

IN THE COURT OF APPEALS 04/22/97
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00077 COA

ROBERT A. DUVERNAY A/K/A ROBERT ANDREW DUVERNAY, JR.

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JERRY OWEN TERRY

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HANCOCK COUNTY

ATTORNEY FOR APPELLANT:

JAMES G. TUCKER, III

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: CONO CARANNA

NATURE OF THE CASE: CRIMINAL - SALE OF CONTROLLED SUBSTANCE

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO 18 YEARS IN
CUSTODY OF MDOC

EN BANC

COLEMAN, J., FOR THE COURT:

Robert Duvernay was tried and convicted in the Circuit Court of Hancock County for the sale or transfer of a controlled substance. For his crime, Duvernay was sentenced to serve a term of eighteen years in the custody of the Mississippi Department of Corrections. Duvernay appeals his conviction on the following grounds:

I. APPELLANT WAS PREJUDICED BY TRIAL COURT PROVIDING INADEQUATE JURY INSTRUCTION ON THE STATE'S BURDEN OF PROOF WHEN THE TRIAL COURT WAS AWARE THE INSTRUCTION HAS BEEN CRITICIZED BY THE SUPREME COURT.

II. APPELLANT WAS PREJUDICED WHEN VENIRE FAILED TO PROVIDE AN ADEQUATE NUMBER OF POTENTIAL MEMBERS OF THE APPELLANT'S RACE WHICH COULD HAVE BEEN RESOLVED BY THE COURT REQUIRING THE ALL PERSONS SUMMONED FOR JURY DUTY TO APPEAR AND IF THE TRIAL COURT HAD HELD A HEARING ON THE ISSUE BEFORE TRIAL.

Finding the first of Duvernay's assignments of error to be procedurally barred from appellate review, and the second to be without merit, we must affirm the judgment of the circuit court.

FACTS

On October 1, 1992, officers of the Biloxi and Bay St. Louis Police Departments were conducting an "undercover" operation to apprehend persons dealing in illegal narcotics. The officers were assisted by a confidential informant who had significant ties to the neighborhood where the operation was being conducted. On the night in question, the police observed Robert Duvernay possessing crack cocaine and participating in the sale of that cocaine to their confidential informant. Duvernay was subsequently arrested and was indicted for the sale of cocaine by a grand jury empaneled in Hancock County in March of 1993. Following trial before the Circuit Court of Hancock County, Duvernay was convicted of the sale or transfer of a controlled substance and sentenced to eighteen years incarceration. It is from this conviction that the instant appeal arises.

I. APPELLANT WAS PREJUDICED BY TRIAL COURT PROVIDING INADEQUATE JURY INSTRUCTION ON THE STATE'S BURDEN OF PROOF WHEN THE TRIAL COURT WAS AWARE THE INSTRUCTION HAS BEEN CRITICIZED BY THE SUPREME COURT.

Duvernay asserts that one of the instructions given to the jury failed to adequately inform it as to the burden the State must meet in establishing guilt "beyond a reasonable doubt." Duvernay, however, failed to make a contemporaneous objection to the complained-of instruction and furthermore, failed to make *any* objection to this instruction at trial or via post-trial motion. In fact, the record discloses

that when the trial court judge questioned counsel regarding the various proposed jury instructions, he asked Duvernay's counsel if he had any objections to the instruction of which Duvernay now complains. The judge asked if either side had any objections to "C-13, presumption of innocence," to which Duvernay's counsel responded "no objection." Because the Mississippi Supreme Court "has repeatedly held that failure to object to a jury instruction constitutes a waiver," *Davis v. State*, 568 So. 2d 277, 279 (Miss. 1990), we hold that Duvernay is barred from raising this issue for the first time on appeal. *See also Russell v. State*, 670 So. 2d 816, 826 (Miss. 1995) (holding that court will not address errors on appeal where defendant failed to raise contemporaneous objection at trial). Accordingly, this assignment of error presents no issue for this Court to review.

II APPELLANT WAS PREJUDICED WHEN VENIRE FAILED TO PROVIDE AN ADEQUATE NUMBER OF POTENTIAL MEMBERS OF THE APPELLANT'S RACE WHICH COULD HAVE BEEN RESOLVED BY THE COURT REQUIRING THE ALL PERSONS SUMMONED FOR JURY DUTY TO APPEAR AND IF THE TRIAL COURT HAD HELD A HEARING ON THE ISSUE BEFORE TRIAL.

Duvernay apparently contends that his Sixth Amendment right to a fair trial was violated because of the racial composition of the jury pool and the resulting jury that was empaneled from it. Duvernay asserts that the jury pool was "non-representative" of the racial composition of the community from which the prospective jurors were summoned. The essence of Duvernay's argument seems to be that the trial court should have empaneled a jury that proportionally represented the racial mix of the citizens in the surrounding community. Duvernay acknowledges that the trial transcript reflects that prospective jurors were drawn at random from the local voting rolls, which did not identify the race of the voters.

The Supreme Court has repeatedly held that "the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial." *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). The Sixth Amendment to the United States Constitution is made binding on the States by virtue of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968). In *Booker v. State*, 449 So. 2d 209, 215 (Miss. 1984), the Mississippi Supreme Court addressed the "fair cross section" requirement in a case where the defendant alleged that he was entitled to a jury containing members of his own race. In *Booker*, the court held that "proportional representation of the races on a jury is not required," but rather "[w]hat is required is that county officials must see to it that juries are in fact and in good faith selected without regard to race." *Booker*, 449 So. 2d at 215. The *Booker* court noted that the defendant did not allege that the jury list did not reasonably reflect a cross section of the community. *Id.* In summation, the *Booker* court held that the fair cross section requirement "does not guarantee the [defendant] a jury with members of his own race." *Id.*

We interpret Duvernay's second assignment of error to assert a claim identical to that rejected by the *Booker* court, *i.e.* that he was entitled to a jury that reflected a cross section of the community's racial composition. In adherence to sound federal and state precedent, we must reject Duvernay's claim. As explained in the preceding discussion, a litigant entitled to a jury trial has a right to a jury drawn from a jury pool that was selected from a fair cross section of the community. This does not mean that the jury pool or the jury that is subsequently drawn from it, must mirror the racial composition of the surrounding community. Like the defendant in *Booker*, Duvernay does not allege

that the jury pool was drawn in a racially discriminatory manner. Rather, Duvernay's complaint is that because so few minority voters responded to the summons, he was unable to get a jury that was "representative" of the racial make-up of the community. Because no such right exists, this assignment of error must fail.

THE JUDGMENT OF THE HANCOCK COUNTY CIRCUIT COURT OF CONVICTION OF TRANSFER OF A CONTROLLED SUBSTANCE AND SENTENCE OF EIGHTEEN YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. COSTS ARE ASSESSED AGAINST HANCOCK COUNTY.

BRIDGES, C.J., McMILLIN, P.J., DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., AND HINKEBEIN, J., NOT PARTICIPATING.