STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. No. 2018 AP 1310-CR

MALCOLM J. SANDERS,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF
THE KENOSHA COUNTY CIRCUIT COURT
HONORABLE BRUCE E. SCHROEDER, PRESIDING

APPELLANT'S BRIEF

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ISSUES PRESENTED

1. Whether basic Due Process was violated when the court below sustained the State's peremptory challenges of the only black members of the venire.

After objection based on *Batson v. Kentucky*, 476 U.S. 79 (1986), the court below found the State's reasons for the strikes were race neutral.

2. Whether basic Due Process was violated when the court below refused Mr. Sanders a continuance so last minute discovery could be reviewed with counsel.

The court below refused trial counsel's request for a continuance.

3. Whether basic Due Process was violated when the court below forced Mr. Sanders to choose between his right to counsel and his right to jury trial.

The court below told Mr. Sanders his request to seek new counsel would be granted only if he agreed to a court trial.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested.

STATEMENT ON PUBLICATION

Counsel requests publication because the opinion here is likely to apply established rules of law to a factual situation significantly different from those in previous opinions and therefore will clarify those rules.

STATEMENT OF THE CASE

1. Nature of the Case

This is a review of Mr. Sanders' convictions by a jury of 2 counts of violating §961.41(d)(2), *Wis. Stats.* (Delivery of Heroin).

2. Proceedings Below

On June 15, 2016, complaint no. 16 CF 677 was filed in Kenosha County Circuit Court charging Mr. Sanders with 2 counts of violating §961.41(d)(2), *Wis. Stats.* (Delivery of Heroin). (1). Both counts were enhanced charging Mr. Sanders as a repeater and that the deliveries were made within 1000 feet of a youth center. *Id.* Mr. Sanders initially appeared with counsel on July 26, 2016, waived reading the complaint and asked for a preliminary hearing. (5)(72:2). The court set bail at $5000 cash and set prelim for August 3, 2016. (15)(72:3-4).

On August 3, 2016, Mr. Sanders waived preliminary hearing. (8)(73). The court set pretrial conference for November 9, 2016 and jury selection for November 28, 2016. (73:6). An information charging Mr. Sanders and 2 codefendants with the identical crimes in the complaint was filed that date. (10).

On August 5, 2016, the scheduling order setting final pretrial at November 9, 2016 was filed. (11).

On November 8, 2016, the final pretrial was adjourned because the codefendants could not be produced. (74). On November 10, 2016 the final pretrial was again rescheduled because the codefendants could not be produced. (75). On November 28, 2016, the final pretrial was again rescheduled so Mr. Sanders could retain counsel. (76). On January 3, 2017, the final pretrial was rescheduled at the parties' request. (77).

On March 9, 2017, the remaining codefendant accepted the State's offer (78:5-12). Mr. Sanders' counsel requested an adjournment because the cooperating codefendant's statement had not been provided in discovery until the day before. (78:16). The court refused counsel's request, instead requiring Mr. Sanders to change his plea that day or go to trial. (78:16-22). Mr. Sanders chose to go to trial. (78:22).

On March 17, 2017, the State filed its witness list and demand for discovery. (14).

Jury trial began March 27, 2017 with jury selection. (79). After peremptory strikes were made, trial counsel objected to the State's strikes of all of the black persons on the venire. (16)(79:45-50). The court denied the objection, finding the State's reasons race neutral. *Id.* The State began presenting its case. (79:82).

On March 28, 2017, the State continued presenting its case and rested (80:126). Mr. Sanders had previously waived his right to testify. (80:92-96). Defense counsel did not present any witnesses. (80:126 [lines 6-7]).

On March 29, 2017, the jury returned its verdict, finding Mr. Sanders guilty on both counts. (40)(41)(81:12-15). The court requested a presentence investigation. (39).

On June 1, 2017, the court sentenced Mr. Sanders to 18 years on Count 1 with 12 years confinement to be followed by 8 years extended supervision and on Count 2 to 5 years probation, consecutive. (51)(82:22-23). On August 31, 2017, following receipt of a letter from the Department of Corrections (59), the court amended the judgment on Count 1 to 17 years, with 12 years confinement to be followed by 5 years of extended supervision. (61).

Notice of Intent was filed June 7, 2017 (57) and Notice of Appeal was filed July 10, 2018. (68).

3. Facts of the Offense

A cooperating codefendant testified to receiving heroin from Mr. Sanders on 2 occasions. (80:31-39).

Argument

I. SUSTAINING THE STATE'S PEREMPTORY STRIKES OF THE ONLY BLACK PERSONS IN THE VENIRE VIOLATED BASIC EQUAL PROTECTION AS GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS.

A. Standard of Review

Issues involving racially discriminatory peremptory challenges prohibited by *Batson v.*

Kentucky, 476 U.S. 79 (1986) and its progeny are reviewed for erroneous exercise of discretion. *State v. Lamon*, 2003 WI 78, ¶37, 262 Wis.2d 747, 766 following *Hernandez v. New York*, 500 U.S. 352, 364-366 (1991). The best explanation of this standard is found in *Burkes v. Hales*, 165 Wis.2d 585, 590-591 & n.2, 478 N.W.2d 37 (Ct.App.1991) followed in *State v. Davis*, 2001 WI 136, ¶28, n.8, 248 Wis.2d 986, 1005. "[W]e look first to the court's on-the-record explanation of the reasons underlying its decision." 165 Wis.2d at 590. If "the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law . . ." there is no error. *Id.* If the court's decision is based on an error of law, this is beyond the limits of discretion and its decision cannot stand. *Id.* at 590, n.2.

B. Additional Facts

After peremptory strikes were made, trial counsel objected to the State's strikes of the only black persons on the panel. (79:45). The court asked the State for an explanation and the prosecutor responded the strikes were based on both jurors reporting they had "prior bad experiences" with police. (79:46 [lines 7-15]). The court accepted this reason as race neutral and denied trial counsel's objection. (79:47-50).

C. Discussion

It is long settled basic Equal Protection is violated if a prosecutor strikes jurors based on their race. *Batson, supra*, 479 U.S. at 89, 100; *Lamon, supra,* 2003 WI 78, ¶22-24. Wisconsin follows the *Batson* procedures for determining when such strikes are unconstitutional. *Lamon*, ¶28-32. And see *County of Kenosha v. C & S Management, Inc.*, 223 Wis.2d 373, 393-394, ¶31 (1999) (due process and

equal protection clauses of state and federal constitutions provide same protection).

These procedures were succinctly summarized by the highest Court:

> once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination(step one), the burden shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proven purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769 (1995).

Step one of the *Batson* procedure is not at issue here. Since the trial judge asked the prosecutor for her reasons for the strike and she provided them (79:45-46), the issue at step one of establishment of the prima facie case is moot. *Hernandez*, 500 U.S. at 359. (It should be noted, however, that since disparate impact alone may be sufficient to establish the prima facie case, 500 U.S. at 375 (conc.opn. per O'Connor, J.), and here the only black jurors on the panel were stricken (79:49 [lines 6-11])), the trial court could have properly found a prima facie case. *Johnson v. California*, 545 U.S. 162, 173, 125 S.Ct. 2410 (2005)(striking all 3 black jurors made out prima facie case); *Morse v. Hanks*, 172 F.3d 983, 985 (7th Cir.1999)(prima facie case can be made out by striking sole black juror).)

Neither is step two at issue since the black jurors did both say they had bad experiences with police and this alone might be considered facially neutral. But the prosecutor's description of the black jurors' responses to her questions was incomplete. If there is anything lesson to be taken from the more recent *Batson* decisions by the high Court, it is that in applying the totality of the circumstances test at step three, see *Hernandez*, 500 U.S. at 363 ("totality of the relevant facts"); *Lamon*, 2003 WI 78, ¶70 ("The application and outcome of the totality of the circumstances test is determined on a case-by-case basis."), a court must consider "the whole

of the *voir dire* testimony" *Miller-El v. Dretke,* 545 U.S. 231, 252, 125 S.Ct. 2317 (2005); *Foster v. Chatham*, ___ U.S. ___, 136 S.Ct. 1737, 1748-1754 (2016)(extensive consideration of *voir dire*). Here, what the State did not tell the court below is that both of the black jurors' reason for their bad experiences with police was they had been pulled over for the non-existent crime of Driving While Black. See (79:23 [juror reports she has "been pulled over for driving in the wrong place"])(79:28-29 [juror reports he has been "racially profiled" by "several times where I have just been pulled over without just cause"]).

