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 REPLY BRIEF

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1. The *Batson* issue

a. All too often ignored by lower courts, and also here by the State in its "Legal Principles" section, Respondent's Brief at 15-17 (hereinafter RB), when considering discrimination in jury selection, is the basic constitutional rule that "by denying a person participation in jury service on account of race, the State unconstitutionally discriminate[s] against the excluded juror." *Batson v. Kentucky*, 476 U.S. 79, 87, 106 S.Ct. 1712 (1986); *Georgia v. McCollum,* 505 U.S. 42, 48, 112 S.Ct. 2348 (1992)(same).

So it is, rarely noted in discriminatory jury selection jurisprudence is "*Batson* was designed to serve multiple ends, only one of which was to protect

an individual defendant from discrimination . . . [internal quote marks and citations omitted]" *Powers v. Ohio*, 499 U.S. 400, 406, 111 S.Ct. 1264 (1991)(because jurors have no easy remedy for exclusion, criminal defendants have 3rd party standing to assert their rights). The other harms *Batson* protects against are to "the dignity of persons" wishing to serve on juries and to "the integrity of the courts." 499 U.S. at 402. And see *Batson,* 476 U.S. at 87 (harm from discriminatory practices "touch[es] the entire community" and undermine[s] confidence in our system of justice.").

Indeed, such discrimination against qualified jurors threatens the democratic basis of the jury system itself, see *Powers* (discussion at 406-408), because "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." 499 U.S. at 407. *Cf. Blakely v. Washington*, 542 U.S. 296, 305-306, 124 S.Ct. 2531 (2004)(jury trial right is meant to ensure the people's ultimate control of the judiciary).

In sum, the issue of fairness here is not just Mr. Sanders, but also of the black jurors who were improperly excluded from the jury in violation of basic Equal Protection. Considering the constitutional basis for objecting to Driving While Black is also the Equal Protection Clause, *Whren v. U.S.*, 517 U.S. 806, 813, 116 S.Ct. 1769 (1996), the constitutional arguments here dovetail nicely.

With these principles in mind, counsel now turns to the merits of the State's arguments.

b. Discussion

The State focuses its argument on the question it asked all the jurors, *i.e.*, whether they had "a prior bad experience with law enforcement" and says this

distinction is "critical." RB 19. But the issue here is not what the State asked but what its question revealed in the black jurors' answers. Counsel, of course, understands the State's problem. Although the highest Court has said pretext stops based on race are unconstitutional, *Whren, supra, id,* there are few cases even mentioning Driving While Black and fewer discussing it. Counsel's research discloses, as presumably did the State's, no cases in which a juror was excluded based on a Driving While Black incident. Where the case is one of first impression, the State can only point to cases it considers analogous. But as neither of the 2 cases the State cites decides the issue of whether a black juror can be excluded because he/she has been illegally pulled over for Driving While Black, these cases are simply not in point. RB 19-20 (citing *U.S. v. Carter*, 111 F.3d 509 (7th Cir.1997) and *Edwards v. Roper*, 688 F.3d 449 (8th Cir.2012)). (Counsel also notes the Montoya law review article the State cites and quotes at RB 20 is one of dozens finding *Batson* has utterly failed to prevent discrimination and the author cites no cases for the quoted sentence.)

The point missed by the State is since only black persons are subject to Driving While Black incidents, Driving While Black is not a race-neutral reason for exclusion from a jury. This is discriminating against a juror because he/she has been discriminated by police and cannot be tolerated.

Of course, in this case of first impression, counsel cannot provide any cases in point, either, but Judge Lavine's concurring opinion in *State v. Holmes*, 176 Conn.App.156, 192-202, 169 A.3d 264, 286-292 (2017) discusses the issue in detail, endorsing the position counsel takes here. "Viewed in the context of the generally ineffectual application of *Batson*," he writes at 176 Conn.App.197, "[t]he reality is permitting the use of peremptory challenges [for Driving While Black and related reasons] *effectively excludes a*

significant number of people belonging to suspect classes from jury service." 176 Conn. App. 198, emphasis in original. He continues "[t]he potential for the kind of categorical exclusion that *Batson* permits is simply unacceptable in a system that strives to treat everyone equally." *Id.* "To prohibit a significant percentage of people belonging to a suspect class from serving on a jury because they express a reasonable, fact-based and widely held view cannot be countenanced." *Id.*

The two black jurors here candidly expressed their feelings based on their Driving While Black experiences. *Cf.* Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched and Stripped of Constitutional Protection*, 38 J. Marshall L. Rev. 439 (2004). Allowing black jurors to be excluded for having been stopped for Driving While Black as "a prior bad experience with law enforcement" will eliminate a whole category of qualified prospective jurors "whose views are reasonable and widely shared in their communities." 176 Conn. App. 198. This would be "most pernicious because it is a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others." *Batson*, 476 U.S. at 88 (internal quote marks and citation omitted).

