EFiled: Jan 06 2014 09:23AM EST
Filing ID 54789503
Case Number 429,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE'S ANSWERING BRIEF

John Williams
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, DE 19904-6750
(302) 739-4211 (ext. 3285)
Bar I.D. # 365

DATE: January 6, 2014

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **Page**

STATUTES AND OTHER AUTHORITIES

NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in the December 13, 2013 Corrected Opening Brief of Appellant William S. Sells, III. This is the State's Answering Brief in opposition to Sells' direct appeal.

SUMMARY OF ARGUMENT

I. DENIED. The Superior Court did not abuse its discretion in denying the various defense requests on behalf of William Sells to sever his joint jury trial from that of co-defendant Russell Grimes. (A-15-20; 44, 57; B-59). Sells has not demonstrated a reasonable probability that substantial injustice resulted from the joint trial with Grimes. Whether Grimes would testify to present an affirmative defense of duress was a unilateral decision of the co-defendant, and Grimes obviously changed his mind several times on that subject. Whether Grimes testified or not, there was still evidence that Sells was in possession of stolen money shortly after the bank robbery and Sells told two people that he had committed a bank robbery. (B-38-50).

II. DENIED. The trial judge's refusal to permit defendant Sells to remove Juror No. 8 on the basis of alleged law enforcement employment (A-29-31) was not clearly erroneous. The juror made an apparent error on the jury questionnaire form in claiming employment by law enforcement. The juror was a mechanic employed by the County government, not a law enforcement employee. There was no ultimate prejudice to Sells because Juror No. 8 had to be removed from the jury later (A-376), and did not participate in rendering the verdict.

STATEMENT OF FACTS

It was raining on Friday afternoon, August 26, 2011, as Hurricane Irene approached Felton, Delaware. (A-58-59, 121-22; B-1). A little before 5 P. M. that day a tall, slim man wearing a gray hooded sweatshirt, a dark mask over his face, and dark gloves came running into the First National Bank of Wyoming branch in Felton. (A-60-63; B-1, 3-4, 7-8, 11, 14). There were no other customers in the bank. (B-1). The man was yelling and cursing, and he had a black handgun and a satchel. (A-63-64, 93-94; B-1-3, 5-8). He jumped over the teller counter, struck his head on the ceiling, pointed the gun at the several female bank employees, and demanded that the teller cash drawers be emptied into his satchel. (A-65-66, 69, 75, 94-95; B-2-4, 6-8).

Vickie Ebaugh, the bank manager of the Felton branch, assisted the obstreperous and profane robber in emptying the teller cash drawers. (A-68-70). Each teller drawer contained both red dye packs and bait money with recorded serial numbers. (A-71-74; B-2). The dye packs explode if removed a certain distance from the bank and mark the money with the red dye. (A-71). The robber took over $50,000 from the bank (A-76), but the money included both dye packs and bait money. (A-72-74; B-2-3, 8).

Ebaugh described the bank robber as yelling and very violent. (A-63, 75). Although the robber was wearing a dark mask (A-63; B-4-5, 7), his eyes were

visible. (A-86). At the May 2013 joint Kent County Superior Court jury trial of William S. Sells and Russell M. Grimes, Ebaugh testified during defense cross-examination that "I do believe it was Mr. Sells" who robbed the bank. (A-85). Ebaugh based her in-court identification of Sells as the bank robber on the appearance of the accused's eyes. (A-86).

During the August 2011 bank robbery a lone dark SUV was backed into a parking space in the customer parking lot. (A-88). When other customers began arriving at the outside drive-thru window, the robber fled and got into the SUV. (B-3, 9-11). As the black Ford Explorer SUV left the bank parking lot in Felton, the red dye packs exploded and red smoke was visible from the vehicle. (A-96, 106-07; B-14). Elizabeth Cole was in line at the outside drive-thru window when she observed a man inside the bank with a gray hooded sweatshirt pulled over his head. (B-11). Cole realized that it was a bank robbery in progress, and she telephoned 911 to report the crime. (B-11). At a nearby Shore Stop convenience store, Cole also saw the black Ford Explorer behind her, and a black male passenger was holding money out the vehicle window. (B-11-12).

