Circuit Court for St. Mary's County
Case No. C-18-CR-22-000110

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1501

September Term, 2022

JESUS TORRES, PERSONAL REPRESENTATIVE OF THE ESTATE OF JACY BRICE TORRES PONCE

v.

STATE OF MARYLAND

Leahy,
Beachley,
Wilner, Alan M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: January 23, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Jacy Brice Torres Ponce was convicted by a jury in the Circuit Court for St. Mary's County of second-degree rape, and sentenced to 20 years' imprisonment, with all but 18 months suspended, and five years' supervised probation. Mr. Torres Ponce noted this timely appeal, presenting the following question for our review:

> Did the [c]ircuit [c]ourt violate the [a]ppellant's right to an impartial jury under Article 21 of the Maryland Constitution, Declaration of Rights, and Maryland law, when it permitted the State to use five peremptory strikes during the jury selection process to remove all seated petit jurors intentionally and systematically under the age of 25?

After submission of his appellate brief, Mr. Torres Ponce died. We subsequently substituted Jesus Torres, Personal Representative of the Estate of Jacy Brice Torres Ponce, as appellant. We shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Because the facts underlying the criminal case against Mr. Torres Ponce[1] are not pertinent to this appeal, we shall provide only a brief summary. Mr. Torres Ponce was charged with four counts of second-degree rape. The main issue at trial concerned whether the sexual encounter between appellant and the victim was consensual. At the time of trial, Mr. Torres Ponce was 21 years old, and the victim was 30 or 31 years old.

The sole issue on appeal is the State's use of peremptory challenges during jury selection. After the State used four of its five peremptory challenges on individuals under age 25, appellant's counsel objected. Counsel argued that the State was exhibiting a

[1] We shall at times refer to Mr. Torres Ponce as "appellant."

"discriminatory pattern" of striking young jurors, thus depriving appellant of "a jury of his peers" and a fair trial. Defense counsel asked that the trial court find "that this is a discriminatory practice[,]" and preclude the State from striking the fourth juror.[2] Furthermore, counsel made clear that, if the State used a peremptory strike on another juror under 25 years old, he would move for a mistrial.

The prosecutor confirmed that she was using age as a factor in determining how to use her peremptory strikes, but indicated that her primary concern was that those jurors did not have enough life experience as adults to serve as jurors in such a serious case, where consent was the principal issue to be decided by the jury. She explained that she was considering multiple factors, "such as jobs, schooling and everything else, and their age to determine if they have enough common sense and experience that will be asked of them when getting the jury instructions." After the State used its final peremptory challenge on a juror under age 25, defense counsel again objected and moved for a mistrial.

The trial court overruled the objections, but reserved on the mistrial motion, asking that counsel use the lunch break to research the issue. The following colloquy occurred after the lunch break:

> [DEFENSE COUNSEL]: . . . I was able to do some research here and in terms of a *Batson*[3] challenge, if this was going to be one, I would have to have the burden of proving that there was a prima facie discriminatory intent by the State in terms of her

[2] The first three jurors that the State used its peremptory challenges to strike had already left the courtroom.

[3] *Batson v. Kentucky*, 476 U.S. 79 (1986).

basically doing a blanket statement of age, that all young people don't have the experience to sit in on a sex offense trial, which is what I think the State had indicated. And, for the record, I do think that is a discriminatory intent.

Having said that, the law is pretty clear *Batson* only covers protected classes and age is not, under the (indiscernible[]) where he makes that pretty clear that it isn't. You can discriminate against any 37 year old you want for any reason. And, so, therefore it can't be a *Batson* challenge.

The [c]ourt would have to find there's purposeful discrimination. And I just, for the record, I will make it clear I think it was, *but I think she's allowed to discriminate on the basis of age. So, therefore, I don't have a motion to make at this time and I don't think I have grounds for a mistrial unless Your Honor thinks I do.*

THE COURT: So, [defense counsel], just so that we can clear the record, *are you withdrawing your request for a mistrial at this time*?

[DEFENSE COUNSEL]: *I don't know*. I mean, you know, the lawyers I'm talking to are, like, well, you know, if the State makes a statement blanket just saying this is what I do, whatever, you should -- what they're telling me I should do, I guess, I don't know whether I'm doing it or not. I'm thinking it through. But is, have the [c]ourt make the finding that that was a blanket discriminatory statement for purposes, I don't think there's any -- I don't think Your Honor has a -- *I don't think Your Honor has a -- you certainly have no basis for a mistrial or for any type of a Batson challenge*. It's not.

So the only question is, is whether or not this [c]ourt, Your Honor, deems that it's inappropriate to go forward by just striking

anyone for age, but there's case law indicating you can do that. So, I guess, in a perfect world I would just like the finding that there was a discriminatory intent, which is, again, I'm not saying anything bad, you know, whatever, I get it. But to one attorney says I can strike all old people, so how is that going to be a problem. I get it. Right? *But at the same time I don't have a basis to request a mistrial*.

