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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2023-000371

THE STATE,

Respondent,

vs.

TERRIO JACQUARD THOMAS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

"Whether the trial court erred overruling Appellant's objection to the composition of the jury where appellant argued the jury was not a fair and accurate cross section of the community under Duren v. Missouri, 439 U.S. 357 (1979)?"

COUNTER-STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by declining to quash the jury in Appellant's case when Appellant failed to meet his burden of establishing Beaufort County's jury selection process was systematically excluding black jurors such that they were being unfairly underrepresented on jury panels from which juries were selected?

STATEMENT OF THE CASE

In March of 2021, Appellant Terrio Jacquard Thomas was arrested after various illegal drugs were discovered inside a vehicle during a traffic stop.[1] On November 4, 2021, the Beaufort County Grand Jury indicted Appellant for trafficking in methamphetamine, possession of cocaine, and possession of marijuana. Four days later, Appellant's case was called to trial before a jury in the Beaufort County Court of General Sessions with the Honorable Carmen T. Mullen, circuit court judge, presiding. However, Appellant was not present at that time, and the trial proceeded forward in his absence. At the conclusion of the two-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge sentenced Appellant for his offenses and sealed the sentences. Subsequently, Appellant was apprehended, and, on February 22, 2023, a sentencing hearing was conducted in the Beaufort County Court of General Sessions with the Honorable D. Craig Brown, circuit court judge, presiding. During the hearing, the sentencing judge unsealed Appellant's sentence and imposed concurrent terms of imprisonment of eight years for trafficking in methamphetamine, three years for possession of cocaine, and one year for possession of marijuana.[2] Appellant then timely filed a notice of appeal.

[1] At the time of the traffic stop, Appellant was free on bond after having earlier been arrested for a number of offenses committed in 2019. (Tr. II p. 48).

[2] After his sentences for his 2021 convictions were unsealed, Appellant entered guilty pleas to a variety of charges from 2019, including possession of marijuana, driving under suspension, and failure to stop for a blue light. (Tr. III pp. 5-6; pp. 10-12). Ultimately, the sentencing judge accepted Appellant's guilty pleas, sentenced Appellant to an aggregate twenty-nine-day term of imprisonment for his 2019 offenses, and awarded Appellant with credit for twenty-nine days of time served. (Tr. III p. 14).

STATEMENT OF FACTS

On the night of March 18, 2021, Deputy John Miles of the Beaufort County Sheriff's Office was on patrol when he observed a Kia Sportage driving along the roadway. (Tr. II pp. 67-68). After spotting the vehicle, Deputy Miles decided to check its license plate information, and, upon doing so, he discovered the plate was supposed to be attached to a Hyundai Elantra, which was an entirely different make and model of vehicle from the one to which the plate was then affixed.[3] (Tr. II pp. 67-68). As a result of that discovery, Deputy Miles activated his patrol vehicle's blue lights—and then siren—to initiate a traffic stop. (Tr. II p. 68).

Eventually, the driver of the Kia Sportage pulled over and stopped in response to the deputy's signals. (Tr. II pp. 68-69). Almost immediately after that, the vehicle's driver—Appellant—suddenly sprang out, began approaching Deputy Miles on foot, and thrust his hands into the air. (Tr. II p. 69). Due to that unusual behavior, Deputy Miles swiftly handcuffed Appellant, and, as he did so, he detected a strong odor of marijuana emanating from Appellant's body. (Tr. II pp. 69-70). Shortly after that, Deputy Miles detected a similar odor of marijuana emanating from the vehicle, and he also saw an open bottle of beer inside it.[4] (Tr. II p. 70). Based on that, he decided to conduct a search of the vehicle for contraband. (Tr. II pp. 70-71).

During the ensuing probable-cause-based search, Deputy Miles located what appeared to be a variety of illegal narcotics along with a digital scale and some plastic baggies.[5] (Tr. II pp. 71-72; p. 87). Appellant—who proceeded to make a number of incriminating admissions about

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[3] Although not revealed to the jury during trial, Deputy Miles apparently decided to check the vehicle's license plate information because it was observed leaving an area known for drug activity. (Tr. II p. 16).

[4] The vehicle was registered in Appellant's girlfriend's name. (Tr. II p. 72).

