IN THE COURT OF APPEALS OF IOWA

No. 0-486 / 89-1181

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

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ANTHONY LAMONT JOHNSON,

Appellant.

Appeal from the Iowa District Court for Scott County, Margaret S. Briles, Judge.

Defendant appeals his conviction contending black jurors were systematically excluded from the pool of prospective jurors. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Patricia R. Lapointe, Assistant Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Sarah J. Coats, Assistant Attorney General; William E. Davis, Scott County Attorney; James D. Hoffman and Terri Sandeman, Assistant County Attorneys, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ., but decided en banc.

SCHLEGEL, J.

Defendant Anthony Johnson appeals his conviction by a jury on charges of first-degree burglary, first-degree robbery and second-degree sexual abuse. Defendant contends that he is entitled to a new trial because minorities were systematically excluded from the jury. He also contends that the trial court abused its discretion in sentencing. We reverse and remand for a new trial.

I.

Johnson was accused of breaking into an apartment, robbing both its occupants at gunpoint and sexually abusing one of the occupants. On April 17, 1989, a jury was impaneled and sworn. There were no objections made to the jury venire or to the selection of the petit jury during jury selection process. Trial continued through that day and resumed the following morning. At approximately 10 a.m. the next day, the court in chambers requested a stipulation from counsel that the jury had been selected and sworn in accordance with the law. The State agreed. Johnson, an African-American, agreed through counsel, but called to the attention of the court that there was no one of African origin on the jury panel. The court confirmed this.

Johnson was found guilty of burglary in the first degree, sexual abuse in the second degree, and two counts of robbery in the first degree. The court sentenced

Johnson to serve up to twenty-five years in prison for each of these four class "B" felonies; the court ordered that three of the four sentences be served consecutively. It was not until he filed his motion in arrest of judgment or for new trial that Johnson raised the issue that he did not receive a fair trial because of what he claims is the systematic exclusion of black people from the prospective jury panel. That motion was overruled, and Johnson appeals.

II.

The State contends Johnson waived his right to appeal the issue of jury composition because he failed to make a timely objection. Our supreme court, however, recently held in State v. Watkins, 463 N.W.2d 411, 413 (Iowa 1990), that the strictures of Iowa Rule of Criminal Procedure 17(3), which permits either party to challenge the jury panel because of a departure from statutory requirements, "does not purport to limit redress for alleged constitutional deprivations." Moreover, when both litigants and the trial court were aware of the ground urged for reversal, we may find the issue preserved for our review. See State v. Martin, 385 N.W.2d 559, 552 (Iowa 1986). We indulge every reasonable presumption against a waiver of constitutional rights. State v. Moore, 276 N.W.2d 437, 440 (Iowa 1979).

It is true that Johnson did not object until after a verdict had been reached. It is also true, however, that the matter was fully heard by the trial court. In the case before us, the issue was raised first before the trial court. The trial court conducted a full hearing and took additional evidence. We also have before us the trial court's July 19, 1989, order denying Johnson's motion which raised the issue of the systematic exclusion of African-Americans from the venire. We conclude, therefore, that the merits of the issue have been properly preserved for our review under either Watkins or Martin.

III.

The sixth amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." The Iowa Constitution contains a virtually identical provision in article I, section 10. Both the United States Supreme Court and the Iowa Supreme Court have recognized that this "entitles a litigant to a jury panel designed to represent a fair cross section of the community. Watkins, 463 N.W.2d at 414 (citations omitted).

The United States Supreme Court has stated:

> [A] defendant does have the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria . . . . The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, . . . or

> on the false assumption that members of his race as a group are not qualified to serve as jurors . . . .

Batson v. Kentucky, 476 U.S. 79, 85-86 (1986) (citations omitted). But, likewise, it has cautioned:

> Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which the juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

Taylor v. Louisiana, 419 U.S. 522, 538 (1975).

