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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000193-MR

ROBERT COBB — APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., SPECIAL JUDGE
ACTION NO. 01-CR-00073

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: CLAYTON, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: Robert Cobb appeals from an order of the Fulton Circuit Court denying his motion to set aside his conviction pursuant to Kentucky Rule[s] of Criminal Procedure ("RCr ") 11.42. He contends that his trial counsel provided ineffective assistance by failing to request a *Batson*[1] hearing challenging the Commonwealth's use of peremptory challenges. The circuit court found that a

[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Batson hearing was "likely" held in this case and that Cobb has shown no prejudice. However, these findings are clearly erroneous. Therefore, for the reasons stated herein, we reverse and remand.

Factual and Procedural Background

In July 2001, a Fulton County grand jury returned an indictment charging Cobb with three counts of trafficking in a controlled substance (cocaine), second offense; one count of possession of a controlled substance (cocaine); and being a persistent felony offender in the first degree. The matter proceeded to a jury trial on two of the trafficking charges in February 2002. At the conclusion of the trial, the jury returned a guilty verdict on both charges and fixed Cobb's sentence at twenty years on each count, to be served consecutively. The trial court thereafter sentenced Cobb to forty-years' imprisonment.

On appeal, the Kentucky Supreme Court affirmed Cobb's convictions but remanded the case for a new sentencing hearing on the grounds that the jury was incorrectly instructed to recommend a sentence within the enhanced penalty range without finding Cobb guilty of being a subsequent offender. *Cobb v. Commonwealth*, 105 S.W.3d 455 (Ky. 2003). On remand, Cobb was sentenced to two consecutive ten-year terms of imprisonment, for a total of twenty years. This sentence was imposed on February 12, 2004.

On January 5, 2005, Cobb filed a *pro se* motion to vacate his sentence pursuant to RCr 11.42, alleging ineffective assistance of trial counsel and violations of his constitutional rights. He also filed motions for an evidentiary

hearing and for the appointment of counsel. The trial court denied the motions following a cursory "hearing" on January 13, 2005, at which neither Cobb nor any counsel on his behalf was present. Cobb then filed a motion to proceed *in forma pauperis* on appeal. The matter languished on the court's docket for over a year. At one point, the trial court directed the Commonwealth to file a response to Cobb's RCr 11.42 motion, despite having denied that motion a year earlier. The Commonwealth thereafter filed a response and submitted an unsigned affidavit that it had prepared on behalf of Cobb's trial counsel. Following a brief hearing on April 27, 2006, the trial court again entered an order denying Cobb's motion for RCr 11.42 relief. Cobb appealed.

On appeal, this Court reversed and remanded for an evidentiary hearing, stating that Cobb's claims of ineffective assistance could not be conclusively refuted on the face of the record. Consequently, this Court reversed and remanded for an evidentiary hearing. *Cobb v. Commonwealth,* 2007 WL 1784089 (Ky. App. 2007). On remand, the trial court appointed counsel for Cobb, who filed a brief on Cobb's behalf. The Commonwealth submitted the same brief it previously filed, this time with a signed affidavit by Cobb's trial counsel. In addition, the sitting circuit court judge recused himself and a special judge was appointed.[2] An evidentiary hearing was scheduled for May 30, 2008.

[2] The sitting circuit court judge had been the prosecutor in Cobb's original trial and in the second sentencing hearing.

The primary issue at the evidentiary hearing concerned whether Cobb's trial counsel had requested a hearing pursuant to *Batson, supra*.[3] During the *voir dire* at trial, there were four African American members on the panel; however, none of them sat on the jury. Cobb maintains that his trial counsel should have challenged the Commonwealth's use of peremptory challenges against African American members of the panel.

Unfortunately, the trial court did not record all of the proceedings involving the parties' exercise of peremptory challenges. As a result, there is no video record addressing whether Cobb's trial counsel requested a *Batson* hearing or whether the trial court conducted such a hearing. Given the lack of a video record and pursuant to this Court's directive, the special judge scheduled an evidentiary hearing on the matter.

