STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYRELL VANQUIZ HARRISON,

APPELLANT

APPELLATE CASE NO. 2022-000866

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge improperly deny Appellant the use of a peremptory strike by removing a juror from the jury pool without informing anyone where Appellant's use of a peremptory strike against the juror would have been proper and defense counsel would have used a peremptory strike against another juror had defense counsel known the judge removed the juror from the pool?

STATEMENT OF THE CASE

On December 9, 2021, an Horry County grand jury indicted Appellant for murder. R. 441-442. On February 9, 2022, an Horry County grand jury indicted Appellant for attempted murder and possession of a weapon during the commission of a violent crime. R. 445-446; R. 449-450. The state, represented by Christopher Helms and Nancy Livesay, called the case to trial on June 13-16, 2022, before the Honorable Thomas W. Cooper. R. 1. Brana Williams represented Appellant. R. 1. Although defense counsel posed no objection, Judge Cooper failed to instruct the jury that attempted murder required a specific intent to kill as required by State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). The jury found Appellant guilty as charged. R. 423, ll. 12-24. Judge Cooper sentenced Appellant to five years imprisonment for the weapon, to thirty years imprisonment for attempted murder, and to forty-five years for murder. R. 434, l. 9 – R. 436, l. 10; R. 443-444; R. 447-448; R. 451-452. He ordered the sentences to be served concurrently. R. 434, l. 9 – R. 436, l. 10; R. 443-444; R. 447-448; R. 451-452.

On June 17, 2022, Appellant served his notice of appeal. This brief follows.

STANDARD OF REVIEW

Appellant is unaware of a case setting forth the standard of review for an appellate court to review a trial judge's improper denial of a peremptory challenge during jury selection. The current situation is most akin to an appellate court's consideration of a violation of Batson v. Kentucky, 476 U.S. 79 (1986) and its progeny. "In the typical appeal from the granting or denial of a Batson motion, the appellate courts give deference to the findings of the trial court and apply a clearly erroneous standard." State v. Cochran, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct. App. 2006). "This standard of review, however, is premised on the trial court following the mandated procedure for a Batson hearing." Id. "[W]here the assignment of error is the failure to follow the Batson hearing procedure, [the appellate court] must answer a question of law. When a question of law is presented, [the] standard of review is plenary." Id.

Likewise, "'[i]n criminal cases, the appellate court sits to review errors of law only.'" State v. Inman, 409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). "A court is bound by the trial court's factual findings unless they are clearly erroneous." Id. (internal quotation omitted). "On review, [the appellate c]ourt is limited to determining whether the trial court abused its discretion." State v. Edwards, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). "[The c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." Id.

Thus, it appears the issue presented here – whether the trial judge improperly denied Appellant the use of a peremptory strike by removing a juror from the pool without informing anyone – is likely to be reviewed under an abuse of discretion standard.

ARGUMENT

The trial judge improperly denied Appellant the use of a peremptory strike by removing a juror from the jury pool without informing anyone where Appellant's use of a peremptory strike against the juror would have been proper and defense counsel would have used a peremptory strike against another juror had defense counsel known the judge removed the juror from the pool.

Relevant facts

During jury voir dire, Jason Freer, juror #134, responded to numerous questions posed by the trial judge. Freer had been the captain at the Horry County Police Department until his retirement "about a year" before Petitioner's trial. R. 13, ll. 15-17. Specifically, he retired on April 1, 2021. R. 38, ll. 19-21. Therefore, he was very familiar with the officers involved in the case. R. 13, ll. 2-17; R. 15, ll. 2-15; R. 16, ll. 4-21; R. 17, ll. 2-18; R. 18, ll. 4-12. He claimed he had not "talked to them [in] over a year," but the officers worked for him at the time of shooting. R. 13, ll. 18-22. Freer was with the Horry County Police Department for twenty-two years, and had been in law enforcement for over thirty years. R. 38, l. 24 – R. 39, l. 3. Also Freer had worked with one of the prosecutors involved in this case. R. 38, ll. 1-12.

Nevertheless, Freer said he could be "fair and impartial as a juror in the trial of this case." R. 15, ll. 16-22; R. 18, ll. 10-13; R. 39, ll. 4-7. He "[a]bsolutely" could and would "set aside that association and decide this case based on the evidence that [he] would hear without regard to that association." R. 15, l. 23 – R. 16, l. 3; R. 17, ll. 18-23; R. 39, ll. 8-10.

During jury selection, defense counsel used nine of her ten strikes. R. 46, l. 10. When she had only one strike left, she held on to the strike and seated a juror who worked for the Transportation Security Administration as a Transportation Security Officer. R. 46, ll. 21-22; R.

49, ll. 11-16. After jury selection, defense counsel argued that Freer "should have been excused as a potential member especially in this case because this was an active ongoing matter while he was active at the police department." R. 49, ll. 1-11. Defense counsel explained that she did not use her last strike because she feared Freer would be selected. R. 49, ll. 1-16. She argued "he should have been stricken for cause." R. 49, l. 16.

