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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002030-MR

DERAY FRYE — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 07-CR-00373

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; GUIDUGLI,[1] SENIOR JUDGE.

COMBS, CHIEF JUDGE: Deray Frye was convicted in Kenton Circuit Court on one count of possession of a handgun and of being a second-degree persistent felony offender. On appeal, he argues that the jury was improperly empanelled and that he is entitled to a new trial. After our review, we agree.

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

At his trial on August 14, 2007, Frye, who is African-American, was convicted and sentenced to fifteen-years' imprisonment. The prosecution used a peremptory strike to remove the only African-American juror (Juror X) on the panel. After some initial hesitation, the trial court allowed use of the strike. This appeal follows.

We recapitulate the pertinent facts involved in the bench conference concerning the strike:

> [DEFENSE COUNSEL]: Judge, I'm going to assume that the only African-American gentleman on the panel was excused by lot.
>
> TRIAL COURT: No. The Commonwealth [inaudible]. [Juror X].
>
> COMMONWEALTH: That's correct, judge. Do you want my reasoning on the record?
>
> TRIAL COURT: The race-neutral reason for that?
>
> COMMONWEALTH: Yes sir. [Juror X] did not respond, that I noticed, to any questions by either the Commonwealth or the defense, um, did not look like he wanted to be here. His eyes were very bloodshot and red, looked like he'd been up all night and, like a couple of other people that I excused, I just don't like jurors that don't look interested in participating or paying attention. That was the impression that I got from [Juror X].
>
> TRIAL COURT: You probably should have brought it up if you had some concerns about his physical condition. Now, [Juror X] served on a jury last month and participated in the jury.
> COMMONWEALTH: Judge, it's not uncommon for an attorney to make judgment calls based on people's just physical behavior and their demeanor, and this, like other jurors that I select or I struck [inaudible] struck me as someone that would not be a good person to have on the jury. . . .

DEFENSE COUNSEL: Judge, my only difficulty with what [the Commonwealth] says is that we're unable to verify a lot of those things because that individual was not brought up. Those were things that I did not notice. He seemed responsive to me. Now, did he give a verbal answer? No, but he was nodding appropriately, paying attention.

. . .

TRIAL COURT: One of the things I noticed throughout this morning is that there was, I think, a noticeable lack of response, not just from [Juror X], but there was really a less than average [inaudible] from my perspective.

COMMONWEALTH: There were other people that I struck for their lack of response, as well.

TRIAL COURT: [inaudible] Whether or not that's the case, the only African-American juror of the 28 is struck by the Commonwealth. That raises a question.

. . .

COMMONWEALTH: I realize any time you strike a juror of ethnicity it's going to raise a question, but that doesn't mean there's a presumption of impropriety.

TRIAL COURT: It doesn't. It does call for a race-neutral explanation, and that's what I'm waiting for. You said that he was not responsive. Well, but like I said, out of the 28, probably about 20 of them weren't responsive.

Toward the end of the bench conference, the trial court finally declared: "Although I'm not totally satisfied with the explanation, I know from prior exposure to [Juror X] that there was some concern about his being a satisfactory juror." That concern was based on an episode of incontinence and dozing during a previous trial.

The Sixth Amendment of the United States Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury[.]" (Emphasis added.) It is well established that if the selection of the jury is based on racial reasons, the defendant's Fourteenth Amendment equal protection rights are implicated and may be violated. *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). In *Batson*, the U.S. Supreme Court outlined a three-step analysis to test whether a peremptory strike was discriminatory:

> First, the defendant must make a prima facie showing of racial bias for the peremptory challenge. Second, . . . the Commonwealth [must] articulate "clear and reasonably specific" race-neutral reasons for its use of a peremptory challenge. . . . Finally, the trial court has the duty to evaluate the credibility of the proffered reasons and determine if the defendant has established purposeful discrimination.

Washington v. Commonwealth, 34 S.W.3d 376, 379 (Ky. 2000).

In this case, the defendant met the first step by articulating a *prima facie* case of discrimination. The Commonwealth then offered a race-neutral explanation for its peremptory challenge as dictated by the second step of *Batson*. *Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (Ky. 1992). The court then undertook its analysis.

The threshold for an acceptable race-neutral reason is generally low – "not a reason that makes sense, but a reason that does not deny equal protection." *Thomas v. Commonwealth*, 153 S.W.3d 772, 777 (Ky. 2004), quoting *Purkett v. Elem*, 514 U.S. 765, 768 (1995). At Frye's trial, the prosecutor claimed that Juror

X seemed unresponsive, looked disinterested, had bloodshot eyes, and had the appearance of sleeplessness – all indications that Juror X might not have possessed the degree of alertness that a juror would need for a day-long trial. Our Supreme Court has held that a potential juror's demeanor is a race-neutral reason. *Thomas v. Commonwealth*, 153 S.W.3d at 778. Thus, the issue before us is whether the trial court properly evaluated the Commonwealth's explanation.