In the Commonwealth's initial response to Cobb's 11.42 motion, it argued that a hearing was unnecessary. The Commonwealth based this argument on the purported fact that the defendant had struck two African American veniremen and that the Commonwealth had struck only one. Thus, the Commonwealth argued, Cobb could not be heard to complain. This argument was also advanced vehemently at the May 30, 2008 hearing. However, at the conclusion of the May 30, 2008 hearing, the Commonwealth acknowledged it had

[3] In addition to the *Batson* issue, Cobb alleged several additional grounds for ineffective assistance: He alleged that his trial counsel failed to conduct an adequate investigation, to review and challenge surveillance tapes, to make motions during sentencing, and failed to request an instruction on his right to remain silent. The trial court ruled against Cobb on all of these issues, and these issues are not raised on appeal.

been mistaken in its claims that the defense struck two African Americans at the trial and rather acknowledged that those two strikes pertained to the second sentencing hearing, which was not the subject of the RCr 11.42 motion.

As there was no record of a *Batson* challenge or a *Batson* hearing at trial, the evidentiary hearing consisted of testimony from participants in the trial. Cobb testified that he discussed juror strikes with his counsel and demanded of his counsel that no African Americans be struck. He further testified that once the strikes were tendered to the court, there was never any discussion in open court about striking African Americans. Cobb further testified that he could not remember whether the attorneys went into chambers with the trial judge but that if they did, Cobb was not present.

Cobb's trial counsel, Dennis Lortie, testified that he had no independent recollection of the *voir dire* proceedings and further testified that he could not recall whether the trial court had conducted a *Batson* hearing. Although he believed that he would have made a request for a *Batson* hearing under the circumstances in this case, he testified that no one prompted him to make such a motion. Likewise, neither the trial judge (now retired Judge William Shadoan) nor the assigned trial prosecutor (now sitting circuit court judge Timothy Langford) could recall whether Judge Shadoan conducted a *Batson* hearing in this case. Neither had any memory of Lortie making a motion for a *Batson* hearing.

However, Judge Shadoan testified that it was his regular practice to conduct a *Batson* hearing in such situations because the Kentucky Supreme Court

had previously reversed him on this issue. Similarly, Judge Langford testified that, as a prosecutor, he generally raised *Batson* as an issue even if defense counsel neglected to do so. After reviewing the file and his own notes, Judge Langford testified he believed that he used peremptory challenges to strike two of the African American jurors.[4]

Based on this testimony, the special judge denied Cobb's RCr 11.42 motion. The special judge noted that Judge Shadoan and Judge Langford both testified that they regularly conducted *Batson* inquiries even without a motion by defense counsel. The special judge also noted that during his testimony at the evidentiary hearing, Judge Langford offered race-neutral reasons why at least two of the African Americans were struck. Finally, the special judge noted that it was unclear from the record whether the Commonwealth used peremptory challenges for all four African Americans, or if two of them were excluded in the random draw.

Cobb filed a motion to alter, amend, or vacate the order pursuant to Kentucky Rules of Civil Procedure ("CR") 59.05, challenging the special judge's reliance on the testimony of Judge Shadoan and Judge Langford concerning their regular practices on *Batson* challenges. In particular, Cobb attempted to impeach Judge Shadoan's testimony by noting that the appellate courts had not reversed

[4] While there is no video record of a *Batson* hearing, it can be determined from the video record of the *voir dire* proceedings, as well as the juror strike sheets in the record, exactly how many African American jurors were struck and by whom. It is unclear why neither the judge nor counsel reviewed the record to discover this at the time of the evidentiary hearing.

Judge Shadoan on a *Batson* issue until after the trial in this case.[5] Cobb also noted, and the Commonwealth conceded, that Judge Langford may have testified during the evidentiary hearing from his contemporaneous notes about the jurors selected during the resentencing hearing rather than from the original trial. In response, the special judge modified its previous order, now finding that this research was sufficient to impeach Judge Shadoan's memory that a *Batson* hearing had occurred, and further noting that it was unclear which phase of the trial Judge Langford was referring to when he offered testimony as to the race neutral reasons for striking jurors. Accordingly, the special judge deleted that finding from its original order. Nevertheless, the special judge found that Judge Langford's testimony was sufficient to establish that a *Batson* hearing had occurred. The special judge also stated that Cobb had failed to show that the result would have been different had a *Batson* hearing been held. Cobb now appeals.

