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Case Number 429,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM S. SELLS, III,	)	
	)	No. 429, 2013
Defendant-Below,	)	
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF DELAWARE
IN AND FOR KENT COUNTY
IN FILE NO. IK11-10-0177 through IK11-10-0190, IK11-10-0260, PK11-10-0198 through PK11-10-0204, and PK11-10-0262, and ID Number 1108023648
Judge Robert B. Young

CORRECTED OPENING BRIEF OF APPELLANT WILLIAM S. SELLS, III

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TABLE OF CONTENTS

TABLE OF CITATIONS

NATURE OF PROCEEDINGS

On September 6, 2011, Defendant was arrested and charged with offenses related to an alleged bank robbery at the First National Bank of Wyoming on August 26, 2011. Defendant waived his preliminary hearing on September 30, 2011. On November 7, 2011 Defendant was indicted on one count of robbery first degree, conspiracy second degree, two counts of possession of a firearm during the commission of a felony, two counts of possession of a firearm by a person prohibited, wearing a disguise during the commission of a felony, six counts of aggravated menacing, felony theft, five counts of attempted murder in the first degree, and conspiracy first degree. (A-2).

On November 22, 2011, Alexander Funk was appointed to represent the defendant. On November 29, 2011, Defendant entered a plea of not guilty to the charges and requested a trial by jury. On January 11, 2012, a conflict of interest was declared by defense counsel and Andre Beauregard was appointed to represent the Defendant. (A-2).

On February 1, 2013 a motion to dismiss was filed by defense counsel. That motion was denied on February 28, 2013. (A-3). On March 11, 2013, a motion for reduction of bail and request to have the Defendant moved out of the secured housing unit to general population was filed on behalf of the Defendant. In the

motion, defense counsel requested that the defendant be relocated to a more accessible housing unit due to constraints on attorney-client contact in the secured housing unit. Defendant's motion for bond reduction was denied on March 20, 2013. It was also ordered that the defendant be relocated from the secured housing unit at James T. Vaughn Correctional Center to general population. (A-4).

On April 10, 2013 a motion to sever, requesting a separate trial form co-defendant Russell Grimes was filed on behalf of the Defendant. A hearing on the Defendant's motion to sever was held on April 18, 2013. (A-5). The Court reserved decision on the motion and the defense was provided an opportunity to submit additional materials in support of the motion. Id. A memorandum of law in support of that motion was filed on April 23, 2013. (A-6).

On April 19, 2013 the State filed a motion to amend the indictment. (A-5). The State's motion to amend the indictment was granted on April 30, 2013. On the same date, the Defendant's motion to sever was denied. (A-6).

A second motion to sever, on different grounds, was filed on May 1, 2013[1].

[1] As originally filed, Exhibit A to Defendant's motion to sever included a summary of an interview between defense counsel and Russell Grimes and signed by counsel. Prior to the beginning of trial, Grimes signed the exhibit at the counsel table and the modified exhibit was provided to the court. No copies were made at the time due to a malfunction with the available copy machine. When counsel attempted to recover a copy of the modified exhibit after trial, the modified exhibit could not be located in the court file. (A-13, A-49-57).

On the same date, the State filed a motion in limine to exclude expert testimony. (A-7). On May 6, 2013, the following motions were filed on Defendant's behalf: motion in limine to exclude evidence of defendant's prior bad acts, motion in limine to preclude reference to defendant's alleged gang affiliation, and two motions to suppress. Id.

Defendant's trial began on May 7, 2013. Id. On May 9, Defendant's second motion to sever was denied. (A-15). Trial concluded on May 28, 2013. During jury deliberations, juror number 8 was removed from the jury for discussing the case with one of the State's witnesses, State Bureau of Identification fingerprint analyst Rodney Hegman. There were no alternate jurors to be seated and the case was decided by eleven jurors. (A-370). Defendant was found guilty of robbery first degree, possession of a firearm during the commission of a felony, possession of a firearm by a person prohibited, wearing a disguise during the commission of a felony, six counts of aggravated menacing, and five counts of reckless endangering second degree. (A-1).

On June 4, 2013, the State filed a motion to declare Defendant a habitual offender. (A-8). On July 25, 2013, at the time of sentencing, the State's motion to declare Defendant a habitual offender was granted. Defendant was sentenced as follows: as to robbery first degree, twenty-five (25) years at Level 5 pursuant to 11

Del. C. § 4214; as to possession of a firearm during the commission of a felony, twenty-five (25) years at Level 5 pursuant to 11 Del. C. § 4214; as to possession of a firearm by a person prohibited, eight (8) years at Level 5 pursuant to 11 Del. C. § 4214; as to wearing a disguise during the commission of a felony, five (5) years at Level 5 pursuant to 11 Del. C. § 4214; as to six counts of aggravated menacing, five (5) years at Level 5 pursuant to 11 Del. C. § 4214 on each of the six counts; and as to five counts of reckless endangering second degree, one (1) year at Level 5 as to each count. A timely notice of appeal was filed on August 16, 2013. (A-8).

SUMMARY OF ARGUMENT

1. The trial court abused its discretion in denying Appellant's motion to sever where Appellant's co-defendant executed a signed proffer indicating that he would testify on behalf of Appellant in a separate trial and offer highly exculpatory testimony, but would invoke his Fifth Amendment right against self-incrimination in a joint trial.