Johnson raised his sixth amendment challenge both before the trial court and this court. He argues that he is part of a distinctive group which is not reasonably represented in Scott County juries because of systematic exclusion. See Watkins, 463 N.W.2d at 414 (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)). Johnson probed the statutory requirements of compiling a jury list before the trial court and has briefed the issue on appeal. We need not reach the constitutional issue if another issue is decisive. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 532 (Iowa 1981).

Iowa Code chapter 607A establishes procedures for the selection of juries. Section 607A.1 declares it to be "the policy of this state that all persons be selected at random from a fair cross section of the population of the area served by the court . . . ." Iowa Code section 607A.2 further provides that:

> A person shall not be excluded from jury service or from consideration for jury service in this state on account of age if the person is eighteen

> years of age or older, race, creed, color, sex, national origin, religion, economic status, physical disability, or occupation.

Iowa Code section 607A.22 unambiguously provides that the names of prospective jurors will be selected as follows:

> The appointed jury commission or the jury manager shall use all of the following source lists in preparing grand and petit jury lists:
>
> 1. The current voter registration list.
>
> 2. The current motor vehicle operator's list.
>
> 3. Any other current comprehensive lists of persons residing in the county, including but not limited to the lists of public utility customers, which the appointive jury commission or jury manager determines are usable for the purpose of a juror source list.
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> * * *

In accordance with section 607A.20, Chief Judge Havercamp appointed Donna Lopez as jury manager for Scott County. Scott County utilizes electronic data processing techniques and equipment for drawing of jurors. See Iowa Code § 607A.19 (1989). Donna Lopez testified that voter and motor vehicle registration lists are merged and then randomized. She further testified that from each array of jurors a panel is chosen by random selection by the computer and by the same randomized method assigned to the various jury trials which are to start each Monday.

The record thus shows that Scott County merged only the voter registration list and the motor vehicle operators list to compile its jury list. This is in clear violation of Iowa Code section 607A.22, which requires the use of "other current comprehensive lists." While the statute

allows some discretion in the selection of such lists, the word "shall" imposes a duty on the jury commission or jury manager. Iowa Code § 4.1(36)(a) (1989).

It is easy to see why this "other" list is necessary. The legislature intended to require a more accurate cross section of the community that motor vehicle and voter registration does not provide. While many persons of every age, creed, religion, and socio-economic status--to name only a few potentially "distinctive" groups--use electricity, telephones, and other public utilities, not all may have exercised their privilege to vote or are fortunate enough to own a motor vehicle. The statutory requirements thus provide the requisite "leeway in application." Taylor, 419 U.S. at 538.

The statutory system does not, nor do we now, impose a "requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." Id. We note, however, that the United States Supreme Court recently stated: "An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." Powers v. Ohio, 59 U.S.L.W. 4268, 4271 (U.S., Apr. 1, 1991). The court in Powers held that such an exclusion, at least by way of peremptory challenges, was a violation of the equal protection clause, id., which causes the criminal defendant to suffer a real injury, id. at 4272.

Although the Iowa Supreme Court has noted that "exclusive reliance on voter registrations, although not the best solution, does not alone offend the Sixth Amendment," State v. Lohr, 266 N.W.2d 1, 6 (Iowa 1978), such reliance since the enactment of section 607A.22 in 1986 is offensive to the statutory framework. It is therefore incumbent upon Scott County to effectuate the prescribed system of compiling its jury lists. Because the Scott County jury which heard Johnson's case was drawn from an illegally compiled jury list, we must reverse the judgment entered by the district court.

We have not been presented a case in which our statutorily mandated juror selection system has been fully employed. We believe that we should allow Scott County the opportunity to comply fully with the selection system established by the legislature before we attempt any other judicial remedy. We therefore remand the action to the district court for a new trial. Such trial shall be had with a jury drawn from a legally compiled venire. We note that this case is unlike the recent decision in Watkins insofar as we may reverse on the statutory violation and need not reach the sixth amendment claim. The supreme court in Watkins was forced to remand to allow the district court to take further evidence concerning the reasons for the disproportionate representation in that case. Watkins, 463 N.W.2d at 416. In the present case, however, we have no need for such further evidence because the record is clear and we did not reach the sixth amendment claim.