At approximately the same time that afternoon, Officer Keith Shyers, the Deputy Chief of the Harrington Police Department, was arriving at the same Shore Stop store to purchase some items on his way home from work. (A-104-07). Officer Shyers also observed a black male hanging out the passenger window of a

black Ford Explorer, and Shyers likewise saw a red poof of paint. (A-106-07, 131). Shyers was driving an unmarked black 2011 Dodge Charger that was equipped with interior flashing lights but no in car camera. (A-106, 132).

Shyers thought it was suspicious when he saw the red poof and a man hanging out the vehicle window. (A-131). The police officer then heard a Kent-Com broadcast on his police car radio that a bank robbery had just occurred at the nearby Felton branch of the First National Bank of Wyoming. (A-107). Officer Shyers followed the black SUV westbound on Evans Road, and he notified Kent-Com that he was behind the suspected getaway vehicle. (A-112-13).

On Evans Road in Kent County, Sergeant Christopher R. Swan of the Felton Police Department joined the pursuit in his unmarked blue Chevrolet Impala automobile. (B-15-16). The fleeing black Ford SUV made several turns, and Shyers noticed Swan's blue Impala was behind him. (A-113-16). At a stop sign at the intersection of Tomahawk and Peach Basket Roads, the passenger in the fleeing SUV suddenly got out of the vehicle and began shooting at Shyers. (A-116-19, 143; B-16). The getaway vehicle was stopped while the passenger was outside shooting at the following police car. (B-16). The video recorder inside Sergeant Swan's car came on when he activated his interior flashing lights. (B-16). Swan's in-car recording of the police chase of the bank robbery getaway car was admitted at trial as State's Exhibit # 8, and the DVD was played for the jury. (B-19).

Shyers described the shooting passenger as a black male wearing a gray hooded sweatshirt. (A-117, 159). Shyers was only 20 to 30 feet away from the passenger when the initial shots were fired. (A-118-19). As the pursuit of the fleeing getaway vehicle continued in the rain, a third police vehicle, a 2010 dark blue Chevrolet Impala, operated by State Police Sergeant Michael Wheeler joined the chase. (A-121-22; B-21-23). A second round of shots ensued when the getaway vehicle passenger stood up in the SUV sunroof and began firing at the following police vehicles. (A-119-21, 123, 145, 148, 177-81; B-16-17, 23-24, 27). The chase of the bank robbery getaway vehicle continued for several miles, and two other Delaware State Police Officers (William E. Killen and Corporal Scott Torgerson) in separate vehicles joined the pursuit. (A-177-79; B-26-27). Both Killen and Torgerson observed the getaway vehicle passenger standing up in the sunroof and shooting at their following vehicles. (A-177-81; B-27-28).

During the lengthy pursuit, the SUV passenger would periodically emerge from the sunroof and shoot at the pursuing police officers. (A-123, 148, 177-81, 199; B-16, 22, 24, 27-28). The vehicle operated by Shyers, the initial pursuing police officer, was struck 6 times by gunfire. (A-156). The police vehicles driven by Sergeant Swan (B-18), and Officer Killen were also struck by gunfire from the fleeing getaway vehicle. (B-28). Two shots hit Swan's windshield (B-18), and the next day two pieces of glass were removed from Swan's eye. (B-20). The identity

of the getaway vehicle operator was revealed to the jury on the second day of trial when Russell M. Grimes, who was proceeding pro se with standby counsel, stated during his recross-examination of Officer Shyers, "I was driving that vehicle that you was chasing that day . . . ." (A-161).

The miles long pursuit of Grimes and his shooting passenger ended near Willow Grove when the black SUV went into a ditch and the two occupants jumped out and began running. (A-183-87; B-17, 24). Grimes, the getaway vehicle driver, went down when he was shot in the right leg by Corporal Torgerson. (A-185; B-17, 24-25). The getaway vehicle passenger continued running and succeeded in eluding police capture that evening. (A-187, 214; B-24). At trial Torgerson testified that when he handcuffed Grimes at the apprehension scene, the pro se defendant asked, "Why did you shoot me? I was the driver." (A-187). Grimes sustained an injury to his right ankle (A-235-37; B-29), and when taken by the police to the hospital for treatment, Grimes gave police and medical personnel a false name. (A-257, 277).

