Circuit Court for Talbot County
Case No. 20-K-16-011155

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1839

September Term, 2016

ANTHONY BANKS
v.
STATE OF MARYLAND

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*Woodward,
Meredith,
**Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: July 10, 2019

*Woodward, Patrick L., J., now retired, participated in the hearing of this case while an active member of this Court and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

** Davis, Arrie W., J., did not participate in the adoption of this opinion. *See* Md. Code, Courts and Judicial Proceedings Article, § 1-403(b).

Appellant, Anthony Banks, was convicted in the Circuit Court for Talbot County of possession of a controlled dangerous substance ("CDS") with intent to distribute and possession of a CDS. He presents the following slightly rephrased questions for our review:

> 1. Did the circuit court err in failing to discern some *prima facie* showing that the State's peremptory jury challenges were impermissibly motivated because appellant failed to show a "pattern" beyond one peremptory strike?
>
> 2. Did the lower court err in asking "compound" *voir dire* questions, which placed the onus on venire members to self-assess their ability to be fair and impartial?

We shall hold that the court erred in asking the *voir dire* questions in compound form and shall reverse.

I.

This appeal involves another "compound question" during voir dire.[1] Appellant was convicted of possession of a CDS (cocaine) with intent to distribute and possession of a CDS (cocaine) in the Circuit Court for Talbot County. The court sentenced him to a term of incarceration of eight years, all but four years suspended, with two years' supervised probation.

Prior to trial, appellant submitted to the court his proposed *voir dire* questions, which included asking the prospective jurors separate questions as to whether any member of the panel held any bias or prejudice towards African-Americans, African-American

[1] Because appellant's claims on appeal arise solely from pre-trial *voir dire* and jury selection, we need not relate the details of the offense.

males, or appellant, and whether any member of the panel had strong feelings concerning illegal drugs. Instead of propounding the requested questions, the court asked the following questions:

> "(2) Do any of you have fixed opinions, biases or prejudices regarding race, gender, age or religion which would affect your ability to render a fair and impartial verdict in this case based solely on the law and the evidence?
>
> (12) Do any of you have strong feelings regarding illegal drugs? Well strong feelings, let me rephrase that. I think everybody, it's a social issue but do any of you have strong feelings regarding illegal drugs that might affect your ability to listen to this case and decide the case based fairly on the evidence in the case and the law as applied to that evidence?
>
> (15) Do any of you feel you would be unable to render a fair and impartial verdict in this case because the Defendant is an African American?"

Appellant objected to the court rephrasing his proposed *voir dire* questions, and the court overruled his objection. The jury convicted him and the court imposed sentence. This timely appeal followed.

II.

Before this Court, appellant argues that the circuit court erred in propounding the three questions above because they impermissibly shifted the onus to assess the venirepersons' ability to be fair and impartial from the court to the venire members. He argues that by allowing prospective jurors to determine the severity of their bias, the court denied him the opportunity to "discover and challenge venire persons who might be biased." Similarly, he argues, the court failed to exercise its discretion because it allowed prospective jurors to determine for themselves whether their biases were disqualifying. He

asserts that the court's errors denied him a fair and impartial jury and cannot be harmless error.

The State responds that the circuit court exercised its discretion properly and, in the alternative, that any error does not require reversal because appellant was not prejudiced. Addressing the second and fifteenth *voir dire* questions, the State argues that "[g]ender, age, and religion—of [appellant] or the State witnesses—were irrelevant" because no one responded to the question regarding those factors. As to the issue of race, the State argues that the court did not abuse its discretion in asking a compound question on the issue. If we require separate questions on the issue of race, the State suggests, we require the court to ask "seemingly absurd questions with little chance of uncovering any disqualifying bias." The State asserts that a second question on racial bias (asking whether the bias prevents the prospective juror from ruling impartially) is unnecessary because the first question (asking whether the prospective juror has a racial bias) already requires the prospective juror to assess their impartiality. Thus, the compound questions here were a "non-substantive technicality."

Turning to the *voir dire* question regarding illegal drugs, the State argues that the court exercised its discretion permissibly to rephrase the question. The State notes that the court asked the standard, permissible first question on the issue, "Do any of you have strong feelings regarding illegal drugs?" The prospective jurors laughed at that question, and no prospective jurors responded affirmatively. The State argues that the court exercised its discretion properly in modifying the question to ask whether their feelings would affect

their ability to listen to the case. In the alternative, the State argues that any abuse of discretion was harmless because it "had the desired effect of eliciting bias."

III.

The State is essentially asking this Court to either reconsider *Dingle v. State*, 361 Md. 1 (2000), and its progeny, or to refine it. Whatever the wisdom of the *Dingle* jurisprudence and its well-institutionalized progeny, this Court is bound by the clear law set out in those cases. This case is controlled squarely by *Dingle*, *Pearson v. State*, 437 Md. 350 (2014), and *Collins v. State*, 463 Md. 372 (2019). Because we conclude the resolution of the *voir dire* questions is determinative of the instant appeal, we shall address this issue first and thus do not reach appellant's *Batson* claim.

