IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: APRIL 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 5-13-04 ELA Grantt, D.C.

2002-SC-1073-MR

ROBERT POLK — APPELLANT

V.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
02-CR-00023

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

Appellant, Robert Polk, was convicted in the Fulton Circuit Court of receiving stolen property over $300, fleeing and evading a police officer, and of being a first-degree persistent felony offender. He was sentenced to twenty years imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

On March 9, 2002, an African-American male forced his way into Mary Tanner's Union City, Tennessee, home. The man held Ms. Tanner at knife point and demanded money. After taking $190, Ms. Tanner's purse and an identification card from her deceased husband's billfold that had been sitting on a dresser, Appellant forced Ms. Tanner outside and into her minivan. Once she started the van, Appellant ordered Ms.

Tanner to get out and he drove away. Ms. Tanner thereafter called 911 and reported the incident.

Later that morning, a police officer noticed the van in the parking lot of a local liquor store in Fulton, Kentucky. Officer Townsend testified at trial that the Fulton City Police Department had recently received a stolen vehicle report regarding a similar van from Tennessee. Officer Townsend pursued the van as it left the liquor store, and confirmed from the license plate that it was, in fact, the stolen vehicle. When he engaged the flashing lights and siren, the van's driver accelerated in an attempt to evade Officer Townsend. Ultimately, the van slid on wet pavement during a turn and crashed. Appellant exited the van and fled on foot. Officer Townsend radioed for assistance and Appellant was apprehended following a foot chase by another police officer, Officer Buckingham, who noted Appellant smelled strongly of alcohol. A breathalyzer test administered at the police station registered a BA level of .112. A subsequent search of Appellant and the van revealed the identification card belonging to Ms. Tanner's husband, Ms. Tanner's purse, as well as the leather jacket and knife that Ms. Tanner had described her assailant as having had during the robbery.

Although the Fulton County Grand Jury issued a ten-count indictment against Appellant, the Commonwealth elected to proceed only on the counts that occurred on March 9, 2002, namely, two counts of receiving stolen property over $300,[1] operating a motor vehicle under the influence, first-degree fleeing or evading police, and one count of being a first-degree persistent felony offender. The remaining unrelated counts of the indictment were continued for a separate trial. At the close of trial, the trial court

[1] The second receiving stolen property count pertained to another vehicle that had been reported stolen on March 8, 2002. That vehicle was found in an open field directly across from Ms. Tanner's residence on the day Ms. Tanner's van was stolen. Footprints at the scene led from the vehicle to Ms. Tanner's residence.

granted a directed verdict on the charge of operating a vehicle under the influence. The jury found Appellant guilty of one count of receiving stolen property over $300 (Tanner vehicle), first-degree fleeing or evading police, and of being a first-degree persistent felony offender. Appellant was sentenced to a total of twenty years imprisonment and this appeal ensued. Additional facts are set forth as necessary.

I.

Appellant first argues that he was entitled to a directed verdict on the receiving stolen property charge pertaining to the Tanner vehicle because the Commonwealth failed to prove every element of the offense. Specifically, Appellant contends that the evidence did not establish either that he possessed the Tanner vehicle with knowledge that it was stolen, or that the value of the van was over $300. We find that Appellant's arguments are not only unpreserved, but also unpersuasive.

In moving for a directed verdict on the receiving stolen property charge, Appellant argued that the NADA[2] blue book value of Ms. Tanner's van was inadmissible, and, as such, the Commonwealth had failed to introduce any evidence to prove that the van was valued at over $300. Appellant did not argue that the NADA book value was insufficient, or that the Commonwealth failed to prove that Appellant had knowledge that the van was stolen. Thus, Appellant's current claims were clearly not preserved for review.

We are of the opinion that the Commonwealth's evidence was more than sufficient to prove that Appellant had knowledge the van was stolen. Appellant seizes on the fact that Ms. Tanner was unable to identify him at trial, since she had undergone brain surgery in the interim that had left her memory somewhat impaired. As such,

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[2] National Automobile Dealers Association.

