

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ROBERT WADE PRESLEY

APPELLANT

VS.

NO. 2008-KA-0455

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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APPELLANT

VERSUS

NO. 2008-KA-0455-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Robert Wade Presley was convicted in the Circuit Court of Monroe County on a charge of aggravated DUI and was sentenced to a term of 20 years in the custody of the Mississippi Department of Corrections with five years suspended. (C.P.76) Aggrieved by the judgment rendered against him, Presley has perfected an appeal to this Court.

SUMMARY OF THE ARGUMENT

Presley has failed to demonstrate error in the trial court's denial of his motion to quash the venire. The trial court's findings and conclusions are amply supported by the record.

PROPOSITION:

**THE TRIAL COURT DID NOT ERR IN REFUSING
TO QUASH THE VENIRE**

Prior to trial, the defense moved the court *ore tenus* to quash the venire on the ground that no potential juror's name began with any letter from the alphabetical sequence T-Z. For this reason, defense counsel contended, "I do not believe that this is a random cross-section of Monroe County

that is required under the Mississippi Code, Annotated, Section 13-5-26, and the cases and the law surrounding that.” (T.6-7) The assistant district attorney countered this assertion as follows:

Other than by Ms. Butler certifying that she complied with the code section that deals with the drawing of the jurors by placing them in the computer system, it’s the computer, it’s my understanding, that’s responsible for generating the list. And by her certification she’s stating that she did nothing other than what was required of her by statute.

(T.7)

In support of its motion, the defense called Judy Butler, the Circuit Clerk of Monroe County. Ms. Butler testified that the jury panel report had been “generated through a computer system.” (T.8) When asked why the system did not “go all the way through the alphabet,” Ms. Butler testified as follows:

Because there is an order that is signed by the Senior Circuit Judge directing the Circuit Clerk to draw “X” number of names to add into the jury wheel for the year. That number for the year 2007 through 2008, through April of 2008, was 8,000. The computer generated those numbers and when it reached the number 8,000 it had to stop and it did not go all the way through the alphabet.

(T.9)

Defense counsel went on to conduct this line of questioning:

Q. Do you— so I’ll understand, persons or potential jurors whose names begin with a Y or a W or a T, or anything after S-T, those people are automatically excluded?

A. That is correct..

Q. And those automatic exclusions there is no way for this Circuit Court to put place those back into the jury pool?

A. No, sir.

Q. So I’ll understand, if your name is Young or White or Williams, you are automatically excluded from this jury pool?

A. For this year, yes, sir.

Q. As a result of a computer program that somebody generated?

A. Yes, sir.

Q. Who generated that?

A. Delta Computer Systems.

Q. And Delta Computer System couldn't— well, I guess you can't speak for them, but no random drawing of any names this year can included people whose names begins with T or after?

A. Yes, sir. But may I explain something?

Q. Sure.

A. That is not a computer glitch by any means. It is strictly because of the number of voters that were ordered to be put into the jury wheel. Had there been 15,000 ordered to be put in there I'm sure it would have gone all the way through the alphabet. It's strictly because of the number that was ordered by the Senior Circuit Judge. And when the computer reached that number based upon the formula it certainly could not go any further. We were ordered to put 8,000 names in there and when those 8,000 names were met it could not go any further and add the other names through the other letters of the alphabet.

Q. So those people that are voters in Monroe voters [sic] were excluded?

A. Yes, sir.

(emphasis added) (T.9-10)

On cross-examination, the assistant district attorney questioned Ms. Butler as follows, in pertinent part:

Q. Ms. Butler, I think I understand, but just to be for sure. When you received your order setting the number of jurors, the list starts at A and then goes through Z?

A. That is correct.

Q. So once it got to S or whatever this number is, it cut off at 8,000?

A. That is correct.

Q. So on another— say another trial next week is there a possibility that anything after S would be on there?

A. I would have to go back and look at the actual jury wheel for the year. But it is— what Mr. White says is true, it did not go all the way through the alphabet to generate the 8,000 names, because it reached number 8,000 prior to getting to the end of the alphabet.

Q. So A through S and then stopped at— the 8,000 was done alphabetically?

A. That is correct.

Q. Now, after you've received that 8,000 I believe you've stated that that was by court order?

A. Yes, sir.

Q. Is that common practice in this district?

A. Yes, sir.

Q. Has it been done on other jury panels in Monroe County?

A. Yes, sir.

Q. And roughly how long has that been done?

A. As far as not going all the way through the alphabet? Is that what you're asking?

Q. Yes.

A. We've had that happen two years.

Q. And how long ago was that?

A. The first time was probably three years ago maybe and then this year.

Q. Okay. Do you recall then how many jurors were summoned for that year?

A. No, sir, I'm sorry, I don't.

Q. Okay. Is it common practice for the order to set a number of registered voters that do not include all of the registered voters?

