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Commonwealth v. Ensley

COMMONWEALTH OF PENNSYLVANIA
v. WILLIAM C. ENSLEY, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Criminal Action, No. 364 of 2004

Equal Protection Clause of the Fourteenth Amendment; Racial Discrimination in Jury Selection; Batson Challenge; Scope of Cross Examination; Impeachment Based on Prior Drug Use; Evidence of Prior Convictions for Sentencing Purposes

1. The use of preemptory challenges by a prosecutor to eliminate venire persons solely based on race is forbidden by the Equal Protection Clause of the Fourteenth Amendment; however, this guarantee does not assure the defendant of a jury composed in whole or in part of members of the defendant's race.
2. To prove a prima facie case of racial discrimination through the use of preemptory challenges the defendant must show that: (1) he is a member of a cognizable racial group; (2) the prosecutor utilized preemptory challenges to remove members of the defendant's race from the venire; and (3) the facts and circumstances put forth by the defendant suggest that the prosecutor used the preemptory challenge to remove members of the venire on account of their race.
3. Should the defendant make a prime facie case, the burden shifts to the prosecutor to present a neutral explanation for the challenges.
4. Prosecutor's explanation that he struck the only black member of the venire panel based on jury questionnaire that indicated the juror was a student and that prosecutor routinely strikes students is a sufficiently neutral explanation to defend against a Batson Challenge.
5. A jury may not consider for impeachment purposes a defendant's use of drugs or alcohol at times irrelevant to the occurrence about which the defendant testified.
6. A prosecutor may further explore a defendant's admitted drug use during cross examination when defendant raised the issue of his drug use on direct examination by referring to himself as a "pothead" and the prosecutor's questioning is not for impeachment purposes.
7. The preponderance of the evidence is the standard when determining prior convictions, which may be met by reliance on official documents.
8. An NCIC report entered into evidence as early as the defendant's bail hearing may be relied on by a sentencing court to correct a deficiency in a pre-sentencing report discovered by the prosecutor.

Appearances:

Matthew D. Fogal, Esq., *Assistant District Attorney*

Jeremiah D. Zook, Esq., *Assistant Public Defender, Counsel for Defendant*

OPINION *sur* Pa.R.A.P. 1925(a)

Facts and Procedural History

This is a direct appeal from the conviction and sentencing of Defendant, William C. Ensley, on two counts of Aggravated Assault and one count of Recklessly Endangering Another Person. The events that precipitated Defendant's convictions occurred in the early morning hours of January 31, 2004. At that time, a bar fight broke out at the Laurel Lodge Elks Club resulting in two women being slashed in the face with a "box cutter" type razor knife. Police units dispatched to the scene made contact with Defendant who identified himself as Michael Cortez. Defendant denied any involvement in the incident and was not arrested. Three days later police arrested Defendant on an outstanding warrant from New York State. Police created a photo line-up using the Defendant's processing picture, and the victims identified him as their attacker.

Defendant was found guilty on September 1, 2004 of the above captioned charges following a two-day jury trial. On October 6, 2004, this Court sentenced Defendant to 30 to 60 months on each charge of aggravated assault to run consecutively. The charge of recklessly endangering another person merged with the first count of aggravated assault. On November 3, 2004, Defendant filed Notice of Appeal to the Superior Court and served said Notice upon this Court. On November 5, 2004, this Court ordered Defendant to serve on this Court a concise statement of the matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). Defendant filed said statement on November 18, 2004, and this Court responds by Opinion pursuant to Pa.R.A.P. 1925(a).

Discussion

Defendant in his concise statement of matters complained on appeal raised three issues: (1) Whether this Court erred when it overruled Defendant's objection to the Commonwealth's use of a preemptory challenge on an African-American member of the venire; (2) whether this Court erred when it overruled Defendant's objection to the Commonwealth's line of questioning regarding Defendant's drug use; and (3) whether this Court erred when it relied on a print-out of Defendant's National Crime Information Center (NCIC) report at the time of sentencing for purposes of calculating Defendant's prior record score. This Court addresses each issue in turn.

