

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 98-KA-00609-COA**

NATHANIEL LARD A/K/A NATHANIEL DAVIS LARD A/K/A NATE LARD APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT: 02/18/1998
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: DEWITT T. ALLRED III
DISTRICT ATTORNEY: BILBO MITCHELL
NATURE OF THE CASE: CRIMINAL - FELONY
TRIAL COURT DISPOSITION: 02/18/1998: DELIVERY OF COCAINE: SENTENCED TO
SERVE A TERM OF (30) YEARS IN THE CUSTODY OF
THE MDOC AND PAY COURT COSTS OF \$246 AND A
\$10,000 FINE; SENTENCE SHALL BE SERVED
CONSECUTIVELY TO THE SENTENCE IMPOSED ON
CAUSE NO. 197-91, LAUDERDALE COUNTY CIRCUIT
COURT;
DISPOSITION: AFFIRMED AND REMANDED FOR A BATSON
HEARING - 8/10/99
MOTION FOR REHEARING FILED:
CERTIORARI FILED:
MANDATE ISSUED: 10/26/99

BEFORE KING, P.J., PAYNE, AND THOMAS, JJ.

KING, P.J., FOR THE COURT:

¶1. Nathaniel Lard was convicted of the delivery of cocaine in the Circuit Court of Lauderdale County and sentenced to serve a term of thirty years in the custody of the Mississippi Department of Corrections. This

sentence was to run consecutively with an earlier sentence imposed by the Lauderdale County Circuit Court. Lard was ordered to pay courts costs in the amount of \$246 and a \$10,000 fine. Aggrieved, Lard has appealed and assigned the following issues for resolution by this Court, as taken verbatim from his brief:

1. Did the trial court err in failing to require the State to give a race-neutral reason for the exclusion of a black juror?

2. The court erred in admitting evidence of flight.

¶2. Finding Lard's first issue to be well-taken, this Court remands this matter to the trial court to conduct a *Batson* hearing. If upon remand the trial court determines a *Batson* violation occurred, it is directed to grant a new trial. If it finds no violation, it is directed to certify the same to this Court along with a copy of the record.

Relevant Facts

¶3. Nathaniel Lard was indicted by the Lauderdale County Grand Jury for the sale of cocaine, which was alleged to have occurred on November 9, 1990. On January 2, 1997, Lard was arrested on this charge and tried on February 17th and 18th of 1998.

¶4. During voir dire, the State exercised a peremptory challenge against one of the two black potential jurors presented to Lard in the first panel. When the State exercised the first challenge against Juror Fifty-Two, Lard was instructed by the trial judge to "state [any objection] now or forever hold your peace." In response to that admonishment, Lard made a *Batson* challenge to the use of the challenge because the State sought to strike one of the only three black potential jurors present on the panel.⁽¹⁾ The trial judge found that Lard failed to establish a *prima facie* case of purposeful racial discrimination and allowed the State's challenge.

¶5. The State challenged the only remaining black potential juror, Juror Thirty-Seven. Lard again made a *Batson* objection and stated "they've now struck [sic] 66 percent -- actually 75 percent because one of them was excused for cause." The trial judge found that Lard had at that point established a *prima facie* case of purposeful racial discrimination and required the State to come forth with a race-neutral reason for the use of the challenge.

¶6. The State responded that Juror Thirty-Seven had previously served on a hung jury and that it was not in the State's best interests that she serve on the jury. The trial judge found the State's proffered reason to be "a non-pretextual [sic], racially-neutral reason" and allowed the use of the challenge.

¶7. Then, Lard inquired whether the State would be required to offer a race-neutral reason for the peremptory challenge exercised against Juror Fifty-Two. The trial judge responded that he would not require the State to give a explanation for the use of the challenge made against Juror Fifty-Two because he did not previously "detect" a *prima facie* case of a "racial motive."

1. DID THE TRIAL COURT ERR IN FAILING TO REQUIRE THE STATE TO GIVE A RACE-NEUTRAL REASON FOR THE EXCLUSION OF A BLACK JUROR?