Inside the getaway SUV the police recovered three handguns and approximately $4,500 in U.S. currency. (B-30-33). The SUV glove box contained an insurance ID card for the Ford Explorer in the name of Sophia Jones. (B-34-35). When contacted by the police on August 26, 2011, Sophia Jones informed the authorities that she was the registered owner of the Explorer used as the bank

robbery getaway vehicle (A-295), but that she had not seen the vehicle in over a week. (A-296). She added that the SUV was in the possession of William S. Sells, the father of her son, and that Sells also used the same Rafiq Basil. (A-293-96). She gave the police Sells' cell phone number and advised them that Sells' best friend was named Russell. (A-299). Sells telephoned Jones two days later on August 28, and inquired if the police had visited her. (A-299).

As the police search for Sells, the masked individual who entered the First National Bank of Wyoming at gunpoint, continued, Sells appeared at different Delaware locations in possession of bills stained with red dye. Shannon Michelle Walch met Sells in Penns Grove, New Jersey, and she was with Sells when he purchased a black Caprice automobile for $3,500 cash. (B-36-37). Walch noted that some of the bills had a red mark. (B-37). She testified at trial that Sells mentioned a bank robbery, and said "That him and his brother robbed a bank." (B-39).

Walch was also present when Sells purchased $475 of cigarettes at a Sunoco gas station in Claymont, Delaware. (B-38, 40-41, 44-45). The Sunoco videotape (State's Exhibit # 93) showed Sells at the gas station. (B-41). Some of the money used for the large cigarette purchase contained red dye. (B-40). The Sunoco night employee was offered $1,000 by Sells to turn over the station surveillance videotape, but the employee declined. (B-42). The employee did put the red

money in a separate zip lock bag (B-43), and this cash was later turned over to the State Police. (B-44-45). A police comparison of the gas station money supplied by Sells revealed that 34 of the 94 bills matched the bank bait list of stolen currency. (B-46-48).

In Dover Sells used more of the red cash to make a deposit on a used Jaguar automobile. (B-53-56). Driving the Jaguar in Wilmington, Sells met Andrea Scott, who agreed to accompany an individual she knew as Rafiq back to Dover. (B-49-50). Scott testified at trial that Sells told her that if the police approached them that the officers might start shooting because they were looking for him for a bank robbery. (B-50).

During a September 2011 police chase in Camden, Sells jumped out of the car and again fled. (B-51, 57). Marijuana was discovered in the vehicle and Scott was taken into custody. (B-57). Scott informed the police that Sells was previously in the vehicle (B-57), and that he might be staying at the Shamrock Motel near Camden. (B-52). Following an extended police seizure, Sells was apprehended on September 6, 2011 at the Shamrock Motel, and additional dye-stained currency was recovered. (A-311, 318, 345-51, 360).

Neither Sells nor Grimes testified at their joint 2013 jury trial.

I. NO SEVERANCE OF DEFENDANTS WAS REQUIRED

QUESTION PRESENTED

Did the Superior Court abuse its discretion in denying a second motion for severance of defendants?

STANDARD AND SCOPE OF REVIEW

The Superior Court's decision to deny a defense motion for severance of defendants (A-15-20, 44, 57; B-59) is reviewed on appeal for an abuse of discretion. See Floudiotis v. State, 726 A.2d 1196, 1210 (Del. 1999); Manley v. State, 709 A.2d 643, 652 (Del. 1998); Stevenson v. State, 709 A.2d 619, 628 (Del. 1998); Outten v. State, 650 A.2d 1291, 1298 (Del. 1994); Robertson v. State, 630 A.2d 1084, 1093 (Del. 1993); Skinner v. State, 575 A.2d 1108, 1119 (Del. 1990). ". . . [D]iscretion has been abused by denial when there is a reasonable probability that substantial injustice may result from a joint trial." Bradley v. State, 559 A.2d 1234, 1241 (Del. 1989) (quoting Bates v. State, 386 A.2d 1139, 1141 (Del. 1978)).

