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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001420-MR

JAMES ALLEN KIRK

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 03-CR-00350

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI, JUDGE; MILLER, SENIOR JUDGE.¹

COMBS, CHIEF JUDGE: James Allen Kirk appeals from a final judgment and sentence of imprisonment entered by the McCracken Circuit Court on July 1, 2004, in which he was found guilty of third-degree burglary and attempted theft by unlawful taking. Kirk claims that the prosecutor's peremptory strike of a single

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

African-American juror violated the constitutional principles enunciated in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). After our review of the record, we affirm.

During the early morning hours of July 30, 2003, Paducah police officers responded to a silent alarm triggered at a local tavern. When they arrived, officers found that the tavern door had been vandalized. Kirk was crouching beneath a pool table inside. The officers discovered nineteen Slim Jim snacks, some sausages, and a flashlight on Kirk's person. The officers also found several twelve-packs of cold beer stowed in the bed of a pick-up truck. The proprietor of the tavern indicated that Kirk did not have permission to be on the premises.

Kirk was indicted on charges of burglary and attempted theft. At his trial, the jury returned guilty verdicts on the charges. Kirk was sentenced to five-years' imprisonment on the burglary conviction and thirty days on the conviction for attempted theft. He was also fined and ordered to pay restitution.

On appeal, Kirk argues that the Commonwealth improperly struck the sole African-American member of the jury panel in violation of Batson, supra. The disputed juror was excused as a result of the Commonwealth's exercise of a

peremptory challenge. After *voir dire*, Kirk objected to the composition of the jury. The prosecutor provided the following explanation:

Our primary concern was the fact he was on probation for a traffic violation. We don't think we want jurors that would potentially have conflicts with law enforcement and the fact that he's a single dad with three children and he's concerned about completing the case today. We don't want anyone rushing to a verdict.

The trial court found that the prosecutor's explanation for the challenge was neutral as to race and upheld the Commonwealth's decision as comporting with constitutional principles.

In Batson, supra, the United State Supreme Court held that the use of peremptory challenges to strike jurors **solely** on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court then outlined a three-step process for evaluating such challenges to the composition of a petit jury when peremptory challenges are alleged to have been used in a racially discriminatory manner. First, the defendant must make a *prima facie* showing that the peremptory challenges in question are based on race. Second, if the requisite showing has been made, the burden of proof shifts to the state to provide race-neutral reasons for the challenges. Finally, the trial court must determine whether the defendant

has carried his burden of proving purposeful discrimination.
Batson, 476 U.S. at 97-98, 106 S.Ct. at 1712, 90 L.Ed.2d 69.

In this case, the Commonwealth's Attorney voluntarily explained his use of the disputed peremptory strike -- without any prompting from the trial court. Therefore, the trial court had no opportunity to determine whether Kirk had or had not made out a *prima facie* showing of intentional discrimination justifying further inquiry.

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, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). Consequently, we need not examine whether Kirk presented a *prima facie* case sufficient to trigger the second and third prongs of the Batson analysis. Our review is limited to the Commonwealth's explanation for its exercise of the challenge and the trial court's evaluation of that rationale.

The Commonwealth's Attorney stated that he struck the disputed juror for two reasons: first, because he felt that the juror might be biased against the police as a result of his own personal history; second, because he felt that the juror might not deliberate in earnest due to his pressing childcare

concerns. “[I]n order to permit the questioned challenge, the trial judge must conclude that the proffered reasons are . . . neutral and reasonable, and . . . not a pretext.” Gambel v. Commonwealth, 68 S.W.3d 367, 371 (Ky. 2002) quoting Wright v. State, 586 So.2d 18 (Fla. 1991). However, it is clear that “the prosecutor’s explanation need not rise to the level justifying exercise of a challenge for cause.” Batson at 97, 106 S.Ct. at 1723. “Unless a discriminatory intent is inherent in the prosecutor’s explanation, the reasons offered will be deemed race neutral.” Hernandez at 360, 111 S.Ct. at 1866.

After evaluating the prosecutor’s explanation for the challenge, the trial court found the Commonwealth’s reason for striking the disputed juror to be both race neutral and credible. The trial court concluded that Kirk had suffered no purposeful discrimination. On appellate review, the determination by a trial court regarding the sufficiency of the basis of the peremptory challenge is granted great deference and will not be disturbed unless it is clearly erroneous. Washington v. Commonwealth, 34 S.W.3d 376 (Ky. 2000).

In his brief, Kirk has offered no precise basis for his contention that the prosecutor’s exercise of a peremptory challenge against the disputed juror was race based or that the rationale underlying the decision to strike the juror was pretextual. Nothing in the prosecutor’s explanation suggests a

race-based decision to exercise a peremptory challenge against him. The prosecutor's justification for striking the juror was wholly race neutral. Significantly, another juror with similar time constraints had been struck by the court for cause -- a factual similarity that would tend to dispel the element of pretext. Thus, the trial court's finding that the Commonwealth's Attorney provided a non-pretextual, race-neutral basis for exercising the peremptory challenge was not clearly erroneous.

Accordingly, we affirm the judgment entered and the sentence imposed by the McCracken Circuit Court in this case.

ALL CONCUR.

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