Circuit Court for Baltimore City
Case Nos. 57526812-13

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 350

September Term, 2019

GOLD LEROY BASS, JR.

v.

STATE OF MARYLAND

Nazarian,
Leahy,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: July 26, 2021

Gold Bass, Jr. ("Appellant"), was convicted in 1976 by a jury sitting in the Circuit Court for Baltimore City of various crimes related to the double-homicide shooting of Harry McGee and Nathaniel Sheppard. More than forty years later, in 2017, Appellant was awarded a new trial under *Unger v. State*, 427 Md. 383 (2012).[1] At Appellant's subsequent re-trial, held in 2019, he was convicted of two counts of felony-murder and two counts of use of a handgun in the commission of a felony or a crime of violence.[2] Appellant appeals his convictions raising four questions, although only the first is dispositive:[3]

1. "Did the circuit court abuse its discretion by not asking particular *voir dire* questions requested by the defense?"

[1] In *Unger*, the Court of Appeals held that the "*Stevenson* [*v. State*, 189 Md. 167 (1980)] and *Montgomery* [*v. State*, 292 Md. 84 (1981)] opinions . . . established a new state constitutional standard" regarding a trial judge's jury instruction being considered advisory. 427 Md. at 411. The Court also held that in light of the new constitutional standard "the lack of objection to the same jury instructions did not constitute a waiver under the previously discussed principle reflected in § 7-106(c)(2) of the Postconviction Procedure Act and in this Court's opinions." *Id.*

[2] Appellant was subsequently sentenced to concurrent terms of life imprisonment for each of the murder convictions and five years of imprisonment, without the possibility of parole, for each of the handgun convictions.

[3] Appellant's remaining "Questions Presented" are:

2. "Did the circuit court err when it permitted a medical examiner who had no involvement with the original autopsies to offer opinions, and bases for those opinions, regarding cause of death and manner of death?"

3. "Did the circuit court err in allowing the State to introduce, in its case-in-chief, rebuttal testimony from the original trial in 1976?"

4. "Did the circuit court err in denying Appellant's motion to dismiss?"

Answering Appellant's first question in the affirmative, we shall reverse his convictions. Because we reverse on Appellant's first question, we need not address the merits of Appellant's remaining questions.

FACTS

Voir Dire

The dispositive issue on appeal concerns what occurred during *voir dire*. On January 25, 2019, the circuit court called Appellant's case. After the court finished asking prospective jurors all of the questions that the court had prepared, Appellant's counsel and the State approached the bench for a conference. The court instructed, "[a]ll right. Let's start with the Defense. You can put in your exceptions to voir dire." Appellant's counsel responded, "[o]kay. Your Honor, I'm going to be offering my entire voir dire . . . I've marked it as Defense Exhibit No. 1[.]" Appellant's typed "Voir Dire" included twenty-one proposed questions, including the following:

> 10. Is there any member of the panel that believes merely because a person is indicted by the Grand Jury or charged by a Criminal Information, that this raises a presumption of guilt on the part of that individual?
>
> 15. In every criminal case, the burden of proving the guilt of the accused rests on the State. The accused has no burden and does not have to prove his innocence. Is there any member of the jury panel who is unable or unwilling to uphold and abide by this rule of law?
>
> 16. Every person accused of a crime has an absolute constitutional right to remain silent and not testify. You may not consider his silence in any way [when] determining whether he is guilty or not guilty. Is there any member of the jury panel who is unable or unwilling to uphold or abide by this rule of law?

In addition to offering the written *voir dire* questions, Appellant's counsel explained to the court why the specific questions should be asked, highlighting questions 10, 15, and 16. After submitting her proffer, Appellant's counsel stated:

> So those are the questions with which I would be taking an exception, but I'm including the entire voir dire so that everything is included and that has been left for Madam Clerk, marked as Defense Exhibit 1 for voir dire.