Appellant contends that it was incumbent upon the Commonwealth to establish Appellant's state of mind, namely that he had specific knowledge that the van he possessed was stolen.

However, KRS 514.110(2) provides, "The possession of any recently stolen movable property shall be prima facie evidence that such person knew it was stolen." Appellant was found in possession of not only Ms. Tanner's van, but also several personal items, only ninety minutes after the van was reported stolen. Further, Appellant fled from police after an attempted stop. As such, and in light of the fact that Appellant offered no proof to rebut the presumption found in KRS 514.110(2), the Commonwealth presented sufficient evidence to withstand a directed verdict. Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991).

We likewise find no merit in Appellant's unpreserved claim that the NADA blue book was insufficient to establish the value of the Tanner van. At trial, the Fulton County Clerk testified that she utilized the NADA blue books supplied by the state to assess the value of vehicles for tax purposes as required by law. The clerk testified that the lowest listed value for a 1995 Mercury Villager van, with no extra equipment, was $6,275. Nonetheless, Appellant asserts that since the Commonwealth failed to inquire about items such as the mileage, repair history, and additional equipment of the van, it was impossible for the jury to arrive at a true valuation of the vehicle. We disagree.

Appellant ignores the fact that the County Clerk testified that the $6,275 value was the lowest base line value given for the vehicle. Further, several witnesses testified that the van was in good working order on the day it was stolen. To establish value, there need only be "sufficient detail for the jury to make a value determination." Commonwealth v. Reed, Ky., 57 S.W.3d 269, 271 (2001). Here, the jury could have

reasonably concluded from the evidence presented that even if the van was not worth the NADA estimate, it was certainly worth more than $300. Appellant offered absolutely no evidence to the contrary. Thus, the Commonwealth met its burden in establishing that the stolen property was valued at over $300. Again, even if Appellant had preserved the issue, the trial court did not err in refusing to grant a directed verdict. Benham, supra; Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983).

II.

Appellant next argues that the Commonwealth exercised peremptory challenges to remove six African-American jurors in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In fact, the record reveals that the Commonwealth exercised six strikes and defense counsel exercised three strikes on African-American jurors. The jury panel ultimately included only one African-American juror.

In response to defense counsel's Batson objection, the Commonwealth asserted that it struck Jurors #4, #5 and #6 because they were related to individuals who were either currently being prosecuted or had recently been prosecuted in the same court. Juror #27 was struck because she knew Appellant and was also related to an individual with an extensive criminal history. With respect to Juror #35, the Commonwealth responded that it had discovered during a recent trial that she suffered from mental difficulties. Finally, the Commonwealth stated that it struck Juror #33 because she knew Appellant and had read about the case, as well as because she had been late to court and had slept during voir dire. The trial court found that the Commonwealth had proffered race-neutral reasons for all six strikes.

Batson, supra, sets forth the three-step process for evaluating claims that peremptory challenges have been used to remove jurors on the basis of race in a manner violating the Equal Protection Clause: (1) the defendant must make a prima facie showing that the peremptory challenges are based on race; (2) if the requisite showing is made, the burden shifts to the prosecutor to articulate a clear and reasonably specific race-neutral explanation for striking the jurors in question; and (3) the trial court must determine whether the defendant has carried his burden of establishing purposeful discrimination. This Court has held that the trial court may accept at face value the explanation offered by the Commonwealth depending upon the demeanor and credibility of the prosecutor. Commonwealth v. Snodgrass, Ky., 831 S.W.2d 176, 179 (1992). Further, evaluation of the proffered explanation as well as the prosecutor's state of mind lies "peculiarly within a trial judge's province [,]" and its findings will be upheld unless clearly erroneous. Id.; Stanford v. Commonwealth, Ky., 793 S.W.2d 112 (1990).

