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RENDERED: APRIL 23, 2009
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2007-SC-000725-MR

DATE 5/14/09 Kelly Klaber D.C.

ROBERT DOBSON — APPELLANT

V.

ON APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
NO. 07-CR-00340

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. Introduction

The incident that led to Dobson's charges began on January 12, 2007. On that day, Jessica Wesner was at work as a delivery driver for Pizza Hut, a job which required her to use her own vehicle in making deliveries. When she came out to make a delivery at 10:40 a.m., her vehicle was gone. She had left her keys in the ignition. Wesner reported the car stolen.

Two days later, Wesner's vehicle was located by police. Officer Jeff Jackson, working third shift on January 14th, was patrolling in a high crime area when he noticed the vehicle being driven by Dobson. A check of the tags confirmed it as a possible stolen vehicle. Officer Jackson pulled the vehicle over. Two other individuals were in the vehicle with Dobson.

When approached by Officer Jackson, Dobson provided him with an expired driver's license. Dobson told Officer Jackson he had borrowed the car

from someone named Jessica on Wilson Street. In a search incident to Dobson's arrest, a crack pipe was discovered on the floorboard under the driver's seat.

As a result of the incident, a Fayette County Grand Jury returned a four-count indictment against Dobson. He was convicted in the Fayette Circuit Court of receiving stolen property valued at over $300.00; operating a motor vehicle without a license; and of being a first-degree persistent felony offender. He was found not guilty of possession of drug paraphernalia (second or subsequent offense). As a result of his conviction for being a persistent felony offender, Dobson received an enhanced sentence of twenty (20) years in prison. Appealing to this Court as a matter of right, Dobson argues the trial court committed reversible error when it failed to: (1) grant his Batson challenge to the Commonwealth's use of its peremptory strikes; and (2) instruct the jury on unauthorized use of a motor vehicle.

A. Dobson has failed to show the trial court committed clear error when it found that the Commonwealth proffered race-neutral reasons for its use of peremptory challenges against three African-American jurors.

At the close of voir dire, the Commonwealth used peremptory strikes to remove three (3) of the seven (7) African-American jurors on the panel. Dobson, an African-American, argued the Commonwealth's actions violated Batson v. Kentucky, 476 U.S. 79 (1986). In response to the race-neutral reasons offered by the prosecutor, Dobson pointed out that none of the three jurors had been brought to the bench to explore the alleged facts underlying the Commonwealth's decision. Dobson argues the trial court erred when it

found the Commonwealth had presented race-neutral reasons and denied his motion.

In response to Dobson's challenge, the prosecutor immediately provided his reasons to the trial court. As to Juror #82, the prosecutor indicated the juror had failed to state on his qualification form that he had criminal charges pending. As to Jurors #263 and #265, the prosecutor noted that both had recently sat on a jury which resulted in a not guilty verdict. Further, the prosecutor noted another prospective juror, who was white, had sat on that prior jury and would have been removed through peremptory challenge had the juror not been removed on other grounds. The trial court, after considering these reasons, concluded the prosecutor had acted based on race-neutral reasons.

This Court has recognized that "[c]hallenging prospective jurors on the basis of race violates the Equal Protection Clause." Washington v. Commonwealth, 34 S.W.3d 376, 378-79 (Ky. 2000). A three step process is utilized to evaluate such claims:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Commonwealth v. Snodgrass, 831 S.W.2d 176, 178 (Ky. 1992) (internal citations omitted). In considering Dobson's argument, we are mindful that "Batson gives great deference to the trial court in determining whether the prosecutor's strike is racially motivated." Id. at 179.

In this case, Dobson relied primarily on the fact that three (3) of the seven (7) African-Americans were removed from the jury panel by the Commonwealth. While the Commonwealth argues reliance merely on numbers is not sufficient to establish a prima facie case under Batson, we need not consider this argument. As soon as Dobson made his challenge, the prosecutor offered a race-neutral explanation for each of the strikes. "[O]nce the Commonwealth has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate issue of discrimination, the preliminary issue of whether the defendant has made a prime facie showing is moot." Gamble v. Commonwealth, 68 S.W.3d 367, 371 (Ky. 2002), citing Snodgrass, 831 S.W.2d at 179. Thus, our review of the trial court's resolution of Dobson's Batson challenge rests on "the substantive issue of whether the trial court's finding that the prosecutor articulated a race-neutral explanation for striking [the juror] from the venire was clearly erroneous." Snodgrass, 831 S.W.2d at 179.

This Court has made it clear that "the trial court has the duty to evaluate the credibility of the proffered reasons and determine if the defendant has established purposeful discrimination." Washington, 34 S.W.3d at 379. "In order to permit the questioned challenge, the trial judge must conclude that the proffered reasons are, first, neutral and reasonable, and second, not a pretext." Gamble, 68 S.W.3d at 371. Finally, we have held that a "trial court may accept at face value the explanation given by the prosecutor depending upon the demeanor and credibility of the prosecutor." Snodgrass, 831 S.W.2d at 179, citing Stanford v. Commonwealth, 793 S.W.2d 112 (Ky. 1990).

Dobson argues the trial court erred in this regard. Dobson points out that the Commonwealth failed to bring any of the three jurors before the bench for further questioning concerning the alleged facts. In fact, this Court has rejected the claim that such further questioning is required. See Snodgrass, 831 S.W.2d at 180 ("[W]e do not believe that either our Federal or State Constitutions require such inquiry, especially where the strike arises from a peremptory challenge."); see also Gamble, 68 S.W.3d at 372 ("As to Appellant's assertion that the Commonwealth should have inquired into these incidents with each potential juror, this Court has previously held that such inquiry is not required before exercising a peremptory challenge.").

