuineness of the motive." Purkett, 514 U.S. at 769 (emphasis in original). Likewise, as our Supreme Court noted in Snodgrass, "the best evidence [of discrimination] 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.'" Commonwealth v. Snodgrass, 831 S.W.2d at 179 (citing Hernandez, supra). Clearly, issues concerning the credibility of the prosecutor and the genuineness of his or her motive are not within this Court's purview to address de novo.

Next, Evans argues that the trial court erred in overruling his objection to statements made by the prosecutor in his closing argument during the penalty phase of the trial. This issue is now moot because of our resolution of the Batson issue. However, we will address the issue as it may recur on retrial. The statements to which Evans objected are as follows:

> How good a person he is will dictate how soon the parole board will let him out. Now, they

> wanted to talk about if he's a model citizen, how much time will he have to stay in there, and we talked about he gets three months knocked off of every year. Well, that's if he's going to serve out the entire sentence. The odds of that happening--it ain't gonna happen. [Defense counsel, "Your honor, I object."] He's gonna meet the parole board, [Trial Judge: "Overruled."] and the parole board is gonna decide to let him out or not.

The Commonwealth argues that the Assistant Commonwealth's Attorney "merely gave [the jury] a full, fair comment on sentencing dynamics in [Evans'] case," and that "[g]iven the reasonably wide latitude granted to prosecutors in argument to persuade the jurors, these comments hardly seem inappropriate[.]" We disagree.

While the probation and parole officer testified that a sentence imposed may not be entirely served out due to good-time and the possibility of parole, he also testified that it would be possible for Evans to serve his entire sentence. Certainly, the evidence of record did not support the prosecutor's insistence to the jury that Evans would not be required to serve out his sentence. See, Whitaker v. Commonwealth, Ky., 895 S.W.2d 953, 957 (1995); and Drietz v. Commonwealth, Ky., 477 S.W.2d 138, 139 (1972). Thus, these remarks could only have caused the jury to be "uncertain as to the legal significance" of any sentence it imposed. Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 164 (1995); See also, Ruppee v. Commonwealth, Ky., 754 S.W.2d 852, 853 (1988).

Accordingly, the judgment of the Christian Circuit Court is reversed and the matter is remanded for a new trial consistent with the Opinion.

BUCKINGHAM, JUDGE, CONCURS AND FILES SEPARATE OPINION.

EMBERTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

BUCKINGHAM JUDGE, CONCURRING: I concur with the majority's opinion that this case must be reversed and remanded for a new trial due to the failure of the trial court to determine whether the Commonwealth's exercise of two of its peremptory challenges to remove the only African-Americans from the jury was racially motivated. I also agree with the majority opinion's statement that a finding by the trial court of whether there was purposeful racial discrimination was essential and that this court may not address the issue de novo. While in some cases it could perhaps be implied that the trial court made the essential finding by simply denying the defendant's motion, that is not the case here. It is apparent in this case that the trial court denied the motion due to the nature of the offense rather than due to a finding that the strikes were not racially motivated.

EMBERTON, JUDGE, DISSENTING: I respectfully dissent. I do not necessarily disagree with the majority that the trial court could have more clearly stated its holding. Implicit in its ruling, however, is that the prosecutor did state sufficient race-neutral reasons for the peremptory strikes; the result was correct and the judgment should be affirmed.

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