MERITS OF THE ARGUMENT

Initially, William S. Sells moved to sever his Superior Court jury trial from co-defendant Russell M. Grimes on the basis that the two defendants would be presenting antagonistic defenses at the scheduled joint trial. (A-10). The Superior Court denied this first severance motion by Sells on April 30, 2013. (A-6). Sells

then filed a second severance of defendants motion on May 1, 2013. (A-10-14). As pointed out by the trial judge on the first day of trial, Monday, May 6, 2013, "it's completely the reverse of the last motion." (A-37). Rather than arguing that the two bank robbery co-defendants would present antagonistic defenses, Exhibit A attached to Sells' second May 1 severance motion asserted that if tried separately co-defendant Grimes would testify that Sells was not in the getaway car driven by Grimes and that some other unidentified male was the bank robber. (A-14).

The second motion for severance of defendants presented by Sells was considered by the Superior Court on the morning of May 6, 2013, immediately prior to jury selection. (A-33-57). Initially, Sells' defense counsel represented that "we can have an affidavit signed and executed today." (A-33). A discussion among counsel and the trial judge ensued about why co-defendant Grimes had not previously signed an affidavit in support of Sells' second severance of defendants motion. (A-33-40). When co-defendant Grimes subsequently arrived in the courtroom he was asked by the trial judge if he intended to testify consistent with the representations in the still unsigned affidavit. (A-40-42). Grimes responded, "I didn't tell anybody that I was testifying ---" (A-42). Grimes added: "I didn't say I was testifying to this, what's on this paper. I don't even know what they talking about, somebody sold me guns. They sold me ---" (A-42). After Grimes was handed a copy of the motion exhibit, the co-defendant stated: "I didn't say nothing

like that." (A-42).

Sells' defense counsel did not have a copy of the proposed affidavit that he wanted Grimes to sign. (A-43). After conferring with his standby counsel (A-44), pro se co-defendant Grimes added:

> Excuse me, your Honor. The only thing I would be willing to testify, the truck situation, me buying the truck and me coming from North Carolina to get the truck, that's the only thing I'm testifying to, if I would testify. Anything other than that, I have nothing to do with it. I don't know what they are talking about.

(A-44). On the basis of this evidentiary record, the Superior Court Judge properly denied the pretrial second motion for severance of defendants filed by Sells. (A-44).

A few minutes later defense counsel for Sells requested that the Superior Court reconsider the denial of the second severance of defendants motion (A-44) because co-defendant Grimes had in the interim apparently executed the missing unsigned affidavit. (A-48-49). In response, one of the State prosecutors noted: "Your Honor, we're now in a position that on the record, he indicated that he would only testify about a truck." (A-49). The trial judge confirmed that this is what Grimes previously said. (A-49). When questioned further by the trial judge about the seeming change of position, Grimes now said he was in agreement with the affidavit contents (A-49-50), and would so testify at a later trial. (A-50).

At this point in the pretrial discussion, the other State prosecutor who had not

seen the affidavit Sells' counsel was offering inquired if Grimes was intending to present "an affirmative defense." (A-50). Co-defendant Grimes replied that he did intend to pursue an affirmative defense of duress. (A-50-51). See 11 Del. C. § 431(a); Wonnum v. State, 942 A.2d 569, 572 (Del. 2007) ("Duress is a recognized affirmative defense to criminal liability in situations where a third party coerces the defendant by threat of bodily harm to commit a crime. The defendant must establish duress by a preponderance of the evidence."). Co-defendant Grimes informed the trial judge, "It will, your Honor, because I'm saying that I was under duress during the whole situation." (A-51).

Following Grimes' disclosure that he intended to pursue an affirmative defense of duress (A-51), the trial prosecutor pointed out that to pursue a duress affirmative defense Grimes "would have to take the stand." (A-51). The prosecutor next noted, ". . . 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." (A-51). Sells' defense counsel then persisted in arguing that severance of defendants should still be granted (A-51-52), but the trial judge observed: "Well, I think what the State is saying is if Mr. Grimes is going to testify, there's absolutely no reason to sever." (A-52). Sells' attorney responded: "Your Honor, but he's reluctant to testify at his trial if the trials are joined." (A-

52).

Co-defendant Grimes conferred with his standby counsel again (A-54), and announced: "I understand now that I would have to testify, so if that's what it is, then that's what it will be." (A-54). Further discussion continued with Sells' defense counsel who argued that the affidavit should control (A-55-57), but the trial judge stated: "Well, all I can go on now is that he says he's going to testify." (A-56). Grimes again confirmed that he planned to testify. (A-56-57). With that record the trial judge again correctly ruled: ". . . the revised motion or second motion is denied." (A-57). Three days later on May 9, 2013, the trial judge issued a written 5 page Order denying Sells' severance of defendants second motion. (A-15-20). On the eighth day of trial (May 20, 2013), after Grimes decided not to testify (B-59), Sells renewed his severance motion and the Superior Court summarily denied the renewed motion. (B-59).

