

IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-KA-00839 COA

DESHAWN CHRISTIAN 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. LARRY EUGENE ROBERTS

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: DAVID A. STEPHENSON

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL

BY: DEIRDRE MCCRORY

DISTRICT ATTORNEY: BILBO MITCHELL

NATURE OF THE CASE: CRIMINAL-FELONY

TRIAL COURT DISPOSITION: CT I ROBBERY BY USE OF FIREARM: CT II AGGRAVATED ASSAULT: SENTENCED TO 10 YRS ON CT I & 20 YRS ON CT II TO SERVE IN THE MDOC WITH SENTENCES TO RUN CONSECUTIVE TO EACH OTHER & CONSECUTIVE TO REVOKED SENTENCE

MOTION FOR REHEARING FILED: 9/24/97

MANDATE ISSUED: 11/25/97

BEFORE THOMAS, P.J., HERRING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Defendant DeShawn Christian was convicted in the Circuit Court of Lauderdale County of one count of armed robbery and one count of aggravated assault. He was sentenced to ten years for the armed robbery conviction and twenty years for the aggravated assault conviction, to be served consecutively. Christian appeals, arguing the trial court erred by denying him the use of a peremptory challenge. He also argues that the trial court erred in restricting his cross-examination of a witness regarding her cocaine addiction. We disagree with these arguments and affirm.

FACTS

John Bourrage was sitting in his car talking to Joyce Jones, who was standing next to the driver's side window. Appellant DeShawn Christian and Andre Lang approached with bandannas over their faces. Christian held a gun to Bourrage's head and told Bourrage to give him all his money, and Lang got into the car. Bourrage began to drive away, and the two men shot him numerous times. The cartridges found at the scene matched the firearms found in the car driven by the assailants. Christian and Lang were apprehended and were charged with armed robbery and aggravated assault on John Bourrage. Christian was convicted of both counts.

DISCUSSION

I. Peremptory challenge

The first issue complains about the procedure followed by the trial court in reviewing the peremptory challenges of the defense to members of the jury venire. A few months after this May 1995 trial, the Mississippi Supreme Court clarified the requirements for the trial court in this area. The defendant argues that those rules were violated here.

After the defense and the prosecutor finished striking different jurors for cause, the court turned to each side's peremptory challenges. The State made two challenges, and after they were made the court asked defense counsel if he had any objections to them. Counsel did not. Then the defense

made its first peremptory challenge to juror number "[f]ifty-nine. He is a Ph. D. Again, Judge, all of this stuff is going to be coming from these --." The court stopped the explanation, saying just "[g]ive me your strikes and if the State voices a reverse *Batson* objection --" and then the defense counsel made his own interruption: "I'll just do it as I'm going along, Judge."

To summarize, these exchanges start with the defense counsel's initiating the giving of explanations for his peremptory challenges; the trial court stopping him to say that he should wait to see if the State made an objection; and the defense again stating that he would shorten the process by giving an explanation with each jury strike. The defense went through five challenges, giving an explanation each time.

When counsel finished, the court asked the district attorney if he had objections on "reverse *Batson*" grounds to any of the strikes. He did. The court rejected all the State's objections.

The process continued with two more State peremptory strikes, which were accepted, and then three more from the defense. One of the defense challenges was to juror number 39, who was a white male. When the defense counsel was giving his quick summary of reasons as he listed all the jurors that he wished to strike, he said that he could not find a juror questionnaire on number 39. After defense listed all three to strike and the State objected to striking juror number 39, the court asked defense counsel to state his reason for striking the juror. Defense counsel this time said his reason was that the juror was in the Air National Guard. The district attorney argued that the new explanation demonstrated that counsel "is just looking for reasons."

BY THE COURT: Well, David, I'm not convinced that you're challenging 39 without a racial motive. I think the fact that you didn't get a questionnaire. He is white.

BY MR. STEPHENSON [defense counsel]: Judge, now, I'm going to object. I have one, two, three, four, five -- this jury is almost all white, and I haven't struck these other white people and to say it's racially neutral -- I mean racially motivated because I'm striking some whites. I struck a black, and this whole jury is white.

BY THE COURT: You've exercised eight challenges and seven of them have been against white jurors.

BY MR. STEPHENSON: Yes. And look how many blacks there are. There were -- from blacks to even strike I struck one out of three that were even available. There were only three blacks even on the jury, and I struck one of those. This guy is in the Air National Guard, and I don't have anything else on him. I'm not striking every white obviously.

BY THE COURT: Any other comments, Bilbo?

BY MR. MITCHELL [district attorney]: No, sir.

BY THE COURT: Well, David, I'm not satisfied that it's motivated by some other reason other than race. I'm not going to let you challenge number 39.

Christian argues on appeal that the court deprived him of his right to due process of law in not allowing him to strike juror 39. He argues that he should not have been required to give a reason for the strike without the State first making a prima facie showing of discrimination. He also argues that even if the State could have shown a pattern of discrimination, that his reasons were not racially motivated and should have been allowed.