THE COURT: I appreciate that. [State], do you have anything in response?

[THE STATE]: No. I think the record is --

THE COURT: I have also looked at the case law on this as well as our law clerk over the course of our break. I agree with you, [defense counsel], that this is not the grounds for a *Batson* challenge. That the *Batson* challenge seems to be limited to the issues of race and gender.

I think what I was interpreting your argument as is being more of a Sixth Amendment argument, a right to an impartial jury argument, but I looked into that as well. I've looked at the cases of *Bridges vs. State*,[4] *Stanley vs. State*,[5] *Spencer vs. State*[6] and, in fact, as you indicated there is language contained within those cases that say, that is, age is a classic basis for peremptory challenge for both prosecutors and defense attorneys.

It's not as straight forward in the Sixth Amendment claim, but even the *Stanley vs. State* case indicated that in that case it may not have

[4] 116 Md. App. 113 (1997).

[5] 85 Md. App. 92 (1990).

[6] 450 Md. 530 (2016).

> been so much of a *Batson* challenge as a Sixth Amendment challenge and the argument in regards to age in that case was also not upheld at our Appellate level. They basically said, as you indicated, that age is a sufficiently (indiscernible[]) which to exercise peremptory challenges.
>
> While it may leave a feeling of, you know, uncomfortableness with us, I don't think it rises to something that would allow for us to declare a mistrial, and, there, I will not be declaring a mistrial in this case.

(Emphasis added).

The jury found Mr. Torres Ponce guilty of one count of second-degree rape, and not guilty of the remaining three counts. The court sentenced appellant to 20 years' imprisonment, with all but 18 months suspended. Appellant then noted this timely appeal.

DISCUSSION

Appellant argues that the State's use of peremptory challenges based on the age of the prospective jurors denied him the right to "trial by an impartial jury" under Article 21 of the Maryland Declaration of Rights. Appellant asserts that "the right to an impartial jury under Article 21 prohibits the State's intentional and systematic exclusion of a cognizable group of jurors," *i.e.*, jurors under 25 years old.

The State responds that appellant waived this argument before the trial court by withdrawing his motion for mistrial. "Ordinarily, an appellate court will not decide any . . . issue [other than one relating to jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Rule 8-131(a). When a party withdraws

a motion, the withdrawal "constitutes a waiver precluding appellate review." *Carroll v. State*, 202 Md. App. 487, 514 (2011), *aff'd*, 428 Md. 679 (2012). Specifically, the State argues that appellant's counsel withdrew his motion for mistrial by stating: "I don't think I have grounds for a mistrial unless Your Honor thinks I do," "I don't think Your Honor has a -- you certainly have no basis for a mistrial or for any type of a *Batson* challenge," and "I don't have a basis to request a mistrial." Although the State presents a compelling argument that the issue is unpreserved, we note that, even after appellant's counsel made these comments, the trial court nonetheless discussed the issue as though the motion for mistrial was still being pursued. Accordingly, the issue was one "decided by the trial court." Rule 8-131(a). The State further argues that "the trial court did not decide any claim under Article 21, because no claim under Article 21 was presented to it." Although it is true that Article 21 was never expressly mentioned, the court relied on cases that construed the interplay between the Sixth Amendment and Article 21. We therefore reject the State's lack of preservation argument.

On the merits, the State asserts that *Bridges v. State*, 116 Md. App. 113 (1997), "is effectively dispositive of this appeal." We agree. In *Bridges*, we considered the "claim that a peremptory challenge based on age somehow violates the Maryland Constitution[,]" specifically the right to "trial by an impartial jury" set forth in Article 21 of the Maryland Declaration of Rights. *Id.* at 120. Writing for this Court, Judge Moylan succinctly described the relevant facts:

> At one point during the jury selection process, defense counsel challenged the prosecutor's exercise of peremptory strikes by noting that

> every strike had been against prospective jurors who were Black. The prosecutor, in an effort to demonstrate to the trial court that she was not striking prospective jurors on the basis of race, responded by stating that "I'm striking everyone around age 30 and under, or trying to." The prosecutor explained her rationale for striking jurors of that age by noting that the defendant was approximately 30 years of age. Conceding that the explanation offered by the prosecutor was, if true, race-neutral, defense counsel immediately shifted tactics and argued that the explanation offered by the State was itself constitutionally infirm because age, like race and gender, is a consideration that may not serve as a basis for a peremptory strike.
>
> The trial court found 1) that the explanation offered by the State was race-neutral and 2) that age-based peremptory strikes had never been ruled unconstitutional.

Id. at 119. On appeal, Bridges offered two arguments: one based on Article 21 of the Maryland Declaration of Rights, and the other based on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 119–20, 128. Mr. Torres Ponce's Article 21 argument is identical to the argument considered by the *Bridges* Court: that Article 21's guarantee of "trial by an impartial jury" prohibits the use of peremptory strikes based on the age of the prospective jurors. *Id.* at 120.