2. The trial court erred in ruling Appellant's preemptory challenge of a juror was in violation of Batson v. Kentucky and ordering the juror to be re-seated. The State had not made a prima facie showing of the use of preemptory challenges on the basis of race. Defense counsel offered a race neutral explanation for the strike that had been previously accepted by the court on a previous strike. There was no evidence to support purposeful discrimination.

STATEMENT OF FACTS

On August 26, 2011 a masked gunman entered the First National Bank of Wyoming in Felton, Delaware. (A-59). The gunman displayed what appeared to firearm and ordered the bank manager to exit her office. (A-63). The suspect continued to the teller area of the bank and ordered the tellers to empty the cash drawers. (A-66). During the robbery, the suspect jumped a counter in the bank. (A-66-67). During later investigation, officers discovered a red mark on the ceiling above the teller station where the suspect jumped over the counter. There was also blood discovered on a countertop in the lobby area of the bank. (A-115, 128).

The suspect placed the money from the cash drawers in a satchel and departed the bank. (A-69). The stolen money contained dye packs, a security device designed to stain money taken from the bank, and bait bills; bills for which the bank has recorded serial numbers and maintained a list in case of theft. (A-70-71). The bank was also equipped with security cameras which recorded the events of August 26. (A-67).

When the suspect exited the bank, he entered a black SUV driven by Russell Grimes. (A-96). The SUV turned onto Irish Hill Road and began to emit a pink or red smoke in the area of a Valero gas station. Id. As the Ford Explorer passed the

gas station it was observed by Officer Keith Shyers of the Harrington Police Department. (A-106-107). Shyers observed the vehicle traveling at a high rate of speed and what appeared to be a "poof of… some type of paint." Id.

Officers Shyers turned his car around and followed the SUV on Evans Road. (A-107). As he turned his vehicle around, Shyers engaged his lights. Id. Soon thereafter, Shyers received a call on the Kent-Comm communication system for a bank robbery at the First National Bank of Wyoming. Id. When Shyers attempted to stop the vehicle, he was fired upon and a high speed pursuit ensued involving officers from the Delaware State Police, Harrington Police Department, and Felton Police Department. (A-117).

In the vicinity of Steeles Ridge Road, Grimes lost control of the vehicle, overcorrected, and spun into a ditch. (A-183). When Grimes was unable to move the SUV from the ditch, he and the suspect exited the vehicle and were fired upon by Trooper Torgerson of the Delaware State Police. (A-183-185). Torgerson shot Grimes in the leg and he was taken into custody. (A-187). The other suspect continued to run from Torgerson and fled the area. Id. A K-9 officer arrived on the scene and tracked the fleeing suspect. (A-212). While tracking the suspect, Corporal Foraker located fresh footprints. (A-216). However, no efforts were made to preserve the footprints. (A-221-224). The suspect was not apprehended.

Following Grimes apprehension, the registered owner of the Ford Explorer, Sophia Jones was contacted by law enforcement officers. (A-292-295). Jones advised the officers that to the best of her knowledge, William Sells was in possession of the vehicle. (A-296). Jones later revealed that she and Sells had been attempting to sell the SUV and William was in possession of the vehicle for that purpose. Id.

Defendant Sells was apprehended on September 6, 2011 at the Shamrock Inn in Dover, Delaware. (A-311). During Sells apprehension, the Delaware State Police bomb squad employed gas grenades, smoke grenades, stingball grenades, and stun grenades and caused extensive damage to the room. (A-320). The explosives used by the police in an attempt to convince the Defendant to exit the motel room also discharged red dye. (A-357). Money discovered in the motel room was burn, torn, and dyed red. (A-350-353).

Defendant Sells was apprehended and transported to Kent General Hospital for treatment. (A-333). He made no statements, maintained his innocence, and elected to proceed to trial. Prior to trial, co-defendant Grimes provided a statement to defense counsel completely exonerating Sells and advised defense counsel that he would testify on behalf of Sells in a separate trial, but not in a joint trial. (A-13) Grimes proffered testimony and intent to testify on Defendant's behalf was

memorialized and included in an exhibit to Defendant's motion to sever filed on May 1, 2013. Id. Grimes later signed that exhibit and expressed his intent to provide exculpatory testimony on Defendant's behalf prior to trial. (A-47-50). Defendant's motion to sever his trial from the trial of Russell Grimes was denied and a joint trial was held. (A-15). Grimes did not testify and Defendant was unable to present the highly exculpatory testimony proffered prior to trial.

At the conclusion of trial, Defendant was found guilty of robbery first degree, possession of a firearm during the commission of a felony, possession of a firearm by a person prohibited, wearing a disguise during the commission of a felony, six counts of aggravated menacing, and five counts of reckless endangering second degree and sentenced as a habitual offender to an aggregate Level 5 sentence of ninety-eight years. (A-8).

ARGUMENT

Question Presented

Was the trial court's denial of Appellant's motion to sever an abuse of discretion? A-15.

Standard and Scope of Review

The Superior Court's decision on a motion for severance is reviewed for abuse of discretion. Burton v. State, 149 A.2d 337 (Del. 1959). What constitutes abuse of discretion depends on the facts found in each individual case. Id. at 339.

