70496-6

70496-6

No. 70496-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY DEON BROWN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Jeffrey Brown was charged with two counts of possession with intent within 1000 feet of a school bus stop. He moved to suppress the evidence against him prior to trial, arguing that the police used a misdemeanor arrest warrant as a pretext to conduct a speculative narcotics investigation. Because the State violated Mr. Brown's article I, section 7 rights, he is entitled to a reversal of his convictions and remand for dismissal.

In the alternative, Mr. Brown is entitled to reversal and a new trial because the trial court denied his right to equal protection when it allowed the State to strike the sole remaining African American venire member without a legitimate race-neutral explanation.

B. ASSIGNMENTS OF ERROR

1. Mr. Brown's article I, section 7 rights were violated when the police used a misdemeanor warrant as a pretext to perform a speculative narcotics investigation and obtain a search warrant for Mr. Brown's motel room.

2. The trial court erred when it entered finding of fact 3a.

3. The trial court erred when it entered finding of fact 3b.

4. The trial court erred when it entered finding of fact 3c.

5. The trial court erred when it entered finding of fact 3d.

6. The trial court erred when it entered conclusion of law 4a.

7. The trial court violated Mr. Brown's right to equal protection when it allowed the State to strike the only remaining African American member from the venire.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, section 7 of the Washington Constitution prohibits the State from invading a person's private affairs without authority of law. Did the State violate Mr. Brown's constitutional right to privacy by using a misdemeanor arrest warrant as a pretext to perform a speculative narcotics investigation and obtain a search warrant for his motel room?

2. The State denies a defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded. In this case, the State used a peremptory challenge to strike the only remaining African American venire member, relying on the fact she had expressed a distrust of police officers. However, the venire member repeatedly stated she would fairly weigh the facts and decide the case. Did the exclusion of

the lone African American venire member from the jury violate equal protection?

D. STATEMENT OF THE CASE

Tanya Simpson entered into an agreement with the Auburn police department, contracting to work as a confidential informant and provide at least three "fileable" felony drug cases within a 30-day period. 3/19/13 RP 57, 99-100. However, after six months of working as an informant, Ms. Simpson was unable to fulfill her agreement. 3/19/13 RP 99-100. Narcotics Detective Lance Pearson, testified that in order to assist her in completing her contract, he asked her if she knew the location of anyone with an outstanding warrant. 3/19/13 RP 59. She told Detective Pearson about a friend, Jeffery Brown, who had an outstanding misdemeanor warrant. 3/19/13 RP 59; 3/20/13 RP 5. She informed the detective that Mr. Brown had engaged in drug dealing in the past, but she was unsure whether he was currently selling. 3/19/13 RP 59, 140.

Detective Pearson confirmed Mr. Brown had a misdemeanor warrant but determined that arranging a controlled buy from Mr. Brown would not work, given that Ms. Simpson did not know whether he was currently engaged in dealing. 3/19/13 RP 62, 64. Instead, he arranged

for Ms. Simpson to lure Mr. Brown out of the motel room where he was staying with a promise of free food. 3/19/13 RP 65-66; 3/26/13 RP 19.

When Detective Pearson arrived at the motel, he saw that Mr. Brown was already outside, speaking with a woman in a car later identified as Mr. Brown's sister. 3/26/13 RP 17; 3/27/13 RP 41. Ms. Simpson arrived at the motel parking lot, spoke with Mr. Brown, and gave him a pizza and $20 that she owed him. 3/27/13 RP 58. She then informed Detective Pearson that Mr. Brown had returned to room 28. 3/19/13 RP 79.

Two additional officers, a K-9 officer, and sergeant arrived on the scene to assist Detective Pearson in what was expected to be a non-violent arrest on a misdemeanor warrant. 3/26/13 RP 21. The officers knocked on the door, and a male voice called out "who is it?" 3/26/13 RP 22. When the officers identified themselves as the police, there was no response. 3/26/13 RP 22. Detective Pearson obtained a key from the motel manager, knocked again, and then opened the door. 3/26/13 RP 23. Mr. Brown and two women were present in the room. 3/26/13 RP 26. The officers ordered the women out of the room and placed Mr. Brown under arrest. 3/26/13 RP 27.

Upon searching Mr. Brown's person, an officer discovered a wallet containing approximately $1327 in cash, which the officer noted was folded neatly. 3/26/13 RP 133-34. However, at trial Mr. Brown's sister testified that she when she met with Mr. Brown in the parking lot she gave him $1200 to get his car fixed, and that every time she gives him money he folds it neatly and puts it away. 3/27/13 RP 34-35.