A. It has happened an [sic] occasion, yes, sir.

Q. Is that-- if you know this, how it's stated in the statute, this 33-5-26, is that authorized under that?

A. Yes, sir.

Q. Is it authorized as far as a number of jurors that you are told to summon?

A. Yes, sir.

Q. Okay. So you're following the guidelines of the statute?

A. Yes, sir.

Q. Now, other than putting the number that you're ordered to do into the computer system, do you have any way of manipulating who-- what names pop up?

A. No, sir.

Q. So that is entirely random?

A. Yes, sir.

Q. You have no way of whatsoever to manipulate what names come out?

A. No, sir.

Q. And the names that were generated on this list are all registered voters within Monroe County?

A. Yes, sir.

Q. Throughout Monroe County?

A. Yes, sir.

Q. Not just centered to say the Nettleton portion of Monroe County, Smithville, Aberdeen and Amory?

A. No, sir.

Q. It includes all of them?

A. It's countywide.

Q. So it is in fact a cross-reference of everybody in the district?

A. Yes, sir.

(emphasis added) (T.11-13)

On redirect examination, Ms. Bulter testified that this particular computer program was being utilized "[f]or this year only." (T.17)

Arguing the merits of his motion, defense counsel maintained his position that the venire did not represent a "full and complete cross-section of Monroe County ... and therefore not a complete and random jury list." When the court asked whether he had "any cases" to support his argument, defense counsel stated that he was relying on "the statute." (T.19-20) The prosecutor then made the following argument:

Your Honor, Ms. Butler, testified to exactly that, that this is a random cross-section of Monroe County. She complied by the court order that was issued for the number of jurors in this particular county for this particular trial term for this year.

As she stated, she has no control over what names are generated from that list. She takes the number that is given her by the Court as far as the numbers to draw, and then she entered that into the program and the computer itself that's been approved is responsible

for drawing the names that come out.

As she stated, it's not simply a list of names from just Aberdeen or any other county in or sitting in Monroe County, it's the cross-section of the community of Monroe County, which, as she signed off on her certification, she's complied with the statute and defense counsel's motion should be denied.

(T.20)

The court then made these findings and conclusions:

I've had an opportunity this morning to seat the jury. The jury looked very diverse. I saw what appeared to be a [sic] equal number of minorities and whites, and I also saw a [sic] equal number of what appeared to be men and women.

Mr. Presley has failed to demonstrate any prejudice to him. And as far as the panel, I find that the panel is diverse, it does represent a cross-section of Monroe County and the motion will be denied.

(T.21)

The court then asked defense counsel, "anything else along those lines?" Defense counsel answered, "No, Your Honor," thereby declining to contest the court's finding that the panel represented a cross-section of Monroe County. (T.21)

The state contends no basis exists for overturning the court's ruling. As Presley recognizes, "[t]he jury laws of this state are directory and the selection of the jury in an irregular manner does not render it illegal." *Rhone v. State*, 254 So.2d 750, 752 (Miss.1971), quoted in *De La Beckwith v. State*, 707 So.2d 547, 598 (Miss.1997). "Unless the defendant shows that the method used was fraudulent or a radical departure from the method prescribed by statute as to be unfair or the prevent

due process of law, the appellate court will not reverse.”¹ *Pratt v. State*, 870 So.2d 1241, 1245 (Miss.App.2004). Finally, when there is no evidence to show that the defendant was not in fact tried by a fair and impartial jury, “error may not be predicated for an irregularity in drawing or impaneling the jury.” *Davis v. State*, 660 So.2d 1228, 1261 (Miss.1995), quoted in *Gates v. State*, 829 So.2d 1283, 1287 (Miss.App.2002). Accord, *Havard v. State*, 986 So.2d 333 (Miss.App.2007); *King v. State*, 857 So.2d 702, 725 (Miss.2003); *Darden v. State*, 798 So.2d 632, 633-34 (Miss.2001); *Adams v. State*, 537 So.2d 891, 894 (Miss.1989).

Assuming without conceding that this method for drawing the panel was irregular, the state submits Presley has not shown that the process used to draw the jury in this case was fraudulent or a departure so radical as to be unfair or prevent due process of law. Nor has he shown that the jury that was impaneled was not fair and impartial, or that it was the result of systematic exclusion of any “distinctive group.” The court’s findings and conclusions in the disposition of his motion to quash are unrebutted. No basis exists for overturning the trial court’s ruling.

¹There is no authority for the proposition that having a surname beginning with the letter T, U, V, W, X, Y or Z is a “distinctive group” within the meaning of *Duren v. Missouri*, 439 SO.2d 357 (1979). Defense counsel did not attempt to rebut the court’s finding that the jury panel in this case was diverse, i.e., that it contained minorities as well as whites, men as well as women, and that it therefore represented a fair cross-section of the county, with no apparent exclusion of distinctive groups. Presley has “failed to provide sufficient proof to raise the requisite inference that a discriminatory practice was used in the selection of the venire persons.” *Wilks v. State*, 811 So.2d 440, 444 (Miss. App. 2001).

CONCLUSION

The state respectfully submits that the trial court properly overruled the motion to quash the venire. The judgment entered below should be affirmed.

Respectfully submitted,

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STATE OF MISSISSIPPI**


BY: DEIRDRE McCRORY
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CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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