In examining the third prong of the *Batson* test (the propriety of the trial court's decision as to the explanation), our role is to scrutinize whether the race-neutral explanation was in reality a subterfuge or a guise for racially motivated use of a peremptory strike. *Id*. We defer to the trial court unless we determine that its finding was "clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369 (1991), *McGinnis v. Commonwealth*, 875 S.W.2d 518, 523 (Ky. 1994) overruled on other grounds by *Elliott v. Commonwealth*, 976 S.W.2d 416, 418 (Ky. 1998). As Justice Breyer wrote:

> ordinary mechanisms of judicial review cannot assure *Batson*'s effectiveness. . . . The trial judge is best placed to consider the factors that underlie credibility. . . . Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation.

Rice v. Collins, 546 U.S. 333, 343 (2006), (Breyer, J., concurring).

The U.S. Supreme Court has recently refined the third prong of the *Batson* test in *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008), a case which was decided **after** Frye's trial. *Snyder* provides that in cases where the juror's

demeanor is the basis for a peremptory strike, "the trial court must evaluate whether . . . the juror's demeanor can be credibly said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Id*. at 1208. *Snyder* places a role of heightened scrutiny upon a reviewing court. The Fifth Circuit summarized the *Snyder* reasoning as follows:

> [T]he Supreme Court rejected the State's argument that the prosecutor's peremptory challenge was validly based on a prospective juror's nervousness for the reason that the record did not reflect whether the trial court, in allowing the challenge, had noted, recalled, or made a determination as to the juror's demeanor. Because the trial court in *Snyder* simply accepted the explanation as race-neutral and allowed the challenge **without stating any reason**, the Supreme Court discounted the possibility that the trial court could have based its "race-neutral" determination on the prosecution's "demeanor" explanation even under a highly deferential "clear error" standard. . . . Under *Snyder*'s application of *Batson*, therefore, an appellate court applying *Batson* arguably should find clear error when the record reflects that the trial court was not able to verify the aspect of the juror's demeanor upon which the prosecutor based his or her peremptory challenge. (Emphasis added.)

Haynes v. Quarterman, 526 F.3d 189, 199 (5th Cir. 2008). In other words, clear findings need to be made by a trial court as to its reasoning in resolving the *Batson* issue.

The *Snyder* rationale dictates that we must reject the explanation for the disputed peremptory strike. The trial court struggled in reaching its findings concerning the proffered race-neutral explanation by the Commonwealth. It noted initially that the Commonwealth's reason was unsatisfactory and that it had not

personally noticed anything negatively noteworthy about Juror X. Ultimately, the court upheld the strike based on **behavior from the previous month** that reinforced the contentions offered by the Commonwealth.

The allusion to past performance was essentially irrelevant for any analysis at this juncture. The court revealed that Juror X had experienced some incontinence and drowsiness due to medication. However, Juror X was not given the opportunity to disclose whether his medical condition still existed at Frye's trial – nearly one month later. Furthermore, neither the Commonwealth nor the defense was aware of any behavioral problems with past performance. More importantly, neither the defense nor the trial court could objectively corroborate the Commonwealth's claims as to Juror X's demeanor. In light of *Snyder,* we are compelled to hold these grounds to be too tenuous and unsubstantiated to prevail.

Additionally, *Snyder* held that it is improper to exercise a strike against a minority panelist for a reason that is shared by white panelists but treated differently. *Snyder*, *supra* at 1211. In *Snyder*, the prosecution's strike was based on school scheduling problems of the potential juror. The Supreme Court held that the strike was suspicious because several white jurors who were not dismissed had disclosed more demanding family and work conflicts. *Id*. In a direct parallel, Frye's trial court observed that "twenty out of twenty-eight" of the panelists displayed the same disinterest that the prosecution claimed was the basis for striking Juror X. Yet their lack of concentration did not serve as a basis for any objection – much less a strike.

We note again that the trial judge in this case did not have the benefit of *Snyder*, which was decided after Frye's trial. Based on the combined reasoning of *Batson*, *supra,* and *Snyder, supra*, we are compelled hold that the use of the peremptory strike was inappropriate.

Since we are remanding this case on the *Batson* issue, we shall address one other issue briefly as it is likely that it will arise during the new trial. Appellant correctly argues that the prosecutor inappropriately questioned Frye as to the veracity of the police officers who testified at trial. During his cross-examination of Frye, the prosecutor repeatedly attempted to elicit from Frye his characterization of the officers as liars. Our Supreme Court has clearly held such a line of questioning to be impermissible. *Moss v. Commonwealth*, 949 S.W.2d 579, 583 (Ky.1997). Although this alleged error was unpreserved for appellate review, we have nonetheless elected to address it since appellant has challenged it as palpable error under Kentucky Rules of Criminal Evidence (RCr) 10.26. Although the court in *Moss* did not agree that it was palpable error requiring reversal, it noted as follows:

> Appellant's failure to object and our failure to regard this as palpable error precludes relief. However, we believe such a line of questioning to be improper. A witness should not be required to characterize the testimony of other witnesses, particularly a well-respected police officer, as lying. Such a characterization places the witness in such an unflattering light as to potentially undermine his entire testimony.

Id. at 583.

Accordingly, we vacate and remand this case to the Kenton Circuit Court for a new trial.

ALL CONCUR.

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