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NOT TO BE PUBLISHED OPINION

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RENDERED: FEBURARY 19, 2009

NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2007-SC-000897-MR

DATE 4/3/09 Kelly Klaber D.C.
APPELLANT

DESMOND COATES

V.
ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
NO. 07-CR-00013

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Desmond Coates, was convicted by a Fayette Circuit Court jury of murder and tampering with physical evidence. For these crimes, Appellant was sentenced to forty-two years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110.

Appellant asserts three arguments on his appeal: 1) that a juror was struck by the Commonwealth for a reason that was not race-neutral; 2) that he was forced to use a peremptory strike to remove a juror that should have been removed for cause and conversely a juror the Commonwealth had removed should not have been; and 3) that prejudicial bad acts evidence was improperly admitted. For the foregoing reasons, we now affirm Appellant conviction and sentence.

**I. THE TRIAL COURT PROPERLY FOUND THAT THERE WAS NO
DISCRIMINATORY INTENT IN THE COMMONWEALTH'S EXERCISE
OF PEREMPTORY CHALLENGES**

Appellant's first argument is that the Commonwealth improperly used a peremptory strike to excuse a juror for a race-based reason. During *voir dire* Juror 89, an African-American male, was questioned about whether he was qualified to sit on the jury. The juror stated that his nephew was previously tried for murder in Bell County, Kentucky, but was acquitted. Despite the prosecution of his nephew, the juror stated that he could be open-minded because he had not yet heard the facts of this particular case. He also stated that he was a licensed substance abuse counselor, but that he would not educate the jury about substance abuse. Evidence in the trial would indicate that illegal drugs were used by Appellant the night of the murder. The juror also answered that he believed his son was a "victim" because he was stopped and arrested by the police eight times in a month for "driving while black." Finally, the juror stated that he was surprised that Appellant was charged with a crime against a white victim because he assumed it was a stereotypical black on black crime. Juror 89 affirmed that his views and life experiences would not affect him in his deliberations.

Based on his answers, the Commonwealth challenged Juror 89 for cause. The Commonwealth argued that contrary to what he stated, Juror 89 would educate the jurors on substance abuse, that the

acquittal of his nephew for murder biased him, and that his feeling that his son was arrested for “driving while black” biased him against the police. The trial judge denied the motion since Juror 89 stated that he could be fair in his deliberations.

The Commonwealth then struck Juror 89 with a peremptory strike. The defense challenged the strike and requested that the Commonwealth state the reasons for removing Juror 89. The Commonwealth reiterated its concern that Juror 89 would educate the jury on substance abuse and about his feelings on the prosecution and acquittal of his nephew. The Commonwealth then focused on Juror 89’s statements that his son was arrested for “driving while black” and that he was surprised that Appellant was not charged with a “black on black” crime. The Commonwealth believed that these statements indicated that race would be an issue to Juror 89 since Appellant is an African-American and his victim white. The Commonwealth argued that it believed Juror 89 could not be impartial. The defense countered that in its opinion none of the responses given by Juror 89 warranted his removal from the jury pool and that of the three African-American jurors in the pool only one would remain after this peremptory challenge.

The trial court overruled the defense’s challenge to the peremptory strike on Juror 89. The trial court believed that the Commonwealth offered “sufficiently race-neutral” reasons for the strike.

Objections to the use of peremptory strikes are evaluated under the three-step standard established in Batson v. Kentucky, 476 U.S. 79 (1986), as articulated by this Court in, Washington v. Commonwealth, 34 S.W.3d 376, 379 (Ky. 2000):

[f]irst, the defendant must make a prima facie showing of racial bias for the peremptory challenge. Second, if the requisite showing has been made, the burden shifts to the Commonwealth to articulate “clear and reasonably specific” race-neutral reasons for its use of a peremptory challenge. “While the reasons need not rise to the level justifying a challenge for cause, self-serving explanations based on intuition or disclaimers of discriminatory motive” are insufficient. Finally, the trial court has the duty to evaluate the credibility of the proffered reasons and determine if the defendant has established purposeful discrimination.

Id. at 379 (internal citations omitted). We review the trial court’s determination regarding the Batson challenge under the clearly erroneous standard. Hernandez v. New York, 500 U.S. 352, 364 (1991); Gray v. Commonwealth, 203 S.W.3d 679, 691 (Ky. 2006). The trial court’s ruling is entitled to great deference because it is in the best position to judge the motives behind the exercise of the peremptory strike. Gray, 203 S.W.3d at 691.

