IN THE COURT OF APPEALS 07/02/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00976 COA

EDDIE JAMES HEARD A/K/A "RED" AND CHANTELL HOWARD

APPELLANTS

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. THOMAS J. GARDNER III

COURT FROM WHICH APPEALED: MONROE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANTS:

J. DUDLEY WILLIAMS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY: CHARLES W. MARIS, JR., SPECIAL ASSISTANT ATTORNEY GENERAL

DISTRICT ATTORNEY: ROB COLEMAN AND DENVIL CROWE, ASST. D.A.

NATURE OF THE CASE: CRIMINAL-FELONY

TRIAL COURT DISPOSITION: EDDIE HEARD AND CHANTELL HOWARD CONVICTED TO COUNT I-SALE OF COCAINE AND SENTENCED TO SERVE TWENTY-FIVE YEARS IN THE MDOC; COUNT II-CONSPIRACY TO SELL COCAINE AND SENTENCED TO SERVE FIFTEEN YEARS IN THE MDOC CONSECUTIVE TO COUNT 1 (SEE RECORD FOR PRIOR CONVICTIONS RUNNING CONCURRENT WITH ABOVE)

BEFORE FRAISER, C.J., DIAZ, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

This is an appeal of the criminal conviction of two defendants tried jointly in the Circuit Court of Monroe County. Eddie James Heard and Chantell Howard were tried as co-defendants and convicted of the sale of cocaine and conspiracy to sell cocaine. They now appeal, both urging as the sole basis for reversal of their conviction that the trial court improperly applied the law of *Batson v. Kentucky* and those cases that followed it, to deny them the right to exercise their peremptory challenges during jury selection. *See Batson v. Kentucky,* 476 U.S. 79 (1986). We conclude that the record does not disclose any such error, and we affirm.

I.

Facts

Because these defendants raise no issue regarding the evidence presented to support the jury verdict, we will not recite the facts of their crime, but, rather, will focus on the facts of the jury selection process. After the trial court had handled all challenges for cause, defense counsel exercised its six statutory peremptory challenges to strike veniremen two through seven, all of whom were white. The prosecuting attorney suggested on the record that these veniremen were struck by the defendants solely on the basis of their race and objected under *Georgia v. McCollum*, 505 U.S. 42 (1992). The court, without more, asked defense counsel to state some reason for exercising those strikes other than race. Defense counsel initially stated simply that "our approach in striking these jurors is not for [any] racial purpose. I've observed them and we just exercised our challenges under the law." The court insisted that the defense's peremptory challenges "must be exercised on the basis of some articulable reason other than the fact that you wish to excuse them in this circumstance." Defense counsel then stated that he had watched the venire and observed their mannerisms and decided to strike these veniremen because, when certain questions were asked "their skin began to turn red at times," and also "because their facial mannerisms were not conducive, was not calm and pleasant" in response to certain inquiries about drugs. The trial court then inquired for "any specific articulable reason to strike those jurors," to which defense counsel replied, "None other than what I've already expressed to the Court." The trial court refused to allow the peremptory challenges, stating, "I have heard no articulable reason that would justify striking those persons." He further stated into the record that he had watched the venire during voir dire and had not observed the mannerisms and reactions described by defense counsel.

Later in the process, defense counsel attempted to peremptorily challenge jurors eleven, twelve and fourteen (juror thirteen had been excused for cause). The prosecution again objected on the ground that these three jurors were also white, and defense counsel, when called upon to state race neutral reasons, replied that he had none "other than what I stated before." The trial court refused to permit peremptory challenges by the defense for these juror as well.

II.