We held that Bridges' argument was flawed in two ways: first, "[e]ven on the larger question of official and systematic exclusion from the pool of eligible jurors, . . . *age* has never been held to be a prohibited selection criterion"; and second, "[e]ven with respect to classifications that unequivocally may not be used to bar jury service generally, Article 21 never applied the bar to the use of peremptory strikes in the *ad hoc* selection of a particular petit jury." *Id.* at 124. We noted that a United States Supreme Court case applying the Sixth Amendment right to trial by an impartial jury was dispositive because the "federal

protection [is] indistinguishable from the Maryland protection":

> The list of rights protected by Article 21 of the Maryland Declaration of rights and the Federal Sixth Amendment are identical. The wording of the two constitutional provisions is virtually *verbatim*. Generally speaking, those entire respective packages of rights should be construed *in pari materia*. Specifically speaking, the *verbatim* guarantees of "trial by an impartial jury" should indisputably be construed *in pari materia*.

Id. at 125–26. We then discussed *Holland v. Illinois*, 493 U.S. 474 (1990), which we determined was dispositive:

> The *Holland v. Illinois* case came right in the middle of the explosion of Fourteenth Amendment law triggered by *Batson v. Kentucky*. Significantly, however, Holland chose, unwisely it turned out, to predicate his attack on the State's use of peremptory challenges against Black prospective jurors exclusively on the Sixth Amendment guarantee of an impartial jury rather than on the Fourteenth Amendment guarantee of equal protection. Under a fact scenario that indisputably represented a patent violation of *Batson* and the Fourteenth Amendment had such a challenge been raised, the Supreme Court nonetheless affirmed the conviction, holding that the Sixth Amendment simply did not apply to the use of peremptories. One year later, in *Powers v. Ohio*, 499 U.S. 400 (1991), in a fact situation indistinguishable from that in *Holland v. Illinois*, Powers did prevail by invoking the Fourteenth Amendment, whereas Holland had failed by invoking the Sixth Amendment.
>
> In *Holland v. Illinois*, the Supreme Court held squarely that the Sixth Amendment's guarantee of an impartial jury is simply not implicated by the use of peremptory challenges:
>
> > We reject petitioner's fundamental thesis that a prosecutor's use of peremptory challenges to eliminate a distinctive group in the community deprives the defendant of a Sixth Amendment right to the "fair possibility" of a representative jury.
> >
> > . . .
> >
> > A prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment, is without support in our prior

> decisions, and would undermine rather than further the constitutional guarantee of an impartial jury.

Id. at 126–27 (alteration in original) (quoting *Holland*, 493 U.S. at 478). Finally, Judge Moylan concluded: "The Maryland constitutional challenge to the State's use of peremptories based on age is a non-starter. Article 21 of the Declaration of Rights (and its Sixth Amendment analogue) are simply inapplicable to the entire phenomenon of peremptory challenging." *Id.* at 128.

Recognizing that the Sixth Amendment provides no support for his appellate claim, appellant argues that Article 21's protections are broader than those contained within the Sixth Amendment. Appellant's reply brief boldly asserts:

> *Bridges'* statement that Article 21 is *in pari materia* with the Sixth Amendment falls flat because the Supreme Court of Maryland and this Court have consistently applied the right to an impartial jury drawn from a fair cross-section of the community under Article 21 more broadly than the analogous Sixth Amendment right.

Appellant cites four cases in support of this assertion: *King v. State*, 287 Md. 530 (1980); *Wright v. State*, 411 Md. 503 (2009); *Kidder v. State*, 475 Md. 113 (2021); and *Williams v. State*, 246 Md. App. 308 (2020). None of these cases support the proposition that Maryland courts have construed Article 21's right to trial by an impartial jury more broadly than the parallel Sixth Amendment right. To the contrary, a footnote in *Kidder* explains:

> Mr. Kidder asserts that *Wilkins* [*v. State*, 270 Md. 62 (1973),] involved an application of only the federal Constitution—*i.e.*, the Sixth Amendment—and suggests, in general terms, that Article 21 of the Maryland Declaration of Rights is more demanding. However, *Wilkins* did not explicitly cite either constitutional provision, and there is no suggestion in that case—or any other of this Court—that the right to an impartial jury under the federal Constitution differs from the same right under the State Constitution. The

> wording of the two constitutional provisions is virtually identical. *Compare* Maryland Declaration of Rights, Article 21 ("[I]n all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury") *with* United States Constitution, Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"). Mr. Kidder provides no reasoned justification for construing them differently.

475 Md. at 141 n.23. Thus, the *Kidder* Court's observations essentially mirror Judge Moylan's analysis in *Bridges*. *See Bridges*, 116 Md. App. at 125–26. The remaining three cases contain no analysis of the breadth of protections in Article 21 vis á vis the Sixth Amendment and, in light of *Kidder's* footnote, we reject any claim that *Bridges* has been overruled *sub silentio*. We see no reason to diverge from *stare decisis* in this matter.

CONCLUSION

For the reasons stated, we affirm the judgment of the Circuit Court for St. Mary's County.

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.