[5] In addition to that, Deputy Miles also discovered Appellant's driver's license was suspended at that time. (Tr. II p. 72).

what had been found—was arrested at the scene, and subsequent testing confirmed the substances located inside the vehicle constituted: (1) 32.43 grams of methamphetamine in tablet form; (2) 11.97 grams of methamphetamine in powder form; (3) 0.68 grams of cocaine; (4) 14.83 grams of marijuana; and (5) a powder mixture containing lidocaine and caffeine.[6] (Tr. II pp. 72-73; pp. 75-76; p. 80; p. 82).

Based on the results of the forensic testing, Appellant was indicted for trafficking in methamphetamine, possession of cocaine, and possession of marijuana, and his case proceeded forward to trial in his absence.[7] (Tr. I p. 46; Tr. II. p. 13; pp. 53-55; Indictments). Ultimately, at the conclusion of trial, the jury convicted Appellant as indicted after just under thirty minutes of deliberations. (Tr. II p. 175; p. 177).

[6] Regarding the lidocaine and caffeine mixture, Appellant advised Deputy Miles the vehicle contained a cutting agent along with the other substances. (Tr. II pp. 75-76).

[7] Before the trial proceeded forward in Appellant's absence, defense counsel confirmed Appellant was personally aware of his impending trial and had "all the information he need[ed] to make any decisions" about whether to appear for it, and the trial judge determined Appellant had knowingly and voluntarily waived his right to be present for trial. (Tr. II pp. 53-53).

ARGUMENT

The trial judge properly declined to quash the jury in Appellant's case because Appellant failed to meet his burden of establishing Beaufort County's jury selection process was systematically excluding black jurors such that they were being unfairly underrepresented on jury panels from which juries were selected.

Relevant Facts

Toward the beginning of Appellant's trial, the trial judge conducted the jury qualification and voir dire processes, and, through those standard processes, a number of individuals were excused or otherwise removed from the panel of summoned prospective jurors. (Tr. I pp. 4-43; pp. 47-79). Amongst those excused, 5 black prospective jurors were eliminated—1 due to vision problems, 1 due to caregiver responsibilities, 1 due to work issues, 1 for cause, and 1 due to a potential connection to a possible law enforcement witness. (Tr. I pp. 7-8; p. 22; p. 30; pp. 41-42; pp. 52-53; Juror Roll Call List, pp. 1-3). In addition to that, 20 white prospective jurors and 1 Asian prospective juror were eliminated for similar legitimate non-race-based reasons. (Tr. I pp. 5-6; pp. 13-20; pp. 25-29; pp. 32-37; pp. 49-50; p. 57; pp. 77-79; Juror Roll Call List, pp. 1-4). Following that, a petit jury of 12 jurors and 2 alternates was selected from the panel of prospective jurors. (Tr. I pp. 81-87).

After the jury was selected, defense counsel swiftly objected to the selection process, asserting he was "worried" the jury did not constitute a fair and accurate cross-section of the community. (Tr. I p. 87). As support for that objection, defense counsel claimed only 6 of the 96 prospective jurors were black. (Tr. I p. 87). However, following further discussions on the matter with the solicitor and the trial judge, everyone appeared to agree: (1) 14 black prospective jurors in total appeared in response to the jury summonses that were sent out; and (2) 11 of the 96 prospective jurors remaining after the qualification process had been completed were black.

(Tr. I p. 88; p. 96). The trial judge then took the matter under advisement to review and consider it overnight. (Tr. I pp. 97-98).

On the following morning, defense counsel—relying on the United States Supreme Court's decision in Duren v. Missouri, 439 U.S. 357 (1979)—continued his challenge to the composition of the jury panel. (Tr. II p. 4). And, as support for that challenge, defense counsel pointed to the fact the percentage of black prospective jurors remaining at the conclusion of the qualification process was approximately 11% while 17.9% of Beaufort County's total population was comprised of black residents. (Tr. II p. 4). Defense counsel also argued he believed there was a "better way" to select juries than the one followed but conceded he did not personally know of one. (Tr. II p. 7). Furthermore, defense counsel maintained juries in three separate Beaufort County cases in the preceding six months had purportedly been "thrown out" due to fair cross-section challenges, but he did not provide any supporting information regarding those earlier cases, including any information about the composition of the jury panels involved, the arguments presented for or against quashing the juries, the nature of the analyses conducted, or the specifics of the rulings made. (Tr. II p. 7).

In response to defense counsel's remarks, the solicitor noted Appellant bore the burden of demonstrating the jury selection process had been discriminatory in nature and contended he had failed to meet that burden. (Tr. II p. 8). Furthermore, the solicitor noted juries were regularly and routinely selected in Beaufort County without issue. (Tr. II pp. 8-9).