Delaware Superior Court Criminal Rule 8(b) permits two or more defendants to be charged in the same indictment if they are alleged to have participated in the same act or series of acts. Manley v. State, 709 A.2d 643, 652 (Del. 1998). Such a joinder of criminal defendants "is designed to promote judicial economy and efficiency . . . ." Bradley v. State, 559 A.2d 1234, 1240 (Del. 1989) (quoting Sexton v. State, 397 A.2d 540, 545 (Del. 1979)). See Floudiotis v. State, 726 A.2d 1196, 1210 (Del. 1989) (". . . judicial economy dictates that the State should jointly

try defendants indicted for the same crime or crimes."); State v. Young, 2013 WL 4046218 (Del. Super. July 31, 2013) at * 1. Accordingly, the general rule is that jointly indicted defendants, such as Sells and Grimes, should normally be tried together. Manley, 709 A.2d at 652; Bradley, 559 A.2d at 1241. The concern for judicial economy is particularly compelling in a case such as this where there were approximately 60 prosecution witnesses and over a hundred trial exhibits in the lengthy trial. (A-52-53). The 2013 Superior Court joint jury trial began May 6 and concluded with a verdict on May 28. Repeating such a 3 week endeavor would be obviously burdensome.

Nonetheless, Delaware Superior Court Criminal Rule 14 also provides that "If it appears that a defendant or the State is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." This Rule is the same as Federal Rule of Criminal Procedure 14. Burton v. State, 149 A.2d 337, 339 (Del. 1959). Applying these principles, the United States Supreme Court has stated that separate trials for co-defendants are appropriate ". . . only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v. United States, 506 U.S. 534, 539 (1993). See Stevenson v.

State, 709 A.2d 619, 630 (Del. 1998); State v. Gibbs, 2012 WL 5989364 (Del. Super. Nov. 30, 2012) at * 2. Sells has the burden of demonstrating substantial injustice and unfair prejudice in the Superior Court's rulings denying the repeated severance of defendants motions. (A-15-20, 44, 57; B-59). See Outten v. State, 650 A.2d 1291, 1298 (Del. 1994); Lampkins v. State, 465 A.2d 785, 794 (Del. 1983); State v. Anker, 2005 WL 823750 (Del. Super. April 4, 2005) at * 2. Sells has not carried his burden of proof in this case and his severance of defendants motions were all properly denied. (A-15-20, 44, 57; B-59).

The Superior Court on May 6, 2013 correctly focused its attention on whether or not co-defendant Grimes would testify favorably for Sells if the trials were severed at the last minute. (A-41). Initially, Grimes stated that he was not going to give any apparently favorable testimony on behalf of Sells. (A-42-44). Grimes first said, "I didn't tell anybody that I was testifying --." (A-42). When it was clarified that Grimes was only willing to testify that he travelled from North Carolina to purchase Sells' truck (A-44), the Superior Court correctly denied the second severance of defendants motion on the basis of that record.

Next, when Sells' defense counsel asked for reconsideration of the severance motion because he had now secured Grimes' signature on an affidavit (A-48-49), the focus of the inquiry logically turned to whether or not Grimes would be presenting an affirmative defense that would require his trial testimony. (A-50-53).

See 11 Del. C. § 431(a); Wonnum, 942 A.2d at 572. At that juncture, Grimes, after conferring with his standby counsel (A-54), announced: "I understand now that I would have to testify, so if that's what it is, then that's what it will be." (A-54). Since Grimes, after apparently being advised that he would have to testify in order to present an affirmative defense of duress (A-54), stated that he intended to testify, the trial judge correctly agreed with the State that no severance was necessary. (A-57). Grimes could simply testify later at the joint trial if he did not change his mind again, present his duress affirmative defense, and be available to offer potentially helpful evidence on behalf of co-defendant Sells. As pointed out by the trial judge in more detail in his subsequent written Order issued 3 days later on May 9, 2013, a severance of defendants was not necessary given Grimes' then professed intention to testify in order to present his own duress defense. (A-15-20).