Batson Challenge

The use of preemptory challenges by a prosecutor to eliminate venire persons solely based on race is forbidden by the Equal Protection Clause of the Fourteenth Amendment. Batson v. Kentucky, 476 U.S. 79 (1986). The Supreme Court in Batson explained that the Equal Protection Clause provides several guaranties when it comes to jury selection. Principally among these guaranties is that the defendant is assured to be tried by a jury selected based on nondiscriminatory criteria. Id. at 85-86, citing Martin v. Texas, 200 U.S. 316, 321 (1906). A jury selected in this manner would more likely represent a jury of peers rather than a body of persons sharing none or little of the same racial or social characteristics of the defendant. Id. at 86, citing Strauder v. West Virginia, 100 U.S. 303, 308 (1880). However, this guarantee does not by default assure the defendant of a jury composed in whole or in part of members of the defendant's race. Strauder, 100 U.S. at 305.

In this case, the prosecutor utilized one of his preemptory challenges to eliminate juror #10 who happened to be the only black member of the venire. Defendant's counsel immediately objected to the preemptory strike alleging it was done solely based on race. A discussion was held on the record^[1] at sidebar to determine the prosecution's response to the objection. The prosecutor adamantly denied that race played any role in his decision to strike juror #10. He insisted, instead, that he exercised the preemptory strike because the juror questionnaire indicated that juror #10 was a student and that the prosecutor generally strikes students. Defense counsel suggested that the prosecutor's reason was neutral. This Court overruled the objection.

In Batson, the Court emphasized the elements required to prove racial discrimination through the use of preemptory challenges in the selection of petit juries. To establish a prima facie case of purposeful discrimination, the defendant must show that he is a member of a cognizable racial group; the prosecutor utilized preemptory challenges to remove members of the defendant's race from the venire; and, the facts and circumstances put forth by the defendant suggest that the prosecutor used the preemptory challenge to remove members of the venire on account of their race. Batson, 476 U.S. at 96. In making this case, the defendant may rely on the fact that preemptory challenges permit "those to discriminate who are of a mind to discriminate." Id. quoting Avery v. Georgia, 345 U.S. 559, 562 (1953). The trial court must look at the totality of the circumstances when determining whether the defendant has met the burden of establishing

a prima facie case. Id. Should the defendant make a prime facie case, the burden shifts to the prosecutor to present a neutral explanation for the challenges. Id. at 97.

Factors the court should consider when determining whether the defendant has made a prime facie case include: (1) the number of strikes against minorities; (2) the percentage of minorities eliminated from the venire; (3) the past conduct of the prosecutor in exercising preemptory challenges in past trials; (4) the type and manner of questions used by the prosecutor during voir dire; and (5) the similarities and differences between challenged and unchallenged venire members. Commonwealth v. Jackson, 562 A.2d 338 (Pa. Super. 1989). The Superior Court in Jackson added that where a defendant raised a timely Batson challenge and established a prime facie case, the prosecutor should present the reasons for the challenge and the defense attorney should have an opportunity to respond prior to the Commonwealth presenting its case in chief. Id. at 349. The trial court should then rule on the objection. Id.

Here, this Court reviewed the record and stands by its decision to overrule Defendant's objection that the prosecutor's preemptory challenge of a black venire member was discriminatory in nature. Although it is true that the prosecutor's strike resulted in the elimination from the venire of its only black member, the facts and circumstances do not raise an inference of a discriminatory purpose on the part of the prosecutor.

This Court is very familiar with the individual prosecutor in this case as well as the Franklin County District Attorney's office. This Court knows of no past or present conduct on the part of either that would indicate a willingness to discriminate on the basis of race for the purpose of denying a defendant the protections afforded by a jury of peers. On the day of jury selection in this case, the undersigned presided and personally conducted voir dire. The questions asked were aimed at determining the prospective jurors' familiarity with the case, possible relations to persons involved in the case, personal experiences with crime and law enforcement, and their ability to accept the presumption of innocence on the part of Defendant. Each question was asked of all. Under these circumstances and given the guidance from Batson and Jackson, this Court cannot find that Defendant made a prime facie case of discrimination. Yet, defense counsel was still afforded an opportunity to hear and respond to the prosecutor's justification for striking juror #10. Defense counsel admitted the reason appeared neutral. This Court agreed and overruled Defendant's objection.

