

IN THE COURT OF APPEALS 08/06/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00427 COA

BOBBY CAMPBELL

APPELLANT

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. MARCUS D. GORDON

COURT FROM WHICH APPEALED: NEWTON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

CHARLES C. PEARCE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL BY:DEWITT ALLRED III, SPECIAL ASSISTANT
ATTORNEY GENERAL

DISTRICT ATTORNEY: KEN TURNER

NATURE OF THE CASE: CRIMINAL (FELONY) -POSSESSION OF COCAINE

TRIAL COURT DISPOSITION: DEFENDANT CAMPBELL CONVICTED OF POSSESSION OF
COCAINE AND SENTENCED TO SERVE A TERM OF THREE YEARS IN THE CUSTODY
OF THE MDOC AND ORDERED TO PAY A FINE IN THE AMOUNT OF \$5,000.00

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

McMILLIN, J., FOR THE COURT:

This appeal arises from the conviction of Bobby Campbell for possession of cocaine in the Newton County Circuit Court. Campbell was sentenced to serve a term of three years in the custody of the Mississippi Department of Corrections and ordered to pay a fine in the amount of \$5,000.00. On appeal, Campbell alleges as error the trial court's failure to grant a peremptory challenge in his favor in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny. Campbell also challenges the sufficiency of evidence supporting the jury verdict and the trial court's refusal to grant a requested jury instruction.

We find merit to Campbell's assertion that the trial court erred in denying his exercise of one of his peremptory strikes, thereby depriving him of his constitutional right to a fair trial. We, therefore, reverse and remand this cause for a new trial.

I.

FACTS

Because we find error in the trial court's failure to grant a peremptory challenge, we will not recite the evidence presented at trial, but will discuss only the facts surrounding the jury selection process. At the close of voir dire, both counsel and the trial judge retired to chambers to select the jury. At the beginning of the selection process, defense counsel requested that the trial judge "invoke the *Batson* rule." Following that request, the resulting colloquy below took place between the judge and counsel for the defendant, Bobby Campbell.

By the Court: Are you prepared to comply with *Batson*, also? It says you have got to do it, too.

By Mr. Pearce: Yes, sir.

By the Court: It isn't attorney discretion. You have just got to convince me you are giving a good reason. Is that what you want to do?

By Mr. Pearce: Yes, sir.

Shortly after the jury selection process had begun, the defendant exercised his first peremptory challenge on Edward Crosby, a white male. At the request of the trial judge, defense counsel stated that his reason for exercising a peremptory on that particular venireman was that Crosby seemed to

be a very conservative man and had a brother who was believed to be involved in the Ku Klux Klan. The judge accepted that challenge, and the process continued.

The defense then attempted to excuse Thomas Hitt, a white male, from the jury panel. At that point, the trial court again stated, "He is white. Now, why do you excuse him?" To that request, Mr. Pearce, counsel for the defendant, stated, "My partner has represented him on occasion in the past and tells me that, in his judgment, he is very conservative, and does not think he would be open-minded." The judge responded, "I won't accept that as being a racially neutral reason. I deny the strike."

II.

Discussion

Campbell alleges that the trial court committed reversible error in denying him the use of a peremptory challenge, thereby denying his constitutional right to a fair trial. Though the right to exercise peremptory challenges has been found not to rise to the level of a constitutional right, it is, nevertheless, a statutorily created right under the Mississippi Code, section 99-17-3. The arbitrary denial of such a statutory right in a criminal prosecution can invoke constitutional due process considerations which entitle the defendant to relief. Miss. Code Ann. § 99-17-3 (1972); *see Stewart v. State*, 662 So. 2d 552, 557 (Miss. 1995) (citing *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980)). The United States Supreme Court set out a fundamental three-step procedure for resolving objections to the use of peremptory strikes against potential jurors under *Batson*:

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 challenged party's explanation, "[t]he trial court then will have the duty to determine if the [challenging party] has established purposeful discrimination."