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee a defendant's right to an impartial jury. *Pearson*, 437 Md. at 356. "*Voir dire*" is a Norman French legal term meaning "to speak the truth" and refers to "[a] preliminary examination of a prospective juror by a [trial court] to decide whether [he or she] is qualified and suitable to serve on a jury." *Collins*, 463 Md. at 376 (quoting Black's Law Dictionary (10th ed. 2014)). *Voir dire* is critical to implementing a defendant's right to a fair and impartial jury. *Pearson*, 437 Md. at 356. In Maryland, as opposed to many other states, the sole purpose of *voir dire* is to ensure a fair and impartial jury by determining the existence of cause for disqualification—not to inform the exercise of peremptory challenges. *Id.* at 356–57.

A court *must* ask a requested *voir dire* question that is "reasonably likely to reveal specific cause for disqualification" on "a collateral matter . . . reasonably liable to have

undue influence on the panel member." *Collins*, 463 Md. at 376–77; *see also Hernandez v. State*, 357 Md. 204, 224 (1999) (holding that, if requested, the court must ask a question referring to "possible racial bias against the accused"). A "compound" question combines two questions: one, "whether the prospective juror has strong feelings about the charges"; and two, "whether those strong feelings would make it difficult for the prospective juror to be fair and impartial." *Collins*, 463 Md. at 377.

In *Dingle*, the Court of Appeals addressed the use of compound questions in examining prospective jurors and made it clear that compound questions are impermissible because they allow the individual venire person to decide his or her ability to be fair and impartial, *i.e.*, to self-assess bias. *Id.* at 21. That process shifts from the trial judge to the panel the responsibility to decide juror bias. *Id*. The *Dingle* court explained as follows:

> Because he did not require an answer to be given to the question as to the existence of the status or experience unless accompanied by a statement of partiality, the trial judge was precluded from discharging his responsibility, *i.e.*, exercising discretion, and, at the same time, the [defendant] was denied the opportunity to discover and challenge venire persons who might be biased.

Id. at 17. In other words, if the court asks a compound question, it will examine only those panel members who self-identify as not impartial. It is the duty of the court, not the prospective jurors, to determine whether the prospective jurors can consider the evidence fairly and impartially. *Id.*

The Court of Appeals's recent holding in *Collins* reaffirmed *Dingle* and *Pearson*. In *Collins*, the Court held that, if requested to ask the so-called "strong-feelings" question during *voir dire*, it is improper for the trial court to ask it in compound form, such as: "Does

any member of the jury panel have such strong feelings about [the charges in this case] that it would be difficult for you to fairly and impartially weigh the facts[?]" *Id.* at 377–79.

The case at bar is completely controlled by *Dingle* and its progeny. Here, the trial court asked the panel whether it had "opinions, biases, or prejudices" regarding race, gender, age, or religion, and then asked in the same question whether those beliefs "would affect [their] ability to render a fair and impartial verdict in this case based solely on the law and evidence." In a subsequent question, the court asked the prospective jurors to decide for themselves whether they could hear fairly a case in which the defendant was an African-American.

By asking these two compound questions, the court erred. It examined only those prospective jurors who responded affirmatively to both questions (whether they had a belief and whether it made them unable to decide fairly), rather than all prospective jurors who had "fixed opinions, biases or prejudices" as to those issues. The State's argument that the first question requires self-assessment and that the second question is therefore unnecessary was rejected in *Dingle*, 361 Md. at 18, because the argument's logical conclusion is that the court need only ask members of the panel whether they can be fair and impartial.

Regarding illegal drugs, the court began its questioning properly by asking whether any member of the panel had "strong feelings regarding illegal drugs." When the question produced laughter from some of the prospective jurors, the court immediately rephrased the question by asking the prospective jurors to decide for themselves whether their beliefs about illegal drugs "might affect your ability to listen to this case and decide the case based

fairly on the evidence." By rephrasing the question, instead of indicating to the prospective jurors that the court was requesting a response, the court effectively withdrew a properly phrased question on strong feelings and substituted a compound question on the same subject. Again, the question was an improper compound question. *See Pearson*, 437 Md. at 361 (holding that the question "Does any member of the panel hold such strong feelings regarding violations of the narcotics laws that it would be difficult for you to fairly and impartially weigh the facts of this trial where narcotics violations have been alleged?" was phrased impermissibly).

In failing to exercise its discretion to ensure an impartial jury, the trial court erred. The error was reversible error.

JUDGMENTS OF THE CIRCUIT COURT FOR TALBOT COUNTY REVERSED; CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY TALBOT COUNTY.