

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

Supreme Court of Kentucky **FINAL**

2005-SC-0448-MR

DATE 12-13-06 E.A. Gorman, D.C.

HENRY BASS

APPELLANT

APPEAL FROM SIMPSON CIRCUIT COURT  
HONORABLE WILLIAM R. HARRIS, JUDGE  
04-CR-105

V.

COMMONWEALTH OF KENTUCKY

APPELLEE

**MEMORANDUM OPINION OF THE COURT**

Affirming

On March 16, 2005, a jury of the Simpson Circuit Court convicted Appellant of first-degree possession of a controlled substance, possession of drug paraphernalia, possession of a radio capable of sending and receiving police messages, and for being a first-degree persistent felony offender. For these crimes, Appellant was sentenced to a total of twenty (20) years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm.

The crimes with which Appellant was convicted stem from a search of 308 Morris Street, Franklin, Kentucky, on the morning of July 6, 2002. The home belonged to Tammy Bass, Appellant's estranged wife. Police found Appellant lying on a bed with Ms. Bass when they entered the residence.

The police recovered \$1,784.00 from the shorts Appellant was wearing. In addition, police took into possession multiple items used to weigh, store, and ingest cocaine. Some of the items contained apparent cocaine residue. The police also found a police scanner that had the Franklin Police Department frequency programmed into it.

Appellant was subsequently charged with and convicted of the crimes of first-degree possession of a controlled substance, possession of drug paraphernalia, possession of a radio capable of sending and receiving police messages, and for being a first-degree persistent felony offender. Appellant now appeals to this Court, claiming he is entitled to a new trial. For the reasons set forth herein, we affirm.

Appellant argues that the trial court violated his Equal Protection rights under both the State and Federal Constitutions when it allowed the prosecutor's use of a peremptory strike to remove an African-American juror. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Appellant, however, failed to preserve this issue for appellate review.

The Commonwealth was notified, during the peremptory challenge phase, by a couple of police officers and a parole officer that an African-American juror was the girlfriend of a drug dealer that had been sentenced by the trial judge the previous week. The Commonwealth notified the trial court of this development. After some discussion, Appellant stated that he did not see a problem with the reasons given for striking the juror. The trial court went on to state that the Commonwealth had given a sufficient race neutral reason, and Appellant agreed that the reason was proper. The jury was then sworn.

In Simmons v. Commonwealth, 746 S.W.2d 393, 398 (Ky. 1988), this Court stressed that an effective Batson challenge must be timely:

If appellant had made a timely challenge to the exercise of peremptories by the Commonwealth, the trial court could have held a hearing to determine if a *prima facie* case of discrimination existed, and if so, the steps set forth in Batson...could have been complied with without delay. If it were determined that the challenge of any juror was the result of discrimination, that challenge could have been disallowed and that juror would have remained on the panel.

As it happened, no objection was made here until after appellant had stated his satisfaction with the jury, the remaining jurors were discharged and had left the courtroom, and the jury was sworn to try the case. The only relief sought was a mistrial and a continuance of the case. We do not think the Commonwealth should be subjected to such delay and additional expenses as would be caused by a new trial when the appellant could have avoided the situation entirely by making a timely motion.

Id.

Here, not only did Appellant fail to object to the peremptory strike of the juror, he agreed that it was proper. Therefore, we need not address this argument any further.

Appellant goes on to argue that if the Court finds the issue unpreserved that it should still be reviewed as palpable error under RCr 10.26. Reversing a conviction based on palpable error requires this Court to determine that a manifest injustice has resulted from an error which affects the substantial rights of a party. RCr 10.26. We do not find this to be the case.

For the reasons set forth herein, the judgment of the Simpson Circuit Court is affirmed.

All concur.

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