Batson, 476 U.S. at 93-94, 97-98.

Since the holding in *Batson* setting out this rudimentary procedure for handling peremptory challenges, numerous decisions have dealt with this issue. By way of example, in *Hernandez v. New York*, 500 U.S. 352, 359 (1991), the prosecutor offered his reasons for peremptory strikes without

"prompting or inquiry from the trial court," and the lower court did not, therefore, have occasion to make a ruling on whether or not the defense had made out a prima facie showing of discrimination by the prosecution. In that situation, the Supreme Court held that if a party "has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Id.*

At first glance, it would appear that under *Hernandez*, the fact that defense counsel offered race neutral reasons for his strikes would waive his right to argue the issue of the lack of a prima facie case of discrimination. However, as the Mississippi Supreme Court noted in *Stewart*, the prosecution in *Hernandez* "voluntarily defended its peremptory strikes 'without any prompting or inquiry from the trial court.'" *Stewart*, 662 So. 2d at 559 (citations omitted). In the present case, as in *Stewart*, "the defense did not voluntarily explain the peremptory in issue. The trial court in fact made the defense prove it was not discriminating without there ever having been an inference of discrimination in the first place." *Id.*

There is no indication in the record that the State lodged an objection to the defendant's use of the peremptory challenge to Hitt or that there was any basis to conclude that a prima facie showing of discriminatory intent had been made.

"A trial judge does not have the authority to invoke a *Batson* hearing on his own initiative." *Stewart*, 662 So. 2d at 559. It is clear that the defense may not be required to pronounce race-neutral reasons without some showing by the State that improper racial motives entered into the defendant's use of his peremptory strikes. *Id.* (citing *Georgia v. McCollum*, 505 U.S. 42, 59 (1992)).

The failure of the lower court to follow the process set out in *Batson* requiring the State to make out its prima facie case, thereby resulting in a lack of findings on the record, was an arbitrary violation of Campbell's constitutional right to a fair trial and was reversible error. *Stewart*, 662 at 560.

Going beyond these procedural failures in the handling of the *Batson* issue, we conclude that the trial court was manifestly in error in concluding that the reason offered was not "a racially neutral reason." An articulated reason for a challenge must be subjected to a two-step analysis by the trial court. At the first level, it must be assessed to determine if, by application of logical principles, it may be traced to racial considerations. Indications that a potential juror is "conservative" and not "open-minded" are not, in any way, directly related to race. In assessing what the Supreme Court has called "the facial validity" of an offered reason, that Court has said that the explanation must be neither persuasive nor plausible. *Purkett v. Elem*, 115 S. Ct. 1769, 1711 (1995).

At the second stage of evaluation, the trial court must determine whether an offered explanation for a strike, though facially race-neutral, is, in fact, a mere pretext to disguise "purposeful discrimination." *Id.* at 1711. Admittedly, the Supreme Court suggests that the more implausible or fantastic the explanation, the more likely it is that it is pretextual, *id.* at 1171; nevertheless, the disallowance of a facially-neutral reason must be based upon an affirmative determination of pretext on the part of the challenged party.

It appears to the satisfaction of this Court that the offered reason was facially valid. There is no indication that the trial court based its ruling upon a determination that defense counsel was using this

facially valid reason to disguise his true discriminatory intent. Thus, even were we to consider defense counsel's acquiescence in the trial court's proposition that the defense had, in effect, invoked *McCollum* on itself by raising *Batson* issues against the prosecution, we still believe that this strike was improperly denied.

In this state of affairs, we find ourselves with no option except to reverse and remand for a new trial untainted by improper restrictions on the right of the defendant to exercise such peremptory challenges as are allowed to him under law.

THE JUDGMENT OF THE NEWTON COUNTY CIRCUIT COURT IS REVERSED AND THIS CAUSE REMANDED FOR A NEW TRIAL. COSTS OF THIS APPEAL ARE ASSESSED TO NEWTON COUNTY.

FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. BRIDGES, P.J., NOT PARTICIPATING.