The State had no "exceptions" for the court. The court did not ask Appellant's proposed *voir dire* questions. At the end of the *voir dire* process, however, defense counsel stated that the empaneled jury was "acceptable to the Defense."

Appeal

At the conclusion of Appellant's trial on January 28, 2019, the jury convicted him of two counts of felony murder and two counts of use of a handgun. On April l, 2019, the circuit court sentenced Appellant to serve an aggregate sentence of life imprisonment. Appellant timely appealed on April 4, 2019.

Appellant filed his opening brief on January 7, 2020, and, on February 26, the State submitted its brief. On our own initiative, we issued an order on April 8 requesting supplemental briefing because the corrected opinion filed March 2, 2020 in *Kazadi* "may affect this appeal." On November 18, 2020, we ordered a stay of this appeal, again on our own initiative, because the Court of Appeals granted certiorari in *State v. Ablonczy*, No. 28, September Term, 2020, and the outcome of that appeal could control our decision in the instant case. On June 23, 2021, the Court of Appeals issued its decision in *Ablonczy*. That same day, Appellant filed an unopposed motion to lift stay, which we granted on July 2, 2021.

DISCUSSION

I.

Voir Dire

In *Kazadi v. State*, 467 Md. 1, 35-36 (2020), the Court of Appeals held that, if requested, a trial court *must* ask during *voir dire* "whether any prospective jurors are unwilling or unable to comply with the jury instructions on the long-standing fundamental principles of the presumption of innocence, the State's burden of proof, and the defendant's right not to testify."

Kazadi's counsel presented the following proposed *voir dire* questions on the State's burden of proof, the presumption of innocence, and the defendant's right not to testify:

> The Court will instruct you that the State has the burden of proving the Defendant guilty of the offenses charged beyond a reasonable doubt. Are there any of you who would be unable to follow and apply the Court's instructions on reasonable doubt in this case?
>
> Is there any member of the [ ] jury panel who would hesitate to render a verdict of not guilty if you had hunch that the Defendant had committed the alleged crime, but were not convinced of that fact beyond reasonable doubt?
>
> The Court will instruct you that the Defendant is presumed of be innocent of the offenses charged throughout the trial unless and until the Defendant is proven guilty beyond a reasonable doubt. Is there any member of the jury panel who would be unable to give the Defendant the benefit of the presumption of innocence?
>
> Under the law[,] the Defendant has an absolute right to remain silent and to refuse to testify. No adverse inference or inference of guilt[ ] may be drawn from the refusal to testify. Does any prospective juror believe that the Defendant has duty or responsibility to testify[,] or that the Defendant must be guilty merely because the Defendant may refuse to testify?

Id. at 9-10. The circuit court refused to ask the proposed questions, and we affirmed that decision on appeal. On January 24, 2020, the Court of Appeals reversed, ordering this Court to "reverse the judgments of the circuit court . . . and remand to that court for a new trial." *Id.* at 54. On March 4, 2020, the Court of Appeals reissued its opinion and clarified that its holding: "applies to this case and any other cases that are pending on direct appeal when this opinion is filed." *Id.* at 47.

The State filed supplemental briefing in which it concedes, appropriately, that "the Court's ultimate holding in *Kazadi* applies to Bass's case, and the trial court was required to ask the questions he requested." However, the State contends, Appellant waived the right to attack the trial court's decision on appeal because, although Appellant's counsel objected to the trial court's refusal to give his requested instructions, she accepted the jury without qualification before it was seated. The State argues, in sum, that the Court of Appeals's recent decisions are consistent with "rejecting an over-broad reading" of *Marquardt v. State*, 164 Md. App. 95 (2005), and that the Court's decision in *State v. Stringfellow*, 425 Md. 461 (2012), "predated *Kazadi* and should be read in light of this new law to require a defendant to renew before accepting the jury any objection to the court's declining to ask a *Kazadi*-type question, or else the objection is waived."