Appellant relies heavily on this Court's opinion in Washington v. Commonwealth, Ky., 34 S.W.3d 376 (2000), wherein we held that the trial court erred in finding that the Commonwealth had offered sufficient race-neutral reasons for striking an African-American juror. However, Washington is factually distinguishable from this case. When the issue of racial bias was first raised in Washington, the prosecutor denied having removed the only African-American juror. After it was shown that the prosecutor had, indeed, struck the juror, the trial court specifically found that the prosecutor's subsequent explanations were insufficient, and yet, later accepted those same reasons as being race-neutral. In reversing the trial court, we held that, "the Commonwealth's

strike of Mr. Newberry was, at best, inadvertent, and at worst, based on something other than a race-neutral reason." Id. at 381.

We find this case much more closely analogous to the facts presented in Gamble v. Commonwealth, Ky., 68 S.W.3d 367 (2002), wherein the Commonwealth used peremptory challenges to strike three of the four African-Americans from the jury. The Commonwealth explained that Juror #52 had been struck because her son had been prosecuted for another crime in the same court; Juror #40 was struck because her brother had sued and recovered a judgment against a police officer for false arrest; and Juror #66 had been struck, in part, because she had recently been cited for a series of traffic offenses. Id. at 370. The defendant asserted that the Commonwealth's explanation was merely pretextual and that none of the reasons articulated by the prosecutor had been brought out during voir dire. The trial court ruled, however, that the Commonwealth had articulated clear and reasonably specific race-neutral reasons for the use of its peremptory challenges, and that Appellant had not shown purposeful discrimination. We affirmed the trial court's decision in that respect. Id. at 371-72.

Here, the Commonwealth articulated clear and reasonably specific race-neutral explanations for each of its peremptory challenges. Furthermore, we disagree with Appellant's argument that the Commonwealth's reasons were improper merely because they were based on information obtained outside of voir dire and not verified by the trial court. Contrary to Appellant's assertion that the Commonwealth should have inquired into its reasons with each potential juror, we have held that such inquiry is not required before exercising a peremptory challenge:

> We find no fault with the prosecutor for exercising a peremptory challenge against a juror where the decision to strike is based upon information which the prosecutor received from a source other than information received from voir dire. Batson does not require the

> neutral explanation for peremptory striking a potential juror to be derived from voir dire. Neither does the explanation have to rise to the level sufficient to satisfy a strike for cause. A prosecutor may utilize his own personal knowledge concerning a juror and information supplied from outside sources. Whether the information is true or false is not the test. The test is whether the prosecutor has a good-faith belief in the information.

Snodgrass, supra, at 179; see also Gamble, supra.

III.

Finally, Appellant asserts that the trial court erred in failing to conduct an on-the-record inquiry after defense counsel admitted during closing argument that Appellant was in possession of the Tanner vehicle and had fled from the police. Appellant construes counsel's statement as a concession of Appellant's guilt and thus, contends the trial court had a duty pursuant to Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), cert. denied, 454 U.S. 1091 (1981), to conduct a sua sponte inquiry to determine whether Appellant consented to counsel's strategy.

We recently addressed this issue in Furnish v. Commonwealth, Ky., 95 S.W.3d 34 (2003), cert. denied, ___ U.S. ___, 124 S.Ct. 115 (2003), wherein the defendant raised the same argument following his counsel's comments during opening and closing arguments that while the defendant was a "thief and burglar" he had not committed the crime of murder. Id. at 52. We noted that although the Sixth Circuit had held in the Wiley case that a client's consent to such a strategy must appear on the record, in a subsequent companion case the Court clarified its prior holding by stating that while an on-the-record inquiry is the preferred practice, due process does not require it. Wiley v. Sowders, 669 F.2d 386 (6th Cir. 1982). We further stated in Furnish:

> More importantly, while Appellant couches this issue in terms of the trial court's duty, this is essentially an ineffective assistance of counsel claim. This Court has held as a general rule that claims of ineffective assistance are not properly raised on

> direct appeal, but rather must proceed by way of post-trial motion under RCr 11.42 to allow the trial court the opportunity to review the issues. (Citation omitted).

Furnish, supra.

Although Appellant acknowledges that Furnish is dispositive, he urges that we revisit the issue and overrule Furnish. We decline the invitation to do so, and find that the trial court did not err in failing to conduct a sua sponte inquiry.

The judgment and sentence of the Fulton Circuit Court are affirmed.

All concur.

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