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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

THE STATE,

RESPONDENT,

V.

TERRIO JACQUARD THOMAS,

APPELLANT

APPELLATE CASE NO. 2023-000371

FINAL BRIEF OF APPELLANT

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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)?

STATEMENT OF THE CASE

On November 4, 2021, a Beaufort County grand jury indicted petitioner for possession of cocaine, trafficking methamphetamine, and simple possession of marijuana. R. 283. Appellant was tried *in absentia* on November 8, 2021, before the Honorable Carmen T. Mullen and a jury. R. 1. Seth Paulk represented appellant and Mary Lempesis, assistant solicitor, represented the state. R. 1. On November 9, 2021, the jury found appellant guilty as indicted. R. 244, ll. 8-15.

The Honorable D. Craig Brown unsealed appellant's sentence on February 22, 2023. Judge Mullen sentenced appellant to concurrent terms of eight years' imprisonment for trafficking methamphetamine, three years' imprisonment for possession of cocaine, and one year imprisonment for simple possession of marijuana. R. 258, ll. 5-21.

This appeal follows.

STANDARD OF REVIEW

“In 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, this Court 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). “This Court 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.*

ARGUMENT

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).

Relevant facts

According to the roll call list there were present: 97 white jurors, 14 black jurors, 1 Asian juror present, 4 Hispanic jurors, and 1 juror listed with no race denoted. R. 274. During jury selection the state struck: juror 303, white male and juror 275, white female. The defense struck: juror 354, white male, juror 69, white female, juror 207, white female, juror 396, white female, juror 156, white male, and juror 275, white female. The selected jury included: 11 white individuals, 1 black female, and the alternates were both white. R. 278.

At the conclusion of jury selection defense counsel objected stating, "I'm worried this jury is not a fair and accurate cross section of the community." R. 87, ll. 21-23. Defense counsel went on to state that at jury qualification there were only six black persons out of ninety-six potential jurors, which was 7.3 percent. R. 87, ll. 23-25. However, after some discussion it was decided there were 14 black persons out of 96 total potential jurors qualified. R. 88, ll. 3-14.

Defense counsel argued that under *Duren v. Missouri*, appellant's jury was not a fair and accurate cross section of the community where: black individuals were the distinctive group, and the representation of black persons was not fair and reasonable in relation to the number of black persons in Beaufort County. R. 101, ll. 2-16. Counsel went on to say that according to the most recent census the black population in Beaufort County was 17.9 percent and the makeup of the qualified jury pool was only 11 percent a 7 percent absolute disparity. R. 101, ll. 16-22. Counsel explained the comparative disparity was 38.8 percent, which meant that the amount of

black persons that showed up and were qualified for jury duty was 38 percent less than what would be expected based on the percentage of black persons in Beaufort County. R. 101, l. 23-102, l. 8.

The court asked defense counsel whether having a “felony record” was significant in this county and in this case. R. 102, l. 9-103, l. 7. Counsel did not have those statistics. R. 103, ll. 8-18. Defense counsel pointed out that within the last 6 months there were 3 cases in Beaufort were “thrown out” because the jury pool was not a fair and accurate cross section of the community. Counsel added this fact supported their contention that exclusion of black persons was a systematic problem in Beaufort County. R. 104, ll. 14-21.

The solicitor argued defense had not met the burden of proving the discrimination was “purposeful” under *State v. Ravenell*, 387 S.C. 449, 692 S.E.2d 554 (Ct. App. 2010). R. 105, ll. 1-9. They also argued that there had been trial in Beaufort during the last two months without “issues” which they asserted went toward showing that the exclusion of black persons as potential jurors was not a systematic problem in Beaufort County. R. 105, ll. 17-25.

The Beaufort County clerk of court testified to the procedures for calling jury pools. R. 106-108. They testified that every January the clerk’s office is provided with a list of individuals that is uploaded by court administration statewide by county. The clerk stated that the lists are generated by voter’s registration. R. 106-107. The clerk maintained to their knowledge there were no systematic, or any type of, exclusions of any particular group. R. 107, ll. 8-11.

Defense counsel asserted the exclusion of a particular group does not have to be intentional under *Duren*. They contended that it “merely has to be an inherent result of the jury selection process.” R. 108, ll. 10-15.