At that point, the trial judge conducted an in limine hearing on the matter and elicited testimony from Beaufort County Clerk of Court Jerri Ann Roseneau, who provided general details about the jury selection process in Beaufort County along with some details related to Appellant's case. (Tr. II pp. 9-11). Based on her testimony, a list of 425 names—along with 3

names transferred from an earlier term of court—of prospective jurors to be summoned was randomly drawn for Appellant's term of court by a computer program used statewide throughout South Carolina, and the master list of Beaufort County residents from which those names were drawn was generated from such sources as the list of registered voters in the county. (Tr. II pp. 9-11). Significantly, Roseneau further explained no particular group was excluded—systematically or otherwise—by the selection process that had been utilized. (Tr. II p. 10).

Following that testimony, defense counsel conceded nothing was being done by anyone "to purposely keep these people out." (Tr. II p. 11). Nevertheless, defense counsel maintained the "filter" in place was not letting enough people through "somehow." (Tr. II pp. 11-12).

Ultimately, after considering the arguments of counsel, the trial judge declined to quash the jury. (Tr. II p. 13). In so ruling, the trial judge concluded no "systematic problem" with the jury selection process had been shown in Appellant's case. (Tr. II p. 13). Furthermore, the trial judge noted she was comfortable the jury panel had been made up of a fair cross-section of the community in light of the fact only roughly 13%—as opposed to 17.9%—of the *voting age* population in Beaufort County was made up of black residents.[8] [9] (Tr. II p. 13; pp. 54-55).

[8] The trial judge's 13% figure was based on demographic data obtained from the South Carolina Revenue and Fiscal Affairs Office. (Court's Ex. # 2 (2020 Census Data Report)).

[9] Significantly, the trial judge's focus on the voting age population of Beaufort County as opposed to the county's population as a whole was both correct and reasonable in light of the fact a South Carolina citizen must—as a matter of law—be at least eighteen years old to serve on a jury. See S.C. Code Ann. § 14-7-130 (instructing the jury list for each county must be comprised of county residents who "are over the age of eighteen years" and either hold a valid driver's license or have a state-issued identification card or who are registered to vote); see also S.C. Const. art. II, § 4 ("Every citizen of the United States and of this State of the age of eighteen and upwards who is properly registered is entitled to vote as provided by law."); cf. United States v. Rioux, 97 F.3d 648, 657 (2d Cir. 1996) ("[T]he appropriate measure in this case [when addressing a fair cross-section challenge] is the eighteen and older subset of the population, regardless of other qualifications for jury service. Focusing on the eighteen and over population

Subsequent to that, nothing further was presented to support the challenge to the jury selection process, and the trial proceeded forward. (Tr. II p. 55). At the conclusion of trial, Appellant was convicted as indicted by the jury as selected. (Tr. II p. 177).

Standard of Review

In criminal cases, appellate courts sit to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). As a result, an appellate court is bound by the trial judge's factual findings—including those regarding whether systematic racial discrimination occurred in the jury selection process—unless they are clearly erroneous. State v. Ravenell, 387 S.C. 449, 454, 692 S.E.2d 554, 557 (Ct. App. 2010); see Patton v. Mississippi, 332 U.S. 463, 466 (1947) ("Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case."); Thomas v. Texas, 212 U.S. 278, 281 (1909) (explaining the matter of whether racial discrimination in the jury selection process occurred "was a question of fact"); cf. Hernandez v. New York, 500 U.S. 352, 367 (1991) ("Whether a prosecutor intended to discriminate on the basis of race in challenging potential jurors is . . . a question of historical fact.").

Analysis

In every criminal case tried in South Carolina, a defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). Significantly, that right "contemplates a jury drawn from a pool broadly representative of the community and impartial in a specific case." State v. Warren, 273 S.C. 159, 162, 255 S.E.2d 668, 669 (1979). Accordingly, it is constitutionally required for petit juries to "be drawn from a source fairly representative of the community[.]" Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

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is a fair and sensible methodology when considering the constitutionality of jury selection." (citation omitted)).

As a result of that requirement, "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Id. Importantly though, the fair cross-section requirement does *not* mean—and has never meant—petit juries must actually "reflect the composition of the community at large." Lockhart v. McCree, 476 U.S. 162, 173 (1986); see also Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) ("[T]his Court has held that a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.").