Merits of Argument

On April 30, 2013, trial counsel for Sells met with Co-Defendant Grimes to discuss the upcoming joint trial and obtain a statement from Grimes. Contrary to prior information and belief, Grimes advised trial counsel that he would not present a defense that is antagonistic to Sells' defense. In fact, Grimes intended testimony unequivocally exonerated Sells of any wrongdoing with regard to the allegations made by the State. On May 1, 2013, a Motion to Sever was filed on behalf of Defendant Sells requesting severance on the basis that Grimes would provide exculpatory testimony for Sells in a severed trial, but would invoke his Fifth Amendment rights against self-incrimination in a joint trial.

Appellant's motion to sever included an exhibit signed by counsel recounting Grimes proferred testimony. While the exhibit was not signed by Grimes at the time of filing, it was later signed by Grimes prior to the start of trial. (A-47-50). In the exhibit, Grimes acknowledged that he was familiar with the Appellant and has known Sells for several years. Grimes stated that he was living in Winston-Salem, North Carolina for seven months in 2011, contacted Sells in the summer of 2011, and arranged to purchase a black Ford Explorer from Sells. He did not purchase the vehicle with the intent to use it in the robbery. Nor did he discuss any criminal activity with Sells. (A-13-14). Grimes further advised that he traveled to Delaware from North Carolina after visiting Myrtle Beach, South Carolina. Upon his arrival in Delaware, he contacted Sells and arranged to meet to purchase the Ford Explorer. Grimes paid $1,500.00 cash for the vehicle. He further reported that he planned to detail the vehicle, replace the rims, and obtain insurance. Id. Grimes explained that he believed the vehicle to be insured by Sophia Jones, Sells' girlfriend, and an insurance card was in the car indicating the same. He further stated that the transfer of the vehicle was not completed properly and that he could not do so because of warrants for his arrest in Delaware. Id. Grimes stated that he was driving the Ford Explorer formerly owned by Sells at the time of the alleged robbery, that Sells was not with him, and that Sells was not

involved in the robbery of the First National Bank of Wyoming. Grimes was unequivocal in his assertion that Sells could not have been involved in the robbery. He described the suspect that committed the robbery as a male, of Spanish descent, six feet tall, thin build, with a tear drop tattoo under his eye. Id.

In the signed exhibit, Grimes stated that he did not intend to testify at the scheduled joint trial. However, had the trials been severed, Grimes advised that he would have testified on Sells' behalf, and would have testified that Sells was not present for, did not plan, nor participate in the robbery at the First National Bank of Wyoming on August 26, 2011. Id. Grimes would have testified that he was in sole possession and control of the Ford Explorer he bought from Sells and rebut evidence introduced by the State for the purpose of implicating Sells. Id.

Prior to the start of trial, Grimes was questioned by the trial judge regarding the proferred testimony contained in the exhibit to Sells motion to sever. (A-49-57). Grimes was asked if he was in agreement with the information contained in the exhibit. (A-49). Grimes responded; "On that page right there, yes." Id. Grimes was asked if he "would testify to that effect at a later trial." (A-50). Grimes responded; "Yes, I would." Id. Grimes did not identify himself as a witness prior to the start of trial and did not intend to testify on his own behalf. (A-

54). However, after additional questioning from the Court and the State, Grimes indicated he would testify in the joint trial:

> THE COURT: Have you seen this, Mr. Grimes?
> DEFENDANT GRIMES: Yes, your Honor.
> THE COURT: And you are in agreement with everything here?
> DEFENDANT GRIMES: On that page right there, yes.
> THE COURT: Including that you would testify to that effect at a later trial?
> DEFENDANT GRIMES: Yes, I would.
> THE COURT: Does the State want to say anything?
> MS. WEAVER: Your Honor, without knowing what's in the affidavit, it's kind of hard to --
> THE COURT: It is hard. And I tried to do it without causing a problem, and all I can say is that if what is said -- if what is attributed to Mr. Grimes, which he says is accurate -- which he now says is accurate -- and he testified to that and if it's believed, it would be completely exculpatory.
> MS. WEAVER: Can I ask would it involve an affirmative defense on Mr. Grimes' part?
> THE COURT: No, it's a straight defense.
> MS. WEAVER: Because --
> THE COURT: "I didn't do it."
> MS. WEAVER: Then I'm at a disadvantage because if he didn't do it -- even though he was shot at the scene after the flight?
> THE COURT: No, no. Not Mr. Grimes. Mr. Sells.
> MS. WEAVER: Exactly. Does it involve an affirmative defense on Mr. Grimes' part?
> DEFENDANT GRIMES: Yes.
> THE COURT: No, it does not.
> DEFENDANT GRIMES: It will, your Honor, because I'm saying that I was under duress during the whole situation. Yes, it does.

