

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 KA 1458

STATE OF LOUISIANA

VERSUS

JORGE ESTRADA

—
**On Appeal from the 21st Judicial District Court
Parish of Tangipahoa, Louisiana
Docket No. 107,680, Division "D"
Honorable M. Douglas Hughes, Judge Presiding**
—

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Jorge Estrada**

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered September 10, 2010

PARRO, J.

The defendant, Jorge Estrada, was charged by bill of information with possession of cocaine in excess of 400 grams, a violation of LSA-R.S. 40:967(F)(1)(c). He pled not guilty. Following a trial by jury, the defendant was found guilty as charged.¹ The defendant was sentenced to a term of imprisonment at hard labor for twenty-five years.² The defendant appealed. On February 7, 2008, this court dismissed the defendant's appeal as untimely. **State v. Estrada**, 07-2156 (La. App. 1st Cir. 2/7/08) (unpublished order). Thereafter, the trial court granted the defendant's motion for an out-of-time appeal. The defendant now appeals, urging two assignments of error, as follows:

1. The trial court erred in refusing to grant a mistrial after the state repeatedly and improperly called attention to the defendant's post-arrest/post-**Miranda** silence.
2. The trial court committed reversible error by refusing to grant a challenge for cause to prospective juror Strahan.

We affirm the defendant's conviction and sentence.

FACTS

In the early morning hours of August 27, 2002, Special Agent Chad Scott, of the United States Drug Enforcement Administration, was participating in surveillance efforts in Baton Rouge, Louisiana. At approximately 2:30 a.m., Agent Scott followed a green Chevy Impala (with a Texas license plate) to a Chevron service station on Sherwood Forest Boulevard near Interstate 12. The Impala was being followed by a white Corvette. Both vehicles stopped at the Chevron station and the passenger in the Impala, subsequently identified as the defendant, exited the vehicle and met with the driver of the Corvette near the trunk. The defendant opened the trunk of the Impala and reached inside as the Corvette driver watched. The defendant quickly closed the

¹ The record reflects that, prior to the instant trial, a previous trial in the matter resulted in a mistrial.

² Under LSA-R.S. 40:967(F)(1)(c), a fine of not less than two hundred fifty thousand dollars, nor more than six hundred thousand dollars, is mandatory. However, the defendant is not inherently prejudiced by the trial court's failure to impose a fine. Accordingly, we decline to correct the illegally lenient sentence. See **State v. Price**, 05-2514 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 124-25 (en banc), writ denied, 07-0130 (La. 2/22/08), 976 So.2d 1277.

trunk and returned to the passenger side of the vehicle. The Corvette driver returned to his vehicle and both vehicles left the scene.

At approximately 3:00 a.m., Louisiana State Police Trooper Ronald Furca stopped the Impala on Interstate 12 in Tangipahoa Parish for improper lane usage. Agent Scott, who had maintained surveillance of the Impala from Baton Rouge, arrived on the scene shortly after the traffic stop. Javier Morales, the driver, and the defendant, the front-seat passenger, exited the vehicle. Trooper Furca questioned the men. After receiving conflicting information regarding their intended destination, Trooper Furca requested permission to search the vehicle. Morales initially gave verbal consent, but then refused to sign a written consent to search form. Agent Jimmy Speyrer, of the Tri-Parish Task Force, and his canine partner, Chelsea, were summoned to the scene. A "free-air sweep" of the vehicle revealed the presence of illegal narcotics. Chelsea provided a positive alert on the vehicle's trunk. A black backpack containing three kilogram packages of cocaine was found inside the trunk compartment of the vehicle. The defendant and Morales were read their **Miranda** rights and placed under arrest.

At trial, the defendant testified and denied knowingly possessing the cocaine found inside the trunk of the vehicle. He claimed that he was unaware of the presence of the cocaine prior to the traffic stop. He stated that, after Morales pulled over in response to the police lights, Morales started behaving strangely. The defendant claimed that he then asked Morales what was wrong and Morales revealed that there was cocaine inside the trunk. The defendant denied having any knowledge of the presence of the cocaine prior to this time. He also denied ever exiting the vehicle and opening the trunk in Baton Rouge.

ASSIGNMENT OF ERROR NUMBER ONE

In his first assignment of error, the defendant argues that the trial court erred in failing to grant his motions for a mistrial when the state made references to his post-arrest silence during the direct examination of Agent Chad Scott and cross-examination of the defendant.