Discussion

The defendants allege reversible error in the denial of their right to freely exercise their peremptory challenges. While the right to exercise peremptory challenges has been found not to rise to the level of a constitutional right, *see, e.g., Davis v. State*, 660 So. 2d 1228, 1243 (Miss. 1995) (citing *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988)), nevertheless, it is a right granted by statute in Mississippi. *See* Miss. Code Ann. § 99-17-3 (1972). It has been adjudicated that the denial of a statutory right in the course of a criminal prosecution can, of itself, constitute a due process violation entitling the defendant to relief. *Stewart v. State*, 662 So. 2d 552, 557 (Miss. 1995) (citing *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980)). Thus, if the defendants are correct in their assertion that they were improperly denied the use of their peremptory challenges, then they would appear to be entitled to a new trial.

Since the United States Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986), there have followed a number of cases, each further limiting the circumstances in which peremptory challenges may be exercised without fear of intervention by the trial court. Thus, in *Batson*, the State was prohibited from striking minority veniremen of the same race as the defendant. In *Powers v. Ohio*, 499 U.S. 400, 409 (1991), the prohibition was extended to race-based challenges by the State without regard to the race of the defendant. In *Georgia v. McCollum*, the Supreme Court discovered sufficient state action in the defendant's exercise of statutorily-granted peremptory challenges to prohibit their use by the defendant based solely upon racial considerations. *Georgia v. McCollum*, 505 U.S. 42, 54 (1992).

The Supreme Court set out only a rudimentary procedure for handling what have come to be known as *Batson* challenges to peremptory strikes "[i]n light of the variety of jury selection practices followed in our state and federal trial courts . . . ." *Batson*, 476 U.S. at 99 n.24. The basic steps necessary to resolve an objection to an otherwise purely discretionary challenge to a potential juror as set out in *Batson* are:

1. The challenging party must "make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose" in the exercise of the challenges.

2. "Once the [challenging party] makes a prima facie showing, the burden shifts to the [challenged party] to come forward with a neutral explanation for challenging" the potential juror.

3. At that point, having had the benefit of the challenged party's explanation, "[t]he trial court then will have the duty to determine if the [challenging party] has established purposeful discrimination."

Id. at 93-94, 97-98 (citations omitted).

A.

The Issue of a Prima Facie Case

This Court has observed a fairly general failure of the trial courts of the State to observe this first element of a *Batson* or *McCollum* challenge to the exercise of peremptory challenges. This has, on occasion, required the reversal of a criminal conviction for problems easily avoided and having essentially no connection with the real issue for which the proceeding was convened -- to determine the guilt or innocence of the defendant. A party may not, merely by the incantation of the name *Batson* or *McCollum*, compel opposing counsel to declare race-neutral reasons for exercising peremptory strikes on peril of having them disallowed should the trial court find them unsatisfactory. The Supreme Court has made it clear that there must be some showing by the challenging party that improper racially based considerations are entering into the opposing party's decision process before that party may be compelled to respond with nonracially-based reasons. Mere accusations or suspicions are not enough.

> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Batson, 476 U.S. at 96-97.

In this case, though the trial court did not explicitly determine on the record that a prima facie case of discrimination had been shown before requiring defense counsel to state his race-neutral reasons for his challenges, we conclude that the clean sweep of jurors two through seven, all of the same race, was sufficient to make a prima facie case of improper racial motivation. Thus, we do not find error in the trial court's decision to move to the second aspect of a *McCollum* inquiry by requiring the defense to articulate its nonracial reasons.

Parenthetically, we note and reject the defendants' argument that "the State cannot initially raise the issue of race unless it is first raised by the Defendant." That proposition in both defendants' briefs is not supported by citation to authority and is simply not the law. *McCollum's* stated purpose is to prohibit the improper use of racial considerations in exercising peremptory strikes by the defense and is not conditioned upon a showing that it is retaliatory in nature. We also note that the defendants

suggest in their briefs that they "told the Judge that [their] reasons for striking the Jurors were for no racial purposes." That this is sufficient to overcome a *Batson* or *McCollum* objection has been specifically rejected by the Supreme Court, when it said, "[n]or may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive . . . ." *Batson,* 476 U.S. at 98.

B.