IV.

We find that the jury list from which Johnson's jury was drawn was compiled in contravention of Iowa Code section 607A.22, which mandates the use of an "other current comprehensive list." Because the jury was illegally drawn, we reverse the judgment of the district court and remand the action for a new trial.

REVERSED AND REMANDED.

Oxberger, C.J., and Hayden, J., concur; Sackett, J., specially concurs; Habhab, J., concurs in part and dissents in part; and Donielson, J., dissents.

SACKETT, J. (specially concurring)

I agree with the majority that the defendant should have a new trial. I agree with Judge Donielson that the issue the majority has reversed on was not raised on appeal or preserved for review. Unlike Judge Donielson, I find the constitutional issue was fully litigated at the trial court level. I find the defendant has shown the system in place in Scott County systematically excludes nonwhites from the jury pool.

Defendant, a black man on trial in Scott County, was confronted with an all-white pool from which to draw his jurors. Scott County has a four percent[1] black population. Defendant has shown generally no more than two percent or three percent of the jury pools are black. I understand this is below the percent some federal courts have required in other jurisdictions to prove the prima facie elements of a fair cross section claim. See United States v. Sanchez-Lopez, 879 F.2d 541, 547-49 (9th Cir. 1989); United States v. Pepe, 747 F.2d 632, 649 (11th Cir. 1984).

I find precedent from jurisdictions having a larger nonwhite population than Iowa to be minimally instructive.

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1. Defendant contended 1980 census figures showed four percent of the county to be black. While not part of the record, 1990 census figures have 11,576 nonwhites in Scott County comprising 7.7 percent of the population, and Davenport to have 84,968 whites, 7,521 blacks, 377 Native Americans, 1,000 Asians, 1,456 other, and 3,300 Hispanics.

The smaller the percentage of a minority population in a jurisdiction, the greater the possibility becomes that a disparity between the percentage of nonminorities in the population and those on the jury panel will result, as here, in a jury composed of only members of the majority race.

None of the ten largest counties in this state have a total nonwhite population of even ten percent. Black Hawk has the largest at 8.2 percent. Scott follows at 7.7 percent, Polk has 7.3 percent, Story has 6.9 percent, Johnson has 6.7 percent, and Woodbury has 6.3 percent. Linn has 3.3 percent. Clinton and Pottawattamie has 1.7 percent, and Dubuque has 1.2 percent. See United States v. Butler, 611 F.2d 1066, 1069-70 (5th Cir.) reh'g denied 615 F.2d 685, 688 (1960) (suggestion other statistical methods may be necessary when there is a small absolute disparity shown and minority less than ten percent of population).

Actually, the exclusion of two percent of the blacks from a jury in Scott County is a fifty percent exclusion of the four percent black population. An exclusion of one percent is a twenty-five percent exclusion of the black population. Those percentages of exclusion should not be acceptable.

I find the method of selecting juries in Scott County has not provided black jurors in a number equal to their percentage of the population. I find defendant has met his

burden of showing the selection process has systematically excluded blacks because:

(1) There were no blacks in defendant's pool.

(2) There was a disparity of twenty-five percent to fifty percent between the percentage of blacks in the population and the percentage of blacks in the jury pools.

(3) There is no valid data to support a finding the system is systematically fair.

As Judge Donielson points out, the jury manager does not have accurate data on the number of minority persons the selection system generates because the only data on race collected is from voluntary answers to a questionnaire. Absent any data showing the method of selection produces a fair result, I can only look to the end result which is blacks are not being called in a ratio representing their presence in the population.

