No. 84-6263

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES KIRKLAND BATSON, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

JOINT APPENDIX

FRANCIS WILLIAM HEFT, JR.
JAMES DAVID NIEHAUS
Jefferson District Public Defender
719 West Jefferson
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Petitioner

CARL T. MILLER, JR.
Assistant Attorney General
of Kentucky
Capitol Building, Suite 34
Frankfort, Kentucky 40601
(502) 564-4047
Counsel for Respondent

PETITION FOR CERTIORARI FILED FEBRUARY 19, 1985
CERTIORARI GRANTED APRIL 22, 1985

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 6, 1982—Indictment charging second degree burglary, receipt of stolen property valued at more than $100.00 and second degree persistent felony offender status returned by the Jefferson County Grand Jury.

February 14-15, 1984—Jury trial in Jefferson Circuit Court. Petitioner was convicted of second degree burglary, receipt of stolen property valued at more than $100.00, and second degree persistent felony offender status.

March 20, 1984—Judgment entered in Jefferson Circuit Court sentencing Petitioner to a 20-year term of imprisonment.

December 20, 1984—Supreme Court of Kentucky renders its Opinion affirming the judgment of conviction.

February 19, 1985—Petition for Writ of Certiorari filed in this Court.

April 22, 1985—Writ of Certiorari granted.

TRANSCRIPT OF EVIDENCE AND PROCEEDINGS EXCERPTS

[5] (Colloquy)

(At this point, the jury panel was seated in the courtroom in alphabetical order, voir dire examination was conducted but was specifically excluded from request for transcript per the Designation of Proceedings; strikes made by respective counsel, extra jurors excused and exited the courtroom, and the jury was seated in the jury box as follows:)

THE CLERK: As I call your name, the sheriff will conduct you to your seat in the jury box.

Juror Number One, Ruth Ran; Juror Number Two, Elsie Dupin; Juror Number Three, Richard Carroll; Juror Number Four, Dena Meece; Juror Number Five, Samuel Dabney; Juror Number Six, Lucia Vibert; Juror Number Seven, Carolyn Bunger; Juror Number Eight, Joseph Gaines; Juror Number Nine, Patrick Yarber; Juror Number Ten, Dona Estes; Juror Number Eleven, Joyce Smith; Juror Number Twelve, Arthur Dickerson; Juror Number Thirteen, Anthony Ferg.

THE CLERK: All right. Would you please stand and raise—

MR. DOWELL: Your Honor, may we approach the bench for a minute, please?

[6]

(WHEREUPON, counsel for the Commonwealth and the Defendant approached the bench where a conference was held in whispered tones, out of the hearing of the jury, as follows:)

MR. DOWELL: Your Honor, prior to the swearing of the jury, I would like to make a motion to discharge the panel on the following grounds.

There were four—I would like the Record to reflect—and, also, I would like it if we could have a hearing on this outside the hearing of the jury; I would like to re-

quest that—but there were four black jurors on the case. After I reviewed my notes, I noted that all four of them were struck by the Commonwealth's pre-emptories. The jury now, as empanelled, I want the Record to reflect, is an all-white panel.

I submit that under these circumstances, the defendant is being denied his right to an impartial trial, a cross-section of the community, under the Sixth and Fourteenth Amendment. He's also being denied equal protection of the law under the U.S. Constitution. And he's also being denied a fair, impartial trial.

[7] THE COURT: You want to have a hearing on this, don't you?

MR. DOWELL: Yes, Your Honor.

THE COURT: All right. I will pick up in just a minute.

MR. DOWELL: I would object to the swearing of the jury at this time.

THE COURT: I'm going to overrule because it has to be a cross-section of the whole, entire panel and that selection process.

Anybody can strike anybody they want to.

MR. DOWELL: Does the Court agree—essentially, the facts I'd want to establish at a hearing are, number one, that there were four black jurors in the panel and that the Commonwealth exercised its pre-emptories as to those, all four black jurors.

THE COURT: Well, they can do it if they want to.

MR. DOWELL: Do you accept that as true? Is that accurate, Mr. Gutmann?

MR. GUTMANN: Yeah, during this particular—yeah, I struck four blacks and [8] two whites.

