

NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued April 2, 2024
Decided September 23, 2024

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 23-1948

MALCOLM J. SANDERS,
Petitioner-Appellant,

v.

MICHAEL MEISNER,
Respondent-Appellee.

Appeal from the United States District
Court for the Eastern District of
Wisconsin.

No. 2:21-cv-229

J.P. Stadtmueller,
Judge.

ORDER

On March 29, 2017, Malcolm Sanders was convicted by a jury in Wisconsin state court of two counts of delivering heroin as a repeater and as a party to a crime. Sanders appealed, arguing that the State's use of peremptory challenges to remove the only two black persons in the jury venire violated the Equal Protection Clause. The Wisconsin Court of Appeals rejected that argument and affirmed his conviction, and the Wisconsin Supreme Court denied review.

Sanders then filed a petition for habeas relief under 28 U.S.C. § 2254(d)(1), again asserting his challenge to the exclusion of those potential jurors. The district court

denied his petition for habeas relief, and he now appeals that determination to this court.

The state court explored at length the reason for the exercise of the peremptory challenges in this case. Three prospective jurors, identified as Ms. R, Mr. O, and Mr. S., were excluded by the State because, in their responses during voir dire, they indicated that past adverse incidents with law enforcement impacted their ability to impartially weigh the evidence. See *State v. Sanders*, 933 N.W.2d 670, 672–75 (Wis. App. 2019). Ms. R identified herself as a person who had a prior bad experience with law enforcement, and responded in the affirmative when asked whether that prior experience with law enforcement would affect her ability to be fair in the case. *Id.* at 672. She then stated that she had an issue with the police, that she had been pulled over for driving in the wrong area, and responded “yes” when asked if, in evaluating testimony, she would believe testimony to be less credible simply because the testimony was from a law enforcement officer. *Id.* She subsequently affirmed that she could be fair overall, although even then she expressed that she did not feel comfortable with it. *Id.* Another prospective juror, Mr. O, initially responded that he could not be fair in the case, nor could he evaluate the evidence in a fair way. *Id.* at 673. He explained that he had a “run-in when [he] was 16 with a cop” who “threatened to beat [his] head in,” and that as a result he just does not trust them. *Id.* The judge discussed whether he could nevertheless be fair, stating he did not think that Mr. O would suggest a jury should consist only of persons who have had good experiences with the police. The judge then asked Mr. O whether there was any reason to think he was any less likely to be fair to both sides than anyone else there, and Mr. O stated “[p]ossibly. I’m just stuck in my ways right now.” *Id.* Finally, Mr. S also identified himself as a person who had a prior bad experience with law enforcement. When asked if he could listen to the evidence and evaluate it fairly, he stated “[honestly, I’m not sure.” *Id.* He explained that based on being racially profiled in the past and pulled over without just cause, he did not know how that would affect him in the case. Finally, when asked if he would be able to return a guilty verdict if the evidence satisfied him beyond a reasonable doubt that the defendant committed the crimes, he responded “possibly.” *Id.* at 674. When pressed by the judge for a “yes” or “no” response, he responded “yes.” *Id.*

As to each of those prospective jurors, the State exercised its peremptory challenges. Mr. O is white, and Mr. S and Ms. R are black. When asked for the reason for the peremptory strike of Mr. S and Ms. R, the prosecutor stated that “[b]oth of those individuals expressed having prior bad experiences with the police, and although in the end they indicated they could be fair, they were quite hesitant and seemed to express feelings based upon their personal experiences of not trusting law enforcement and

maybe looking more skeptically at law enforcement testimony than other witnesses, and that is the reason they were struck, which is also consistent with Mr. [O].” *Id.* at 676. The court concluded that the State had provided a race-neutral reason for the exclusions and that the explanation for the exclusions was legitimate and credible. On appeal, the Wisconsin Court of Appeals affirmed that decision, citing numerous federal decisions supporting its conclusion that “[b]ias against law enforcement and/or the criminal justice system more generally is a legitimate and very understandable reason for the State, when given the opportunity, to strike a potential juror.” *Id.* at 678.