It is imperative to the credibility of our system of justice that our system treats members of all races fairly and without prejudices. A member of a minority race in this state should not have to have his or her fate decided by a jury that may harbor or exercise racially discriminatory prejudices toward him or her. See Wright-Bey v. State, 444 N.W.2d 772, 776 (Iowa App. 1989). The chances any such prejudices may be overt is significantly lessened when the jury panel represents diverse backgrounds. Id.

We must be aggressive in seeing that our system is fair and perceived as being fair. The protection of minorities is a responsibility of the courts. We are judges in a state where our numbers are almost exclusively white. Our appellate courts are exclusively white. We have no minority input into our decision making process. I suggest this puts an additional burden on each of us to continually sensitize ourselves to the need of assuring the absence of racial bias in our justice system.

The City of Davenport alone has 7,521 blacks[2] and Scott County has a minority population of 11,576 according to the 1990 census. It cannot be that difficult to provide a black man or woman in Scott County with one or more black jurors on his or her jury panel. Hopefully, the majority's directive will be an affirmative step toward more diverse jury panels.

2. Des Moines with 13,741 blacks and Waterloo with 8,068 blacks are the only cities in Iowa with more black citizens.

HABHAB, J. (specially concurring, concurring in part, and dissenting in part)

The circumstances of this case require me to write separately. In doing so, it is necessary that I set forth several of the facts that occurred prior to the defendant's arrest for, in my opinion, those facts explain why defense counsel approached the problem in the manner he did.

I.

Laura Peden, one of the victims, shared a duplex with her friend, Penny Schryver. On the evening of January 11, 1989, she heard a knock at her door. Before she could respond, a man entered. He was holding a gun and pointed it at her. He demanded money. He made Laura and Penny lay on the floor and stated if they moved, he would kill them with the gun he pointed in their direction.

The intruder then grabbed Laura and took her into the living room. She emptied her purse and he grabbed the money. He hit Laura over the head with his gun and then grabbed her and took her into the kitchen. He pointed his gun at her, told her to get on her knees, and forced her to have oral sex. The intruder was later identified as the defendant, and he was placed under arrest, charged with burglary in the first degree, sexual abuse in the second degree, and two counts of robbery in the first degree. He pleaded not guilty.

On the morning of April 17, 1989, a jury was impaneled and sworn. The record reflects there were no objections

made to the jury venire or to the selection of the petit jury during jury selection process. The trial continued through that day and resumed the following morning. At approximately 10:00 a.m. the next day, the court in chambers requested a stipulation from counsel that the jury had been selected and sworn in accordance with the law. The State agreed. The defendant, through his counsel, also agreed but called to the attention of the court that there were no black persons on the jury panel. The court confirmed this. No objections as to this circumstance were made at this time by defendant's attorney.

This matter proceeded to trial. The defendant was found guilty on four counts. It was not until he filed his motion in arrest of judgment or for new trial that he raised the issue that he did not receive a fair trial because of what he claims is the systematic exclusion of black people from the prospective jury panel.

The motion in arrest of judgment consisted of six numbered paragraphs. Because this motion has direct bearing on the issue at hand, I will paraphrase those paragraphs except number five which I set forth in full. I do so as to paragraph five for it is the one that was most relevant to the trial court and is most relevant to this court on appeal.

MOTION IN ARREST OF JUDGMENT OR FOR NEW TRIAL

1. Court failed to grant directed verdict of not guilty.

2. Jury misconduct.

3. Court failed to poll jurors.

4. Newly-discovered evidence.

5. Systematic exclusion of black people from the prospective juror pool meant that this defendant did not receive a fair and impartial trial by a jury of his peers.

6. Verdicts contrary to evidence and law.

Noticeably absent from the motion in arrest of judgment is any mention by the defense that section 607A.22 (the section relied on by the majority for reversal) of the Iowa Code was not complied with. That motion was overruled and the defendant appeals.

II.