The court overruled defense counsel’s objection to the composition of the jury stating that there was not a systematic problem in this case. R. 110, ll. 13-19. Later, the court clarified that according to the 2020 census black persons made up 13 percent of Beaufort county not 17 percent. The court continued that the statistics and do not show who of the 13 percent are eligible for jury service stating “I think we’re more comfortable as having an adequate cross section of the community.” R. 121, l. 24-122, ll. 8.

Discussion

The trial court erred in overruling appellant’s objection to the composition of the jury where it did not represent a fair and accurate cross section of the community in Beaufort County.

“Whether there has been systematic racial discrimination by the jury commissioners in the selection of jurors is a question to be determined from the facts in each particular case.” *State v. Stallings*, 253 S.C. 451, 454, 171 S.E.2d 588, 590 (1969). “Discrimination in the selection of a jury must be proved and it cannot be presumed.” *Id.* The individual attacking their conviction on the ground that the state systematically excluded members of their race from the jury that convicted him has the burden of proving the existence of purposeful discrimination. *See State v. Ravenell*, 387 S.C. 449, 459, 692 S.E.2d 554, 559–60 (Ct. App. 2010); *Id.* at 454–55, 171 S.E.2d at 590.

In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show that 1) the group excluded is a “distinctive” group in the community; 2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) this underrepresentation is due to a systematic exclusion of the group in the jury selection process. *See Duren v. Missouri*, 439 U.S. 357 (1979); *State v. Patterson*, 324 S.C. 5, 21, 482 S.E.2d 760, 767–68 (1997); *State v.*

Ravenell, 387 S.C. 449, 459, 692 S.E.2d 554, 559–60 (Ct. App. 2010).

Appellant showed that the group excluded, black persons, was a distinctive group in the community. Second, appellant demonstrated the representation of black persons in the venire from which appellant's jury was selected was not fair and reasonable in relation to the number of black persons in the community. Both the roll call list and the transcript reflect 14 black persons were present. R. 274; R. 88, ll. 3-18. Defense counsel contended the most recent census in Beaufort County showed the black population was 17.9 percent. He stated that there was 11 percent in the jury pool for this case which resulted in a 7 percent absolute disparity and a 38.8 percent comparative disparity. Later the court disputed those numbers and entered the 2020 census as court's exhibit 2. The 2020 census reflected a total number of persons of voting age in Beaufort County as 151,768 and of that population there were 20,942 black persons 13.8 percent. R. 268. That results in 2.8 percent absolute disparity and 20 percent comparative disparity.

Additionally, the court seemed focused on whether the percentages accurately depicted persons that were qualified to serve as jurors specifically whether a person had a felony conviction. Defense counsel correctly pointed out that because the pool relied on information from the department of motor vehicles and voter registration it would not count individuals that cannot vote due to felony conviction.

Lastly, appellant demonstrated that the underrepresentation was due to a systematic exclusion of black persons during jury selection where it is undisputed in the record that there were three times in the six months prior to appellant's trial where the jury pool had been found not to be a fair and accurate cross section of the community.

CONCLUSION

Based on the foregoing arguments appellant's convictions should be reversed, and the case remanded to Beaufort County Court of General Sessions for a new trial.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of August, 2024.

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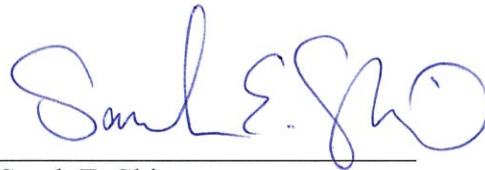
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APPELLANT

APPELLATE CASE NO. 2023-000371

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Mark R. Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 2nd day of August, 2024.



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From: [Mcinnis, Sara](#)
To: [Mark Farthing](#)
Cc: ccollins@scag.gov; [Shipe, Sarah](#)
Subject: 2023-000371 The State v. Terrio J. Thomas Final Brief of Appellant
Date: Friday, August 2, 2024 9:13:00 AM
Attachments: [2023-000371 The State v. Terrio Jacquard Thomas Final Brief of Appellant.pdf](#)

Good Morning Mr. Farthing,

Please find attached for service in the above-referenced case the Final Brief of Appellant, which will be filed with the Court of Appeals today, August 2, 2024, via email filing.

Thank you!

Sara McInnis

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