In **Doyle v. Ohio**, 426 U.S. 610, 619, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91 (1976), the United States Supreme Court held that the use, for impeachment purposes, of petitioner's silence at the time of arrest and after receiving the **Miranda** warnings, violates the Due Process Clause of the Fourteenth Amendment. See also **Portuondo v. Agard**, 529 U.S. 61, 74-75, 120 S.Ct. 1119, 1128, 146 L.Ed.2d 47 (2000). However, it is not every mention of the defendant's post-arrest silence that is prohibited by **Doyle**. As specified by the Louisiana Supreme Court in **State v. George**, 95-0110 (La. 10/16/95), 661 So.2d 975, 980, "*Doyle* condemns only 'the use **for impeachment purposes** of [the defendant's] silence at the time of arrest, and after receiving *Miranda* warnings...'" The prosecutor may not use the fact of an accused's exercise of his constitutional right to remain silent, after he has been advised of this right, solely to ascribe a guilty meaning to his silence or to undermine, by inference, an exculpatory version related by the accused for the first time at trial. **State v. Arvie**, 505 So.2d 44, 46 (La. 1987). A brief reference to post-**Miranda** silence does not mandate a mistrial or reversal where the trial as a whole was fairly conducted, the proof of guilt is strong, and the state made no use of the silence for impeachment. See **State v. Smith**, 336 So.2d 867, 868-70 (La. 1976); see also **State v. Stelly**, 93-1090 (La. App. 1st Cir. 4/8/94), 635 So.2d 725, 729, writ denied, 94-1211 (La. 9/23/94), 642 So.2d 1309.

The **Doyle** proscription against referring to a defendant's post-arrest silence is not without exceptions. The state is allowed reference to the defendant's post-arrest silence when the line of questioning is an attempt to summarize the extent of the police investigation and is not designed to exploit the defendant's failure to claim his innocence after his arrest in an effort to impeach his testimony or attack his defense. See **State v. George**, 661 So.2d at 979-80. Another exception to **Doyle** also exists when the evidence of post-arrest silence is relevant to rebut a defense-raised assertion that the arresting officer failed to properly investigate, or that the defendant actively cooperated with the police when arrested. **State v. Bell**, 446 So.2d 1191, 1194 (La. 1984).

In **Bell**, the Louisiana Supreme Court underscored the following footnote appearing in **Doyle**:

It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. Cf. *United States v. Fairchild*, 505 F.2d 1378, (CA5 1975).

State v. Bell, 446 So.2d at 1192 (quoting **Doyle**, 426 U.S. at 619 n. 11, 96 S.Ct. at 2245 n. 11).

Our review of the record in the instant case revealed that the defendant is correct in his claim that the prosecutor elicited information from Agent Scott and from the defendant regarding the defendant's post-arrest silence. During the direct examination of Agent Scott, the state questioned him regarding the circumstances surrounding the defendant's arrest and booking. Agent Scott explained that the defendant and Morales were advised of their rights on the scene. They were initially transported to the Tangipahoa Parish Sheriff's Office substation for booking, and later to the Tangipahoa Parish Jail. The prosecutor asked Agent Scott whether the defendant made any "excited utterances" or "statements" regarding his knowledge of the cocaine in the vehicle at that time. Agent Scott indicated that he did not. This was the first reference to the defendant's post-arrest silence. However, there was no objection by the defense at this time. The second reference was made when the prosecutor asked if the defendant ever asked to speak to Agent Scott privately on the morning of his arrest, and Agent Scott responded negatively. At this point, defense counsel objected to the reference and moved for a mistrial. The trial court denied the motion.

Later, during the prosecutor's cross-examination of the defendant, the following exchange occurred:

Q: When you were transported from Hammond to Amite, did you and Javier ride together?

A: Yes.

Q: You did?

A: I believe so.

Q: Okay, but you didn't ride together from the scene to the substation?

A: No.

Q: [Jorge] why didn't you tell anybody about this—

Counsel for the defendant interrupted and requested that the jury be excused. Once the jury was removed from the courtroom, counsel reurged his motion for a mistrial arguing that the prosecutor repeatedly referred to the defendant's post-arrest silence. In response, the prosecutor argued that the line of questioning was permissible because the defendant testified regarding several post-arrest statements in his testimony on direct examination. However, the prosecutor agreed to rephrase the question. The trial court denied the mistrial motion. The defense did not request an admonition. When the cross-examination was resumed, the prosecutor did not return to the inquiry regarding why the defendant chose to remain silent. Instead, he proceeded to question the defendant regarding the circumstances surrounding his custodial interrogation by Agent Scott.

We find that the aforementioned references to the defendant's silence do not warrant reversal of the conviction in this case. In opening statements, defense counsel told the jury that the defendant was going to testify and state that he did, in fact, tell the investigating officers that he only learned of the presence of the cocaine in the vehicle immediately after the traffic stop. With this argument, defense counsel attempted to create the impression that the defendant disclosed his exculpatory story to the officers at the time of the arrest, so it was proper for the state to rebut this contention by showing that the defendant made no such statements to the officers. With its opening remarks, the defense invited the state's inquiry into what transpired during the early stages of the investigation of the matter. Therefore, there was no

error or constitutional violation when the state questioned Agent Scott regarding the events surrounding the defendant's arrest. When considered in context with the entirety of the trial, it is clear that these references to the defendant's silence were made in an attempt to rebut the defense claim that he advised the investigating officers that Morales told him he had drugs in the vehicle only after they were stopped.