In order to establish a prima facie violation of the fair cross-section requirement, a defendant bears the burden of showing: (1) the group excluded is a "distinctive" group in the community; (2) the representation of the group in venire*s* from which jur*ies* are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation results from a systematic exclusion of the group in the jury selection process. Duren v. Missouri, 439 U.S. 357, 364 (1979); State v. Patterson, 324 S.C. 5, 21, 482 S.E.2d 760, 767-768 (1997). Significantly, for that burden to be met, the defendant "must offer strong and convincing evidence" in support of his challenge to the fairness of the jury selection process. State v. Hill, 394 S.C. 280, 288, 715 S.E.2d 368, 373 (Ct. App. 2011), overruled on other grounds by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016); cf. United States v. Lara, 181 F.3d 183, 192 (1st Cir. 1999) ("A showing of underrepresentation must be predicated on more than mere guesswork."). If—and only if—that burden is satisfied, the responsibility shifts to the State to show the attainment of a fair cross section in the jury selection process is incompatible with a significant state interest. Duren, 439 U.S. at 368.

In the case sub judice, Appellant contends the trial judge reversibly erred by failing to quash the jury in his case. As support for that contention, Appellant—while primarily relying on various statistical calculations—maintains the jury panel from which his petit jury was selected was constitutionally inadequate because black prospective jurors were purportedly unreasonably underrepresented due to the fact census data suggested 17.9% of Beaufort County's total population was made up of black residents with 13.8% of those residents being of voting age while approximately 11% of the prospective jurors on the jury panel were black. Appellant further maintains he demonstrated the underrepresentation of black prospective jurors occurring in Beaufort County was the result of systematic exclusion because it was purportedly "undisputed" jury panels had been found not to be representative of a fair and accurate cross-section of the community on three occasions in the six-month period preceding trial.

To the contrary and just as the trial judge accurately recognized, what was presented in Appellant's case was categorically not sufficient to demonstrate black jurors were being *systematically* excluded from the jury selection process in Beaufort County. Instead, the only testimony presented on the matter came from the Beaufort County Clerk of Court, who confirmed the routine selection process employed was—consistent with statewide practices—conducted randomly and electronically *without* any consideration whatsoever given to race from a list of prospective jurors that was undeniably representative of the community. See S.C. Code Ann. § 14-7-130 (instructing the jury list for each county must be comprised of county residents who either hold a valid driver's license, have a state-issued identification card, or are registered to vote); S.C. Code Ann. § 14-7-140 (sanctioning the use of a computer to randomly select available jurors for service); see also State v. Hyman, 276 S.C. 559, 564, 281 S.E.2d 209, 212 (1981) ("[V]oter registration lists are the most representative source of a community."),

overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). In light of that unrefuted evidence, the trial judge simply did not have any grounds upon which to conclude any systematic exclusion of black jurors was—or had been proven to be—occurring in Beaufort County's jury selection process. Cf. State v. Stallings, 253 S.C. 451, 456, 171 S.E.2d 588, 590 (1969) (concluding Stallings failed to meet his burden of proving racial discrimination in the jury selection process because the testimony presented "affirmatively show[ed] that there ha[d] been no discrimination by race in the selection of juries in Charleston County"); Moorer v. State, 244 S.C. 102, 108, 135 S.E.2d 713, 716 (1964) (concluding Moorer did not meet his burden of showing systematic exclusion of black jurors because "[t]he testimony of all the witnesses rather than sustaining [Moorer]'s allegations, affirmatively show[ed] there ha[d] been no discrimination by race in the selection of juries in Dorchester County").

Meanwhile, in attempting to support his claim of discrimination in the jury selection process, defense counsel did *not* present any testimony—expert or otherwise—identifying any particular aspect or feature of the selection process employed that was racially discriminatory in nature or result. See State v. Mong, 988 N.W.2d 305, 311 (Iowa 2023) ("To prove systematic exclusion, Mong was required to produce evidence that any alleged underrepresentation resulted from a particular feature (or features) of the jury selection system. Proof that underrepresentation resulted from a particular feature or features of the jury selection system will almost always require expert testimony to (1) identity the precise point of the juror summoning and qualification process in which members of distinctive groups were excluded from the jury pool and (2) offer a plausible explanation of how the operation of the jury system resulted in their exclusion." (citations and internal quotations omitted)); cf. Obregon v. United States, 423 A.2d 200, 206 (D.C. 1980) ("Citing to Duren, appellant argues that, by merely showing that a

