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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001297-MR

LESLIE L. LAWSON — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 98-CR-00137

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND NICKELL, JUDGES.

COMBS, JUDGE: Leslie L. Lawson appeals from an order of the Laurel Circuit Court rejecting his collateral attack on a felony conviction. After our review, we vacate and remand.

In its decision on Lawson's direct appeal, the Supreme Court of Kentucky summarized the underlying facts as follows:

The charges [against Lawson and his co-defendant] stemmed from the investigation of a fire started in a home belonging to Robert Jenkins which substantially damaged one room of the home and caused smoke and water damage elsewhere in the residence. In the course of the investigation, Jenkins indicated to the investigating officer, Detective Riley of the Kentucky State Police, that he suspected Lawson and Brown as the culprits, and Detective Riley focused his investigation on Appellants. At trial, the Commonwealth relied upon circumstantial evidence suggesting Appellants unlawfully entered Robert Jenkins's home and started a fire. Appellants defended against the charges at trial by arguing that the Commonwealth failed to satisfy its burden of proof and suggesting that the fire could have started by accident because no witness nor any physical evidence placed them inside the Jenkins home.

Karen Jones and Barbara Flannelly, Appellants' former girlfriends, testified at trial for the Commonwealth that, while returning from a trip the two couples had taken to the lake, Lawson noticed Jenkins's truck and stated "There that SOB is. Let's get him while he ain't home." Other testimony established that Lawson did not like Jenkins and referred to him as a "rat." Jenkins had worked as a police informant, and had provided information in the past which resulted in Lawson's father's arrest. Flannelly, who had driven the couples back from the lake on the date of the fire, testified that Lawson instructed her to drop the men off in Jenkins's neighborhood around the curve from the Jenkins home, drive to the house and verify that Jenkins was not home, and then retrieve Appellants ten (10) to twenty (20) minutes later. The women testified that, just before they dropped off Appellants, Lawson suggested to Brown, "let's hoodoo that punk." According to Flannelly and Jones, the women then proceeded to Jenkins's house, where Jones rang the doorbell and no one answered, and they "revved" the car's engine to signal Appellants that the house was vacant. The women testified that, as they pulled out of Jenkins's driveway, they met up with Flannelly's uncle and decided to travel to a local fast food restaurant. Flannelly and Jones testified that, upon their

> return from the fast food trip, they heard firecrackers and saw smoke coming from the Jenkins home.
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> Lois Lyon, Jenkins's neighbor, testified that she saw an older model four-door grey Oldsmobile sitting in Jenkins's driveway for approximately fifteen minutes with Flannelly behind the wheel and that she saw Flannelly's uncle enter the vehicle. Lyon testified that shortly thereafter she heard firecrackers explode, noticed smoke coming from Jenkins's house, and called 911 to report a fire.
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> Detective Riley testified that he located the vehicle Lyon described at Appellant Brown's mother's home, and later discovered that car belonged to Barbara Flannelly.
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> Other witnesses testified that, after the date of the fire at the Jenkins home, Appellants possessed an air rifle and a leather case containing a wrench. Jenkins testified that these items belonged to him and that he had seen them in his home the morning of the fire.
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> An arson investigator testified to his opinion that the perpetrator intentionally used a lighter or match to ignite what he referred to as combustible material (newspapers, magazines, records, etc.) cluttering the floor of Jenkins's living room.

Lawson v. Commonwealth, 53 S.W.3d 534, 537-38 (Ky. 2001).

Lawson was convicted of second-degree arson and second-degree burglary and was found to be a first-degree persistent felony offender (PFO). The jury recommended that he serve consecutive terms of sixty (60) years for the PFO-enhanced second-degree arson conviction and twenty (20) years for the PFO-enhanced second-degree burglary conviction. The trial court entered judgment in accordance with the jury's recommendation and sentenced Lawson to serve a total

term of eighty-years' (80) imprisonment. The Supreme Court of Kentucky affirmed Lawson's conviction in a published opinion rendered May 24, 2001.

In August 2002, Lawson filed a motion to vacate the conviction pursuant to the provisions of Kentucky Rule[s] of Criminal Procedure (RCr) 11.42. Lawson claimed that he was entitled to relief from the judgment, alleging prejudice at his trial due to the failure of his counsel to object to the allocation of an inadequate number of peremptory challenges. The circuit court denied the motion without a hearing. The court reviewed the matter, and it was remanded to the trial court for a hearing to consider evidence related to Lawson's claim of ineffective assistance of counsel concerning the allocation of peremptory strikes.

The trial court conducted a hearing on October 7, 2010, and considered testimony offered by Lawson and his trial counsel. By order entered July 14, 2011, the Laurel Circuit Court denied Lawson's motion for relief. This appeal followed.

In reviewing Lawson's claim of ineffective assistance of counsel, we are governed by the two-pronged principle established by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Gall v. Commonwealth,* 702 S.W.2d 37 (Ky. 1985). Under *Strickland,* a petitioner must show that his counsel's performance was deficient; *i.e.,* "... that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2064. In addition, a petitioner must show that his counsel's deficient performance caused him to suffer prejudice; *i.e.,* ". . . that counsel's errors were so

serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* In order to be entitled to relief, the petitioner must make both showings.

