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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0234**

State of Minnesota,
Respondent,

vs.

Gary Lee Johnson,
Appellant.

**Filed April 29, 2008
Affirmed
Minge, Judge**

Pennington County District Court
File No. 57-K1-06-372

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101-2134; and

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Lawrence Hammerling, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges his conviction of first-degree driving-while-impaired (DWI) test refusal. Appellant contends that his conviction must be reversed because the district court failed to stay the proceedings pursuant to Minn. R. Gen. Pract. 813 after the Pennington County jury commissioner acknowledged that she did not comply with Minn. R. Gen. Pract. 806(e) and because the lack of a racially balanced jury pool denied him his rights under the Sixth and Fourteenth Amendments. Because appellant's claim under the rules was not asserted before the district court and because appellant does not show a violation of his constitutional right to a representative jury, we affirm.

FACTS

Appellant Gary Lee Johnson, a Native American, was charged with one count of first-degree DWI and one count of first-degree test refusal arising out of a vehicle stop in July 2006. On the day before his October 2006 trial, Johnson and his counsel determined that there were no Native Americans on the prospective juror list. The day of the trial, Johnson challenged his jury pool, claiming that Native Americans were underrepresented and systematically excluded from the jury pool in violation of his Sixth and Fourteenth Amendment rights.

The Pennington County court administrator, acting as the jury commissioner, was called as a witness at the hearing on the challenge. She explained how the jury pool was based on the lists of voters, holders of drivers' licenses, and holders of state identification cards. When asked about compliance with the review/report requirement of Minn. R.

Gen. Pract. 806(e), the administrator/commissioner stated that she was unfamiliar with that rule and there was no compliance. The district court then considered the constitutional challenge and concluded that Johnson failed to show a violation of his constitutional rights because he offered no proof that Native Americans were underrepresented on Pennington County jury pools over a significant period of time or that any underrepresentation was a result of systematic exclusion. The trial commenced, and the jury subsequently found Johnson guilty of refusal to submit to a chemical test. This appeal follows.

DECISION

I.

Compliance with Minn. R. Gen. Pract. 806(e) and 813

The first issue is whether the district court erred by failing to stay the proceedings, pursuant to Minn. R. Gen. Pract. 813, after the Pennington County jury commissioner acknowledged the county's failure to comply with the review/report requirement of Minn. R. Gen. Pract. 806(e).

Minn. R. Gen. Pract. 801-814 govern the general selection and management of juries. Counties are required to use drivers' license and voter-registration information to create jury-pool source lists and to randomly draw prospective jurors from these lists. *Id.*, 806(b), (c). In addition, county jury commissioners must "review the jury source list once every four years for its representativeness and inclusiveness of the adult population in the county and report the results to the chief judge of the judicial district." *Id.*, 806(e).

Rule 813 provides the exclusive means for a party to challenge a jury on the ground that the jury was not selected in conformity with rules 801-814. Minn. R. Gen. Pract. 813(c). If a person believes there is a rule violation, the person may move for relief, providing a sworn statement alleging facts that, if true, constitute a substantial failure to comply with the jury-management rules. *Id.*, 813(b). The moving party is then entitled to present the testimony of the jury commissioner or any relevant records in support of the motion. *Id.* The moving party is entitled to present the testimony of the jury commissioner only *after* filing the sworn statement. *Id.* If the district court subsequently determines that there has been a substantial failure to comply with the provisions governing jury selection, the district court “shall stay the proceedings while a jury is selected in conformity” with the rules. *Id.*

The Pennington County court administrator, who serves as the jury commissioner, testified that she was not aware of the requirements of rule 806(e). On cross-examination, the commissioner acknowledged that Pennington County had not reviewed the jury-source list for representativeness and inclusiveness or forwarded a report to the chief judge of the judicial district as required by that rule.

Cross-examination by defense counsel regarding rule 806(e) caught both the district court and the county attorney by surprise. The county attorney initially objected to counsel’s line of questioning as falling outside the job description of the witness. But the witness stated that she served both as a court administrator and the local jury commissioner, and the district court overruled the objection. As the cross-examination continued, the following exchange occurred:

THE COURT: I have just found the rule that [Johnson's counsel] is referring to . . . you said it's Rule 806?

[DEFENSE COUNSEL]: "E," yes.

THE COURT: Of the Rules of Practice and . . .

[PROSECUTION]: What page is that, Your Honor?