In response to questioning, one of the women found in the motel room with Mr. Brown told Detective Pearson that Mr. Brown had thrown her a pouch containing drugs, which she hid in the bathroom. 3/19/13 RP 87. Both women were released and the room was locked and secured until a search warrant was obtained. 3/19/13 RP 89-90.

After obtaining a search warrant, the officers searched the motel room and found a bag containing cocaine, heroin, and methamphetamine under the sink. 3/19/13 RP 93; 3/26/13 RP 35. They also found an Arm & Hammer box with cocaine in an armoire, as well as a digital scale, a used pipe, and cell phone. 3/26/12 RP 50-51. A total of 0.3 grams of meth, 1.3 grams of cocaine, and 22.8 grams of heroin were found in the motel room. 3/26/13 RP 67, 71, 73.

During the search, a cell phone lying on the bed rang repeatedly. 3/26/13 RP 152-53. An officer answered the phone and, disguising

himself as a dealer, arranged to sell the callers drugs. 3/26/13 RP 152-53.

Prior to trial, Mr. Brown moved to suppress the evidence against him, arguing the police used the misdemeanor arrest warrant as a pretext to gather evidence of drug dealing. 3/20/13 RP 31. The trial court denied Mr. Brown's 3.6 motion.

During jury selection, the State used a peremptory strike to remove the only remaining African American from the venire. 3/21/13 RP 32. Mr. Brown objected under Batson v. Kentucky, but the trial court credited the State's explanation and permitted the challenge. 3/21/13 RP 37.

After a jury trial, Mr. Brown was convicted of one count of possession with intent of heroin within 1000 feet of a school bus stop and one count of possession with intent of cocaine within 1000 feet of a school bus stop. CP 110, 112-13, 115. Mr. Brown appeals.

E. ARGUMENT

1. **The State violated article I, section 7 when it used a misdemeanor arrest warrant as a pretext for a speculative narcotics investigation in order to obtain a search warrant for Mr. Brown's motel room.**

a. A misdemeanor arrest warrant may not be used as a pretext to conduct a speculative criminal investigation or search.

Article I, section 7 of the state constitution directs that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." An arrest warrant provides authority of law to invade an individual's home and make an arrest, but this power is strictly limited. State v. Hatchie, 161 Wn.2d 390, 392, 166 P.3d 698 (2007). The entry must be reasonable, it must not be a pretext for conducting an unauthorized search or investigation, and the police must have probable cause to believe the person named in the arrest warrant is an actual resident of the home and present at the time of the entry. Id.

In Hatchie, officers decided to pull over an individual they suspected of buying materials to make methamphetamine after they learned his driver's license was suspended and there was an outstanding misdemeanor warrant for him. 161 Wn.2d at 393. After losing sight of his vehicle, they found it parked in front of a house. Id. Neighbors informed the police that the suspect lived in the house and

that he was likely inside since his vehicle was out front. Id. Before finding the man hiding in the garage, the officers observed materials used to manufacture methamphetamine in plain view. Id. at 394. Based on this observation, they obtained a search warrant to look for evidence of possession and the manufacturing of methamphetamine. Id. The court held that, under these circumstances, the officers' actions were lawful. Id. at 406.

However, the court also stated:

> we take pains to point out an arrest warrant does not allow for a general search of the premises. Rather, it allows the police only the limited ability to enter the residence, find the suspect, arrest him and leave. Police action that deviates from the narrow bounds of this authority has no authority of law.

Id. at 400. The court noted that had the police apprehended the individual outside of the house, they would have no authority to enter the house. Id. at 400-01. Further, while the court did not feel the need to address the pretext issue because it was not raised by Hatchie, it specifically noted that the police are not permitted to "use arrest warrants as a guise or pretext to otherwise conduct a speculative criminal investigation or a search." Id. at 401.

Questions of constitutional construction, such as this one, are reviewed de novo. Id. at 394 (citing State v. Norman, 145 Wn.2d 578, 579, 40 P.3d 1161 (2002)).

b. The State improperly used the misdemeanor arrest warrant as a pretext to perform a speculative investigation as to whether Mr. Brown was currently selling drugs.

When examining whether a stop is a pretext for an unauthorized investigation, the court should consider "the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior." State v. Ladson, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999). Here, the totality of the circumstances show that the arrest of Mr. Brown in his motel room was used as a pretext to conduct a speculative investigation of whether Mr. Brown was currently selling drugs.

Detective Pearson became interested in arresting Mr. Brown only after his confidential informant could not produce definitive information about individuals who were currently dealing. Ms. Simpson had agreed to work as a confidential informant for the Auburn police department in exchange for not being charged on a prior arrest for delivery of cocaine. 3/19/13 RP 99; CP 143 (Finding of Fact 1a). She contracted to provide three "fileable" felony drug cases in 30 days

but after six months, she still did not have enough information to complete her contract. 3/19/13 RP 99-101; CP 143 (Finding of Fact 1a). Detective Pearson gave her the opportunity to fulfill her agreement by providing any other information that would lead to an arrest. 3/19/13 RP 59. Ms. Simpson gave Detective Pearson information about Mr. Brown, explaining both that he had an outstanding arrest warrant and that he had engaged in drug dealing in the past. 3/19/13 RP 59, 140. At the 3.6 hearing, Detective Pearson testified that Ms. Simpson indicated Mr. Brown might be selling drugs now, and that given Mr. Brown's history, this would not surprise him. 3/19/13 RP 60, 141-42. He testified that he did not think "people who sell drugs typically just stop." 3/19/13 RP 61.

When Detective Pearson arrived at the motel, he saw Mr. Brown outside and called for back-up because he was alone and in an unmarked vehicle. 3/19/13 RP 67; CP 144 (Findings of Fact 1f-1g). However, his "back-up" consisted of four additional officers, including a K-9 unit. 3/19/13 RP 68, 80; CP 144 (Finding of Fact 1m). When the officers opened the motel room door, they saw two women and Mr. Brown in the room. CP 145 (Finding of Fact 1s). Another officer placed Mr. Brown under arrest while Detective Pearson interviewed the

two women. 3/19/13 RP 83, 85-88; CP 145 (Findings of Fact 1u-1w). One of the women informed Detective Pearson that Mr. Brown was selling drugs. 3/19/13 RP 86; CP 146 (Finding of Fact 1x).

Using information obtained after Mr. Brown's arrest, Detective Pearson secured a search warrant for the motel room. 3/19/13 RP 88; CP 146 (Finding of Fact 1cc). During a search of the room, officers found cocaine, heroin, methamphetamine, a pipe, a scale, and a cell phone which they used to arrange "buy busts" with callers requesting drugs. CP 146-47 (Findings of Fact 1ff-1hh).

In denying Mr. Brown's motion to suppress, the trial court erred when it accepted Detective Pearson's testimony that he believed Mr. Brown was a threat to the community, as the facts Detective Pearson offered in support of this belief were weak. CP 147 (Finding of Fact 3a). Detective Pearson explained he learned from Ms. Simpson that another woman who was assaulted suspected Mr. Brown might have had something to do with the assault. 3/19/13 RP 61. No one alleged Mr. Brown actually committed the assault, and the only information that he was involved in the incident came from a woman's alleged suspicion, relayed to Ms. Simpson, which she relayed to Detective Pearson. During the hearing Detective Pearson admitted that this claim

had been investigated and no charges had been filed against Mr. Brown. 3/19/13 RP 113. This does not support the court's conclusion that Detective Pearson genuinely believed Mr. Brown was a threat to the community.

The trial court also found that Detective Pearson had reason to believe that Mr. Brown was not selling drugs. CP 147 (Finding of Fact 3b). In fact, Detective Pearson testified to just the opposite: that his confidential informant believed Mr. Brown might still be selling drugs and that he believed drug dealers do not typically stop selling. 3/19/13 RP 60-61, 141-42. Detective Pearson stated, "I felt like yeah, there's definitely a possibility he was selling, but I didn't – I had no way to confirm it." 3/19/13 RP 61.

The court also erred in crediting Detective Pearson's testimony that he wanted to arrest Mr. Brown in the parking lot, but did not want to arrest Mr. Brown without back-up officers or in the presence of Ms. Simpson, because that could put her in danger of retaliation. CP 148 (Finding of Fact 1c). Detective Pearson offered no explanation as to how he planned to have Ms. Simpson lure Mr. Brown out of the motel room with pizza and arrest him outside of her presence. This plan defied logic, as there was no reason to think Mr. Brown would linger in

the parking lot once Ms. Simpson left. It is far more likely that Detective Pearson anticipated exactly what occurred: that Ms. Simpson would be able to tell him which room Mr. Brown was staying in after watching him return to the motel, at which point the officers could perform the arrest.

Finally, the trial court erroneously found that a K-9 unit was involved in the arrest because there was concern Mr. Brown might flee, not because the officers were engaged in a narcotics investigation. CP 148 (Finding of Fact 1d). Detective Pearson acknowledged there was only one door to the motel room, and that there would be "nowhere" for Mr. Brown to go once the officers approached the door. 3/19/13. Thus, it was unlikely the K-9 unit would be needed to track Mr. Brown.

The totality of the circumstances demonstrated that Detective Pearson was interested in using the information he received from Ms. Simpson to perform a speculative narcotics investigation. See Ladson, 138 Wn.2d at 358-59. He testified to his subjective intent when he indicated he suspected Mr. Brown was continuing to sell. His actions, which included arranging for several officers to assist him with the arrest and interviewing the women in the motel with Mr. Brown,

demonstrated that he arranged the arrest in order to perform a speculative narcotics investigation.

This is not permitted under Hatchie. The misdemeanor warrant gave the officers authority to enter the motel, locate Mr. Brown, arrest him, and leave. Hatchie, 161 Wn.2d at 400. The officers' deviation from these actions was a violation of article I, section 7. Id. Because the evidence that provided the basis for the search warrant was obtained unlawfully, all evidence discovered during the search is fruit of the poisonous tree and must be suppressed State v. Gaines, 154 Wn.2d 711, 717-18, 116 P.3d 993 (2005) (citing State v. Coates, 107 Wn.2d 882, 887, 735 P.2d 64 (1987)); see also State v. O'Bremski, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) (citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Mr. Brown's convictions must be reversed, and the case remanded for dismissal.

2. The trial court violated Mr. Brown's right to equal protection by allowing the State to strike the only remaining African American juror.

a. The Fourteenth Amendment prohibits the State from striking a juror because of her race.

"[T]he State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." Batson v. Kentucky, 476 U.S.

79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); U.S. Const. amend. XIV. Racial discrimination in jury selection harms not only the accused, but also the excluded juror and society as a whole. Batson, 476 U.S. at 87.

> Defendants are harmed, of course, when racial discrimination in jury selection compromises the right of trial by impartial jury, but racial minorities are harmed more generally, for prosecutors drawing racial lines in picking juries establish state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

Miller-El v. Dretke, 545 U.S. 231, 237-38, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).

Courts apply a three-part analysis to determine whether a potential juror was peremptorily challenged pursuant to discriminatory criteria. First, the defendant must make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Batson, 476 U.S. at 93-94. The burden then shifts to the State to explain the exclusion and demonstrate that race-neutral selection criteria and procedures "produced the monochromatic result." Batson, 476 U.S. at 94. The prosecutor must give a "clear and reasonably specific" explanation of his or her reasons for striking the relevant juror. Miller-El, 545 U.S. at 239.

Finally, the trial court has the duty to determine if the defendant has established purposeful discrimination. Batson, 476 U.S. at 98. In deciding whether the exercise of the peremptory challenge violates equal protection, the court should consider all relevant evidence, and not simply take the State's race-neutral explanation at face value. Id. at 97-98; Miller-El, 545 U.S. at 240. Prosecutors' questions, patterns of peremptory challenges, and disproportionate impact may provide circumstantial evidence of discriminatory intent. Batson, 476 U.S. at 93. "For example, total or seriously disproportionate exclusion of [African Americans] from jury venires is itself such an unequal application of the law as to show intentional discrimination." Id. (internal citations omitted).

This Court reviews a trial court's Batson ruling for clear error. State v. Rhone, 168 Wn.2d 645, 651, 229 P.3d 752 (2010). The error is structural, requiring reversal without any showing of prejudice. Batson, 476 U.S. at 100.

b. The State engaged in unconstitutional discrimination by using a peremptory challenge to strike the only remaining African American member of the venire.

Here, two of the members of the venire were African American, but one expressed a hardship the court was unable to accommodate.

3/21/13 RP 37. The State then struck Juror No. 5, the only remaining African American member on the venire, eliminating all African American members from the jury. This established a prima facie case of improper discrimination. State v. Rhone, 168 Wn.2d at 656; see also Smithkline Beecham Corp. v. Abbott Laboratories, __ F.3d __, 2014 WL 211807 (C.A.9 (Cal.)) at *3 (failing to look closely when a sole minority is struck from the venire would inoculate peremptory strikes against Batson challenges in jury pools lacking diversity).

However, whether Mr. Brown established a prima facie case is moot, because the prosecutor defended his use of the peremptory strike without any prompting from the court and the court ruled on the ultimate question of intentional discrimination. 3/21/13 RP 33, 35-36; State v. Hicks, 163 Wn.2d 477, 492, 181 P.3d 831 (2008) (citing Hernandez v. New York, 500 U.S. 352, 359, 111 S.Ct.1859, 114 L.Ed.2d 395 (1991)). Therefore, the only issue to be considered on review is the court's ultimate ruling on the Batson challenge. Hicks, 163 Wn.2d at 493.

The court erred when it found the State provided a legitimate, nondiscriminatory reason for the strike. It credited the State's explanation that Juror No. 5 "said she would have difficulty trusting

police officers and law enforcement in general, that she would look negatively on them." 3/21/13 RP 33, 35-36. Juror No. 5 expressed a distrust of police officers when explaining that she did not assume they were credible based simply on the fact they were police officers. 3/20/13 RP 200. She stated:

> I kind of don't want to go with the credibility theory because if you're going to have police officers up on the stand telling their side of the story, they have all the credibility in the world against the person who might be the addict who doesn't have the best credibility, but the officer could be lying and the drug addict could be telling the truth.

3/20/13 RP 200.

When questioned about how she would decide between conflicting testimony, she indicated that she would pay attention to eye movements, body movements, and the story they told. 3/20/13 RP 200. She differentiated between credibility automatically afforded to police officers, which concerned her, and examining whether an officer's testimony actually appeared credible. 3/20/13 RP 201-02. Upon the prosecutor's direct questioning, Juror No. 5 stated that she did not trust police officers and that it could interfere with her ability to be open to their testimony. 3/20/13 RP 203. However, she also stated that she could be fair to all the witnesses and would not hold anything against

police officers who testified. 3/20/13 RP 205-06. She simply would not assume the police officers were automatically telling the truth by virtue of their uniform. 3/20/13 RP 202.

Juror No. 5 shared her perspective as an African American woman whose interactions with police officers had not always been pleasant. 3/20/13 RP 202. Mr. Brown is also African American and, as defense counsel articulated to the trial court, it is not uncommon for African Americans to have negative experiences with police officers. 3/20/13 RP 144; 3/21/13 RP 34. The United States Department of Justice found that the Seattle Police Department engaged in unconstitutionally excessive use of force, and that over 50% of the excessive-force cases involved minorities. United States Department of Justice, Civil Rights Division, Investigation of the Seattle Police Department (December 16, 2011) at 6.

The State may not exclude an African American juror based on the fact that she does not think highly of the police. United States v. Bishop, 959 F.2d 820, 825 (9th Cir. 1992) (overruled on other grounds in United States v. Nevils, 598 F.3d 1158 (9th Cir. 2010)); Turnbull v. State, 959 So.2d 275, 277 (Fla. Ct. App. 2006). In Bishop, the prosecutor challenged an African American juror based on the fact she

lived in a poor and violent community whose residents may be inclined to believe the police use excessive force. 959 F.2d at 825. The court found this reasoning was not race-neutral, and that "[g]overnment acts based on such prejudice and stereotypical thinking are precisely the type of acts prohibited by the equal protection clause of the Constitution." Bishop, 959 F.2d at 826 (citing Batson, 476 U.S. at 97). Similarly, in Turnbull, the prosecutor exercised peremptory strikes against African American venire persons who indicated a belief that the police engage in racial profiling. 959 So.2d at 276. The court held this was not a legitimate justification, finding that a "facially race-neutral reason is one that is not based on race at all." Turnbull, 959 So.2d at 277.

Here, Juror No. 5 stated her distrust of police officers, but also indicated that she could be fair and apply the law as directed. 3/20/13 RP 203-04. She repeatedly made it clear that she objected to automatically assuming an officer was telling the truth, and that she would rely instead on assessing body language and listening to the testimony, which is exactly what jurors are asked to do. 3/20/13 RP 200-01, 205-06, 209. By arguing that it struck her because of her distrust of police, the State failed to provide a legitimate race-neutral

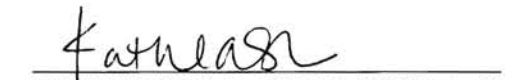
basis for its challenge. The trial court erred in allowing the State to dismiss the lone African American juror and this Court should reverse Mr. Brown's convictions and remand for a new trial.

F. CONCLUSION

Jeffery Brown is entitled to a reversal of his convictions and a remand for dismissal because his article I, section 7 rights were violated. In the alternative, he is entitled to a reversal of his convictions and a remand for a new trial because the State violated his equal protection rights under Batson v. Kentucky.

DATED this 31st day of January 2014.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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Respondent,	)	
	)	NO. 70496-6-I
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	)	
JEFFREY BROWN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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