For at least 20 years, legal literature has catalogued and described the discriminatory practice, now commonly known as Driving While Black, in which police, without any legal cause, stop vehicles driven by black persons. See, *e.g.*, David A. Harris, *Driving While Black and All Other Traffic Offenses:*etc., 87 J. Crim. and Criminology 544 (1997). This practice in recent years has regrettably morphed into killing while black. See Devon W. Carbado, *From Stopping Black People to Killing Black People:*etc., 105 Cal. L. Rev. 125 (2017). Is it any wonder then that black people who have been stopped for Driving While Black are skeptical about the police?

More to the point, since it is only black people who are stopped for Driving While Black, the States' reason for striking these black jurors was not race-neutral. If black persons who have been stopped for Driving While Black, *i.e*. have been discriminated against by police, are therefore ineligible to serve on juries, then the State has based discrimination upon discrimination. Thus, the State's reason for striking the black jurors was not race neutral and the court below's decision to sustain the strikes was clearly erroneous.

This error was prejudicial *per se* because *Batson* error is structural error. *Rivera v. Illinois,* 556 U.S. 148, 161, 129 S.Ct. 1446 (2009); *Winston v. Boatwright*, 649 F.3d 618, 627-629 (7th Cir.2011). Therefore, Mr. Sanders' conviction must be reversed and remanded on this ground alone.

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II. MR. SANDERS BASIC RIGHT TO ASSISTANCE OF COUNSEL WAS VIOLATED WHEN THE COURT BELOW REFUSED TO GRANT A CONTINUANCE TO PERMIT HIM TO CONSULT WITH COUNSEL ABOUT LAST MINUTE DISCOVERY.

A. Standard of Review

Right to counsel issues are reviewed *de novo*. *State v. Cummings*, 199 Wis.2d 721, 748, 546 N.W.2d 406 (1996).

B. Additional Facts

At the final pretrial, trial counsel asked for a continuance to confer with Mr. Sanders about last minute discovery from the State. (78:3)(78:16 [lines 13-18]). The court refused the continuance and told Mr. Sanders he had to either change his plea that day or go to trial. (78:4)(78:14-22). The last minute discovery was the statement of the cooperating codefendant which, *inter alia*, identified Mr. Sanders as the perpetrator of the crimes charged against him in the information. (78:3-4)(78:16).

C. Discussion

The state and federal constitutions guarantee every person accused in a criminal prosecution a right to counsel in defense. U.S. Const., Amendment VI; Wis. Const., Art I, §7. The right extends to all "critical stages" of the prosecution against the accused. *U.S. v. Wade*, 388 U.S. 218, 224, 87 S.Ct. 1926 (1967); *Sparkman v. State*, 27 Wis.2d 92, 101, 133 N.W.2d 776, 781 (1965). The right to counsel includes a right to confer with counsel. *Geders v. U.S.*, 425 U.S. 80, 91, 96 S.Ct. 1330 (1976) (court's refusal to allow accused to consult with counsel overnight during trial denied his right to counsel). The pretrial is a critical stage. *Schmidt v.*

Foster, 891 F.3d 302 (7th Cir.2018)(where judge held pretrial *ex parte* hearing, prohibiting counsel's presence, right to counsel denied); *Mitchell v. Mason*, 325 F.3d 732, 742 (6th Cir.2003)(where accused saw counsel for only 7 minutes during pretrial, right to counsel denied).

It is further long settled the accused is entitled to counsel at plea hearings, *Kitchens v. Smith*, 401 U.S. 847, 91 S.Ct. 1089 (1971)(guilty plea), and during plea negotiations. *Padilla v. Kentucky*, 559 U.S. 356, 364, 130 S.Ct. 1473 (2010)("Before deciding to plead guilty, a defendant is entitled to 'the effective assistance of counsel.' ").