THE COURT: 772. [Commissioner], you may answer the question, if you know.

As noted above, Minn. R. Gen. Pract. 813(c) provides the *exclusive* means by which a party may challenge jury selection under rules 801-814. Johnson did not provide a sworn statement alleging facts that, if true, would constitute a substantial failure to comply with the rules as required by Minn. R. Gen. Pract. 813(b). Furthermore, Johnson did not move to stay the proceedings under rule 813(a) within seven days of discovering grounds for the motion during the jury commissioner's testimony.¹

Accordingly, we conclude that Johnson did not comply with the exclusive remedy for challenging his jury selection, and we rule that the district court did not err by continuing with Johnson's trial rather than staying the proceedings under rule 813.² Ultimately, whether the jury selection process is improper depends on its constitutionality. We next move to a consideration of that issue.

¹ We note that the county attorney initially waived any procedural irregularities when responding to Johnson's constitutional challenge. Because the county attorney stated its waiver before learning of Johnson's rule 806(e) argument, we conclude that this was not a waiver of Johnson's failure to follow the procedure set forth in rule 813.

² We note that one of the strategic goals of the Minnesota Judicial Branch is to "ensure that individuals called for jury duty are representative of the population from which the jury is drawn." Minnesota Judicial Council, *Priorities and Strategies for Minnesota's Judicial Branch: Focus on the Future*, Strategic Goal 3, Priority 3C(5) (Fiscal Year 2007-2009) *available at* http://www.mncourts.gov/documents/0/Public/Court_Administration/Strategic_Plan_for_Minnesota_Courts.pdf. Because the jury management rules at issue in this appeal help the judicial branch achieve this strategic goal, it is important that rules such as Minn. R. Gen. Pract. 806(e) are being observed and followed.

II.

Constitutional Claim

Johnson challenges his conviction on the constitutional ground that Native Americans were systematically excluded and underrepresented in Pennington County jury pools. The district court denied Johnson's claim, finding that Johnson failed to provide evidence of underrepresentation or systematic exclusion.

"Sixth and Fourteenth Amendment challenges to the makeup of jury pools are questions of law that this court reviews de novo." *State v. Gail*, 713 N.W.2d 851, 862 (Minn. 2006). The Sixth Amendment requires that the pool from which a jury is drawn reflect a representative cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 528, 95 S. Ct. 692, 697 (1975). To establish a prima facie showing that a Sixth Amendment right to a representative jury has been violated, a defendant must show "that over a significant period of time—panel after panel, month after month—the group of eligible jurors in question has been significantly underrepresented on the panels and that this results from 'systematic exclusion.'" *Gail*, 713 N.W.2d at 862 (quoting *State v. Williams*, 525 N.W.2d 538, 542-43 (Minn. 1994)). An equal protection challenge to the jury pool under the Fourteenth Amendment similarly requires that a defendant show underrepresentation "over a significant period of time." *Id.* (citing *Castaneda v. Partida*, 430 U.S. 482, 494-95, 97 S. Ct. 1272, 1280 (1977)).

We note that Pennington County uses the same method for assembling jury pools as was upheld in previous Minnesota Supreme Court decisions to create random, race-neutral jury source lists and pools. *See, e.g., State v. Roan*, 532 N.W.2d 563, 569 (Minn.

1995) (finding no systematic exclusion resulting from Hennepin County's creation of jury pools drawn from lists of registered voters, drivers' licenses, and registered Minnesota identification card holders). Here, Johnson provides no evidence that would satisfy the standard articulated in *Gail* and *Williams*. The jury commissioner testified that Pennington County uses the state's Next Generation system to select its jury pools. The county requests 120 names from the state every four months. The names are drawn from drivers' license records, state identification cards, and voter registration information. After receiving the names, the county sends out qualification letters, and the county generally ends up with a jury pool of about 70-75 people after removing non-residents, the elderly, and others who may be unable to serve. The commissioner asserted that it was impossible for Native Americans to be purposely excluded from the jury pool because "it's a random draw. We just plug in a number and that number [of prospective jurors] comes out."

Because Johnson has failed to make a prima facie showing that Native Americans have been underrepresented on Pennington County jury panels over a significant amount of time as a result of systematic exclusion from the county's jury selection process, we conclude that the district court did not err by denying Johnson's Sixth and Fourteenth Amendment challenges to his jury pool.

Affirmed.

Dated: