

COMMONWEALTH V. WILLIAMS, C.P. Franklin County
Branch, Criminal Action NO. 124 of 1991.

Action seeking post conviction relief asserting ineffective assistance of counsel for (1) failing to call a witness to testify for identification purposes; (2) failing to raise the issue that evidence used during the alleged transaction was not marked or recovered by the police; and (3) failing to object to the Commonwealth's use of peremptory challenges to exclude African-Americans during the venire.

1. Section 9543 of the Post Conviction Relief Act provides that a person must plead and prove by a preponderance of the evidence that their conviction of a crime under the laws of Pennsylvania resulted from ineffectiveness of counsel which, in the circumstances of the particular case, so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place.
2. In order to find ineffectiveness of counsel, there must be an arguable basis on which to base the claim, counsel's conduct could not have reasonably been designed to protect defendant's interests, and defendant must have been actually prejudiced by counsel's conduct.
3. Counsel took adequate measures to locate and secure defendant's identification witness by securing that witness' address upon his release, sending that witness a letter certified mail, serving the witness by subpoena, contacting the witness by telephone to inform him of the date of trial, and finally requesting a continuance when that witness failed to appear for trial.
4. As defendant was arrested approximately four months after the alleged transaction occurred, defense counsel's argument that he felt that it would have been fruitless to raise an objection concerning the Commonwealth's failure to mark and recover from the defendant the money used during the alleged transaction was reasonable.
5. Defendant has the burden of making out a prima facie case that the prosecutor has used his peremptory challenges to eliminate members of a particular minority class in violation of the Equal Protection Clause.
6. In order to make a prima facie showing of racial discrimination, defendant must be a member of a racial group; opposing counsel must exercise his peremptories to exclude those members of defendant's race; and defendant must show that taking all the facts and surrounding circumstances, an inference is raised that opposing counsel has used his peremptory challenges to exclude those potential jurors due to their racial background.
7. A single improper exclusion of a potential juror would be sufficient to find that the Equal Protection Clause has been violated.

8. A mere disparity in numbers is insufficient to raise an inference of discriminatory use of peremptories.

9. A defendant who has an arguable claim for improper exclusion of potential jurors based on a violation of the Equal Protection Clause and whose counsel fails to object to the striking of those jurors through the use of peremptory challenges due to his mistaken belief that they could be used to strike anyone for any reason was never given the opportunity to challenge the striking of those potential jurors who were members of his racial class.

10. It is unlikely that defense counsel's conduct was reasonably designed to protect defendant's interests when counsel was unaware that use of peremptory challenges to remove jurors of defendant's racial class could be improper.

11. Defendant must show that counsel's conduct so affected the trial itself ("the truth-determining process") that the result of the trial is inherently unreliable.

12. If the Commonwealth improperly used its peremptory challenges to remove the potential jurors in question, not only were defendant's rights infringed upon, but also the rights of those potential jurors.

13. When there is the possibility that a case has been tainted by a party's use of peremptory challenges, the opposing party has been prejudiced by that conduct and the trial is "inherently unreliable".

T.R. Williams, Assistant District Attorney, Attorney for the Commonwealth

Shawn D. Meyers, Esquire, Attorney for Defendant

OPINION AND ORDER

Walker, P.J., October 14, 1994:

FINDINGS OF FACT

This case is before this court pursuant to the Post Conviction Relief Act (42 Pa.C.S.A. Section 9541 et seq.) Defendant has raised several issues for review. These issues include:

1. Whether trial counsel was ineffective for failing to call a witness to testify that another person, resembling the defendant was located at the scene where the events took place for which the defendant was convicted?

2. Whether trial counsel was ineffective for failing to raise the issue that the money which was used during the alleged

transaction was not marked or not recovered by the police officers?

3. Whether trial counsel was ineffective for failing to object to the Commonwealth's use of peremptory challenges to exclude African-Americans during the venire?

DISCUSSION

Section 9543 of the Post Conviction Relief Act provides in pertinent parts that a person must plead and prove by a preponderance of the evidence that their conviction of a crime under the laws of Pennsylvania resulted from "[i]neffectiveness of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place."

In order to find ineffectiveness of counsel, there must be an arguable basis on which to base the claim, counsel's conduct could not have reasonably been designed to protect defendant's interests, and defendant must have been actually prejudiced by counsel's conduct. *Commonwealth v. Davis*, 518 Pa. 77, 541 A.2d 315 (1980), *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987). *Commonwealth v. Jones*, 386 Pa. Super. 467, 563 A.2d 161 (1989), affirmed 529 Pa. 149, 602 A.2d 820 (1992), *Commonwealth v. Jermyn*, 533 Pa. 194, 620 A.2d 1128 (1993).