high comparative disparity existed over a long period of time and that the underrepresentation probably did not happen by chance, he proved that the exclusion was systematic. We do not read Duren, so broadly as to hold that a statistical showing alone, without some analysis of the particular system involved, is sufficient to prove systematic exclusion." (footnote omitted)). Instead, defense counsel—despite being presented with an opportunity to present more—rested on the fact the specific jury panel from which the petit juror was selected contained a slightly lower percentage of black prospective jurors than the percentage of black residents that lived in the community coupled with the fact several earlier juror panels had purportedly been quashed in Beaufort County based on fair cross-section claims. See People v. Burgener, 62 P.3d 1, 20 (Cal. 2003) ("A defendant does not discharge the burden of demonstrating that the underrepresentation was due to systematic exclusion merely by offering statistical evidence of a disparity. A defendant must show, in addition, that the disparity is the result of *an improper feature* of the jury selection process." (emphasis added)); cf. Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir. 1998) ("To allow Truesdale to substitute evidence of substantial underrepresentation for evidence of systematic exclusion would go a long way towards requiring perfect statistical correspondence between racial percentages in the venire and those in the community. Such a rule would exalt racial proportionality over neutral jury selection procedure.").

Critically though, such information standing alone was insufficient as a matter of law to satisfy Appellant's burden of demonstrating black jurors were being *systematically* excluded from the jury selection process in Beaufort County. See Akins v. Texas, 325 U.S. 398, 403-404 (1945) ("Purposeful discrimination is *not* sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. . . . The mere fact of inequality in the number selected does not in itself show discrimination."

(emphasis added)); see also Taylor, 419 U.S. at 538 (emphasizing no requirement exists for petit juries to "mirror the community and reflect the various distinctive groups in the population"); cf. Mong, 988 N.W.2d at 312 ("Even on appeal, Mong does not identify the precise feature or features in the jury-selection process that allegedly resulted in systematic exclusion. Instead, he argues the alleged disparity between African-Americans in the jury pool and general population is sufficient, in and of itself, to establish systematic exclusion. We disagree. Mong's failure to present evidence defeats his fair-cross-section claim."); Patterson, 342 S.C. at 21, 482 S.E.2d at 768 (concluding Patterson failed to meet his burden of showing a system of exclusion when the record did not reveal *why* any black jurors were excluded in his case even though Patterson did establish black prospective jurors were underrepresented on the jury panel by several percentage points). And, defense counsel's vague and unspecific allegations about earlier jury panels that had supposedly been quashed in response to fair cross-section challenges were likewise insufficient to meet his burden and fell far short of the type of evidence that has previously been recognized as being sufficient to satisfy that burden, which was particularly true given that defense counsel did not present anything demonstrating the earlier Beaufort County jury panels that were allegedly quashed were, in fact, *correctly* quashed based upon a properly-conducted analysis. Cf. Duren, 439 U.S. at 366 (concluding Duren demonstrated systematic exclusion of female jurors by demonstrating the underrepresentation occurred "not just occasionally but in every weekly venire for a period of nearly a year"); State v. Waitus, 224 S.C. 12, 21-22, 77 S.E.2d 256, 260-261 (1953) (concluding both the petit jury and indictment should have been quashed because the unrebutted evidence presented demonstrated no black jurors were seated on a grand or petit jury in Marion County for a period of at least *twelve years* and no black jurors were seated on a Georgetown County grand jury for a period of at least *five years*).

Accordingly, just as the trial judge correctly concluded, Appellant failed to meet his burden of demonstrating the jury selection process in Beaufort County was racially discriminatory or otherwise constitutionally flawed, and the only evidence actually presented during trial showed the exact opposite was true. See Moorer, 244 S.C. at 110, 135 S.E.2d at 716 ("Discrimination in the selection of a jury must be proved; it cannot be presumed."); cf. State v. George, 331 S.C. 342, 349-350, 503 S.E.2d 168, 172-173 (1998) (concluding any prima facie showing of systematic exclusion in the jury selection that could have theoretically existed was rebutted by evidence and testimony showing Horry County "use[d] race neutral selection criteria and procedures" and a system that "attempts to make the selection process as neutral and random as possible"); Waitus, 224 S.C. at 20, 77 S.E.2d at 259 (explaining the mere absence of black jurors from a particular petit jury "is insufficient, in and of itself, to show discrimination against the defendant in the selection of the jury"). Therefore, the trial judge committed no error by declining to quash the jury in Appellant's case, and there is no legitimate basis upon which that sound ruling could properly be disturbed on appeal. See State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974) ("The burden is upon one challenging the [jury] array, as the moving party, to introduce or offer strong and convincing evidence in support of his motion, and the failure to prove such contentions is fatal."). Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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