Legal Analysis

In order to prevail on an ineffective assistance of counsel claim, a movant must show that his counsel's performance was deficient and that, but for the deficiency, the outcome would have been different. *Strickland v. Washington*,

[5] We do not take issue with the research by Cobb's counsel on this question. However, we take notice that Westlaw's database generally does not include unpublished Kentucky cases prior to 2003. The Kentucky Court's web-site, http://courts.ky.gov, includes a database of opinions by Kentucky's appellate courts. http://apps.courts.ky.gov/supreme/sc_opinions.shtm. The Court of Appeals database includes all opinions rendered after July 1996. However, the Supreme Court database includes only published opinions rendered after August 1999, and all opinions rendered after January 2003. Consequently, the absence of any published case involving Judge Shadoan's reversal on a *Batson* issue prior to 2002 does not necessarily mean that no such case exists. Having said this, however, we agree with the special judge that Cobb's research tends to impeach Judge Shadoan's memory.

466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Cobb argues that his trial counsel provided ineffective assistance by failing to make a *Batson* challenge after all the African American members of the panel were struck. Cobb notes that none of the witnesses could recall whether a *Batson* hearing had been requested or held in this case. Given the lack of any affirmative evidence, Cobb contends that the special judge erred by relying on the testimony of Judge Shadoan and Judge Langford about their general practices of holding *Batson* hearings.

We agree with Cobb that the evidence did not conclusively show whether a *Batson* hearing had been held in this case. Moreover, we believe a simple review of the video record of the *voir dire* proceedings during the February 2002 trial, the Juror Strike Sheets, and the judge's own notes from the bench convincingly show that not only was a hearing **not** held, but that the Commonwealth struck three of the four African American jurors who were in the final venire.

During the initial *voir dire* proceedings, the Commonwealth asked whether any of the panel members knew any of the parties or counsel. Four jurors (#21, #14, #32, and #39) indicated that they knew Cobb. The prosecutor called out each of those juror's numbers for the benefit of the trial court. When the trial court called twenty-eight jurors forward to be empanelled, jurors #7, #21, #32, and #39, all African Americans, came forward.[6] Subsequently, when juror #39 was excused

[6] A review of the video record shows each juror walking forward to the jury box as each of their names and numbers are called.

for cause, juror #14, an African American, was called forward.[7] During questioning, juror #38, a white male, indicated that he also knew Cobb. After the defense concluded *voir dire*, the trial court briefly recessed to allow the parties an opportunity to decide their peremptory strikes. Subsequently, twelve jurors were called, at which time the trial court immediately administered the oath and admonished the jury not to discuss the case. The trial court asked the parties if there were any questions about "this jury," to which Cobb's attorney and the Commonwealth both responded, "No, your Honor." The remaining jurors were excused and another recess was called.

Included in the record are two Juror Strike Sheets, one listing eight names and numbers (#6, #21, #5, #24, #7, #20, #14, and #34), and the other listing five names and numbers (#9, #12, #18, #35, and #40). Also in the record is a yellow, legal-sized sheet of paper with all the jurors' names and numbers, as well as annotations at the bottom of the paper, "PA strikes", with no names or numbers and "DA strikes" with five names and numbers (#9, #12, #18, #35, and #40). This yellow sheet with these annotations appear to be Judge Shadoan's handwritten notes from the bench.

Judge Langford testified at the May 2008 evidentiary hearing that he was certain he had struck one juror (#21) because he had prosecuted his son; that he probably struck a second juror (#14) because of some potential legal problems;

[7] Although the names of these jurors are included in the record, we have not named them in this opinion to protect their identities.

and that he noted a third juror (#7) "looked bored".[8] A review of the Juror Strike Sheets clearly shows that Judge Langford did in fact strike all three of these jurors, all of whom are African American. Judge Langford noted that he had question marks by at least two other names, but offered no reason for those marks. Based upon this review of the record as well as a review of the twelve jurors who were actually seated, it is clear that the Commonwealth struck three of the four African American jurors on the panel and that the fourth African American juror (#32) was eliminated by a random draw. All parties acknowledged that this resulted in an all white panel.[9] Thus, the special judge erred in its July 31, 2008 Order finding that it was unclear how many peremptory challenges were used by the Commonwealth to strike African American jurors.

Cobb bears the burden to establish convincingly that he was deprived of a substantial right that would justify the extraordinary relief afforded by a post-conviction proceeding. *Dorton v. Commonwealth*, 433 S.W.2d 117, 118 (Ky. 1968). Further, he must show that the special judge's findings of fact in denying his motion were clearly erroneous. CR 52.01.

We find that the special judge's findings were clearly erroneous. As previously stated, although none of the participants could recall the particulars of this case, Judge Shadoan and Judge Langford both testified that they regularly

[8] Contrary to the Commonwealth's concession during the hearing and the trial court's amended findings, we believe the record is clear that Judge Langford correctly identified those jurors he peremptorily struck during the original *voir dire* proceedings in February 2002.