Defendant claims that counsel was ineffective because he failed to call a witness who had observed another individual resembling the defendant at the scene. It is apparent to this court that defense counsel took adequate measures to secure this witness's appearance at trial. Defense counsel interviewed the witness while incarcerated, and secured his new address upon release. Counsel sent a letter to the witness at his new address but received no reply. Counsel then sent a letter by certified mail which was returned undelivered. An attempt to serve this witness by subpoena was made and was served upon the witness's mother. Subsequent to this subpoena, defense counsel

was able to contact the witness by telephone at which time he was informed of the trial date. The witness failed to appear and counsel requested a continuance in order to allow him to locate the witness. The request for continuance was denied. This court feels that defense counsel took adequate measures to locate the witness and secure his appearance at trial. Consequently this court fails to find an arguable basis on which to find defense counsel ineffective in regards to this particular claim.

Defendant further claims that defense counsel was ineffective for failing to raise the issue of the Commonwealth's failure to mark and recover from the defendant the money used during the events which occurred. The events on which defendant was arrested in this case occurred approximately four months before defendant was actually arrested. Defense counsel testified that he felt that it would have been fruitless to raise such an objection considering the length of time which had lapsed between the transaction and the arrest. Defendant had the opportunity to dispose of the money during that time; in fact, it seems very likely that in that expanse of time defendant did dispose of that money. Consequently, this court feels that defendant's argument for ineffective counsel on this claim has no merit.

Defendant claims that because his attorney failed to object to the Commonwealth's exercise of peremptory challenges to remove two juror's who were of the same minority race as the defendant, counsel was ineffective. The only African-Americans in defendant's jury pool were selected during venire. However, both were struck by the Commonwealth through the use of peremptory challenges. Defense counsel failed to make any objections to the striking of either potential juror noting that he believed that peremptory challenges could be used to strike anyone for any reason. Such is not the case with members of minorities when the defendant is also a member of that same minority.

The defendant has the burden of making out a prima facie case that the prosecutor has used his peremptory challenges to eliminate the members of the particular minority class in violation of the Equal Protection Clause. *Commonwealth v. Dinwiddie*, 529 Pa. 66, 601 A.2d 1216 (1992). In order to make a prima facie showing of racial discrimination, defendant must be a member of a racial group; opposing counsel must exercise his peremptories to exclude those members of defendant's race; and defendant must show that taking all the facts and surrounding circumstances, an inference is raised that opposing counsel has used his peremptory challenges to exclude those potential jurors due to their racial background. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), *Dinwiddie* at 71.

A single improper exclusion of a potential juror would be sufficient to find that the Equal Protection Clause has been violated. *Dinwiddie* at 72 n. 10. However, a "[m]ere disparity in numbers . . . is insufficient to raise an inference of discriminatory use of peremptories." *Id.* at 77. (Zappalla J., concurring).

This court feels that defendant may have had an arguable claim for improper exclusion of potential jurors based on a violation of the Equal Protection Clause. Because defense counsel in this instance mistakenly believed that peremptories could be used to strike anyone for any reason, defendant was never given the opportunity to challenge the striking of the only potential jurors which were members of his racial class.

Because defense counsel did not know that such use of peremptory challenges could be improper, it seems unlikely that his conduct was reasonably designed to protect defendant's interests. Therefore, this court sees no reasonable basis for defense counsel's conduct other than mistaken belief.

It is not enough that defendant simply claim that he suffered some prejudice. Defendant must show that counsel's conduct "so affected the trial itself ("the truth-determining process") that the result of the trial is inherently unreliable." *Commonwealth v. Korb*, 421 Pa.Super. 44, 47, 617 A.2d 715, (1992), quoting

Commonwealth v. Weinder, 395 Pa. Super. 608, 577 A.2d 1364 (1990). If the Commonwealth improperly used its peremptory challenges to remove the potential jurors in question, not only were defendant's rights infringed upon, but also the rights of those potential jurors. Because there is the possibility that the instant case was tainted by the Commonwealth's use of peremptory challenges, it is obvious that defendant has been prejudiced by defense counsel's conduct. If the Commonwealth's peremptories were used for a discriminatory motive, the result of the trial is "inherently unreliable".

CONCLUSION

Upon reviewing the facts and circumstances of this case, defendant's argument that the Commonwealth may have exercised their peremptory challenges improperly does have arguable merit. Because defendant was denied the opportunity to challenge Commonwealth's use of their peremptory challenges due to defense counsel's mistaken belief this court is granting defendant's motion that his conviction under Criminal Action 124 - 1991 be reversed and remanded for a new trial.

ORDER OF COURT

October 14, 1994, the court grants the defendant's request for relief and orders the case remanded for a new trial.