Ultimately, on the eighth day of trial (May 20, 2013), when the State had finally completed the presentation of its extensive case-in-chief, Grimes again changed course and advised the Superior Court that he was now electing not to testify. (B-59). Even though the State's case-in-chief was complete at that point, defense counsel for Sells once more renewed the severance of defendants request. (B-59). The trial judge's summary denial of the renewed motion on the eighth day of trial (B-59) is not addressed in Sells' Opening Brief in this direct appeal. Ordinarily, unbriefed issues are deemed waived. See Somerville v. State, 703 A.2d

629, 631 (Del. 1997); Murphy v. State, 632 A.2d 1150, 1152 (Del. 1993). See also Roca v. E. I. DuPont DeNemours & Co., 842 A.2d 1238, 1242 (Del. 2004); Ward v. State, 2009 WL 597190 (Del. March 10, 2009) at * 1 n. 5. Similarly, Sells' conclusory assertion that the joint trial violated his rights under Article I, Section 7 of the Delaware Constitution (December 13, 2013 Corrected Opening Brief at 21) may also be summarily denied for failure to comply with this Court's requirements for asserting State Constitutional violations as announced in Ortiz v. State, 869 A.2d 285, 290-91 & n. 4 (Del. 2005). See Sykes v. State, 953 A.2d 261, 266 n. 5 (Del. 2008) ("Sykes's conclusory assertion that his rights under the Delaware Constitution have been violated results in his waiving the State constitutional law aspect of this argument.").

Sells has not demonstrated a reasonable probability that substantial injustice resulted from his joint trial with co-defendant Grimes. Bradley, 559 A.2d at 1241. In this circumstance, no abuse of discretion by the trial judge in denying the various severance of defendants motions has been established and Sells' first appellate argument must be rejected. Whether Grimes testified on behalf of Sells or not, there was other incriminating evidence that Sells was in possession of money recently stolen in the bank robbery (B-38-48), and Sells told two people that he had committed a bank robbery. (B-39, 50). Sells cannot establish substantial injustice here.

II. THE STATE'S REVERSE BATSON CHALLENGE WAS PROPER

QUESTION PRESENTED

Did the Superior Court properly uphold the State's reverse Batson challenge when defendant Sells attempted to use his fifth peremptory challenge to remove Juror No. 8, Justin Hurley?

STANDARD AND SCOPE OF REVIEW

The trial judge's determination that defendant Sells did not offer a valid race-neutral explanation for use of a peremptory jury challenge to remove a white potential juror (A-27-31) is subject to de novo appellate review. See Sykes v. State, 953 A.2d 261, 269 (Del. 2008); Jones v. State, 940 A.2d 1, 9 (Del. 2007); Burton v. State, 2007 WL 1417286 (Del. May 15, 2007) (reverse Batson challenge); Barrow v. State, 749 A.2d 1230, 1238 (Del. 2000); Dixon v. State, 673 A.2d 1220, 1223 (Del. 1996). ". . . the trial court's findings with respect to discriminatory intent will stand unless they are clearly erroneous." Jones, 940 A.2d at 9 (quoting in Sykes, 953 A.2d at 269).

MERITS OF ARGUMENT

During jury selection on May 6, 2013 in the joint Superior Court trial of William S. Sells, III and Russell M. Grimes, the State asserted a reverse challenge under Batson v. Kentucky, 476 U.S. 79, 94-100 (1986), and argued that both black

defendants had utilized their first three peremptory jury challenges only to exclude potential white jurors. (A-21). See generally Riley v. State, 496 A.2d 997, 1009-13 (Del. 1985). Challenges that a party in a criminal prosecution is utilizing peremptory jury strikes in a racially discriminatory manner are normally asserted against the governmental prosecuting authority; however, the prosecution has an equal right to challenge peremptory jury strikes by a criminal defendant if a pattern of racial discrimination appears. Such a challenge to a criminal defendant's action during jury selection is referred to as a "reverse Batson" challenge. See Burton v. State, 2007 WL 1417286 (Del. May 15, 2007) at * 1.