Scope of Cross-examination Regarding Defendant's Drug Use

Defendant next attacks the prosecutor's questioning regarding Defendant's drug use as being beyond the scope of direct examination. A jury may not consider for impeachment purposes a defendant's use of drugs or alcohol at times irrelevant to the occurrence about which the defendant testified. Commonwealth v. Rizzuto, 777 A.2d 1069, 1081 (Pa. 2001); Commonwealth v. Small, 741 A.2d 666, 677 (Pa. 1999); Commonwealth v. Harris, 852 A.2d 1168, 1174 (Pa. 1995). Defendant voluntarily admitted during direct examination to his use of marijuana, even referring to himself as a "pothead." [2] On cross-examination the prosecutor followed up Defendant's admission with questions pertaining to his use of marijuana on the night of the occurrence, his frequency of use, and his physical and mental response to the drug. [3] Defense counsel objected to this last line of questioning as irrelevant since Defendant testified he was not under the influence of marijuana on the night in question. Defendant points to Commonwealth v. Small, *supra*, and Commonwealth v. Harris, *supra*, as support for this objection.

Both Small and Harris involve situations where trial courts denied defense counsel the opportunity to cross-examine prosecution witnesses regarding their drug use or mental health illness at times other than the occurrence for which they had testified. The sole purpose of this line of questioning was to impeach the witnesses' credibility. Here, the prosecutor is cross-examining Defendant concerning a subject that he brought out on direct examination, and contrary to the cited cases, the prosecutor is not attempting to impeach Defendant's credibility. This line of questioning is clearly within the scope of cross-examination and well within the discretion of this Court to permit. This Court finds support for its contention from Commonwealth v. Hill, 666 A.2d 642 (Pa. 1995).

In Hill, the Court found that Hill's cocaine use was first raised by defense during direct examination. The court reasoned that "this subject was first raised by defense counsel, and thus, the prosecutor was entitled to further explore it during cross-examination." Id. at 647. Here, the prosecutor was simply exploring further the nature of Defendant's admitted drug use. The questioning did not relate to any specific instance of drug use beyond the occurrence for which Defendant was being tried. Instead, the questioning appeared to delve into Defendant's propensity for peacefulness or violence as it related to his use of drugs. The Court found this line of questioning to be relevant. Therefore, this Court properly overruled this objection.

Use of NCIC Report at Sentencing

Defendant's last allegation of error addresses the Court's use of the NCIC report at sentencing to calculate Defendant's prior record score. After Defendant was found guilty, this Court ordered that a pre-sentence investigation report be prepared for use at sentencing.[4] That report lists as its sources for determining Defendant's prior record the NCIC, Defendant himself and the Criminal Court of Queens, New York. The sentence recommendation from the report called for 30 months to 60 months on each charge of aggravated assault to run consecutively.

At sentencing, counsel for Defendant questioned the grading of one of Defendant's prior offenses as a felony one (F1). The prosecutor agreed that the New York offense would not equate to an F1 in Pennsylvania. Therefore, a determination was made that six months should be taken off the standard range and the sentence be adjusted accordingly.[5] Later in the sentencing proceeding, the prosecutor realized that Defendant's most recent offense was missing from the pre-sentence report.[6] The prosecutor stated that he recalled the offense as being listed on the NCIC report used and admitted as Commonwealth's exhibit number one at Defendant's bail hearing.[7] The prosecutor retrieved the NCIC report and presented it to the Court for review. The NCIC report indicated that Defendant was convicted upon plea of guilty to assault with intent to cause physical harm on October 8, 2003 in Suffolk County, New York. Defendant disputed this information insisting that the charge was dismissed in exchange for time served. Defendant's counsel then placed his objection to this Court's use of the NCIC report on the record. The additional prior offense resulted in Defendant's sentence being adjusted back to the original recommendation of 30 months to 60 months on each charge.[8]

Defendant supports his objection to the NCIC report by citing to Commonwealth v. Travaqlia, 661 A.2d 352 (Pa. 1995) and Commonwealth v. Perkins, 538 A.2d 930 (Pa. Super. 1988). In Travaqlia, the prosecutor objected to the defendant's attempt to introduce an NCIC report as evidence that the defendant had no prior convictions. The trial court refused to admit the NCIC report because the defendant could not produce a witness who could authenticate the document. The trial court also indicated that it had experienced inaccuracies with similar reports in the past. The Pennsylvania Supreme Court affirmed the trial court's decision finding that an inability to establish the trustworthiness of a document is a proper reason to refuse its admission. Travaqlia, 661 Pa. at 363.