MS. WEAVER: Then Mr. Grimes is trying to -- to put on an affirmative defense, he would have to take the stand. And what he's trying to do -- then the severance makes no sense because if Mr. Grimes is trying to avoid self-incrimination, he can't do that if he has to get on the stand to make the affirmative defense; and so, severance in that case would not make any sense at all.
THE COURT: Well, I don't know that he understands what an affirmative defense means.
DEFENDANT GRIMES: For an affirmative defense such as duress, beyond a preponderance of the evidence, I have to prove that the reason I'm claiming this defense is it actually happened, and I have to prove that during the case.
MR. BEAUREGARD: I think we're talking about apples and oranges a little bit, your Honor. One is the testimony that benefits Mr. Sells as to Exhibit A and then also the predicament that he finds himself if he joins with Sells and how he wouldn't testify.
THE COURT: Well, I think that what the State is saying is if Mr. Grimes is going to testify, there's absolutely no reason to severe.
MS. WEAVER: Exactly.
MR. BEAUREGARD: Your Honor, but he's reluctant to testify at his trial if the trials are joined.
THE COURT: Well, that's what you say, but that's not what he's saying.
MR. BEAUREGARD: I think the affidavit might say that, your Honor, that he's reluctant to testify if they are joined together.
THE COURT: Irrespective of what the affidavit may or may not say, I don't recall that it says that, but -- well, it says he does not intend to testify at the scheduled joint trial.
MR. BEAUREGARD: Right.
MS. WEAVER: But if his goal is to avoid cross-examination on his record, then that is the sole reason we're going to bring in 60 witnesses and go over 70

pieces of evidence twice? It just doesn't seem enough of a reason to sever the trial, your Honor.
MR. BEAUREGARD: Except that everyone has rights and individual defendants have rights and it's exculpatory evidence on behalf of Mr. Sells. I mean, we can't wash all that away.
THE COURT: Well, the trouble is that it's not just a question of his record. He would have to admit to some culpability himself. Otherwise, he wouldn't know how to answer the things that he's answering.
MS. WEAVER: Does Mr. Grimes understand if he's going to present an affirmative defense, that he'll have to take the stand no matter what?
THE COURT: Yes, I'm not certain that this -- it's not an affirmative defense.
MS. WEAVER: I'm sorry?
THE COURT: It's not an affirmative defense. It's a denial.
MS. WEAVER: He said he's going to make a duress argument.
MR. BEAUREGARD: Well, your Honor --
THE COURT: Wait a minute. What was that, Mr. Grimes?
DEFENDANT GRIMES: Yes. I was under duress during the whole situation, so I didn't understand why I had to take the stand if I'm claiming an affirmative defense.
MS. WEAVER: He does, your Honor.
THE COURT: Do you want to have a little chat with Mr. Harpster for a second?
DEFENDANT GRIMES: Yes.
(Defendant Grimes speaks with his standby counsel.)
DEFENDANT GRIMES: I understand now that I would have to testify, so if that's what it is, then that's what it will be.
THE COURT: Are you listed as a witness on your behalf?
DEFENDANT GRIMES: No, your Honor, I was not.

THE COURT: Yes. That doesn't mean you're committed to be one, but the question is --
MR. HARPSTER: His name was not on the list. I had no idea if he was testifying or not testifying, your Honor.
THE COURT: His name is on the list?
DEFENDANT GRIMES: No, it wasn't at the time, your Honor.
THE COURT: How about if we determine – on the witness list that's going to be read to the jury, is Mr. Grimes -- as potential possible people to be called, is Mr. Grimes on that list?
MS. SCHMIDHAUSER: Your Honor, he was not on that list because he didn't understand if he was going to present this duress defense, that he was going to have to testify.
DEFENDANT GRIMES: Right.
MS. SCHMIDHAUSER: But I believe he may be requesting now to add his name to that list.
THE COURT: Is that a fact, Mr. Grimes?
DEFENDANT GRIMES: Yes, your Honor.
THE COURT: Well, why aren't we back, then, to where we were with the decision 15 minutes ago, now an hour ago? Mr. Beauregard.
MR. BEAUREGARD: Your Honor, I think there's been a little bit of a difficulty in understanding -- or at least Mr. Grimes understanding court procedure, his rights and everything else. And, obviously, he's pro se with assistance of counsel, so the only thing I can address to the Court is the affidavit speaks for itself. I mean, that's the presentment.
THE COURT: Yes, but the question is whether he's actually going to testify to this, and it doesn't sound like he's going to testify to this.
MR. BEAUREGARD: Except that in the affidavit that was executed, he says that if it's a joint trial, then he will not testify because of reasons that are attached in that exhibit.
THE COURT: He said he's going to testify.

> MR. BEAUREGARD: And, again, we're going around the horse in the room.
> THE COURT: Well, all I can go on now is that he says he's going to testify.
> MR. BEAUREGARD: And I guess the question is, is he going to testify in this trial as a joint, or is he just going to testify in Mr. Sells if it's severed?
> THE COURT: He's going to testify in this trial.
> MR. BEAUREGARD: I mean, that's fine, your Honor. I mean, he doesn't say that in the affidavit.
> THE COURT: I understand that, though the affidavit was slapped together pretty quickly. But we have now specifically asked Mr. Grimes if he, now understanding what this is all about, that he's going to testify, and my understanding is -- and correct me if I'm wrong, Mr. Grimes -- that he does plan to testify.
> DEFENDANT GRIMES: No, you're correct, your Honor.
> THE COURT: Okay. Thank you.
> Okay. Can we get the jury in? And to be clear, the revised motion or second motion is denied. (A-49-57).

Despite his responses to the misleading line of questioning by the Court and the State, Grimes did not testify, and Appellant was denied the ability to present highly exculpatory testimony.

