

IN THE COURT OF APPEALS 05/07/96
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00208 COA

AARON LEE WASHINGTON A/K/A

AARON LEE

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. MIKE SMITH

COURT FROM WHICH APPEALED: WALTHALL COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JACK G. PRICE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL: BY DEIRDRE MCCRORY

DISTRICT ATTORNEY: DANNY SMITH

NATURE OF THE CASE: CRIMINAL: POSSESSION OF FIREARM BY A FELON

TRIAL COURT DISPOSITION: CONVICTED AND SENTENCED TO THREE YEARS IN
MDOC AND FINED \$5,000 AND ORDERED TO PAY COURT COSTS AND APPOINTED
ATTORNEY'S FEES.

BEFORE BRIDGES, P.J., COLEMAN, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

Aaron Lee Washington a/k/a Aaron Lee ("Washington") was tried and convicted of possession of a firearm by a felon in the Walthall County Circuit Court. Washington was sentenced to serve three (3) years in the Mississippi Department of Corrections and ordered to pay a five thousand dollar (\$5,000) fine as well as court costs and attorney's fees for his appointed counsel. Aggrieved from this judgment, Washington appeals to this Court asserting the following errors: 1) that the lower court erred in refusing Washington's motion for continuance; 2) that the trial court erred in allowing the State's challenges for cause in the selection of the venire; 3) that the verdict was against the overwhelming weight of the evidence; 4) that the trial court erred in denying Washington's motion for directed verdict; 5) that the trial court erred in granting jury instruction S-6; and 6) that the trial court erred in denying Washington's motion to suppress evidence found in plain view on the floorboard of the car. Finding no reversible error, we affirm the judgment of the court below.

FACTS

On September 2, 1994, Officer Lionel Harrel (Harrel) was on duty at the Tylertown High School football game in Tylertown, Mississippi. Harrel was posted at the entrance where he scanned spectators with a metal detector as they entered the stadium. While doing this, he spotted Washington approaching the entrance with another male and a baby. Harrel was acquainted with Washington from previous encounters they had with each other. Harrel testified that when he motioned for Washington to approach him to be scanned, Washington grabbed the baby from his friend, and held the baby against his chest. When Harrel scanned Washington, the detector was triggered when the scanner reached Washington's chest area. Harrel immediately tried to place his hands on Washington's chest, and he felt a large object like a weapon. At that point, he testified that Washington threw the baby into Harrel's arms and began to run. Harrel and Brett Busbin, another officer on duty, pursued Washington. At one point, Harrel caught up with Washington and grappled with him. Harrel stated that again, he felt Washington's chest and felt what he thought to be a nine-millimeter pistol in a holster. Washington eventually was able to slip free and run into the woods.

During the struggle, Harrel managed to grab a set of keys out of Washington's hands. When Harrel asked the parking lot attendant, Frederick Magee, where Washington parked, Magee pointed out the car to Harrel, who apparently recognized the car because he had seen Washington driving it previously. When the officers peered inside the vehicle, Harrel testified that they saw a gun in plain view on the floorboard behind the driver's seat. Harrel opened the door with the key he had and seized the gun. He testified that he had reason to believe that there were other weapons in the car, therefore, he opened the trunk and found a "J.C. Higgins pump shotgun." The car was registered to Demetric Carson, Washington's girlfriend. Washington was arrested a few weeks after the incident.

At the time of the incident, Washington was out of jail on an appeal bond while previous convictions for burglary and aggravated assault were on appeal. Washington testified that he does not own a gun, nor a holster. He stated that he was not carrying a weapon that evening because he was aware that the police were scanning everyone for weapons.

DISCUSSION

I. MOTION FOR CONTINUANCE

Washington's first assignment of error alleges that the trial court erred in denying his motion for continuance. After the court's voir dire of the jury, defense counsel asked to approach the bench. At that time, counsel asked the clerk to call the defense's witnesses. Apparently, Esau Harris who was with Washington at the time of the incident was not present. Counsel argued that although he was appointed on February 8, 1995, and the trial date was set for February 22, 1995, subpoenas were not issued to the defense witnesses until February 17, 1995, because he was not sure that the case was going to go to trial. Apparently, Harris had not been served. At the time, Washington's request for a continuance was based on the fact that Harris was not present to testify. No written motion for a continuance was made. The trial judge overruled the motion.

The decision to grant or deny a continuance is left to the sound discretion of the trial court. *Atterberry v. State*, 667 So. 2d 622, 631 (Miss. 1995) (citations omitted). Unless manifest injustice appears to have resulted from the denial of the continuance, this Court should not reverse. *Atterberry*, 667 So. 2d at 631. Furthermore, the denial of a continuance in the trial court is not reviewable, unless the party whose motion for continuance was denied, makes a motion for a new trial on this ground. *Metcalf v. State*, 629 So. 2d 558, 562 (Miss. 1993). "On a motion for a new trial, certain errors must be brought to the attention of the trial judge so that he may have an opportunity to pass upon their validity before this Court is called upon to review them." *Metcalf*, 629 So. 2d at 561-62. In the present case, Washington's motion for new trial only addresses the insufficiency of the evidence to support the verdict.

