

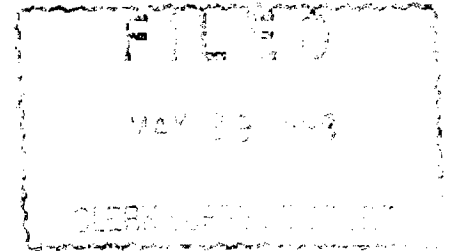
IN THE COURT OF APPEALS OF IOWA

No. 8-145 / 97-518

STATE OF IOWA,
Appellee,

vs,

SHERRY HARRINGTON,
Appellant.



Appeal from the Iowa District Court for Black Hawk County, James C. Bauch and George L. Stigler, Judges.

Following a jury trial, Sherry Vanessa Harrington appeals her conviction for delivery of a controlled substance in violation of Iowa Code section 124.401(1)(c) (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde and Kasey Wadding, Assistant County Attorneys, for appellee.

Considered by Cady, C.J., and Huitink and Vogel, JJ.

VOGEL, J.

Following a jury trial, Sherry Vanessa Harrington appeals her conviction for delivery of a controlled substance in violation of Iowa Code section 124.401(1)(c) (1995). We conclude both procedural and constitutional grounds existed supporting the district court's orders denying Harrington's motion to dismiss, motion for a mistrial, and overruling her *Batson* challenge; we accordingly uphold Harrington's conviction.

Background facts. On December 4, 1996, a trial information was filed against Sherry Vanessa Harrington charging her with delivery of cocaine on April 26, 1994. Harrington allegedly sold cocaine on that date to an undercover police officer who personally identified her out of a photographic lineup.

Following a jury trial, Harrington was found guilty as charged and sentenced to an indeterminate ten-year prison term to run concurrent with another sentence.

I. Preaccusatorial delay/motion to dismiss. We review due process claims de novo. *State v. Lange*, 531 N.W.2d 108, 111 (Iowa 1995). Harrington filed a motion to dismiss the information arguing the two-and-a-half year delay in bringing the charge was unreasonable and prejudiced her ability to present her defense. She accordingly asserted her constitutional right to due process was violated.

In order to prove preaccusatorial delay violated due process, it is incumbent on Harrington to show: (1) unreasonable delay; and (2) prejudice to defendant's defense

resulted. *State v. Trompeter*, 555 N.W.2d 468, 470 (Iowa 1996); *State v. Isaac*, 537 N.W.2d 786, 788 (Iowa 1995). Harrington must prove both elements to prevail. *Id.* Actual prejudice must first be established. *United States v. Miller*, 20 F.3d 926, 931 (8th Cir. 1994); see *Trompeter*, 555 N.W.2d at 470. Our inquiry ends if Harrington fails to establish actual prejudice. *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir. 1995).

Harrington asserts she was prejudiced by lack of memory due to the lapse of time from being charged on April 26, 1994, to the issuance of an arrest warrant in November 1996. She argues the length of the delay was unreasonable and allowed the State to gain a tactical advantage over her. Harrington claims she did not sufficiently remember the events on the evening of the drug buy that took place in the course of five minutes two-and-a-half years earlier. She could not therefore establish any alibi or defense for herself. However, the district court ruled the delay was reasonable and the motion was denied.

The district court found Harrington's claim of memory loss lacked credibility and was inconsistent with other statements she made. We defer to the district court's credibility finding with regard to Harrington's impaired memory. *State v. Simpson*, 528 N.W.2d 627, 634 (Iowa 1995). Harrington's general assertions of loss of memory and loss of witnesses is insufficient to establish she suffered actual prejudice. *State v. Burrell*, 255 N.W.2d 119, 121-22 (Iowa 1977). Rather, Harrington should have

established a specific impairment to her defense. *Burrell*, 255 N.W.2d at 121-22. None was offered. As the government is not required to explain its reasons for the delay until actual prejudice has been demonstrated by the defendant, our inquiry on this issue ends here. *See United States v. Sowa*, 34 F.3d 447, 451 (7th Cir. 1994).