Articulated Reasons

The original *Batson* decision warned that, in evaluating an offered race-neutral reason for exercising a challenge, the trial court may not require an explanation that would "rise to the level justifying exercise of a challenge for cause." *Id.* at 97 (citations omitted). This stricture on rejecting offered explanations was further explained in *Purkett v. Elem*, where the Supreme Court emphasized that "a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Purkett v. Elem*, 115 S. Ct. 1769, 1771 (1995). Thus, when assessing articulated reasons to determine if they are acceptable, the trial court is put to a two-fold analysis. First, the offered reason must be considered to determine if, on its face, it demonstrates an improper racial animus in its exercise. It is at this level that such reasons as attempts to achieve racial balance on the jury, or an articulated opinion that a particular racial group would be unduly partial to or prejudiced against a particular side, must fail. Second, assuming the given reason can pass this first test, it must, nevertheless, be evaluated at a different, more subjective, level. At this stage, the trial court must still affirmatively determine that the facially valid reason offered is not, in fact, a pretextual explanation offered to disguise a hidden racial motivation on the part of the party. *Hernandez v. New York*, 500 U.S. 352, 363 (1991).

We conclude, in this case, that the reasons given by defense counsel were, on their face, race-neutral in character. A pronounced physical reaction demonstrating an extraordinary emotional response to a particular subject during voir dire cannot, by any stretch, be seen as a characteristic peculiar to any particular race. However, there are readily apparent problems in the articulated reasons given by the defendants that would appear to justify the trial court's refusal to permit he challenges. We note that the stated reasons were generally described as relating to all of the jurors without anything more specific being said as to the particular reaction of each potential juror. Allegations of such a similarity of response by six randomly selected veniremen has an air of implausibility. The trial court observed that he had watched the venire closely during voir dire and had not observed the same reactions. *Purkett v. Elem* teaches us that, at this stage of analysis, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett,* 115 S. Ct. at 1771. We conclude that the trial court, in his articulated conclusions, essentially found, not that the reasons offered were based on race on their face, but that they were pretextual in nature. Because of the highly subjective nature of such an evaluation, involving as it does an assessment of credibility of counsel, appellate courts have been admonished that the trial court is entitled to great deference in its conclusions. *Willie v. State*, 585 So. 2d 660, 672 (Miss. 1991) (citations omitted).

We, therefore, conclude that the trial court was not manifestly in error when it determined that the defendants were improperly exercising their peremptory challenges based upon nothing more than the

race of the challenged veniremen. Thus, it was not reversible error to deny the exercise of these challenges and seat these jurors to hear the case -- jurors that, it must be remembered, were fully qualified to sit on the jury, each of them having survived challenge for cause. The convictions must, therefore, be affirmed.

THE JUDGMENT OF THE MONROE COUNTY CIRCUIT COURT FINDING EDDIE JAMES HEARD AND CHANTELL HOWARD GUILTY OF THE CRIMES OF COUNT ONE - SALE OF COCAINE AND SENTENCE OF TWENTY-FIVE YEARS AND COUNT TWO - CONSPIRACY TO SELL COCAINE AND SENTENCE OF FIFTEEN YEARS TO RUN CONSECUTIVELY WITH SENTENCE IN COUNT ONE AND CONCURRENTLY WITH SENTENCE IMPOSED IN CAUSE NO. CR93-029, IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS, IS AFFIRMED. COSTS OF THIS APPEAL ARE TO BE DIVIDED EQUALLY BETWEEN CHANTELL HOWARD AND MONROE COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., CONCURS IN RESULT ONLY WITH SEPARATE WRITTEN OPINION.

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APPELLEE

KING, J., CONCURRING:

I write to concur only in the result reached in this case, and I do so merely because we are obligated to give deference to the findings of the trial court.

I remain very disturbed by what I perceive to be this Court's inconsistent and unequal application of *Batson*, and its failure to provide meaningful guidance to the trial courts, which has now forced them to engage in soothsaying.