When Lawson and his co-defendant were tried in 1999, the trial court allotted a total of nine peremptory strikes to the co-defendants. However, pursuant to the provisions of RCr 9.40, the co-defendants were entitled to exercise a total of eleven peremptory challenges. Lawson's counsel did not object to the error. Although an improper allocation of peremptory challenges may be grounds for an automatic reversal on direct appeal, the Supreme Court of Kentucky declined to review the issue in Lawson's matter-of-right appeal because it had not been properly preserved.

In the collateral proceeding, Lawson contends that counsel's failure to object to the trial court's allotment of peremptory challenges plainly prejudiced him and that, at a minimum, the trial court should have permitted him to interview jurors who participated in his trial. We agree that he was clearly prejudiced by the erroneous allotment of two peremptory challenges. Although the matter was not addressed by the Supreme Court on direct appeal for failure to preserve the issue, it is properly raised in this collateral attack under RCr 11.42.

The argument advanced by Lawson at the motion hearing was addressed by the Supreme Court of Kentucky in *Commonwealth v. Young,* 212 S.W.3d. 117 (Ky. 2006). In *Young,* our supreme court explained that the prejudice prong of *Strickland* requires a ***demonstrable*** prejudice flowing from counsel's failure to object to the court's allocation of peremptory challenges. Lawson contends that he

did indeed suffer a specific, identifiable prejudice as a result of counsel's error. Due to the improperly limited peremptory challenges, he argues that his counsel was unable to strike two offensive jurors who were later called to serve on the jury.

In his brief, Lawson contends that the body language of Juror #47 changed noticeably once she heard another juror state during *voir dire* that he had seen Lawson at the detention center. Lawson claims that this juror thereafter appeared to be biased in favor of the Commonwealth and should have been stricken. Lawson contends that Juror #44 and Juror #47 gathered together. Lawson argues that this change in body language and the gathering of these two jurors showed some prejudice or bias against him and that counsel's failure to challenge the jurors showed that counsel's performance was deficient (and, presumably, prejudicial).

Lawson's counsel could remember very little about the trial. However, she indicated that it was her practice to use all peremptory strikes. Counsel's notes from *voir dire* did not indicate which jurors she selected to strike or if there were any other jurors she would have stricken had she been allotted more strikes.

Following the evidentiary hearing, the trial court concluded that Lawson had not demonstrated that he suffered any identifiable prejudice as a result of receiving an incorrect number of peremptory challenges. The court specifically found that "Lawson's testimony is not viewed as credible in light of [other matters] in which the record has shown his testimony to be in contradiction." Order at 10. With respect to Juror 47, the court concluded that Lawson "has not shown any possible prejudice that might have resulted from her selection." *Id*. With respect to Juror

44, the court concluded that the jurors were sitting at opposite ends of the jury box during *voir dire* and that "[i]t was only after passing on the jury when the actual trial began that the two jurors are seen together in the record." *Id.* "Lawson has done no more than say he would have stricken two jurors and has demonstrated no prejudice." *Id.* at 12.

Critical to a proper analysis of this case is *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2008). *Shane* unequivocally dictates that the trial court was not at liberty to speculate as to what Lawson would have done – either to his benefit or to his detriment – with the peremptory challenges to which he was entitled.

In *Shane*, the trial court had failed to strike a prospective juror for cause, thus forcing the defendant/appellant to use one of his peremptory challenges. In holding that he should not have had to use the peremptory challenge to remedy the court's omission or error, the Supreme Court reasoned as follows:

> The issue is actually simple: Can a trial be called fair and the jury impartial if the method of arriving at the qualified jury is not?
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> * * * * * *
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> If 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. Here, the defendant was tried by a jury that was obtained by forcing him to forgo a different peremptory strike he was entitled to make. If he had been allowed that strike, he may well have struck one of the jurors who actually sat on the jury. He came into the trial expecting to be able to remove jurors that made him uncomfortable in any way except in violation of *Batson*

> *v. Kentucky*; this was a right given to him by law and rule. Depriving him of that right so taints the equity of the proceedings that ***no*** jury selected from that venire could result in a fair trial. No jury so obtained can be presumed to be a fair one.
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> An error affecting the fundamental right of an unbiased proceeding goes to the integrity of the entire trial process.

(Emphasis original.)

At issue in the case before us is the sacrosanct nature of the peremptory challenge. Although a challenge was not "used up" to correct a judicial error as in *Shane*, nonetheless the under-allocation of peremptory challenges (by two) equally impaired Lawson's right to select his jury. The reasoning of *Shane* is compellingly analogous and pertinent.

Counsel clearly erred in failing to object to the improper allotment of challenges and did so to the substantial detriment of Lawson. Thus, both of the *Strickland* prongs of deficient performance of counsel and consequent prejudice to the appellant have been established.

Therefore, having found that Lawson was entitled to relief pursuant to RCr 11.42, we vacate the order of the Laurel Circuit Court and remand this matter for additional proceedings consistent with this opinion.

ALL CONCUR.

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