In this matter, the first step of the Batson analysis is moot since the Commonwealth offered an explanation for the peremptory strike to the trial court. See Hernandez, 500 U.S. at 358. We thus begin our review at the second step to determine if the Commonwealth provided race-neutral reasons for the exercise of the peremptory strike. On its face, the Commonwealth did provide race-neutral reasons. The

Commonwealth was concerned that Juror 89's knowledge about substance abuse may be transferred to the jury, that he had potentially negative feelings toward the Commonwealth because of his nephew's prosecution, and that he harbored potential racial biases and beliefs. The Commonwealth may use a peremptory strike to remove a juror because of his potential racial biases. See Fugett v. Commonwealth, 250 S.W.3d 604, 611-612 (Ky. 2008) (holding that the Commonwealth used race-neutral reasons to remove two potential African-American jurors from the panel when the two men's answers in *voir dire* were tinged with potential racial biases). Additionally, Appellant has provided no concrete evidence that the Commonwealth harbored any discriminatory intent in striking Juror 89.

Based on the evidence before us, we cannot find that the trial court's denial of Appellant's Batson challenge was clearly erroneous. Thus, there is no error here.

II. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO STRIKE A JUROR FOR CAUSE OR FOR GRANTING THE COMMONWEALTH'S MOTION TO STRIKE A JUROR FOR CAUSE

Appellant next argues that the trial court should have granted his motion to strike Juror 141 and deny the Commonwealth's motion to strike Juror 25. We will address both claims separately.

A. Juror 141

During *voir dire* Juror 141, a white male, stated that in 1998 a man broke into his truck and that the Commonwealth had been helpful in prosecuting the perpetrator. The perpetrator ultimately accepted a plea agreement. The Commonwealth also helped Juror 141 by getting assault charges filed against him by the family of the perpetrator dropped. The Commonwealth's prosecutors called Juror 141 nightly about the case and asked him if the perpetrator's plea agreement was satisfactory. Juror 141 described the Commonwealth as "very helpful" in the case and stated that he had a favorable impression of them. However, he could not remember the names of the prosecutors who assisted him. Despite his favorable impression, Juror 141 said that his prior experiences would not affect his ability to be impartial in Appellant's case.

Appellant's counsel moved that Juror 141 be struck for cause due to his prior experience with the Commonwealth. The trial court denied the motion. Appellant ultimately used a peremptory strike to remove Juror 141 from the jury panel. Appellant now argues that the trial court should have granted his motion to strike Juror 141 for cause and that he is entitled to a new trial since he had to use a peremptory strike to remove him. See *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2008).

A trial court may grant a motion to strike a juror for cause "[w]hen there is a reasonable ground to believe that a prospective juror cannot

render a fair and impartial verdict on the evidence.” RCr 9.36(1). This Court reviews a trial court’s ruling on motions to strike for cause for abuse of discretion. Ratliff v. Commonwealth, 194 S.W.3d 258, 265 (Ky. 2006). A trial court abuses its discretion if it fails to grant a motion to strike for cause if the potential juror had been represented by the prosecution in the past and stated that he would seek their representation in the future. See Riddle v. Commonwealth, 864 S.W.2d 308, 311 (Ky. App. 1993). Alone an attorney-client relationship does not automatically mean a juror should be excused for cause. Id. at 310. However, if the challenged juror stated that he or she would seek the prosecutor’s counsel in the future, the juror should be struck for cause. Fugate v. Commonwealth, 993 S.W.2d 931, 938 (Ky. 1999). Additionally, if the challenged juror is currently involved in a case the prosecutor is working on, it is an abuse of discretion to deny striking that juror for cause. Id. at 939.

In this matter, the trial court did not abuse its discretion in denying Appellant’s motion to strike Juror 141 for cause. The relationship between Juror 141 and the Commonwealth was different from the attorney-client relationships described in Fugate, supra, and Riddle, supra. In Fugate, the prosecutor prepared a living will and incorporation papers for a Habitat organization on behalf of the challenged juror. Id. at 938. In Riddle, the prosecutor served as the personal attorney for the challenged jurors. Id. at 308. In this case, the

prosecutors never personally represented Juror 141, but only prosecuted a crime in which Juror 141 had been the victim. There was no indication that Juror 141 called the prosecutors for legal advice or that they ever served as Juror 141's personal attorneys. Most importantly, Juror 141 never stated that he would seek the prosecution's legal representation in the future. Thus, we cannot hold that the trial court abused its discretion in denying Appellant's motion to strike Juror 141 for cause. See Cochran v. Commonwealth, 114 S.W.3d 837, 839-840 (Ky. 2003) (holding that a trial court did not abuse its discretion by denying a motion to strike a juror for cause when that juror had contact with the Commonwealth because she was the victim of a crime).