Severance on the ground that exculpatory testimony of a co-defendant is needed is called for where a defendant demonstrates: (1) a bona fide need for the testimony; (2) the substance of the testimony, (3) its exculpatory nature and effect, and (4) that the co-defendant will, in fact, testify if the cases are severed. Given such a showing, the court should (1) examine the significance of the testimony in

relation to the defendant's theory of defense, (2) assess the extent of prejudice caused by the absence of the testimony, (3) Pay close attention to judicial administration and economy, and (4) give weight to the timeliness of the motion. U.S. V. Butler, 611 F.2d 1066, 1071 (5th Cir. 1980); State v. Harris, 1989 Del. Super. LEXIS 237 (Del. Super. Ct. May 11, 1989).

Applying the Butler factors, the trial court found that the first three prongs had been satisfied:

> The Court has reviewed the paraphrased proposed assertion. It is clear to the Court that, if believed, the statements attributed to Grimes are potentially exculpatory. Indeed, again if believed, they completely exonerate Defendant Sells. Thus, the substance of Defendant Sells' proffer would go directly to the nature of the charges against Sells. Hence, the second and third criteria of the "Butler test" are satisfied. Step one of the test, the bona fide need for the testimony, can be known only by Defendant Sells at this point, though assuming that step to be the case is entirely rational. (A-15).

In its Order, the trial court also gave consideration to the signed proffer by co-defendant Grimes, indicating he would testify on Appellant's behalf, as satisfying the fourth prong of the preliminary analysis and considered the secondary analysis of the Butler test. Despite concerns of judicial economy and timeliness of the motion, the court expressed "concern that the testimony suggested was so plainly exculpatory, and otherwise unavailable was great." (A-15-20). However, the court

concluded that severance was not needed, based on the assumption that Grimes would testify, because "if co-defendant Grimes really does have testimony to exculpate Sells, the movant will be able to pursue it in the context of a joint trial." Id.

Appellant's motion to sever and the proffered testimony from co-defendant Grimes satisfied the requirements of the "Butler test." The trial court's denial of Appellant's motion to sever was an abuse of discretion as it was based on an assumption that Grimes would testify in the joint trial. At the time the court made its decision, there was no guarantee that Grimes would testify, but the court treated this assumption as fact. In fact, Appellant was denied the ability to present the evidence which the trial court found to be "plainly exculpatory." Id. The trial court's abuse of discretion lies in its failure to properly consider the facts related to the likelihood of Grimes testimony and Appellant's ability to introduce the highly exculpatory evidence. Given the court's analysis under the Butler test and finding that the proferred testimony was plainly exculpatory, due consideration of the Appellant's constitutional right to present the exculpatory evidence should have been given such great weight as to require severance in light of the uncertainty with regard to whether Grimes would actually testify.

Grimes proferred testimony was highly significant to the Appellant's theory of defense as Appellant took a position of actual innocence and Grimes proferred testimony was consistent with that defense. As noted by the court, if believed, the testimony was completely exculpatory. Grimes was a critical alibi witness. The trial court's abuse of discretion is seen in the resulting prejudice – Appellant was unable to present Failure to sever Appellant's trial from co-defendant Grimes' trial resulted in a violation of Sells constitutional right to present evidence under the Sixth Amendment of the United States Constitution and Article I Section 7 of the Constitution of the State of Delaware.

ARGUMENT

Question Presented

Did the trial judge err when he ruled Appellant's preemptory challenge of a juror was in violation of Batson v. Kentucky and ordered the juror to be re-seated? (A-21-31).

Standard and Scope of Review

In reviewing a claim under Batson, whether a party offered a race-neutral explanation for a preemptory challenge is reviewed de novo. The standard of review applied to the ultimate determination of whether there was purposeful discrimination, however, is clearly erroneous. Burton v. State, 925 A.2d 503 (Del. 2007).

Merits of Argument

During jury selection, the State made a Batson challenge to both Appellant and his co-defendant's use of preemptory challenges. (A-21). In its challenge, the State only advanced the assertion that Appellant and his co-defendant had each used three of three preemptory challenges to white jurors. (A-21). Rather than applying the three step test from Batson, the Court simply held "As counsel for Mr. Sells know and as Mr. Grimes may well not, while these strikes are peremptory and can be made for any reason or no reason, basically, they cannot be exercised

on the basis of race. I think I will not change anyone seated to this point, but I would simply say to counsel for Defendant Sells and to Mr. Grimes that from this point forward, because of the pattern that has emerged, that any excusal of a Caucasian juror will have to be for an express reason other than race." (A-21-22). In fact, there was no emerging pattern in Appellant's use of preemptory challenges. As defense counsel noted and the court acknowledged after its hasty ruling, Appellant had exercised one of his three preemptory challenges to strike an African American juror. (A-22-23).

Following the court's ruling on the State's Batson challenge, Appellant exercised his fourth preemptory challenge to strike a white female juror. Defense counsel offered two race neutral reasons for exercising the strike: the juror's occupation as a cashier in the context of a robbery case, and her response to a jury questionnaire indicating employment by law enforcement. (A-23). Following an inquiry by the court, counsel's stated race neutral reason of an affirmative response to the jury questionnaire regarding law enforcement employment was accepted and Appellant's preemptory challenge was upheld:

> THE COURT: Did she come up when the jury was called?
> MR. BEAUREGARD: I don't believe so, your Honor.
> THE COURT: I don't believe so either. So what are the objections again?
> MR. BEAUREGARD: That her job title is that she's a cashier.