Nevertheless, Washington now argues for the first time on appeal that when the trial court denied his motion for continuance, he was being punished because his attorney was a sole practitioner. He contends that his motion for continuance should have been granted because his counsel was only appointed to him on February 8, 1995, and thus, only had nine working days to prepare for trial. Even if there was no procedural bar, we do not find that any manifest injustice has resulted from the denial of the continuance.

At trial, Washington's argument for a continuance was based on the fact that Harris was not present to testify. The fact that Harris testified leaves this argument moot. Washington cites to *Hughes v. State*, 589 So. 2d 112, 114 (Miss. 1991). He argues that his situation is similar to the situation in *Hughes* where the supreme court found that the defendant was penalized for hiring a sole practitioner when the lower court denied a motion for continuance. *Hughes*, 589 So. 2d at 114. The present case is readily distinguishable from *Hughes*. In *Hughes*, the attorney was appointed on November 1, 1989, with the trial set for November 6, 1989. The attorney attempted to reach the district attorney, but was told that he was at a conference and would not be back until November 6, 1989. *Id.* at 113. The trial was eventually heard on November 9, 1989. In that case, the attorney had communication problems. The defendant had trouble remembering what happened on the date of the incident, and provided counsel with only nicknames of witnesses. Counsel was unable to find out the identity of the witnesses, much less talk with them until the day he filed an affidavit in support of his motion for continuance on November 9, 1989.

In the case *sub judice*, counsel was appointed on February 8, 1989, and trial was set for February 22,

1995. Subpoenas were not issued until February 17, 1989, and despite knowledge of the whereabouts of Harris, counsel made no attempt to talk to him. The trial court did not abuse its discretion in denying the motion for continuance, and absent manifest injustice, we will not reverse that decision.

II. CHALLENGES FOR CAUSE

The trial court allowed the State to strike three prospective jurors for cause. Charlene Badon, Noema Robertson, and Annie Mae Baker were all excused for cause because when the State asked them during voir dire if they would give more weight to the testimony of a witness they knew, they all responded affirmatively. When the defense rephrased the question to them, they responded that they could be fair.

Washington cites to *American Creosote Works v. Harp*, 60 So. 2d 514 (Miss. 1952), in support of his argument. In that case, the appellants argued that the trial court should have sustained their challenge for cause because a juror lived in the same community with the plaintiff, as well as a member of the same church and lodge. *Harp*, 60 So. 2d at 517. The supreme court held that a juror is not incompetent merely because "he and one of the parties are members of the same religious denomination, church, organization, or fraternal order." *Id.* at 518 (citations omitted). Clearly, that case is distinguishable from the present case, and therefore, not dispositive on the issue.

Voir dire is "conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." *Ballenger v. State*, 667 So. 2d 1242, 1250 (Miss. 1995) (citations omitted). The court excused the potential jurors based on their responses that they would give one witness more weight on her testimony than the other witnesses they did not know. We do not think that the court abused its discretion in so finding. There is no merit to this issue.

III. PEREMPTORY CHALLENGES

Washington argues that the State struck three out of four eligible black veniremen thereby violating the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986). A defendant claiming a *Batson* violation must first make a prima facie showing of purposeful discrimination by establishing the following: (1) that he is a member of a cognizable racial group; (2) that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; (3) that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. *Davis v. State*, 660 So. 2d 1228, 1240 (Miss. 1995) (citations omitted). Once this is established, the burden then shifts to the State to come forward with race-neutral explanations for challenging jurors. *Stewart v. State*, 662 So. 2d 552, 557 (Miss. 1995). Although we are unable to ascertain Washington's race from the record before us, under *Powers v. Ohio*, the rule in *Batson* would apply equally whether the accused and the prospective jurors stricken through peremptory challenges share the same race or not. *Walker v. State*, No. 92-DP-00568-SCT, 1995 WL 598825, at *50 (Miss. Oct. 12, 1995); see *Powers v. Ohio*, 499 U.S. 400 (1991).

Washington contends that the State failed to give race-neutral reasons in challenging the jurors. Applying *Batson*, the State is not required to do so unless a prima facie case has been established. We do not think that there has been a prima facie case of discrimination here. Of the four peremptory challenges the State exercised, three out of the four were African-Americans. It should be noted that

the State had two peremptory challenges remaining. Based on the actual composition of the jury, nine Caucasians, and three African-Americans, obviously, the State did not use all of its challenges in an effort to impermissibly eliminate all minority venirepersons. *See Walker v. State*, No. 92-DP-00568-SCT, 1995 WL 598825 at *52 (Miss. Oct. 12, 1995).