[9] The final panel included jurors #28, #43, #19, #26, #27, #16, #11, #29, #33, #36, #3, and #38. Of interest to note, Juror #38 reported that he (like the African American jurors who were struck) knew Cobb.

raised *Batson* inquiries if defense counsel neglected to do so. The special judge found Judge Langford's testimony in particular to be convincing. However, Judge Langford could not recall what happened in this particular case; rather, he only testified about what he believed happened based upon what he describes as "the routine practice" in Fulton County. Not only did his testimony fail to definitively resolve the issue, but both Cobb and his trial counsel provided evidence to the contrary. Finally, the record itself raises a question as to why, after the jury was sworn and defense counsel stated he had no objection to the jury, the Commonwealth would have insisted on having a hearing to challenge the peremptory strikes it had just made. Consequently, the special judge clearly erred by finding that a *Batson* hearing was "likely" held in this case.

While we find that Cobb has presented clear evidence that there was no *Batson* challenge or hearing, we further find the special judge's ruling was clearly erroneous because it misapplied the law. The testimony that either the judge or the prosecutor would make a *Batson* challenge or conduct a *Batson* hearing, while admirable, is contrary to the law of the Commonwealth. While we agree with the special judge's observations that a prosecutor or a judge may remind defense counsel of the potential challenge under *Batson*, it is the prerogative of the defendant and his counsel to decide whether a challenge should be made.

The trial court's process for holding a *Batson* hearing would have been in error. In his testimony during the Commonwealth's proof phase of the evidentiary hearing, Judge Langford testified regarding the standard jury practice

in Fulton County, stating that after *voir dire* in open court, the parties typically would retire to make their peremptory stirkes. They would then return the strikes to the clerk who would remove those names and then at random draw the "pills" (numbered capsules) corresponding to the number of jurors required to serve. The trial court would then dismiss those jurors not selected, swear in and admonish the remaining jurors, then recess for ten minutes prior to opening statements. Judge Shadoan testified this was his practice, and the trial record of February 2002 confirms his testimony as far as the chronology of events. It is during the final ten minute recess prior to opening statements, according to Judge Langford, that a *Batson* hearing would have been held. In *Simmons v. Commonwealth*, 746 S.W.2d 393, 398 (Ky. 1988), cert. denied 489 U.S. 1059, 109 S.Ct. 1328, 103 L.Ed.2d 596 (1989), it was held that a *Batson* objection not raised before the swearing of the jury and the discharge of the remainder of the panel is **untimely**.

Thus, assuming there was a hearing during the recess, it was held outside the parameters set forth in *Batson, supra,* and *Simmons, supra.*

Strickland v. Washington, supra, sets out a two-prong test for whether counsel is ineffective. First, a defendant must show that his trial counsel's performance was deficient. From the facts set out above, we believe it is clear that Cobb's trial counsel failed to request a *Batson* hearing and further that such failure fell below an "objective standard of reasonableness." *Strickland, supra.* Second, a defendant must show that such deficiency prejudiced his defense, such that there is a reasonable likelihood that, but for the deficient performance, the result would

have been different. The Commonwealth argues that even if a *Batson* hearing were not held, Cobb's prayer for relief fails the second prong under *Strickland* because he did not show that he was prejudiced by his trial counsel's failure to request a hearing. The special judge agreed with the Commonwealth's argument in its amended order of January 8, 2009.

In *Strickland*, the Supreme Court stated that in order to establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* at 2068. This case poses a novel and quite difficult question: How could a defendant *ever* show that the racial makeup of a jury affected a verdict?

If we mandated such a showing, then we would allow in the back door the very result that *Batson* seeks to avoid; *to wit*, that the race of a juror may affect a juror's thought process. As Justice Kennedy noted in his concurring opinion in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 153-54, 114 S.Ct. 1419, 1434, 128 L.Ed. 89 (1994):

> [I]t is important to recognize that a juror sits not as a representative of a racial or sexual group but as an individual citizen. Nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice.

In *Batson, supra*, the United States Supreme Court established that the racially biased use of peremptory challenges violates that Equal Protection Clause of the Fourteenth Amendment. In *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 1371, 113 L.Ed.2d 411 (1991), the Court clarified its holding in *Batson*, stating that,

> The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury . . . not because the individual jurors dismissed . . . may have been predisposed to favor the defendant [but] **because racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process . . . and places the fairness of a criminal proceeding in doubt.**

(Internal quotes and citations omitted.) (Emphasis added.) Thus, regardless of the outcome, this issue goes to the heart of the fairness of the trial proceeding.