The State first contends the defendant has waived his right to appeal on the issue of jury composition for the defendant failed to timely object; i.e., it was not until after the jury was selected and sworn and trial commenced that the question was directly called to the attention of the trial court; and it was not until the matter was submitted to the jury, a verdict reached, and a date fixed for sentencing that the defendant formalized his objection by the filing of a motion in arrest of judgment.

I agree with the majority that because the defendant did not timely raise his sixth-amendment objection, this does not constitute a waiver of his right to raise that

question under the circumstances here on appeal.[1] After this case was submitted to us, the Iowa Supreme Court, in State v. Watkins, 463 N.W.2d 411 (Iowa 1990), a case where the defendant did not raise his claimed violation of his sixth-amendment right to a jury panel representing a fair cross-section of the community until after the jury was selected and sworn and before opening statements, held that the defendant did not waive his right to appeal under rule 17(3) because of the failure to timely object.

In Watkins, as is the case here, the supreme court had before it Iowa Rule of Criminal Procedure 17(3), which provides:

> Before any jury is sworn for examination, either party may challenge the panel, in writing, distinctly specifying the grounds, which can be founded only on a material departure from the statutory requirements for drawing or returning the jury.

(Emphasis added.)

In reaching its decision in Watkins, our supreme court held that a claimed waiver based on defendant's failure to comply with the time requirements of rule 17(3) cannot extend to matters not encompassed in the rule. Id. at 413. The court reasoned that rule 17(3) deals only with defects in statutory procedures in the selection of a jury

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1. Although I agree the defendant has not waived his appellate rights, the appellate courts of this state have strongly urged counsel to raise their objections before the trial court at the earliest opportunity after the grounds for objection become apparent. As stated in State v. Gibb, 303 N.W.2d 673, 680 (Iowa 1981), this will give the trial court the opportunity to take any necessary corrective action at a time when correction is still possible.

panel and found that it does not purport to limit redress for alleged constitutional deprivations. Id. As previously stated, the supreme court in Watkins held there was not a waiver of the right asserted therein. Id.

As in Watkins, I, too, would hold that the failure of the defendant to object within the time provided by rule 17(3) does not waive his right to raise the sixth amendment issue. Also like in Watkins, I would not want to be on record as holding that a defendant cannot be found to have waived a constitutional challenge under other circumstances. The supreme court in Watkins recognized that constitutional rights, including the right to a fair trial, may be waived. See Davis v. United States, 411 U.S. 233, 238, 93 S. Ct. 1577, 1580, 36 L. Ed. 2d 216, 222 (1973) ("[Federal r]ule 12(b)(2) precludes untimely challenges to grand jury arrays, even when such challenges are on constitutional grounds.")

As the supreme court stated in State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987):

> It is well settled in Iowa that objections to evidence must be raised at the earliest opportunity after the grounds for objection become apparent. State v. Sharkey, 311 N.W.2d 68, 71 (Iowa 1981). Constitutional questions must be reserved in the same manner as any other issue. State v. Johnson, 272 N.W.2d 480, 484 (Iowa 1978). No "plain error" rule exists to allow appellate review of allegations and deprivations of constitutional rights without requiring preservation of error via timely and adequate objections at trial. Id.

III.

Recognizing that the defendant did not waive his sixth amendment rights, I now turn to the reason relied upon by the majority for reversal. The defendant's attorney did not raise the issue of noncompliance with section 607A.22 of the Iowa Code before the trial court nor, as I view the record before us, has he done so here. I suspect his reasoning is that under Iowa Rule of Criminal Procedure 17(3), if a material departure from statutory requirements exists, the objection must be made in writing before the jury is sworn. This he did not do and under that rule and the court's statement in Watkins, I believe that right has now been effectively waived.

