

Circuit Court for Prince George's County

Case No. CT190046X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1949

September Term, 2019

NIJAH DAIONNE JOHNSON

V.

STATE OF MARYLAND

Reed,
Shaw Geter,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: February 25, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The appellant, Nijah D. Johnson, was convicted in the Circuit Court for Prince George’s County by a jury, presided over by Judge Beverly J. Woodard, of both wearing or carrying a loaded handgun and wearing or carrying a handgun on her person. Upon this appeal, she raises the three contentions:

1. That the trial court abused its discretion by refusing to ask the appellant’s requested voir dire question regarding a criminal defendant’s right not to testify;
2. That the court erroneously refused to admit into evidence the appellant’s medical records; and
3. That the conviction for wearing a handgun should have merged into the conviction for wearing a loaded handgun for sentencing purposes.

Because we agree with the appellant with respect to her first contention and must reverse her convictions on that basis, we find it unnecessary to address her latter two contentions.

The Applicability of Kazadi

The merits of the appellant’s first contention are completely controlled by the recent decision of the Court of Appeals in Kazadi v. State, 467 Md. 1, 223 A.3d 554. The Kazadi opinion was filed on January 24, 2020. In the present case, the appellant was convicted on August 28, 2019. The appellant was sentenced on October 25, 2019. Her notice of appeal was filed on November 13, 2019. Hence, this case was pending on appeal when Kazadi was filed on January 24, 2020. As it concluded its analysis, the Kazadi opinion, 467 Md. at 47, squarely held:

[O]ur holding applies to this case and any other cases that are pending on direct appeal when this opinion is filed, where the relevant question has been preserved for appellate review.

(Emphasis supplied.)

The Kazadi Holding

Kazadi made mandatory, upon request, “voir dire questions concerning a prospective juror’s ability to follow jury instructions on the long-standing fundamental principle of the presumption of innocence, the burden of proof, and a defendant’s right to remain silent.” 467 Md. at 7. Of the three fundamental rights covered by Kazadi, the one that concerns us in this case is the right of a criminal defendant, pursuant to the Fifth Amendment privilege against self-incrimination, to remain silent.

Prior to trial, the appellant submitted to the court a list of requested voir dire questions. Included was requested voir dire question No. 16, which was:

16. A defendant in a criminal trial has an absolute right not to testify and I would instruct you that you cannot consider, use, or even discuss the fact that the defendant does not testify in this case. Is there anyone who cannot think of a reason why an innocent person would not want to testify in a criminal trial?

(Emphasis supplied.)

The first sentence of that requested voir dire question was squarely covered by Kazadi.¹ The requested voir dire question was rejected by the court on the ground that it was an appropriate matter for a jury instruction but was not an appropriate question for the

¹ The possible significance of the second sentence, pro or con, is potentially interesting, but it is another question for another day. Neither at trial nor on appeal did it generate so much as passing notice by the appellant, by the State, or by the trial court. The interesting little wrinkle that whereas the first sentence may have been a mandatory voir dire inquiry under Kazadi, the second part of the question almost certainly was beyond the mandate of Kazadi never occurred to anyone, because in this case everything was treated as being beyond the mandate of Kazadi. There was, therefore, no occasion for the more subtle distinction to be made. In any event, nothing concerning the second sentence of the requested voir dire is remotely before us for consideration in this case.

voir dire examination of perspective jurors. The sum total of discussion on the issue was as follows:

THE COURT: All right. Other than the catchall question, is there any other question you want me to ask?

DEFENSE COUNSEL: Your Honor, I'd ask you to ask about the defendant, Number 16 on my voir dire.

THE COURT: On yours?

DEFENSE COUNSEL: About testifying. The defendant has a right [not] to testify.

THE COURT: Testifying, that is a jury instruction not a voir dire.

DEFENSE COUNSEL: If you're so inclined, I would request that you do so.

(Emphasis supplied.) At the conclusion of the voir dire examination, the appellant stated that she was satisfied with the jury panel that was ultimately seated.

Under Kazadi, it is now indisputably clear that a requested voir dire question about a juror's ability to accept the fundamental principle that a defendant has the right not to testify is mandatory. The failure of the trial court to propound the question is presumably reversible error.

The Waiver Question

The State, however, argues that even if the court were in error in not asking the question mandated by Kazadi, the appellant has forfeited her right to object because her ultimate acceptance of the jury panel waived her earlier objection. This precise waiver issue, however, was squarely before this Court in Foster v. State, 247 Md. App. 642, 239 A.3d 741 (2020) and we squarely rejected the appellant's waiver argument. The State in

Foster was in precisely the same situation as was the State in this case, and raised precisely the same argument that is now being raised by the State here:

During the pendency of this appeal, the Court of Appeals decided Kazadi v. State, 467 Md. 1, 223 A.3d 554 (2020), which held that it was reversible error for a trial court to refuse to ask a requested voir dire question concerning whether any prospective juror would be unable to follow an instruction not to consider a defendant's exercise of the Fifth Amendment right not to testify as evidence of guilt. Because the circuit court denied Foster's request for such a voir dire question below, he contends that his conviction must be reversed.

The State counters that Foster filed to preserve the issue for review because, upon the conclusion of jury selection, he accepted the empaneled jury without qualification.

247 Md. App. at 645-46.

Following the earlier decision of this Court in Marquardt v. State, 164 Md. App. 95, 882 A.2d 900 (2005) and of the Court of Appeals in State v. Stringfellow, 425 Md. 461, 42 A.3d 27 (2012), we held that Foster, who had earlier objected to the trial court's refusal to ask a question mandated by Kazadi, did not waive that objection when he accepted the jury panel:

In short, we must follow Stringfellow. Accordingly, we conclude that Foster preserved his objection to the court's refusal to pose the voir dire question that Kazadi subsequently said is mandatory upon request.

247 Md. App. at 651-52.

Accordingly, we hold that the appellant did not waive her objection to the Kazadi violation. Kazadi was, indeed, violated and the convictions must be reversed.²

² This issue is currently before the Court of Appeals in the case of State v. Ablonczy. In an unreported opinion filed on June 19, 2020, we reached the same decision we later reached in Foster v. State. In Ablonczy, the Court of Appeals granted the State's request for certiorari on October 6, 2020.

**JUDGMENTS REVERSED;
COSTS TO BE PAID BY
PRINCE GEORGE'S
COUNTY.**