Here, the purpose of the requested continuance was for Mr. Sanders to consult with counsel about the incriminating statement of the cooperating codefendant which had been provided by the State only the day before.

Denying the continuance thus denied Mr. Sanders his right to confer with counsel during plea negotiations. Had the court granted the continuance and given client and counsel ample time to consider the codefendant's statement, this appeal might have been unnecessary. Where counsel has been denied at a critical stage, reversal is mandated regardless of prejudice. *Penson v. Ohio*, 488 U.S. 75, 88, 109 S.Ct. 346 (1988). Therefore, the conviction must be reversed and remanded on this ground as well.

III. THE COURT BELOW DENIED BASIC DUE PROCESS BY FORCING MR. SANDERS TO CHOOSE BETWEEN HIS RIGHT TO COUNSEL AND HIS RIGHT TO JURY TRIAL.

A. Standard of Review

Right to counsel issues are reviewed *de novo*. *State v. Cummings*, *supra*. Right to jury trial

issues are also reviewed *de novo*. *State v. Hansford*, 219 Wis.2d 226, 234, 580 N.W.2d 171 (1998).

B. Additional Facts

Before the State presented its last witness, Mr. Sanders told the court he thought his attorney hadn't had enough time to prepare for trial and wasn't providing effective assistance during trial. (80:75-84). The court told Mr. Sanders it would not give him any time to replace counsel unless he waived his right to jury trial. (80:82-83).

C. Discussion

Fifty years ago in *Simmons, et al. v. U.S.*, 390 U.S. 377, 88 S.Ct. 967 (1960), the accused was forced to choose between enforcing his Fourth Amendment rights or exercising his Fifth Amendment privilege against self-incrimination. *Simmons, supra*, 390 U.S. at 394. The Court found "it intolerable that one constitutional right should have to be surrendered in order to assert another" and reversed the conviction. *Id.*

The principle announced in *Simmons* has been applied by state and federal courts in a variety of different contexts. See *People v. Angelillo*, 472 N.Y.S.2d 127, 128 (N.Y. Cty. Ct.1980)(collecting cases); *State v. Schultz*, 148 Wis.2d 370, 385-386, 435 N.W.2d 305 (Ct.App.1988)(dis.opn. per Sundby, J. collecting cases). And see *U.S. v. Scott*, 909 F.2d 488 (11th Cir.1990)(where judge forced accused to choose between right to counsel and right to testify, conviction reversed following *Simmons*); *State v. Francis*, 317 Conn. 450, 118 A.3d 359 (2015)(same without following *Simmons*).

Counsel submits the *Simmons* principle applies here as well. "A defendant in a criminal proceeding is entitled to certain rights and protections which

derive from a variety of sources. He is entitled to all of them; he cannot be forced to barter one for another. When the exercise of one right is made contingent upon the forbearance of another, both rights are corrupted." *U.S. ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120 (3d Cir.1977)(habeas relief aff'd where accused forced to choose between right to counsel and right to testify). Forcing Mr. Sanders to choose between his right to counsel and his right to jury trial was equally as, if not more so, intolerable as in *Simmons* and its progeny. Error affecting the right to jury trial is structural, *Sullivan v. Louisiana*, 508 U.S. 275, 281-282, 113 S.Ct. 2078 (1993), which requires reversal regardless of prejudice as does right to counsel error. *Penson, supra, id.* Thus, this ground justifies reversal as well.

Conclusion

Counsel respectfully submits the foregoing demonstrates the Court should reverse and remand for a new trial.

Dated: October 22, 2018

Respectfully submitted,

_____

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SANDERS

STATE OF WISCONSIN

C O U R T OF A P P E A L S

DISTRICT II

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Plaintiff-Respondent,

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MALCOLM J. SANDERS,

Defendant-Appellant.

CERTIFICATIONS

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) & (c) for a brief produced with a proportional serif font.

The length of this brief is 2,730 words.

ACCURACY CERTIFICATION

I hereby certify that the electronic copy of this brief conforms to the rule contained §809.19(12)(f) in that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

MAILING

I certify that this brief was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first class mail on October 22, 2018. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: October 22, 2018 So Certified,

Signature: _____

Timothy A. Provis

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