If the issue of exclusion is to be resolved, it must be done, in my opinion, on constitutional grounds.[2] I do not mean to say that because the defendant did not raise noncompliance with section 607A.22 as a reason for reversal, it does not have relevancy. I believe it does

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2. I recognize that we are faced with language in State v. Lohr, 266 N.W.2d 1 (Iowa 1978), which held, "exclusive reliance on voter registrations, although not the best solution, does not alone offend the Sixth Amendment." Id. at 6.

I do not take issue with any statement that the employment of section 607A.22 may result in the exclusion of a distinctive group. But Scott County used the lists that were statutorily prescribed. Whether "Other current comprehensive lists" is mandated or as a matter of fact will make any difference when the next jury panel is selected is an open question. But because I believe the issue must be resolved on constitutional grounds and not on the failure to comply with the statute, I need not resolve that question.

for even though here he failed to preserve his rights under section 607A.22, that section still has relevancy insofar as it relates to the determination of defendant's rights under the sixth amendment. In other words, even when section 607A.22 is fully employed, is the defendant's sixth amendment right violated?

I think defense counsel recognized the statutory violation problem when he, in his brief, stated:

> Iowa Code section 607A.22 (1989) provides that, in addition to the voter registration list and the motor vehicle operators list, the jury manager may use, "any other current comprehensive list of persons residing in the county, including but not limited to the lists of public utility customers." See Cooper, 397 N.W.2d at 918; Lohr, 266 N.W.2d at 6.

I view this as a concession on the part of the defense that the use of other current comprehensive lists is not mandated.

DONIELSON, J. (dissenting)

I respectfully dissent. I have exhaustively searched this record and have failed to find that defendant has made any mention of a statutory challenge to the drawing of his jury pool. It is manifestly wrong for this court to decide an issue not raised in the district court and neither briefed nor argued before this court. Furthermore, any statutory challenge to the drawing of the jury was waived when defendant failed to make a written objection prior to the jury panel being sworn for examination. Iowa R. Crim. P. 17(3)[1] and State v. Watkins, 463 N.W.2d 411, 412-13 (Iowa 1990) (challenge to panel based on departure from statutory requirements "must be raised prior to the time jury panel is sworn . . ."). I do not disagree with the majority that defendant's constitutional challenge to the jury selection process was properly raised and preserved. I believe this court must reach the merits of defendant's constitutional challenge. However, I am unable to sanction the majority's circumvention, albeit creative circumvention, of our rules of judicial review. The general rule, that we need not reach the constitutional issue if another issue is decisive, is not here applicable because no other issue is before us. As an appellate

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1. "Before any juror is sworn for examination, either party may challenge the panel, in writing, distinctly specifying the grounds, which can be founded only on a material departure from the statutory requirements for drawing or returning the jury . . . ." Iowa R. Crim. P. 17(3).

court, we are limited in our review to issues raised and properly preserved; other issues are waived and will not be addressed. This court cannot circumvent the proper scope of our review by finding a constitutional issue preserved but then deciding the case on statutory grounds not properly raised. I would reach the merits of defendant's constitutional challenge.

After a hearing the district court rejected defendant's constitutional challenge, concluding that because the jury selection occurred by random computer selection, it could not be discriminatory. I must disagree. Just because Scott County employs a process of randomized selection of prospective jurors, it does not necessarily negate a finding of systematic exclusion of a distinct segment of the community. The means employed to select jury pools may inherently underrepresent some distinct segment of the community. See Duren v. Missouri, 439 U.S. 357, 366, 99 S. Ct. 664, 669, 58 L. Ed. 2d 579, 588 (1979). Furthermore, the jury manager of Scott County was unable to provide defendant with accurate information concerning the racial composition of jury pools selected by this "random" selection process. Without accurate data, statistical analysis is impossible and defendant is frustrated in his attempt to establish his constitutional claim. I do not believe this court can approve such a state of affairs. I would affirm on condition and remand this case for further evidentiary hearing on the sixth amendment issue. See Watkins, 463 N.W.2d at 415-16.