B. Juror 25

During *voir dire* Juror 25, an African-American man, stated that he had been prosecuted for committing a felony in Fayette County ten years earlier. He received a probated three-year sentence for his crime. His rights subsequently were restored. Although he was prosecuted by the Commonwealth, he said he harbored no ill will against the prosecutors or the police and felt that he was treated fairly. Juror 25 indicated that he could be impartial in this trial.

The Commonwealth moved to strike Juror 25 for cause believing that he would be partial to the defense. Appellant's counsel challenged this strike arguing that since Juror 25 was African-American, race could be an issue in the Commonwealth's motion. The Commonwealth

responded to this allegation that it would move to strike for cause any juror who was convicted of a felony and prosecuted by the Commonwealth. The trial court granted the motion to strike.

Again, the trial court's ruling on the motion to strike for cause must be reviewed for abuse of discretion. Ratliff, 194 S.W.3d at 265. In reviewing the evidence presented, the trial court did not abuse its discretion in striking Juror 25 for cause. Based on the fact that the Commonwealth successfully prosecuted Juror 25 for a felony, it was reasonable for the trial judge to conclude that he would be biased against the Commonwealth, or at least very sympathetic to Appellant. Additionally, Appellant has tendered no evidence to indicate that the Commonwealth moved to strike Juror 25 for race based reasons. We cannot say that the trial court abused its discretion here. Thus, there is no error.

**III. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION
FOR A MISTRIAL**

Appellant's final argument is that the trial court improperly denied his motion for a mistrial. Prior to trial, Appellant filed a motion in limine to prevent the admission of any evidence regarding Appellant's drug trafficking from being presented to the jury. The Commonwealth agreed to exclude that evidence.

During the trial, evidence presented indicated that Walter's murderer had a street name of "Logic." Detective Bill Brislin of the

Lexington Police Department was asked what he did to determine the legal name of the person known as “Logic.” He stated that he spoke with the Narcotics Unit of the Lexington Police Department to see if they knew anyone with that street name. Appellant immediately objected.

During the ensuing bench conference Appellant pointed out that the Commonwealth had agreed to exclude any evidence regarding Appellant’s drug trafficking. Appellant believed that Detective Brislin’s testimony implied that Appellant was known by the Narcotics Unit because he was a drug trafficker. The trial court denied Appellant’s request for a mistrial.

Detective Brislin was then brought to the bench, where he stated that he learned that Appellant was known as “Logic” from two police detectives, not from the Narcotics Unit. Detective Brislin was then instructed to testify that the Narcotics Unit did not provide him the identity of “Logic.” He was also told to avoid any testimony regarding drug usage or trafficking. Despite this proposed remedy, Appellant still was concerned about any prejudice that may occur because of Detective Brislin’s answer. Appellant feared that even if Detective Brislin stated that he learned nothing from the Narcotics Unit, the jury would still wonder why he contacted them. Appellant again unsuccessfully moved for a mistrial. The trial court suggested that an admonition be provided to the jury. Appellant’s counsel declined this proposal. Detective Brislin

ultimately testified that the Narcotics Unit provided him no information on the identity of “Logic.”

Appellant now argues that the trial court should have granted a mistrial after Detective Brislin’s testimony because the mention of the Narcotics Unit constituted prior bad acts evidence under KRE 404. “It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice.” Shabazz v. Commonwealth, 153 S.W.3d 806, 811 (Ky. 2005) (quoting Gould v. Charlton Co., Inc., 929 S.W.2d 734, 738 (Ky. 1996)). The granting of a mistrial is within the sound discretion of the trial court and its ruling should not be disturbed absent a showing of abuse of discretion. Combs v. Commonwealth, 198 S.W.3d 574, 581 (Ky. 2006).

The trial court did not abuse its discretion in denying a mistrial. While Detective Brislin did mention that he spoke with the Narcotics Unit, he never stated that they provided him any information regarding Appellant. The jury could only conclude from the information provided that the Narcotics Unit had no information on Appellant. Thus, Detective Brislin’s testimony cannot constitute any prior bad acts evidence from Appellant. The best remedy in this situation would have been an admonition from the trial court for the jury to disregard Detective Brislin’s testimony. See Combs v. Commonwealth, 198 S.W.3d at 581

(holding that the jury is presumed to follow any admonishment from the trial judge). Appellant rejected such a remedy. There is no error here.

For the foregoing reasons the judgment and sentence of the Fayette Circuit Court is affirmed.

All sitting. All concur.

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