Washington also argues that the racial composition of the jury did not reflect that of the community. The Mississippi Supreme Court has held that while a defendant has a right to be tried by a jury whose members were selected in a nondiscriminatory manner, he is not constitutionally guaranteed that the jury selected had to "mirror the community and reflect the various distinctive groups in the population." *Carr v. State*, 655 So. 2d 824, 840 (Miss. 1995) (citing *Britt v. State*, 520 So. 2d 1377, 1379 (Miss. 1988)). There is no merit to this argument.

IV. SUFFICIENCY OF THE EVIDENCE

The Mississippi Supreme Court provides the standard for reviewing a sufficiency of the evidence question:

[T]he sufficiency of the evidence as a matter of law is viewed and tested in a light most favorable to the State. The credible evidence consistent with [Washington's] guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may be reasonably drawn from the evidence. Matters regarding the weight and credibility of the evidence are to be resolved by the jury. We are authorized to reverse only where . . . the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

McClain v. State, 625 So. 2d 774, 778 (Miss. 1993) (citations omitted). In reviewing the evidence, we find that it supports the verdict of the jury.

The testimony reflects that after the metal scanner was triggered, Washington ran when Officer Harrel tried to frisk him. Officer Harrel testified that what he did manage to feel felt like a gun in a holster underneath Washington's shirt. Later, after the game, officers Harrel and Busbin saw a pistol lying in plain view on the floor board of the vehicle Washington was driving. The jury found Washington guilty of possession of a firearm by a felon. We find that the sufficiency of the evidence, when viewed in the light most favorable to the State, supports the jury verdict.

V. JURY INSTRUCTION S-6

Washington contends that the trial court erred in granting jury instruction S-6.

This Court does not review jury instructions in isolation. *Eakes v. State*, 665 So. 2d 852, 871 (Miss. 1995). "All instructions are to be read together and if the jury is fully and fairly charged by other instructions, the refusal of any similar instruction does not constitute reversible error." *Eakes*, 665 So. 2d at 871. The language in instruction S-6 is that which is usually found in jury instructions involving drug possession. The supreme court announced the standard to be used when determining questions of possession in *Curry v. State*. *Curry v. State*, 249 So. 2d. 414, 415 (Miss. 1971).

What constitutes a sufficient external relationship between the defendant and the narcotic property to complete the concept of 'possession' is a question which is not susceptible of a specific rule. However, there must be sufficient facts to warrant a finding that defendant was aware of the presence of the [weapon] and was intentionally and consciously in possession of it. It need not be actual physical possession. Constructive possession may be shown by establishing that the [weapon] involved was subject to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances.

Curry, 249 So. 2d. at 415. More recently the supreme court addressed the issue of constructive possession stating that in order to determine if there was constructive possession, the court must look to the totality of the circumstances. *Berry v. State*, 652 So. 2d 745, 750 (Miss. 1995). The factor of control is essential. *Berry*, 652 So. 2d at 751. In reviewing the jury instructions given, we think that the standard given in *Curry* as well as the control element addressed in *Berry* was adequately and correctly embodied in the given instructions. Hence, we find no error.

VI. MOTION TO SUPPRESS

Washington's final argument is that the pistol that Officers Harrel and Busbin retrieved was a product of an illegal search, and therefore, the evidence should have been suppressed. At a suppression hearing, Officer Harrel testified that when he shined his flashlight into the car that Washington drove to the stadium, he saw a pistol on the floorboard behind the driver's seat, in plain view. Harrel opened the door with the key that he managed to obtain from Washington during their scuffle, and seized the gun. According to Washington, the officers should have at least obtained a search warrant.

Courts have allowed warrantless search and seizures of a vehicle based on probable cause when, under similar scenarios, a warrant may have been required to search a house. *Franklin v. State*, 587 So. 2d. 905, 907 (Miss. 1991). A warrantless search and seizure of a vehicle may be proper if there was probable cause to believe that the vehicle itself may be evidence of crime or contain something that offends the law. *Franklin*, 587 So. 2d. at 907. The United States Supreme Court has held that, "justification to conduct such a warrantless search does not vanish once the car has been immobilized." *Id.* (citing *Michigan v. Thomas*, 458 U.S. 259, 261 (1982)). Furthermore, "any information obtained by means of the eye where no trespass has been committed in aid thereof is not illegally obtained." *Id.* (citing *Patterson v. State*, 413 So. 2d. 1036, 1038 (Miss. 1982)). From the foregoing, it is apparent that the supreme court has rejected limiting the automobile exception to mobile vehicles. Accordingly, we find that the search and subsequent seizure of the gun from the car were lawful. Therefore, the trial court did not err in ruling that such evidence was admissible. We do not find reversible error in any of the issues presented on this appeal. The judgment of the Walthall County Circuit Court is affirmed.

THE JUDGMENT OF THE WALTHALL COUNTY CIRCUIT COURT OF CONVICTION OF POSSESSION OF A FIREARM BY A FELON, AND SENTENCE OF THREE (3) YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND FINE OF \$5,000 IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO WALTHALL COUNTY.

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, McMILLIN,
PAYNE, AND SOUTHWICK, JJ., CONCUR.**

KING, J., CONCURS IN RESULT ONLY.