Appellant counters, (again, we summarize), that "*Stringfellow* and *Marquardt* have been routinely cited for the principle that defense counsel's acceptance of the empaneled jury does not waive a challenge to the trial court's refusal to ask certain *voir dire* questions."

The Court of Appeals recently considered this issue in *State v. Ablonczy*, ___Md. ___, No. 28, September Term 2020, slip op. at 15-16 (filed June 23, 2021). In *Ablonczy*, the *voir dire* questions that were requested by the defendant's counsel also fell within the parameters of *voir dire* questions that are required pursuant to *Kazadi*. *Id.* at 2. The court refused to ask the proposed questions, and defense counsel immediately objected. *Id.* at 3. However, at the conclusion of jury selection, defense counsel accepted the jury as empaneled. *Id.*

Applying the Court's prior decisions in *Kazadi* and *Stringfellow* to these facts, Judge Hotten, in her opinion on behalf of the majority, rendered the following holding:

> As this Court set forth in [*State v.*] *Stringfellow*[, 425 Md. 461 (2012)], objections that relate to the determination of a trial court to not ask a proffered *voir dire* question are not waived by later acceptance, without qualification, of the jury as empaneled. Respondent noted an objection to the decision of the trial court not to ask proffered *voir dire* question number eighteen. For the reasons expressed previously, Respondent did not waive that objection by accepting the jury as empaneled without repeating his prior objection.

Id. at 15-16. Judge Hotten explained that in *Stringfellow*, the Court had differentiated and subdivided objections during *voir dire* into two categories:

> The first group of objections goes "to the inclusion or exclusion of a prospective juror (or jurors) or the entire venire[.]" *Stringfellow*, 425 Md. at 469, 42 A.3d at 32 (citing *Gilchrist*, 340 Md. at 617, 667 A.2d at 881). In that case, unqualified acceptance of the jury panel waives any prior objections. *Id.*, 42 A.3d at 32. The second group of objections, on the other hand, which are "incidental to the inclusion [or] exclusion of a prospective juror or the venire[, are] not waived by accepting a jury panel at the conclusion of the jury-selection process[.]"*Id.* at 469, 42 A.3d at 32 (citing *Gilchrist*, 340 Md. at 618, 667 A.2d at 882).

Id. at 6. The Court held in *Stringfellow*, that "an objection to a judge refusing to ask a proposed *voir dire* question" falls within the realm of "objections deemed incidental to the inclusion/exclusion of prospective jurors and, therefore, not waived by the objecting party's unqualified acceptance thereafter of the jury panel." 425 Md. at 470-71. Accordingly, relying on its prior reasoning in *Stringfellow*, the *Ablonczy* Court held that Ablonczy's objection, which was incidental to the inclusion/exclusion of prospective jurors, was not waived after his unqualified acceptance of the jury. *Ablonczy*, ___Md. at ___, slip op. at 8.

Here, it is not disputed that this appeal was pending when the *Kazadi* decision was rendered and that Appellant's proposed *voir dire* questions concerned whether prospective jurors would be able to comply with the principles of the presumption of innocence, the State's burden of proof, and the defendant's right not to testify or produce evidence. It is also undisputed that Appellant's counsel objected to the trial court's refusal to ask the proposed *voir dire* questions, but later accepted the jury without qualification. Applying the foregoing precepts to these facts, we hold: that under *Kazadi v. State*, 467 Md. 1 (2020), Appellant is entitled to a reversal of his convictions based on the trial court's refusal to propound his requested *voir dire* questions; and, that under *State v. Ablonczy*, ___Md. ___, No. 28, September Term 2020 (filed June 23, 2021), Appellant's counsel's objection to the court's refusal to propound those questions was not waived by accepting the jury as empaneled without repeating her prior objection. Accordingly, we shall reverse Appellant's convictions.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; CASE REMANDED FOR NEW TRIAL; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.