Insofar as the inquiry, during the defendant's cross-examination, regarding whether the investigating officers asked if he wanted to make a statement, we note that this was simply a question regarding the investigation, and not a reference to the defendant's post-arrest silence. Thus, this earlier inquiry clearly did not warrant a mistrial.

Finally, we note that while the inquiry regarding why the defendant "did not tell anybody," when considered in isolation, appears to come dangerously close to offending the defendant's significant constitutional right to remain silent, when it is considered in conjunction with argument by defense counsel and the defendant's trial testimony (indicating that he did, in fact, tell Agent Scott his exculpatory story during the investigation), it is clear that the defendant was not unfairly prejudiced by the reference to his post-arrest silence. Thus, a reversal of the conviction because of this reference is not warranted.

The trial court did not err in denying the defendant's motions for a mistrial. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant contends that the trial court erred in denying the defense challenge for cause against prospective juror Anthony Strahan. Specifically, he argues that Strahan should have been excluded for cause because his voir dire responses evidenced his inability to remain impartial in a drug-related case. The defendant asserts that the trial court's efforts to rehabilitate Strahan were unsuccessful. He notes that, even after Strahan eventually responded that he thought he could be fair and impartial, he reiterated, "I'm very much against drugs."

Pursuant to LSA-C.Cr.P. art. 797(2), a prospective juror may be challenged for cause on the ground that:

The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence[.]

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination and to the exercise of peremptory challenges. LSA-Const. art. I, § 17(A). A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment according to law may be reasonably implied. **State v. Martin**, 558 So.2d 654, 658 (La. App. 1st Cir.), writ denied, 564 So.2d 318 (La. 1990). A refusal by the trial court to excuse a prospective juror on the ground that he is not impartial is not an abuse of discretion where, after further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. **State v. Copeland**, 530 So.2d 526, 534 (La. 1988), cert. denied, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989). A trial court's ruling on a motion to strike jurors for cause is afforded broad discretion because of the court's ability to get a first impression of prospective jurors during voir dire. See State v. Kang, 02-2812 (La. 10/21/03), 859 So.2d 649, 653-54.

A defendant must object at the time of a ruling refusing to sustain a challenge for cause by the defendant of a prospective juror. LSA-C.Cr.P. art. 800(A). Prejudice is presumed when a challenge for cause is erroneously denied by a trial court and the defendant has exhausted his peremptory challenges. To prove there has been reversible error warranting reversal of the conviction, defendant need only show (1) the erroneous denial of a challenge for cause, and (2) the use of all his peremptory challenges. **State v. Robertson**, 92-2660 (La. 1/14/94), 630 So.2d 1278, 1280-81. It is undisputed that defense counsel exhausted all of the allotted peremptory challenges

in this case. Therefore, we need only determine the issue of whether the trial court erred in denying the defendant's challenge for cause regarding the prospective juror in question.

The record reflects that, at the conclusion of the voir dire examination of the first panel of prospective jurors, counsel for the defendant challenged Strahan for cause. The trial court denied the motion and concluded, "[h]is testimony was, at the end, that he could be fair and impartial and Mr. Estrada was, at this time, not guilty."

In reviewing the entirety of prospective juror Strahan's voir dire responses, we note that, although he indicated a firm position against drugs, and he initially indicated that his strong conviction would possibly affect his ability to decide the case impartially, he was successfully rehabilitated by the court. As the trial court noted, after being advised of his duty as a juror and the burden of proof required by the state, Strahan indicated that he would hold the state to its burden. He stated, "I think I can be fair, it's just that the State would definitely have to show that he was in possession of it. I'm very much against drugs though." Further evidencing his understanding of the burden of proof and his willingness to hold the state to it, Strahan later commented, "If the State didn't prove their case, then, not guilty." Thereafter, when the trial court asked Strahan whether at that point (prior to the presentation of any evidence) the defendant was guilty or innocent, Strahan replied, "He's not guilty. They haven't proved that he was in possession of anything." Therefore, despite the defendant's contentions to the contrary, we find that Strahan's voir dire responses, when considered as a whole, indicate that he was willing to set aside personal convictions, listen to the evidence, and follow the law. Therefore, we find no abuse of discretion in the trial court's ruling denying the challenge for cause of this prospective juror. This assignment of error lacks merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.