Further, we fail to see how Cobb could present evidence of any circumstances which might raise an inference that the prosecutor exercised his peremptory strikes in a racially biased way, because there is no contemporaneous record of a hearing, assuming one was even conducted.

Regardless, we also find that Cobb sufficiently alleges constitutional grounds for collateral attack of his judgment and sentence, as *Batson* goes to the heart of whether he received a fair trial. RCr 11.42 permits collateral attacks on judgments, not only on the basis of ineffective assistance of counsel, but also upon constitutional grounds. *See, e.g., Lynch v. Commonwealth*, 610 S.W.2d 902 (Ky. App. 1980). *See also,* 83 *Ky. L.J. 265* (1994-95). Unfortunately, we cannot escape

the fact that Cobb has procedurally defaulted this claim by failing to raise the issue in his direct appeal.

In conclusion, this case aptly demonstrates the importance of making a complete record. While the trial court's failure to record all of the proceedings may have been inadvertent, the absence of a record necessitated the holding of an evidentiary hearing on this motion. While it is the responsibility of defense counsel to protect the record, it is the duty of the court to create and preserve the record. A defendant (except one who proceeds *pro se*) has no ability to do either of these things. We do not accept the Commonwealth's assertion that the defendant's challenge is the equivalent of accusing the trial judge or the prosecutor involved in this case with committing perjury. As conceded by Judge Shadoan, even judges may err. Their memories are subject to fallibility, just as are the memories of any other person. The special judge was faced with the unenviable task of discerning the truth from the memories of the trial participants. Since those memories involved proceedings which had occurred six years earlier, it is not surprising that their recollections were murky. We are still unclear why the trial court and counsel did not simply review the Juror Strike Sheets, the existing video record, and notes from the bench in an attempt to discern the juror strikes that were made.

In this case, we cannot find that Cobb has suffered no prejudice, as the fairness of a trial and the possibility of racism being injected into the jury selection process threatens the very integrity of the system. To hold otherwise would be to

effectively remove *Batson* from post-conviction review in the Commonwealth, as a defendant who failed to raise the claim on direct appeal could not succeed on a constitutional challenge under either RCr 11.42 or CR 60.02, or under an ineffective assistance of counsel claim under RCr 11.42 because of the second prong of *Strickland*. We will not so hold today.

Accordingly, the order of the Fulton Circuit Court denying Cobb's RCr 11.42 motion is reversed and remanded with instruction for the Fulton Circuit Court to set aside the judgment of conviction of April 11, 2002.

CLAYTON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTS.

CLAYTON, JUDGE, CONCURRING. I fully concur with the analysis of the majority opinion. I write separately to comment on the significance of a defendant's right to the effective assistance of counsel.

In *U. S. v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the United States Supreme Court addressed an argument regarding the Sixth Amendment right to counsel. It stated that, "[A]n accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.' [A lawyer's] presence is essential because [he or she is] the means through which the rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail,' as this Court has recognized repeatedly. 'Of all the rights that an accused

person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.'" *Id*. at 653-54. Further, "[U]nless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'" *Id.* at 655 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S.Ct. 1708, 1715 64 L.Ed.2d 333 (1980).

In the case *sub judice*, the defendant was not allowed the safeguards afforded to him by the *Batson,* 476 U.S. 79*,* decision. As a result, he was not tried by the jury that he was entitled to select. In *Shane v. Com.,* 243 S.W.3d 336, 340 (Ky. 2007), a case on direct appeal, the Kentucky Supreme Court wrote that, "[I]f a right is important enough to be given to a party in the first instance, it must be analyzed to determine if it is substantial, particularly where deprivation of the right results in a final jury that is not the jury a party was entitled to select. . . . An error affecting the fundamental right of an unbiased proceeding goes to the integrity of the entire trial process.'" Just as in *Shane,* the trial that Cobb received may not be called fair and the jury impartial if the method of arriving at a qualified jury was not.

As the majority opinion states, RCr 11.42 permits collateral attacks upon verdicts based upon constitutional grounds. The right to the effective assistance of counsel has an effect on the ability of the accused to receive a fair trial. In this instance, the proper remedy is to reverse and remand and set aside the conviction.

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