A challenge to a peremptory strike necessitates a 3-step process. First, the party objecting to the other side's strike must establish a prima facie case of purposeful discrimination in the selection of jury members. Second, should the showing be made, the striking party then has the burden to state a racially neutral explanation for the challenged strike. *Lester v. State*, 692 So. 2d 755, 793 (Miss. 1997). If a racially neutral explanation is offered, the other side can rebut the explanation. *Id.* Finally, the trial court must make a finding of fact to determine if the defendant has proved purposeful discrimination. *Id.*

The trial judge's finding of purposeful discrimination will not be disturbed on appeal unless it was clearly erroneous. *Id.* citing *Lockett v. State*, 517 So. 2d 1346, 1349 (Miss. 1997).

The Mississippi Supreme Court has held that a trial judge does not have the authority to invoke a *Batson* hearing on his own initiative. *Stewart v. State*, 662 So. 552, 559 (Miss. 1995). In *Stewart*, the court reversed a trial court's ruling to deny the use of a peremptory challenge where the judge erroneously required each party to give race neutral reasons with each challenge without requiring the opposing party to make a prima facie case of discrimination. *Id.* The court held that the trial court's failure to place the initial burden on the State to establish a prima facie case of racial discrimination was reversible error. *Id.*

The defense argues this case is controlled by *Stewart*. That is incorrect. The trial court here initiated the correct process. The State named the jurors that it wished to strike peremptorily; the court turned to the defense to determine if there were any objections and there were none. Then the defense named the first juror that it wished to strike and started to give reasons for doing so. The court attempted to stop him from stating reasons until the State raised an objection. As we have quoted, the defense interrupted the judge and said that he wished to give explanations as he went along. Thus Christian cannot complain here that the trial court permitted him to do just what he insisted upon doing. The prima facie showing is a threshold to cross before a court may require that reasons for a strike be given. If the defense insists on waiving this threshold requirement, even after the court tried to stop him, no prima facie showing, is needed. We turn to whether the explanation itself is racially neutral, or even if it is, whether the court was on solid ground in finding the reason pretextual.

The defendant offered two race-neutral reasons for striking the juror: that he did not have a questionnaire on the juror and that the juror was in the National Guard. The reason is not required to rise to the level of a "for cause" challenge, rather, it merely must be based on a juror characteristic other than race. The State then argued that the defense was just "looking for reasons." The court

pointed out that seven of the defense's eight peremptory strikes up until that time were against whites. The reason the judge disallowed the strike was stated on the record to be that he did not believe that the absence of a questionnaire was the actual reason for the strike, but that he believed there was a racial motive.

A finding on issues of racial motivation in jury selection is a "finding of fact of the sort accorded great deference on appeal." *Hernandez v. New York*, 500 U.S. 352, 353 (1991). The trial court had the benefit of observing counsel and is entitled, indeed is required, to discern actual motivations that are the essence of a holding that a stated reason was only a pretext for the real reason. The trial court was within the range of his discretion in this case in denying the peremptory strike.

II. Limiting cross-examination

One of the state's witnesses admitted on cross-examination to being a crack addict but testified that she had stopped her use of drugs a month before this armed robbery to which she was a witness. The court allowed inquiry as to whether she had been using drugs around the date of the robbery, and she denied such contemporaneous use. The court would not allow questioning as to the length of time she had used drugs prior to stopping a month before the robbery.

The defense is not arguing that the witness's ability to observe the events of the robbery was hampered by her former drug use. No relevance for the details of her drug addiction was offered other than the assumption the defense states in its brief, that the longer the witness had been a drug user the less reliable her testimony would be that she had in fact stopped using drugs. If she were still using drugs, then that would fit into part of the defense theory that the witness was engaged in a drug transaction and was not just an innocent observer of a robbery.

The defense offered no expert testimony or other evidence that would support the assumption he wishes the jury to make, i.e., if a person states that she has avoided drugs for a month, the reliability of that testimony is poor if she had been a drug user with a certain frequency for at least a certain period of time. Without saying that kind of evidence would even be admissible, absent such evidence we find no relevance for what the defense was trying to prove. In the form presented, the evidence of the testimony would have been inadmissible character evidence. M.R.E. 404.

The defense had the evidence from this witness to which they were entitled, and both sides dealt with the witness's drug addiction in their closing arguments. Defense counsel reminded the jury of her statement that she had not used drugs in a month and told them "you be the judge of that." That is the function of the jury, using relevant, admissible evidence that is not an attempt to discredit the character of witnesses. There is nothing that would stop jurors from making decisions on credibility based on knowing that the witness once had used drugs. The additional evidence the defense wanted to elicit would not have properly assisted in that decision.

The trial court did not err in restricting the cross examination of the witness regarding her cocaine addition.

THE JUDGMENT OF CONVICTION OF THE LAUDERDALE COUNTY CIRCUIT COURT OF COUNT I OF ROBBERY BY USE OF FIREARM AND SENTENCE OF TEN (10) YEARS

AND COUNT II OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY (20) YEARS WITH SENTENCES TO RUN CONSECUTIVELY WITH EACH OTHER AND ANY AND ALL OTHER SENTENCES IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO LAUDERDALE COUNTY.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND PAYNE, JJ., CONCUR.

MCMILLIN, P.J., NOT PARTICIPATING.