Even if we were to find Harrington established actual prejudice, her claim would ultimately fail as she could not have demonstrated the delay was unreasonable. The trial court found the delay was reasonable as there was an ongoing investigation surrounding the people with whom Harrington associated. We find the district court's ruling provided sound reasoning when it appropriately found the delay was reasonable. We accordingly affirm the district court's denial of Harrington's motion to dismiss.

II. Prosecutorial misconduct. Trial courts are vested with broad authority to determine whether prejudice has resulted from an act of prosecutorial misconduct and we do not overturn trial court rulings in the absence of a showing of abuse of discretion. *State v. Ruble*, 372 N.W.2d 216, 218 (Iowa 1985) (citations omitted).

Harrington submits the prosecutor willfully interjected questions regarding drug usage by Harrington at trial to prejudice her in front of the jury. She asserts the prosecutor asked questions about her familiarity with and use of cocaine in direct contravention of a prior evidentiary ruling by the court. The testimony proceeded as follows:

Prosecutor: And are you familiar with crack cocaine?

Harrington: Yes.

Prosecutor: And are you, in fact, a user of --

The court had warned the prosecutor he was not to go into a letter that Harrington had written regarding her drug usage without first alerting the court and defense counsel and proceeding only with the court's permission to do so. However, as defense counsel lodged an objection, the fact question posed to Harrington went unanswered. The court did not find this was grounds for a mistrial, but offered to issue a cautionary instruction to the jury, which defense counsel declined. Because a State witness had previously testified Harrington had produced a crack pipe and told him she was a user of crack, and because the undercover officer Hayes talked to Harrington during the drug transaction, and officer Meyer recognized her at the transaction from prior contacts, as well as other probative evidence, we find the evidence, independent of the prosecutor's questioning, militated in favor of Harrington's guilt. We therefore determine the district court acted within its discretion by concluding no prejudice resulted from the misconduct; we affirm the district court's denial of Harrington's motion for a mistrial.

III. Denial of Harrington's Batson challenge. We review this constitutional claim de novo. *State v. Veal*, 564 N.W.2d 797, 806 (Iowa 1997). Harrington argues

her equal protection right and right to a jury drawn from a fair cross-section of the community were violated when the State struck one of only two black jurors.

There were three blacks on the twenty-four person jury panel. One remained on the jury, and a second, Mr. Smith, was peremptorily struck by the State as he was not “actively participating in the jury selection.”

Pursuant to the Equal Protection Clause, the United States Supreme Court in *Batson v. Kentucky*¹ constructed a three-pronged test for the determination of whether peremptory challenges or strikes were exercised impermissibly on the basis of race: (1) the defendant must establish a prima facie case of purposeful discrimination by showing that he or she is a member or a cognizable racial group and that the prosecutor has used peremptory challenges to remove prospective jurors of defendant’s race, raising an inference that such exclusion is discriminatory; (2) the burden then shifts to the State to articulate a race-neutral reason for challenging the jurors; and (3) the trial court must determine whether the defendant has established purposeful discrimination (the court must decide whether to believe the prosecutor’s explanation for the peremptory challenges). *Id.*, 476 U.S. at 96-98, 106 S. Ct. at 1723-24, 90 L. Ed. 2d at 87-89.

It is uncontroverted Harrington made a prima facie showing that the struck juror was one of two black jurors and that she is black. The State’s race-neutral

¹ 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

reason for the strike was believed by the court: the juror's demeanor, including his reaction to the attorneys and his need to be prompted to answer a general question that all other jurors responded to, indicated a lack of participation in the jury selection process. We defer to the district court's acceptance of the prosecutor's explanation. *See Veal*, 564 N.W.2d at 807 (stating trial court's acceptance of prosecutor's explanation should be accorded "great deference" on appeal). We are unable to conclude the district court erred in denying Harrington's *Batson* challenge.

Having carefully considered all issues properly before us on appeal, we affirm the district court's decision and uphold Harrington's conviction.

AFFIRMED.