THE COURT: Where?
MR. BEAUREGARD: I'm just reading from --
THE COURT: Tell me where.
MR. BEAUREGARD: At Walmart, your Honor.
THE COURT: All right.
MR. BEAUREGARD: And that she had some ties with law enforcement.
THE COURT: Well, she's answered the question as to whether there's anything that would cause any difficulty.
MR. BEAUREGARD: Your Honor, with the peremptory challenge, your Honor, I mean, I know the constraints of *Batson*, but I mean, there's still freedom as long as it's not tied to some type of biasness, and I understand that.
THE COURT: Right.
MR. BEAUREGARD: So usually the Court can find any reasons whatsoever --
THE COURT: No, that's not correct. It's if there is a legitimate reason.
MR. BEAUREGARD: Right.
THE COURT: And I was just about to ask Ms. Schmidhauser are there any other cashiers who have been seated. That's not a particularly superficially strong basis.
MR. BEAUREGARD: No, your Honor, but also law enforcement also.
THE COURT: Well, I think that that question has been answered. I thought I did it already, that it's noted on her -- I don't know. What is noted relative to the law enforcement?
MR. BEAUREGARD: It just says the question of law enforcement and it has a yes.
THE COURT: Yes. Well, that could mean anything. And one of the questions that was asked by the clerk was: Is there any reason you can't be fair and unbiased?
MR. BEAUREGARD: According to the document that the Court gave us, it says "employed by law enforcement?" and there's a yes.
THE COURT: Employed by law enforcement?
MR. BEAUREGARD: Yes.

> THE COURT: For her or her spouse?
> MR. BEAUREGARD: It doesn't say whether it's a spouse or her.
> THE COURT: It doesn't?
> MR. BEAUREGARD: No. It just says employed by law enforcement and it says yes.
> THE COURT: All right.
> MS. WEAVER: Can we just have a moment? We're checking, your Honor.
> THE COURT: Yes.
> MS. SCHMIDHAUSER: Your Honor, there are no other cashiers at this point, but we are checking on the law enforcement box.
> THE COURT: Well, the tie for if she is employed by law enforcement... All right. I'll take that as a reason. (A-23-26).

With Appellant's fifth preemptory challenge, counsel moved to strike another juror, number 8, who had indicated employment by law enforcement on the jury questionnaire. (A-30). Co-defendant Grimes had previously attempted to strike the same juror and the court ruled that he was not permitted to strike the juror under Batson. (A-29). Appellant's preemptory challenge was similarly denied under Batson:

> MR. BEAUREGARD: Your Honor, the reason for the strike is according to the information we have from the court, he was employed or he is employed by law enforcement.
> THE COURT: He's a mechanic.
> MR. BEAUREGARD: I know what that says. I don't know why it says that he's employed by law enforcement.

> THE COURT: Okay. You heard everything that was said two minutes ago, and you heard my ruling on that. You have nothing to add to that; is that correct?
> MR. BEAUREGARD: Except, your Honor, that now it's our motion to strike.
> THE COURT: No, no. It's no different, yours or Mr. Grimes.
> MR. BEAUREGARD: Well, there is a difference.
>
> THE COURT: Mr. Grimes made the same motion and it was denied. He's seated. Now, unless you have something new to add, then I'm going to really be concerned about why we're going through this exercise at all.
> MR. BEAUREGARD: I'm establishing a record, in that, we believe he's employed by law enforcement.
> THE COURT: Okay. Fine. He's going to be seated. (A-30-31).

In Batson, the United States Supreme Court established a three step analysis for evaluating claims that a peremptory challenge was exercised in a racially discriminatory manner. First, a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if the requisite showing has been made, the burden shifts to the opposing party to articulate a race-neutral explanation for striking the jurors in question. Robertson v. State, 630 A.2d 1084, 1089 (Del. 1993). As the Batson Court noted, while this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, the explanation need not rise to the level justifying exercise of a challenge for cause. Batson v. Kentucky, 476 U.S. 79, 90 (U.S. 1986). Finally, the trial court

must determine whether the movant has carried their burden of proving purposeful discrimination. Robertson v. State, 630 A.2d 1084, 1089 (Del. 1993).

In Batson, the Court held that to establish a prima facie showing of purposeful exercise of peremptory challenges in a racially discriminatory manner, a "defendant first must show that he is a member of a cognizable racial group, . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the jury on account of their race." Batson, 476 U.S at 96. In considering a Batson objection all of the circumstances that bear upon the issue of racial animosity must be consulted." Snyder v. Louisiana, 552 U.S. 472, 478 (2008).

First, there was no prima facie showing that preemptory challenges were exercised by the defense on the basis of race. The State only asserted a pattern; that Appellant had struck three white jurors with three strikes and nothing more. (A-21). In fact there was not even a pattern as the court later noted; Appellant had

exercised one of three strikes against an African American juror. (A-22-23). Even with Appellant's subsequent strikes of white jurors, there were no facts pointed to that established the required prima facie showing under Batson. The only facts on the record the trial judge could have considered was the number of white jurors struck against the number of black jurors struck. At the time the trial judge made his determination that a prima facie showing had been made, Appellant's strikes of two white jurors and one black juror in and of itself was consistent with the racial demographics of Kent County.[2] Appellant's subsequent strikes established nothing more than a pattern of striking jurors who identified employment by law enforcement. It should also be noted, Appellant is mixed race, both Caucasian and African-American.

Second, defense counsel articulated a race neutral reason for striking juror number 8; because the juror indicated employment by law enforcement on his jury questionnaire. This race neutral justification was quickly rejected by the court despite prior acceptance of the same reasoning just minutes earlier. (A-23-26). Despite the juror's response to the jury questionnaire and the information provided to counsel, the trial judge required justification for a challenge for cause,

[2] According to the most recent Census Data, Kent County is 68.8% White alone and 24.9% African American. U.S. Bureau of the Census, Population Estimates Program (PEP). Updated annually. http://www.census.gov/popest/index.html

questioning the accuracy of the jury questionnaire and reaching a conclusion without a factual basis on the record. (A-27-31). As noted by the Court in Batson, the race neutral explanation need not rise to the level justifying exercise of a challenge for cause. Batson, 476 U.S at 97. Defense counsels' legitimate concerns about juror number 8 were later validated when the juror was excused during deliberation. Shortly after the jury began deliberating, the State informed the court of communications between juror number 8 and a law enforcement witness called by the State. (A-371). The State advised the court of an email received from Rodney Hegman, a fingerprint analyst with the State Bureau of Identification, in which Hegman detailed his prior relationship with juror number 8 through membership of the Little Creek Fire Company and the juror's efforts to discuss the case with Hegman. Id. The trial judge's rejection of Appellant's race neutral explanation and concerns of the juror's ties to law enforcement were clearly erroneous. There was no proof whatsoever of purposeful discrimination.

CONCLUSION

For the foregoing reasons, the conviction of the Appellant should be reversed and the case remanded to the Superior Court for further proceedings.

Respectfully submitted,

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DATED: December 13, 2013

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE

VS.

WILLIAM S SELLS

Alias: See attached list of alias names.

DOB: 06/19/1982
SBI: 00353072

CASE NUMBER:
1108023648

CRIMINAL ACTION NUMBER:
IK11-10-0177
ROBBERY 1ST(F)
IK11-10-0178
PFDCF(F)
IK11-11-0260
PFBPP PABPP(F)
IK11-10-0180
AGGR MENACING(F)
IK11-10-0182
AGGR MENACING(F)
IK11-10-0183
AGGR MENACING(F)
IK11-10-0184
AGGR MENACING(F)
IK11-10-0185
AGGR MENACING(F)
IK11-10-0186
AGGR MENACING(F)
IK11-10-0188
DISGUISE(F)
PK11-10-0198
RECK END 2ND(M)
LIO:ATT MURDER 1ST
PK11-10-0199
RECK END 2ND(M)
LIO:ATT MURDER 1ST
PK11-10-0200
RECK END 2ND(M)
LIO:ATT MURDER 1ST
PK11-10-0201
RECK END 2ND(M)
LIO:ATT MURDER 1ST
PK11-10-0202
RECK END 2ND(M)
LIO:ATT MURDER 1ST

COMMITMENT

SENTENCE ORDER

STATE OF DELAWARE
VS.
WILLIAM S SELLS
DOB: 06/19/1982
SBI: 00353072

NOW THIS 25TH DAY OF JULY, 2013, IT IS THE ORDER OF THE COURT THAT:
The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IK11-10-0177- : TIS
ROBBERY 1ST

The defendant shall pay his/her restitution joint/severally as follows: $50000.00 TO FIRST NATIONAL BANK OF WYOMIN

Effective September 6, 2011 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- The defendant is declared an Habitual Offender and is sentenced pursuant to 11 Del.C. 4214(a) on this charge. Life is not subject to the award of Good time. (A sentence less than life under(a) is eligible for good time.)

AS TO IK11-10-0178- : TIS
PFDCF

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- The defendant is declared an Habitual Offender and is sentenced pursuant to 11 Del.C. 4214(a) on this charge. Life is not subject to the award of Good time. (A sentence less than life under(a) is eligible for good time.)

AS TO IK11-11-0260- : TIS
PFBPP PABPP

- The defendant is placed in the custody of the Department of Correction for 8 year(s) at supervision level 5

- The defendant is declared an Habitual Offender and is sentenced pursuant to 11 Del.C. 4214(a) on this charge. Life is not subject to the award of Good time. (A sentence less than life under(a) is eligible for good time.)

AS TO IK11-10-0180- : TIS
AGGR MENACING

- The defendant is placed in the custody of the Department

of Correction for 5 year(s) at supervision level 5

- The defendant is declared an Habitual Offender and is sentenced pursuant to 11 Del.C. 4214(a) on this charge. Life is not subject to the award of Good time. (A sentence less than life under(a) is eligible for good time.)

AS TO IK11-10-0182- : TIS
AGGR MENACING

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

- The defendant is declared an Habitual Offender and is sentenced pursuant to 11 Del.C. 4214(a) on this charge. Life is not subject to the award of Good time. (A sentence less than life under(a) is eligible for good time.)

AS TO IK11-10-0183- : TIS
AGGR MENACING

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

- The defendant is declared an Habitual Offender and is sentenced pursuant to 11 Del.C. 4214(a) on this charge. Life is not subject to the award of Good time. (A sentence less than life under(a) is eligible for good time.)

AS TO IK11-10-0184- : TIS
AGGR MENACING

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

- The defendant is declared an Habitual Offender and is sentenced pursuant to 11 Del.C. 4214(a) on this charge. Life is not subject to the award of Good time. (A sentence less than life under(a) is eligible for good time.)

AS TO IK11-10-0185- : TIS
AGGR MENACING

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

- The defendant is declared an Habitual Offender and is sentenced pursuant to 11 Del.C. 4214(a) on this charge. Life is not subject to the award of Good time. (A sentence less than life under(a) is eligible for good time.)

STATE OF DELAWARE
VS.
WILLIAM S SELLS
DOB: 06/19/1982
SBI: 00353072

AS TO IK11-10-0186- : TIS
AGGR MENACING

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

- The defendant is declared an Habitual Offender and is sentenced pursuant to 11 Del.C. 4214(a) on this charge. Life is not subject to the award of Good time. (A sentence less than life under(a) is eligible for good time.)

AS TO IK11-10-0188- : TIS
DISGUISE

- The defendant is placed in the custody of the Department of Correction for 5 year(s) at supervision level 5

- The defendant is declared an Habitual Offender and is sentenced pursuant to 11 Del.C. 4214(a) on this charge. Life is not subject to the award of Good time. (A sentence less than life under(a) is eligible for good time.)

AS TO PK11-10-0198- : TIS
RECK END 2ND

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO PK11-10-0199- : TIS
RECK END 2ND

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO PK11-10-0200- : TIS
RECK END 2ND

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO PK11-10-0201- : TIS
RECK END 2ND

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO PK11-10-0202- : TIS
RECK END 2ND

- The defendant is placed in the custody of the Department

STATE OF DELAWARE
VS.
WILLIAM S SELLS
DOB: 06/19/1982
SBI: 00353072

of Correction for 1 year(s) at supervision level 5

- Suspended for 1 year(s) at supervision level 4 **WORK RELEASE**

- Hold at supervision level 5

- Until space is available at supervision level 4 **WORK RELEASE**

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
WILLIAM S SELLS
DOB: 06/19/1982
SBI: 00353072

CASE NUMBER:
1108023648

The Defendant is to pay all financial obligations pursuant to a schedule established by probation officer.

Have no contact with the victim(s) Maryann Emig , the victim's family or residence.

Have no contact with the victim(s) Joni Maio , the victim's family or residence.

Have no contact with the victim(s) Vickie Ebaugh , the victim's family or residence.

Have no contact with the victim(s) Cynthia Evans , the victim's family or residence.

Have no contact with the victim(s) Lindsey Chasanov , the victim's family or residence.

Have no contact with the victim(s) Rosemarie Hase , the victim's family or residence.

Have no contact with the victim(s) Jessica Gedney , the victim's family or residence.

Have no unlawful contact with the victim(s) Michael Wheeler .

Have no unlawful contact with the victim(s) Scott Torgeson .

STATE OF DELAWARE
VS.
WILLIAM S SELLS
DOB: 06/19/1982
SBI: 00353072

Have no unlawful contact with the victim(s) Christopher Swan .

Have no unlawful contact with the victim(s) Keith Shyers .

Have no unlawful contact with the victim(s) William Killen .

Pursuant to 29 Del.C. 4713(b)(2), the defendant having been convicted of a Title 11 felony, it is a condition of the defendant's probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

Defendant to be evaluated for substance abuse and follow recommendations for counseling, testing, treatment at level 5 or all levels.

NOTES

Restitution is joint and several with codefendant Russell Grimes 1108023033a

While at Supervision Level 5 the defendant shall be evaluated for sustance abuse, and shall receive mental health evaluation and follow with all recommendations for treatment counseling and screenings deemed appropriate.

While at Supervision Level 5 if there are any programs considered appriopriate by the Dept. of Corrections or if the defendant believes there are appropriate programs the defendant shall follow and complete all programs recommended.

JUDGE ROBERT B YOUNG

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
WILLIAM S SELLS
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SBI: 00353072

CASE NUMBER:
1108023648

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	50000.00
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	540.00
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	100.00
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	15.00
DELJIS FEE ORDERED	15.00
SECURITY FEE ORDERED	150.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	225.00
SENIOR TRUST FUND FEE	
TOTAL	51,145.00

LIST OF ALIAS NAMES

STATE OF DELAWARE
VS.
WILLIAM S SELLS
DOB: 06/19/1982
SBI: 00353072

CASE NUMBER:
1108023648

RAFIQ BASIL
WILLIAM SELLS
CHASE SELLS
CASPER SELLS
WILLIAM S ELLS
WILLIAMS S SELLS

AGGRAVATING-MITIGATING

STATE OF DELAWARE
VS.
WILLIAM S SELLS
DOB: 06/19/1982
SBI: 00353072

CASE NUMBER:
1108023648

AGGRAVATING
LACK OF AMENABILITY
PRIOR VIOLENT CRIM. ACTIVITY
STATUTORY HABITUAL OFFENDER
CUSTODY STATUS AT TIME OF OFFENSE

CERTIFIED
AS A TRUE COPY
ATTEST: ANNETTE D. ASHLEY, PROTHONOTARY
BY: Rhonda Loz
DATE: 11-4-13