

IN THE COURT OF APPEALS 01/28/97
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-01018 COA

GLEN DALE PENSON

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. HENRY LAFAYETTE LACKEY

COURT FROM WHICH APPEALED: UNION COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

STEPHEN P. LIVINGSTON

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: WAYNE SNUGGS

DEIDRE MCCRORY

DISTRICT ATTORNEY: LAWRENCE L. LITTLE

NATURE OF THE CASE: CRIMINAL: SALE OF A CONTROLLED SUBSTANCE

TRIAL COURT DISPOSITION: SENTENCED TO SERVE A TERM OF 25 YRS IN THE MDOC

BEFORE THOMAS, P.J., DIAZ, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Glen Dale Penson was convicted of sale of a controlled substance in the Circuit Court of Union County. Penson appeals on two issues, that his case was prejudiced by the state's failure to produce discoverable material, and that his equal protection rights were violated in that he is a black man and he was tried by an all white jury. These claims are without merit. We affirm.

DISCUSSION

During an undercover operation targeting sellers of crack cocaine, Penson allegedly sold crack cocaine worth \$40.00 to an undercover police officer who was wearing a body wire. At trial, one of the arresting officers testified that another officer made notes of the transmission over the body wire, which were later reduced to a report. The witness did not know what happened to these notes. The defense moved for a mistrial, on the ground that it had not been furnished with the notes which may have included exculpatory evidence. The judge denied the motion.

There was no proof that these notes still existed, nor that the district attorney's staff had knowledge of them. The judge in his ruling stated:

I don't know whether that scratch sheet is in existence or not. My assumption would be that after it was reduced to an official report that the scratch sheets were destroyed or disposed of. Now, I may be wrong, I don't know, but anyway, if it was reduced and carried forward in the official report, I think you have the results of it, and for that reason, the Court is going to overrule the motion.

The objection concerns notes made by someone writing down what he was hearing transmitted from a body microphone. The report prepared from those notes, and a nearly-unintelligible tape of what the microphone transmitted were produced. No one was called who had knowledge that the notes were even in existence at the time of discovery or at trial. Certainly there is no evidence that the State was aware of the notes or any exculpatory evidence on them. The supreme court has been concerned in the past when the State appeared to quibble regarding whether certain evidence was discoverable. The court declared "as a matter of good practice and sound judgment in the trial of criminal cases, prosecuting attorneys should make available to attorneys for defendants all such material in their files and let the defense attorneys determine whether or not the material is useful in the defense or not." *Hentz v. State*, 489 So. 2d 1388, (Miss. 1986). There is no evidence of a failure to conform to this standard. We cannot reverse based on speculation regarding what potentially non-existing notes might say, that never were in the possession of the State.

II.

Penson, a black man, next argues that his Equal Protection rights were violated by being tried by an all white jury. After all the challenges for cause and all peremptory challenges were completed and the jury was then seated, Penson moved to quash the jury and requested a new jury to be drawn. He based his motion on *Batson v. Kentucky*, 476 U. S. 79 (1986), which prohibits purposeful discrimination in the exercise of peremptory challenges.

Defendants employed a similar argument in other cases. The supreme court held that "(t)he mere fact that a jury is white does not violate *Batson*; rather it is the racially discriminatory exercise of peremptory challenges to strike black jurors from the jury that violates the *Batson* rule." *Suddeth v. State*, 562 So. 2d 67, 71 (Miss. 1990), *Govan v. State*, 591 So. 2d 428, 429 (Miss. 1991). Penson never gave the court an opportunity to examine the basis for individual peremptory challenges, but instead made a tardy, blanket objection once the jury was fully selected. The trial court correctly denied his motion to quash the jury panel and affirm on this issue.

THE JUDGMENT OF THE UNION COUNTY CIRCUIT COURT OF CONVICTION OF SALE OF A CONTROLLED SUBSTANCE AND SENTENCE OF 25 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO UNION COUNTY.

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

KING, J., CONCURS IN RESULT ONLY.