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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000560-MR

CHRISTOPHER BRANDON WINN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
IINDICTMENT NO. 02-CR-01109

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND TACKETT, JUDGES.

DYCHE, JUDGE. Christopher Brandon Winn appeals from a final judgment and sentence of probation entered by the Fayette Circuit Court on February 25, 2003, finding him guilty of trafficking in a controlled substance in the first degree, possession of drug paraphernalia in the first degree, and possession of marijuana. Winn claims that the prosecutor's peremptory strikes of three African-American jurors violated the principles of Batson v. Kentucky, 476 U.S. 79 (1986), and that

the trial court erred in admitting opinion testimony from a police officer. We affirm.

Winn was arrested on Thursday, September 12, 2002. He was found to possess 5.76 grams of crack cocaine, $273 in cash, a cellophane-wrapped cigar, and a small quantity of marijuana. He was indicted for trafficking in a controlled substance in the first degree, possession of drug paraphernalia in the first degree, and possession of marijuana. Winn conceded his guilt to the latter two charges. The sole issue to be determined by the jury was whether Winn possessed the crack cocaine with the intent to sell it. The jury returned guilty verdicts on all the charges, and the trial court sentenced Winn to five years for trafficking and twelve months on each of the other two counts, all sentences to be served concurrently. The trial court suspended the sentence, however, and placed Winn on probation for five years subject to various conditions.

Winn's first argument is that the trial court denied him the right to a trial by a jury of his peers when it rejected his Batson challenge to three peremptory strikes of African-American jurors. We note that the holding in Batson is founded on the Equal Protection Clause of the Fourteenth Amendment, not on the Sixth Amendment right to a jury trial. Nonetheless, we find that Winn has made a cognizable Batson claim, and we will review it as such.

Washington v. Commonwealth, Ky., 34 S.W.3d 376 (2000), sets forth the three-part Batson test for evaluating a claim that a potential juror has been removed for racially-motivated reasons. The defendant must first make a prima facie showing of racial bias for the peremptory challenge. If the requisite showing is made, the burden shifts to the Commonwealth to articulate "clear and reasonably specific" race-neutral reasons for the peremptory challenge. The trial court must then evaluate the credibility of the proffered reasons to determine if the defendant has established purposeful discrimination. Id. at 379 (citing Batson, 476 U.S. at 96-98).

In this case, the Commonwealth attorney explained her use of peremptory strikes without any prompting from the trial court or defense counsel.

> As a result, the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination. . . . Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.

Hernandez v. New York, 500 U.S. 352, 359 (1991).

We therefore proceed directly to a review of whether the trial court erred in finding an absence of discriminatory intent.

Kentucky has adopted the "clearly erroneous" standard to review a trial court finding of no discriminatory intent in the exercise of peremptories. See Hernandez, 500 U.S. at 365-66; Commonwealth v. Snodgrass, Ky., 831 S.W.2d 176 (1992). The United States Supreme Court has observed that, "[a]s with the state of mind of a juror, evaluation of the prosecutor's state of mind lies 'peculiarly within a trial judge's province.'" Hernandez, 500 U.S. at 365 (citations omitted).

The Commonwealth used its peremptory challenges to eliminate nine potential jurors, three of whom were African-American. The Commonwealth justified its strikes as follows: Two African-American jurors and three white jurors were rejected because they all had family members who had been convicted of drug offenses. Another African-American juror was stricken because he was a preacher. The three remaining white jurors were rejected for the following reasons: one believed that drug addiction was a disease and not a crime; one because the Commonwealth attorney "didn't like the way he looked"; and one because he had been accused of passing bad checks.

In his objection to the Commonwealth's peremptory strikes, Winn's counsel argued that, because African-Americans are more likely to be familiar with or related to people involved in drugs, using peremptory strikes to exclude African-

Americans on those grounds will inevitably result in racial discrimination.

On appeal, Winn argues that the reason provided by the Commonwealth for eliminating the two African-American jurors who had family members involved with drugs was pretextual. According to Winn, these jurors might have had more knowledge and experience of drug problems because they are African-American and therefore "[a]ll three might not need an expert witness such as Sergeant Ensminger to enlighten them as to crack cocaine dealings in the community."

Where a party specifies his grounds for an objection at trial, he cannot present a new theory of error on appeal. Gabow v. Commonwealth, Ky., 34 S.W.3d 63, 75 (2000). Although trial counsel's objection and Winn's argument on appeal differ slightly, we will address both as they are founded on similar premises.

We take Winn's argument on appeal to mean that the Commonwealth struck these jurors because, simply by virtue of being African-American and thus more knowledgeable about drug culture, they would not have found Winn guilty of trafficking in drugs. Even if we accept Winn's unsupported assumption that African-Americans are likely to have "more knowledge and experience concerning drug problems," this alleged greater familiarity need not manifest itself in leniency towards

defendants accused of drug offenses. We note that one African-American juror was excused for cause because he disclosed that his brother was addicted to drugs, and that this would cause him to treat the defendant more harshly.