MR. DOWELL: Okay. And that this left an all-white jury. Is that right?

MR. GUTMANN: In looking at them, yes; it's an all-white jury.

MR. DOWELL: Okay. I would assert that that violates the constitutional provisions, so I just asserted in

absence of any, you know, compelling justification that that denies the defendant of equal protection of law, denies him his right to a fair cross-section and a fair and impartial jury.

THE COURT: You're talking about the cross-section selection process of the panel itself, if that happened. Out of Frankfort where they draw them by computer, you might have a point, but this is different.

MR. DOWELL: Okay. So my motion, my objection to the swearing of this jury is overruled?

THE COURT: Yes.

MR. DOWELL: And also my motion to set aside is overruled?

THE COURT: That's right.

[9] MR. DOWELL: Okay. Thank you, Your Honor.

MR. GUTMANN: Thank you.

(End of conference at bench.)

* * * *

THE COURT: All right. Swear the jury.

THE CLERK: Will you stand and raise your right hand, please.

(WHEREUPON, the jury having been duly sworn by the Clerk of the court, proceedings continued as follows:)

THE COURT: Now, all the jurors that have not been selected for one reason or another, I appreciate your being over here. We always have to have a panel large enough to select the twelve or thirteen that try the case.

Thank you very much. You can go back to the Jury Pool and maybe you can pick up another case in there.

(At this point, the "extra" jurors were excused and exited the courtroom.)

THE COURT: I'm going to call for a fifteen-minute break here now. You all have been sitting————

SUPREME COURT OF KENTUCKY

No. 84-SC-733-MR

JAMES KIRKLAND BATSON, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

Rendered: December 20, 1984

[Date Jan. 10, 1985]

Appeal from Jefferson Circuit Court
Honorable George Ryan, Judge
No. 82-CR-0010

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, James Kirkland Batson, was convicted by a jury in the Jefferson Circuit Court of second-degree burglary and receiving stolen property over $100.00. Punishment was raised to 20 years for both counts after the establishment of second-degree persistent felony offender status.

Appellant was convicted of burglarizing the home of Mrs. Henrietta Spencer and her husband in September of 1981. Mrs. Spencer testified that while she was sitting in her living room with her husband, she felt a draft,

heard a noise, and then saw a young black man stooping in their front doorway and taking purses which were hanging on a doorknob in the next room. Among the property lost in the burglary were three ladies' rings. Mrs. Spencer later identified the appellant as the man she saw by picking his photograph out of a photopack. The Spencers' neighbor, Regina Cornellius, stated to police that on the day of the burglary she saw appellant Batson standing between her house and the Spencers', and later saw him running away from the back of the Spencers' house. Appellant produced a witness at trial, Lee Weese, an investigator for the public defender, who testified that Mrs. Cornellius gave him a statement some six months later that appellant Batson appeared to be standing guard and that there was another person whom she did not know standing at the front of the Spencers' house with a chair.

Appellant's conviction for receipt of stolen property arose from an incident where appellant Batson and co-indictee Larry Macklin appeared together at a pawn shop where Batson pawned a Caravelle watch and Macklin pawned two ladies' rings. The two rings were later identified by Mrs. Spencer as belonging to her. Batson was charged with having acted alone or in complicity with Macklin on this charge, but Macklin is not a party to this appeal.

Appellant charges the trial court with four errors in his appeal. First of all, appellant argues that the evidence at trial did not exclusively support the felony charge of receiving stolen property in an amount over $100, and therefore the trial judge erred in refusing appellant's tendered instructions on the misdemeanor charge of receipt of stolen property under $100.00. A trial court is bound to give instructions applicable to every state of the case deducible or supported by the testimony, including instructions on lesser-included offenses where there could be reasonable doubt as to the greater offense. *Kelly v. Commonwealth, Ky.*, 267 S.W.2d

536 (1954), and *Luttrell v. Commonwealth, Ky.*, 554 S.W. 2d 75 (1977). The evidence at trial concerning value consisted of testimony by Mrs. Spencer that one of the rings had a fair-market value of $110 00, and the testimony of the pawnbroker that the replacement value of the two rings was in excess of $100.00 although he allowed only $15.00 for each ring. The record shows that it was his practice to give only a small percentage of an item's full value in pawn. Thus, the evidence of the pawn value of the rings is irrelevant to an accurate determination of their fair-market value. There was no evidence from which it could reasonably be inferred that the fair-market value of the rings was less than $100.00.