This Court finds that Defendant's reliance on Travaqlia is misplaced. To begin, this Court does not share the Travaqlia trial court's concerns regarding the trustworthiness of NCIC reports. This Court has found that these reports are reliable and accurate particularly as regards the criminal record actually reported. In other words, this Court's experience has been that any discrepancies that may occur stem from the omission of legitimate criminal convictions rather than from the inclusion of erroneous ones. Regardless, the NCIC report was introduced into evidence as early as Defendant's bail hearing on June 7, 2004, four months prior to sentencing. Defendant had an opportunity to examine the report and object to it in whole or in part at that time. This, Defendant did not do. Nor did Defendant raise any concerns regarding the use of the report as a primary source for determining Defendant's prior record in the pre-sentencing investigation report. Lastly, Defendant's assertion that the charge in question was dismissed in exchange for time served is unrealistic. In all likelihood, the actual disposition regarding this charge is as stated in the NCIC report: convicted upon plea of guilty and sentenced to time served.[9]

Defendant's reliance on Perkins is likewise misplaced. In Perkins, the defendant challenged a pre-sentencing report that indicated a prior DUI conviction in New York. The defendant alleged that the prior DUI was not supported by a preponderance of the evidence. In fact, the only evidence of the prior conviction came from the probation officer's statement that the defendant admitted to a previous DUI conviction. The Court ruled that a trial court must schedule a hearing to determine the accuracy of a pre-sentencing report when challenged by a defendant. Perkins, 538 A.2d at 932. The preponderance of the evidence is the standard when determining prior convictions, which may be met by reliance on official documents. Id.

Here, Defendant is not disputing the accuracy of the pre-sentencing report so much as he is challenging the use of the NCIC report to correct a deficiency in the pre-sentencing report discovered by the prosecutor. This Court finds that an NCIC report is sufficient evidence of prior convictions and may be relied on to determine the accuracy of a pre-sentence report. After all, such reports are routinely used in the preparation of pre-sentence reports, as occurred in this case. The simple fact is that the probation department omitted Defendant's most recent conviction when preparing the report. In this case, unlike in Perkins, the prosecutor made available official documentation in the form of the NCIC report to correct the deficiency in the pre-sentence report. Therefore, no hearing was required to present evidence of Defendant's prior record since the evidence was at hand. Furthermore, this Court offered to have a hearing in which Defendant could present evidence to dispute his prior record. Defendant did not take advantage of this opportunity, and this Court can only presume that no such contrary evidence exists. For the reasons stated, this Court again submits that no error was committed.

Conclusion

This Court respectfully requests that the Superior Court affirm this Court's determinations regarding each of the issues raised in Defendant's Concise Statement of Matters Complained of on Appeal for the reasons stated herein.

ORDER OF COURT

And now this 17th day of November, 2004, pursuant to Pa.R.A.P. 1931(c), it is hereby ordered that the Clerk of Courts of Franklin County shall promptly transmit to the Prothonotary of the Superior Court the record in this matter along with the attached Opinion *sur* Pa.R.A.P. 1925(a).

[1] Jury Selection Tr. 16:25-18:1 (July 12, 2004).

[2] Trial Tr. Day 2, 43:4-17 (Sept. 1, 2004).

[3] Trial Tr. Day 2, 56:13-58:13 (Sept. 1, 2004).

[4] Trial Tr. Day 2, 125:19-20 (Sept. 1, 2004).

[5] Sentencing Tr. 2:4-3:23 (Oct. 6, 2004).

[6] Sentencing Tr. 9:4-15 (Oct. 6, 2004).

[7] Bail Hrg. Tr. 20:5-16 (June 7, 2004).

[8] Sentencing Tr. 9:16-12:23 (Oct. 6, 2004).

[9] NCIC report pt. 3 pp. 6-7 (Mar. 16, 2004).