In response to the State's reverse Batson challenge to the exercise of the first three peremptory jury strikes by both defendants Sells and Grimes, the trial judge did note that a "pattern" of racially discriminatory peremptory jury challenges "has emerged" and, henceforth, "any excusal of a Caucasian juror will have to be for an express reason other than race." (A-22). Jury selection then continued until co-defendant Grimes attempted to use one of his remaining peremptory jury strikes to remove Juror No. 8, Justin Hurley, a white male. (A-27). The trial judge asked pro se co-defendant Grimes "What is your nonracially-based reason?" (A-28). Grimes responded: "The nonracially-based reason is because he's employed by the Kent County Levy Court, I guess he's employed by law enforcement through them." (A-28).

The trial judge answered: "Levy Court is not law enforcement." (A-28). Grimes then pointed out that juror Hurley said on the jury questionnaire that he was employed by law enforcement. (A-28). The prosecutor attempted to clear up the confusion engendered by juror Hurley's notation on the jury questionnaire that he was employed by law enforcement. (A-29). She stated: ". . . while Justin Hurley does indicate that he's employed in Kent County Levy Court, his occupation is a mechanic." (A-29). After this clarification by the prosecutor, the trial judge permitted Justin Hurley to remain on the jury. (A-29).

When it was then Sells' next opportunity to exercise a peremptory jury challenge, his defense counsel also attempted to remove Hurley from the jury. (A-30). The reason for Sells' attempted jury strike was the same as Grimes; that is, on the jury questionnaire Hurley apparently had indicated that he was "employed by law enforcement." (A-30). The trial judge stated: "He's a mechanic." (A-30). After Sells offered no other basis for striking Hurley (A-30-31), the trial judge rejected Sells' attempted strike of Juror No. 8 and permitted Justin Hurley to remain on the jury. (A-30-31).

On direct appeal, Sells argues first that there was no pattern of racial discrimination in the exercise of his first three peremptory jury strikes. (Corrected Opening Brief at 27-28). While the prosecutor had asserted that both defendants utilized their first three peremptory jury challenges to remove only white

individuals (A-21), Sells argues on appeal that one of his first three peremptory jury strikes was utilized to remove "an African American juror." (A-22-23). Sells made the same point at jury selection, and the trial judge recognized the State's error by stating: "Yes. We're talking five for six at this juncture. All that's necessary is a stated reason." (A-23).

Second, Sells argues on appeal that Hurley's response on the jury questionnaire indicating law enforcement employment was a valid race neutral basis to permit his removal by the defense. (Corrected Opening Brief at 28-29). Sells must now establish that the trial judge's actions in rejecting the race neutral explanation offered by Sells to attempt to remove Juror No. 8, Justin Hurley, was clearly erroneous. See Robertson v. State, 630 A.2d 1084, 1090-91 (Del. 1993); Burton, supra at * 1. Since Hurley was a mechanic employed by the Kent County government, the Levy Court (A-29-30), arguing that he was employed by law enforcement was a factually erroneous contention. The trial court's rejection of this defense rationale (A-30-31) was not clearly erroneous. Sells has demonstrated no equal protection Constitutional violation in this case.

There was also no ultimate prejudice to Sells or Grimes because Juror No. 8, Justin Hurley, had to be removed from the jury at the outset of deliberations and was not a participant in rendering the final jury verdict. (A-371-76) With Hurley's removal from the jury on May 23, 2013 (A-376), Sells succeeded in obtaining

Hurley's eventual removal from his petit jury. In the absence of any ultimate prejudice, the trial judge's May 6 jury selection rulings about Juror Hurley (A-29-31) because inconsequential.

CONCLUSION

The judgment of the Superior Court should be affirmed.

John Williams
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
(302) 739-4211, ext. 3285
Bar I.D. # 365

Dated: January 6, 2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 6th day of January 2014, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on January 6, 2014, she did deposit in the mail two copies of the attached State's Answering Brief properly addressed to:

André Beauregard, Esquire
Brown, Shiels & Beauregard, LLC
502 South State Street
Dover, DE 19901

Adam D. Windett, Esquire
Hopkins & Windett, LLC
438 South State Street
Dover, DE 19901

Mary T. Corkell

Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

Devera B Scott
Notary Public

Devera B. Scott, Esquire
NOTARIAL OFFICER
Pursuant to 29 Del.C. § 4323(a)(3)