Appellant's second assertion of error is that he was denied a fair trial due to the trial court's refusal to provide his counsel with a transcript of a previous trial on the same charge which ended in a mistrial. Appellant relies on *Britt v. North Carolina*, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed.2d 400 (1971), which stands for the proposition that a state must provide an indigent defendant with the transcript of a prior trial if needed for an effective defense. Appellant asserts that his need for a transcript can be seen by the inherent value of a transcript of prior proceedings as a discovery device or impeachment tool, and by a situation which occurred at trial wherein a transcript allegedly was sorely missed. Appellant points to a situation where a Commonwealth's witness testified inconsistently with his testimony at the previous trial. Later, during the appellant's case-in-chief, appellant's counsel sought to have the court reporter read notes of the prior testimony, but was refused by the trial court. A later avowal of the testimony clearly showed the inconsistency. However, the record shows the trial court's refusal to allow the court reporter's notes to be read was simply that any impeachment of the witness should have occurred while he was on the stand during cross-examination, and not by the introduction of evidence during the defense's case-in-chief. The

trial court showed no disposition to restrict appellant's access to the court reporter's notes.

Britt specifically holds that where adequate alternatives exist, a trial court need not provide an indigent defendant with a transcript of prior proceedings. Since the same counsel represented the appellant during both trials, and the trial court showed no inclination to restrict appellant's use of the court reporter's notes, we hold the appellant was not denied a fair trial due to the refusal to supply him with a free transcript.

Appellant next contends that it was error to permit the prosecuting attorney to exercise preemptory challenges to all of the blacks who were called as jurors in this case. Appellant acknowledged that the United States Supreme Court in *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), held that preemptory challenges against blacks, by themselves, do not violate the Fourteenth Amendment equal-protection clause. However, appellant urges this court to adopt the position of other states based upon the Sixth Amendment and their own state constitutions, that preemptory challenges against minority groups can be unconstitutional if they were shown to be a pattern of challenges against jurors from a discrete group and a likelihood that the challenges were based solely on group membership. *People v. Wheeler*, 583 P.2d 748 (Cal. 1978), and *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass. 1979). We have recently reaffirmed our reliance upon *Swain* in *Commonwealth v. McFerron, Ky.*, —— S.W.2d —— (1984), holding that an allegation of the lack of a fair cross-sectional jury which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions, and we decline to adopt another rule.

Appellant finally contends the trial court erred in refusing to admit testimony of a witness concerning the physical description of Larry Macklin. He sought to offer this testimony to show that Larry Macklin fitted the description of the perpetrator of the crime and that

the identification of appellant by Mrs. Spencer may have been mistaken. By avowal the witness, Detective Robert Rutledge, stated that the arrest sheet showed that Larry Macklin was a black male weighing 170 pounds and was twenty-nine years old.

Larry Macklin was a codefendant with appellant but was tried separately. One witness testified that an unidentified person was seen fleeing the Spencer premises. Mrs. Spencer saw only one person inside her house. She identified appellant as that person. Evidence of any striking similarity between Macklin and appellant would be admissible as to the credibility of the identification by Mrs. Spencer, but the testimony offered was of such a general nature that it could have little, if any, effect upon the credibility of Mrs. Spencer. Further, the proffered testimony was properly excluded as hearsay. We conclude the exclusion of the testimony was not error.

The Judgment is affirmed.

All concur.

ATTORNEY FOR APPELLANT:

J. David Niehaus
Office of the Jefferson
District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202

ATTORNEYS FOR APPELLEE:

David L. Armstrong
Attorney General
Paul Reilender, Jr.
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

SUPREME COURT OF THE UNITED STATES

No. 84-6263

JAMES KIRKLAND BATSON, PETITIONER

v.

KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

ON CONSIDERATION of the motion fo leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 22, 1985