Reversal is justified on this ground alone.

2. The right to confer with counsel issue

a. Forfeiture

The State claims this issue was forfeited. RB 23-24. The State is confused about the distinction between forfeiture and waiver. See *State v. Ndina*, 2009 WI 21, ¶28, 315 Wis.2d 653 (state supreme court admits it has contributed to confusion). "Whereas forfeiture is the failure to make a timely

assertion of a right, waiver is the intentional relinquishment of a known right." *Ndina, supra*, ¶29 (internal quote marks and citation omitted). Even waiver of a statutory right "must be an intentional and voluntary relinquishment of a known right, and it must be accompanied by clear and specific renunciation of that right." *State v. Lewis*, 2004 WI App 111, ¶14, 277 Wis.2d 446.

Here, the right is the right to confer with counsel. This right is guaranteed by the Sixth Amendment. *Geders v. U.S.*, 425 U.S. 80, 96 S.Ct. 1330 (1976). Fundamental rights, such as the right to counsel, are lost only by a "personal and express waiver." *Ndina*, ¶31. "Such rights cannot be forfeited by mere failure to object." *Id.* Since there was no personal and express waiver of the right to confer with counsel by Mr. Sanders, he did not forfeit this issue.

Even were it appropriate to apply a forfeiture rule here, counsel notes "we have never required an objection to be as specific as possible to be effective." *State v. Agnello*, 226 Wis.2d 164, ¶12, 595 N.W.2d 427, 431 (1999). "All that we have required of a party is to object in such a way that the objection's words or context alert the court to its basis." *Id.* Here, it seems clear from the colloquy between trial counsel, Mr. Sanders and the court below the court knew the basis for the objection. See Appellant's Appendix 14-24, hereinafter AA.

b. Discussion

Again, the State focuses on the wrong facts. That the co-defendant was turning State's evidence may or may not have been a surprise, RB 25, but the co-defendant's statement and its details weren't known until the day before. The State complains there was no indication of insufficient time for trial counsel and Mr. Sanders to confer about the details of the statement and how it would affect Mr. Sanders

decision to plead or not. RB 25-26. Apparently, the State is unaware of the rule, in a criminal case, the decision to plead or go to trial is entirely one for the accused to make, *State v. Gordon*, 2003 WI 69, ¶21, 262 Wis.2d 380, or that counsel often try to "sell the deal" to the accused if they find it in the client's best interest to do so and that this often takes more than one day.

The court below was pushing to have Mr. Sanders make this decision immediately. AA 14-24. It appears the court below was more interested in moving his calendar along than it was in justice. *Cf. State ex rel. Collins v. American Family Ins. Co.*, 153 Wis.2d 477, 451 N.W.2d 429 (1990)(where judge created system requiring parties to stipulate to trial date or not in order to shift costs of last minute settlements from courts onto litigants, system violated litigants state constitutional rights and so was illegal).

As counsel noted in the opening brief, an accused is entitled to effective assistance of counsel before deciding to plead guilty. Appellant's Brief at 9, citing *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010). The court below violated that right here by putting its calendar ahead of Mr. Sanders' right to counsel and so reversal is justified on this ground.

3. The *Simmons* issue

a. The State again claims forfeiture. RB 27-29. Again, by the reasoning presented in 2.a., *supra*, there was no waiver here as the rights involved are fundamental and there was no express and personal relinquishment by Mr. Sanders.

b. Discussion

The State argues no error because Mr. Sanders had a jury trial. RB 29. Again the State

misses the point. Mr. Sanders wanted to seek another counsel. (80: 82-83); AA at 32-33. By forcing Mr. Sanders to choose between his right to jury trial and his right to counsel of his choice, see *Chandler v. Fretag*, 348 U.S. 3, 9-10,75 S.Ct. 1 (1954)(accused entitled to counsel of choice)(80:79 [trial counsel was retained]), the *Simmons* principle was violated. Mr. Sanders had a jury trial but he was denied his right to counsel of his choice as a result of the court below's improper decision to make him choose between the two. "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841 (1964). Reversal is justified on this ground.

Conclusion

Counsel respectfully submits the foregoing demonstrates the State's arguments are without merit and the Court should reverse and remand for a new trial.

Dated: January 15, 2019

Respectfully submitted,

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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 1,801 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.

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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 January 15, 2019. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: January 15, 2019 So Certified,

Signature: _____

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