It is well-established that, to succeed on a claim that the State’s use of peremptory challenges was discriminatory in violation of the Equal Protection Clause, the criminal defendant must demonstrate that the decision to strike the prospective jurors was based on a racially discriminatory intent or purpose. *Batson v. Kentucky*, 476 U.S. 79, 96–97 (1986). To meet that burden, Sanders first would need to make a prima facie showing that the prosecutor exercised the peremptory challenges based on race. *Id.* at 96. If that burden was met, the prosecutor would have to provide a race-neutral explanation for the challenges, and if the prosecutor did so, the court would determine whether Sanders had met his burden of demonstrating purposeful discrimination. *Id.* at 97–98. The Wisconsin state court followed those procedures. Once Sanders argued that the only two black prospective jurors had been eliminated, the court queried the prosecutor as to the basis for those challenges and determined that the basis was non-discriminatory.

On habeas review, Sanders has an even greater burden. It is not enough to argue that the decision was wrong or that the Constitution should be interpreted more broadly so as to protect against the use of the peremptory challenges that occurred here. Under the Antiterrorism and Effective Death Penalty Act (“AEDPA”), to obtain habeas relief from his state court conviction, Sanders has to demonstrate that the state court’s decision on the merits was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.” 28 U.S.C. § 2254(d)(1); *Brown v. Payton*, 544 U.S. 133, 141 (2005). A state-court decision is contrary to the Supreme Court’s clearly established precedents if it applies a rule that contradicts Supreme Court law or if it confronts a set of facts materially indistinguishable from those in a Supreme Court decision but reaches a different result. *Payton*, 544 U.S. at 141. The relevant state court decision here is that of the Wisconsin Court of Appeals, which was the last state court to rule on the merits because the Wisconsin Supreme Court declined review. *Charlton v. Davis*, 439 F.3d 369, 374 (7th Cir. 2006). Sanders asserts that its decision was an unreasonable application of clearly-established constitutional law.

Sanders asserts on appeal that the State exercised peremptory challenges against the only two black persons on the venire based upon their seizure for “Driving While Black.” He contends that eliminating them from the jury based upon that discriminatory seizure constitutes a violation of the Equal Protection Clause. Notably, he does not dispute that the prospective jurors challenged by the State had expressed concerns with their ability to be fair and to weigh law enforcement testimony without bias. He maintains, however, that where the source of the bias against law enforcement is a discriminatory stop for “driving while black,” the subsequent use of the peremptory challenge targets only black persons and therefore is also discriminatory.

That is a novel claim, and one not properly made in a habeas petition given the restrictive AEDPA limitations on review. Sanders has not pointed to any case—and certainly no clearly-established Supreme Court precedent—establishing that the State’s exclusion of potential jurors who express animosity toward law enforcement officers generally violates the Equal Protection Clause if that animosity stems from past incidents with particular law enforcement officers that were discriminatory. He does not even point to any case that establishes that the Equal Protection Clause requires a court to consider whether a potential juror’s negative view of law enforcement is the result of prior discrimination. We note that it is of course well-established that in the situation of a discriminatory seizure, the victims of such discrimination could bring a civil claim against the law enforcement officers alleging a violation of their constitutional rights. But Sanders has no case support for his contention that the prosecutors in a separate criminal trial cannot exercise peremptory challenges based on the negative views of law enforcement occasioned by such past experiences, particularly where the potential jurors express difficulty in fairly considering the evidence in the case before them.

Sanders relies only on a Supreme Court case from 1879, *Strauder v. West Virginia*, 100 U.S. 303 (1879), arguing that it clearly establishes the law that black persons cannot be prohibited from serving on juries because of their race. That is a proposition that is not contested, and the prosecutor did not justify the use of the peremptory challenge here by declaring that black persons can be excluded based on their race. Here, the peremptory challenges were issued based on the responses to questions by three prospective jurors as to their negative experiences with the police, and the impact of those experiences on their ability to remain impartial. Two of the excluded persons are black and one was white. As the district court properly recognized, courts have repeatedly recognized that peremptory challenges may be used based on prospective jurors’ reports of negative interactions with the police that impacts their ability to fairly weigh the evidence. See *United States v. Alqahtani*, 73 F.4th 835, 847–48 (10th Cir. 2023),

United States v. Carter, 111 F.3d 509, 512–13 (7th Cir. 1997). Even if Sanders believes that we should reconsider those holdings in light of evidence that police interactions can be based on racism, that argument cannot succeed in the context of a habeas action in light of the AEDPA because it requires a change in the law and thus, by definition, he cannot establish that the state court violated clearly-established law.

The decision of the district court is AFFIRMED.