

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002128-MR

KWAME CALDWELL

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 06-CR-00582

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

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BEFORE: ACREE AND NICKELL, JUDGES; LAMBERT,¹ SENIOR JUDGE.

ACREE, JUDGE: Kwame Caldwell appeals from a Hardin Circuit Court judgment sentencing him to fifteen years' imprisonment after a jury found him

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

guilty of first degree trafficking in a controlled substance and being a first degree persistent felony offender (PFO). We affirm.

A Hardin County Grand Jury indicted Caldwell for complicity to commit trafficking in marijuana, more than eight ounces but less than five pounds, with a firearm enhancement; fourth degree assault; and for being a first degree PFO on October 31, 2006. A jury acquitted Caldwell on the assault charge and the firearm enhancement and convicted him of trafficking and being a PFO. On October 1, 2007, the trial court entered a final judgment sentencing Caldwell to fifteen years' incarceration. This appeal followed.

On appeal, Caldwell alleges that the trial court erred by overruling his challenge to the jury composition pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). We disagree.

Following *voir dire*, Caldwell challenged the Commonwealth's use of peremptory strikes to excuse four of seven African-American members from the jury panel. The trial court found Caldwell had not made a *prima facie* showing that the strikes were based on race, but nevertheless asked the Commonwealth if it would like to explain its basis for the strikes. The Commonwealth stated that it struck one juror because he had a sister-in-law that had been charged with possession, and that sister-in-law resided with the prospective juror. A second juror was struck because a relative had been convicted of murder and the juror's

mother had been a victim of domestic violence. The remaining prospective jurors were struck because they were non-responsive during *voir dire* and appeared uninterested in the proceedings. The Commonwealth noted that Caucasian jurors were struck for the same reason.

While the trial court reiterated that it overruled Caldwell's objection because there was no showing of *prima facie* discrimination, it also stated that the Commonwealth provided race-neutral reasons for the strikes. The trial court concluded that non-interest and unresponsiveness were race-neutral reasons that withstood Caldwell's challenge.

Batson outlined a three-step process for evaluating claims that a prosecutor used peremptory challenges in a manner violating the Equal Protection Clause. First, the defendant must make a *prima facie* showing that the prosecutor has exercised peremptory challenges based on race. Second, if the required showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the particular jurors. Third, the trial court has the duty to evaluate the credibility of the proffered reasons and determine if the defendant has established purposeful discrimination.

Great deference is given to the trial court in determining whether the strikes by the prosecutor are racially motivated. *Commonwealth v. Snodgrass*, 831 S.W.2d 176, 179 (Ky. 1992). The trial court may accept at face value the explanation given by the prosecutor depending upon the demeanor and credibility of the prosecutor. *Snodgrass, supra*; *Stanford v. Commonwealth*, 793 S.W.2d 112,

114 (Ky. 1990). The explanation does not have to rise to the level sufficient to satisfy a strike for cause. *Snodgrass, supra*. On appeal, the standard of review is whether the finding of the trial judge that the prosecutor articulated a race-neutral explanation for exercising the strikes was clearly erroneous. *Snodgrass; Stanford, supra*.

The preliminary issue of whether Caldwell established a *prima facie* case of discrimination under *Batson* is moot because the prosecutor offered purportedly race-neutral explanations for the peremptory challenges and the trial judge ruled on the ultimate question of intentional discrimination. *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). We therefore need only address the sufficiency of the prosecutor's explanations for the exercise of the two peremptory strikes of the non-responsive African-American jurors.²

Caldwell claims that the Commonwealth used demeanor as a pretext for racial discrimination in excusing two of the African-American jurors. As evidence, Caldwell notes that a Caucasian juror who was also non-responsive during *voir dire* was not struck. We find this argument unconvincing. The third step in *Batson* alleviates the risk that a prosecutor theoretically could fabricate a demeanor-based pretext for a racially-motivated peremptory strike by permitting the court to determine whether it believes the prosecutor's reasons. *Thomas v. Commonwealth*, 153 S.W.3d 772, 778 (Ky. 2004).

² Caldwell does not take issue in this appeal with the Commonwealth's reasons for striking the other two African-American jurors.

The trial court found that the non-interest and unresponsiveness of the stricken jurors, regardless of race, was a sufficient race-neutral reason for using the preemptory strikes. Unless the trial court's findings of fact are clearly erroneous, they must be accepted. There is nothing in the record upon which to base a finding of clear error. Thus, Caldwell has failed to satisfy the clearly erroneous standard.

For the foregoing reasons, the judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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