As part of this argument, Dobson seems to challenge the prosecutor's reliance on information obtained from sources other than voir dire. Again, this Court has rejected this argument. Specifically, in Snodgrass this Court stated:

> 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 has received from a source other than information received from voir dire. Batson does not require the neutral explanation for peremptorily striking a potential juror to be derived from voir dire . . . . A prosecutor may utilize his own personal knowledge concerning a juror and information supplied from outside sources.

831 S.W.2d at 179. Thus, the source of the prosecutor's information and the failure to question each juror further as to the underlying facts do not convert the prosecutor's actions into a violation of Batson.

Regarding the two jurors who were challenged based on having served on a prior jury which returned a not guilty verdict, Dobson argues such a circumstance is not grounds to preclude service on a subsequent jury. Dobson relies on White v. Commonwealth, 499 S.W.2d 285 (Ky. 1973); and Jones v.

Commonwealth, 310 Ky. 180, 220 S.W.2d 369 (1949). However, a review of these cases indicates they involve the question of whether prior service on a jury served as sufficient grounds to support a challenge for cause. The other case cited by Dobson, Washington v. Commonwealth, 34 S.W.3d at 376, involves a peremptory challenge. In that case, this Court recognized that prior service on a jury may have been sufficient grounds for a peremptory challenge. 34 S.W.3d at 379, citing McGinnis v. Commonwealth, 875 S.W.2d 518 (Ky. 1994).[1] However, in that case the prosecutor could not give any details as to the prior jury. Id. Further, when initially confronted with the Batson challenge, the prosecutor denied having even struck the juror. Id. at 378. Thus, we cannot agree that prior service on a jury can never serve as grounds for a race-neutral peremptory strike.

This leaves us with the question of the prosecutor's demeanor and credibility. Dobson argues the reasons proffered by the Commonwealth amounted to no more than pretext. Yet, Dobson fails to fully appreciate the role of the trial court. The "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" Snodgrass, 831 S.W.2d at 179, citing Hernandez v. New York, 500 U.S. 352, 364 (1991). Further, the circumstances present in this case are unlike the circumstances in Washington, 34 S.W.3d at 379, wherein this Court reviewed the record and concluded the prosecutor's "subsequent explanations for the strike were disingenuous." In the case sub judice, Dobson has failed to

[1] McGinnis v. Commonwealth, 875 S.W.2d 518 (Ky. 1994), has been overruled in part on other grounds by Elliott v. Commonwealth, 976 S.W.2d 467 (Ky. 1998).

demonstrate clear error regarding the trial court's resolution on the issue of the prosecutor's demeanor and credibility. Further, as Dobson has failed to show the trial court's finding of race-neutral explanation amounted to clear error, we find no grounds upon which to base a reversal concerning the Batson issue.

B. The trial court did not err in denying Dobson's motion seeking an instruction on unauthorized use of a motor vehicle.

Dobson was charged with, and convicted of, receiving stolen property valued at more than $300.00. The Commonwealth put on evidence that the vehicle was stolen on January 12th. It was recovered two days later being driven by Dobson. Dobson claimed that he was using the vehicle with the permission of a girl named "Jessica," who he presumed to be the owner. There is no question that the "Jessica" who allegedly gave Dobson permission to use the vehicle was not the same person as Jessica Wesner, the owner of the vehicle. Nor was there any evidence that Dobson knew Wesner. At the conclusion of the evidence, Dobson argued he was entitled to an instruction on unauthorized use of a motor vehicle as a lesser included instruction. Dobson now argues the trial court erred when it refused to give such an instruction.

"A defendant is of course entitled to have his theory of the case submitted to the jury." Logan v. Commonwealth, 785 S.W.2d 497, 498 (Ky.App. 1989), citing Davis v. Commonwealth, 252 S.W.2d 9, 10 (Ky. 1952). However, "the instructions must follow the evidence[.]" Id. (citation omitted). Further, "[a]n instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a

reasonable doubt that he is guilty of the lesser offense." Houston v. Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998), citing Wombles v. Commonwealth, 831 S.W.2d 172, 175 (Ky. 1992).

"A person is guilty of the unauthorized use of an automobile . . . when he *knowingly* operates, exercises control over, or otherwise uses such vehicle without consent of the owner . . . ." KRS 514.100 (emphasis added). Scienter is required and a defendant must know that the vehicle is not in the possession of the rightful owner to be guilty of this offense. This is the same element required in knowingly receiving stolen property, for which Dobson was convicted. As in the Logan case, Dobson's explanation, if believed, would exonerate him of any crime. As unauthorized use would require Dobson to knowingly use a vehicle without the owner's consent, it is not enough that he mistakenly believed he had the owner's permission. Thus, there is simply no evidence of this crime in this case. Either Dobson had the vehicle with the owner's consent and would not be guilty of any crime; or he knew that the vehicle was stolen and, therefore, had the vehicle without the consent of the owner.

Further, when Dobson's evidence is viewed in conjunction with that presented by the Commonwealth, we cannot conclude the jury might have a reasonable doubt as to his guilt of receiving stolen property, and yet believe beyond a reasonable doubt that he is guilty of unauthorized use of a motor vehicle. Under these circumstances, we cannot say the trial court erred in denying Dobson's motion for an instruction on unauthorized use of a motor vehicle.

II. Conclusion

Dobson has failed to show clear error on the part of the trial court in its finding that the Commonwealth proffered race-neutral reasons for its use of peremptory strikes against three (3) of the seven (7) African-Americans on the jury panel. Likewise, Dobson has failed to demonstrate substantial evidence existed to support an instruction on unauthorized use of a motor vehicle. As a result, we are forced to reject Dobson's claim that the trial court erred in denying his motion for an instruction on that offense. For these reasons, the judgment of the Fayette Circuit Court is affirmed.

All sitting. All concur.

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