In regard to the objection made at trial that the Commonwealth's questions to the jury regarding drug involvement of family members would automatically lead to racial discrimination, it is well-established that, although "[a] trial court should give appropriate weight to the disparate impact of the prosecutor's criterion in its decision, . . . this factor is not conclusive in the preliminary race-neutral inquiry." Snodgrass, 831 S.W.2d at 179. To sustain a Batson challenge, a prosecutor must have acted with racially discriminatory intent or purpose. See Hernandez, 500 U.S. at 365. Asking whether potential jurors have family members involved in drugs does not automatically demonstrate discriminatory intent on the part of the Commonwealth. The trial court's finding that the prosecutor's strikes were not motivated by discriminatory intent was not clearly erroneous, especially in light of the fact that three white jurors were excused for precisely the same reason as the two African-Americans: they had family members involved in drugs.

Winn also claims that striking one of the African-American jurors on the grounds that he was a preacher was

pretextual because he was not questioned during voir dire. "Batson does not require the neutral explanation for peremptorily striking a potential juror to be derived from voir dire." Snodgrass, 831 S.W.2d at 179. Furthermore, "the [prosecutor's] explanation [does not] have to rise to a level to satisfy a strike for cause." Id. The Commonwealth may well have decided that a preacher would be inclined to show greater sympathy for a defendant.

We therefore find no error in the trial court's finding of no discriminatory intent on the part of the Commonwealth in the exercise of its peremptory challenges.

Winn's second argument is that the trial court committed reversible error in allowing Sergeant James Ensminger to testify as an expert witness for the Commonwealth. Ensminger qualified as an expert on the grounds that he had worked for over five years in the Lexington Police Narcotics Unit; had worked a street-level narcotics beat; had extensive training sessions in narcotics investigation; had participated in hundreds of drug investigations, particularly those involving crack cocaine; and had worked undercover posing as a drug dealer. Ensminger testified that, in his opinion, the 5.76 grams of crack cocaine found on Winn's person was for sale rather than personal use, due to the large quantity and the way it was packaged. Winn maintains that, but for Ensminger's

testimony, the jury might have found him guilty of the lesser charge of possession.

Winn argues that he received inadequate notice of Ensminger's testimony and had no opportunity for a hearing into the matter. He maintains that Ensminger testified beyond the scope permissible for an expert when he gave his opinion regarding the crack cocaine and the way it was packaged. He asserts that the Commonwealth should have been forced to prove its case with facts, rather than through this opinion testimony. He argues that Sargent v. Commonwealth, Ky., 813 S.W.2d 801 (1991), and Brown v. Commonwealth, Ky. App., 914 S.W.2d 355 (1996), cases which permit such opinion testimony from police officers, have been "stretched to the breaking point."

Winn's claim that he received inadequate notice and had no opportunity for a hearing into the question of Ensminger's testimony is not preserved for appeal. Winn's counsel did make a motion in limine on the morning of the trial to exclude expert testimony from a police officer or detective about the sale of drugs. The motion was denied. Winn's counsel also objected during Ensminger's testimony.

"A trial court's ruling as to the admissibility of evidence is reviewed under an abuse of discretion standard. An abuse of discretion occurs when a 'trial judge's decision [is] arbitrary, unreasonable, unfair, or unsupported by sound legal

principles.'" Evans v. Commonwealth, Ky. App., 116 S.W.3d 503, 509 (2003)(citations omitted).

The trial court based its decision to permit the expert testimony of Sergeant Ensminger on the holdings in Sargent and Brown.

In Sargent, two police officers testified as qualified experts that it was their opinion that nearly 15 pounds of marijuana seized from the Sargents were for sale and not for personal use. The Kentucky Supreme Court held that such testimony was admissible and explained its decision as follows:

> The police testimony indicates that their opinion was based on experience derived from many drug related investigations.
>
> . . . .
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> Both detectives testified about the marijuana trade which is certainly specialized in character and outside the scope of common knowledge and experience of most jurors. The opinion of the police aided the jury in understanding the evidence and resolving the issues. The trial judge did not abuse his discretion when he determined that both police officers were sufficiently qualified to give expert testimony. There was no invasion of the province of the jury as the ultimate factfinder and there was no error."

Sargent v. Commonwealth, Ky., 813 S.W.2d 801, 802 (1991). See also Kroth v. Commonwealth, Ky., 737 S.W.2d 680, 681 (1987).

Similarly, in Brown v. Commonwealth, supra at 357, this Court held that testimony from the Commonwealth's witnesses

regarding the manufacture of crack cocaine and that the defendants working together as a team was indicative of drug trafficking was properly admitted.

Winn fails to explain how the circumstances of his case differ sufficiently from those of Brown and Sargent to render the holdings of those cases inapplicable. Ensminger's testimony about the quantity and manner of packaging which characterize crack cocaine that is to be sold is "specialized and outside the scope and common knowledge of most jurors." Sargent, 813 S.W.2d at 802.

In light of the case law which clearly permits such expert opinion testimony, and the fact that Sergeant Ensminger was properly qualified as an expert witness, we find that the trial court did not abuse its discretion in admitting his testimony.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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