The judge lamented that he "would like to have been able to deal with that before." R. 49, ll. 17-18. He noted that he was not sure that a motion to strike for cause, if it had occurred during the voir dire process, "would have been successful in any event." R. 49, ll. 22-24. The judge then noted that he inquired fully of Freer every time he stood up. R. 50, ll. 1-2. According to the judge, "nothing that he said during that entire period of time, would have been grounds for [the judge] to disqualify him." R. 50, ll. 4-7. The judge then intimated that he believed the cumulative effect of Freer knowing the witnesses who were going to testify and his involvement in law enforcement for all those years would taint the process if the judge allowed Freer "to continue as a potential juror." R. 50, ll. 7-17. Therefore, the judge "took him out" "not anticipating the fact that that was going to give rise to a dilemma on [defense counsel's] part." R. 50, ll. 15-17. The judge believed he was "removing a dilemma" for defense counsel by "at least taking him out of the mix for whatever reason." R. 50, ll. 17-20. The judge concluded that there was no "harm here" and defense counsel's request occurred "too late for [him] to do a whole lot with it in any event." R. 51, ll. 5-8.

Discussion

"Competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at trial." Batson v. Kentucky, 476 U.S. 79, 86 (1986). In Batson, the Court addressed the use of race to exercise a

peremptory strike in light of the Equal Protection Clause of the Constitution. Considering the use of race as a reason to remove a juror, the Supreme Court held "by denying a person participation in jury service on account of his race, the state unconstitutionally discriminate[s] against the excluded juror." Id. at 87. "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." Id. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." Id. Thus, not only does a defendant have a right to have a jury of his peers, but citizens have a right to serve on juries.

Here, the judge's removal of Juror Freer from the jury pool without informing defense counsel of the removal essentially denied Appellant's right to exercise his peremptory strikes. As defense counsel explained, she withheld exercising one peremptory strike in case she needed to use it for Juror Freer. However, this hoarding of a strike was unnecessary in light of the judge's actions, which were not communicated to defense counsel. In essence, the judge denied Appellant the right to a peremptory challenge.

"The principal function of the peremptory strike is to allow for the removal of a juror in whom the challenging party perceives bias or prejudice, even where the juror is not challengeable for cause." State v. Short, 327 S.C. 329, 335, 489 S.E.2d 209, 212 (Ct. App. 1997), aff'd as modified by State v. Short, 333 S.C. 473, 477-478, 511 S.E.2d 358, 360 (1999). "Indeed, while challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable." Id. at 336, 489 S.E.2d at 212 (internal quotation omitted). Where a judge denies a party the right to exercise a peremptory challenge, no showing of actual prejudice is required. State v. Short, 333 S.C. 473, 477-478, 511 S.E.2d

358, 360 (1999). The Court explained that "no showing of actual prejudice is required to find reversible error for the denial or impairment of the right to a peremptory challenge." Id. See also State v. Anderson, 276 S.C. 578, 578-579, 281 S.E.2d 111, 112 (1981) (finding reversible error where a judge limited a defendant to five peremptory challenges to prospective jurors where the statute provided for ten).

There is no doubt Appellant could have exercised a peremptory challenge against Juror Freer due to his prior employment as a law enforcement officer with the agency that investigated and prosecuted Appellant and his relationship with law enforcement officials, including those who testified at trial. See State v. Ford, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) ("Also, it is legitimate to strike a potential juror because she or he has a relationship with a law enforcement official or because she or he is pro-law enforcement."). Furthermore, there is no doubt Appellant could have exercised a peremptory strike against Juror #286, Pier Petriccione, for the same reason – he was a member of law enforcement. See id. However, Appellant was denied the use of exercising a peremptory strike against Juror Petriccione because the judge failed to inform defense counsel that Juror Freer had been removed from the jury pool. Defense counsel feared having Juror Freer on the jury in light of his past employment with the Horry County Police Department, the very agency that investigated and prosecuted Appellant. Defense counsel feared having Juror Freer on the jury in light of his past employment with the Horry County Police Department occurring while that agency investigated and prosecuted Appellant and ended only shortly before Appellant's trial. Defense counsel feared having Juror Freer on the jury in light of his close and personal relationships with many witnesses who testified against Appellant. Defense counsel's decision to save her last peremptory challenge for Juror Freer was a wise

decision based on what she knew at the time; however, it proved to be a foolish decision when she learned – after the jury had been selected – the judge had removed Juror Freer from the pool.

By removing Juror Freer from the jury pool *without informing anyone*, the trial judge denied Appellant the opportunity to exercise his peremptory strike against Juror Petriccione. Defense counsel rightly saved her last peremptory strike to use if Juror Freer were called. In doing so, she did not strike Juror Petriccione, a juror whom she said she would have struck if she had known Juror Freer was not in the jury pool. The judge improperly denied Appellant the use of his statutory peremptory strikes.

CONCLUSION

Appellant respectfully requests this Court reverse the trial judge and order a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of March, 2023.

RECEIVED
Mar 08 2023
SC Court of Appeals

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyrell Vanquiz Harrison states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and she was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before Judge Thomas W. Cooper, which was held on June 13-16, 2022, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

Wherefore, she asks the Court to relieve her as counsel for Tyrell Vanquiz Harrison.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of March, 2023.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Trial transcript;
(2) Jury strike sheet;
(3) True-billed indictments; and
(4) Sentence sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

Susan B. Hackett

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ATTORNEY FOR APPELLANT

This 8th day of March, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Tyrell Vanquiz Harrison, #388185, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 8th day of March, 2023.

Susan B. Hackett

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