¶8. Lard argues that the trial court erred in failing to require the State to offer a race neutral reason for its use of a peremptory strike against Juror Fifty-Two after having subsequently found *prima facie* evidence of

improper racial motives.

¶9. The State suggests that this case presents a question of first impression under Mississippi law. To aid this Court in resolution of this case, the State cites an opinion of this Court, *Shelton v. State*, 728 So.2d 105 (Miss. Ct.App., 1998)⁽²⁾. While *Shelton* touched upon this issue, it does not directly address the issue.

¶10. The State contends that there exists confusion among the trial judges over the application of case law as opposed to URCCC 4.05. Uniform Circuit and County Court Rule 4.05 does not supplant United States Supreme Court decisions on federal constitutional law. To the extent that Rule 4.05 may be in conflict with such, it must fail. Once a *prima facie* case is established the State must give race-neutral explanations for the use of all strikes, not just that one deemed to trigger the *prima facie* case. This, of necessity, required that the trial judge request from the State a race-neutral reason for its peremptory challenge against Juror Fifty-Two.

¶11. In order that our trial courts might be instructed on this matter, we hold that where a defendant (1) properly objects and (2) establishes a *prima facie* case of racial motivation in the exercise of a peremptory challenge, that such objection relates back to the State's first exercise of a peremptory challenge and mandates a race-neutral explanation from the State of each person within the challenged class.

¶12. If in doing so, the trial court vacates a previously accepted challenge as an improper exercise under *Batson*, that challenge is restored and remains available for use the same as if there had never been an attempt at its exercise.

¶13. This matter is remanded for a *Batson* hearing wherein the trial court is instructed to require the State to offer a race-neutral explanation for its use of a peremptory strike against Juror Fifty-Two. If the trial court finds that the State's proffered reason for the strike successfully rebuts Lard's *prima facie* case, then the conviction must stand. However, if the trial court is unpersuaded by the State's reason then, it is instructed to conduct a new trial.

2. THE COURT ERRED IN ADMITTING EVIDENCE OF FLIGHT.

¶14. Next, Lard complains that the trial court erred in allowing inadmissible evidence of flight to be heard by the jury. In support of this argument, Lard directs the Court to the direct examinations of Glenn Knight and Warren Buchanan, both of whom were employed by the Mississippi Bureau of Narcotics on November 9, 1990.

¶15. The portion of Glenn Knight's testimony which Lard argues was improper flight evidence reads as follows:

Q. Now, after you got your arrest authority; that is, you either had an arrest warrant or after you had a capias from an indictment to arrest Nate Lard, what were the efforts of the Mississippi Bureau of Narcotics to bring -- to arrest him and bring him to court?

A. We went to trailer -

BY MR. STEPHENSON: Judge, I'm going to object if there's anything about an alleged flight in here or anything like that as being improper.

BY THE COURT: All right. Just in general terms, if he can, of the efforts without any inference of any misconduct, please.

BY MR. ANGERO: Well, Judge, I don't know how I can do that. I'm asking him -- all I can do is ask him where he went and what he did and what happened.

BY THE COURT: All right. I'll let you proceed.

. . .

A. Went to a house between Lauderdale and Toomsuba on the left going towards Toomsuba. I went to a place called the Ponderosa. It's a joint between Toomsuba and Lauderdale. Went to a joint north of Lauderdale two or three times. Went to Shuqualak, Mississippi, and met with the Chief of Police up there one time, and he had gotten away. Went to Cuba one time to --.

BY MR. STEPHENSON: Judge, I'm going to object to that and -

BY THE COURT: Well, objection is overruled.

Q. Let me ask you this question -- and I'm asking about your personal participation -- what efforts did you personally participate in to apprehend the defendant during that period of time between November the 9th and, say, the early part of 1997?

A. I personally went to Shuqualak at one time, heard he was there. I've personally gone to Lauderdale, various nightclubs that are in Lauderdale at nighttime to try to arrest him. I've flown a helicopter up to around Lauderdale around a house that he was supposed to be in hoping that when we all went up to try to apprehend him -- he had a bad habit of running.

BY MR. STEPHENSON: Object, your Honor, to that.

BY THE COURT: Sustained as to the last comment.

BY MR. STEPHENSON: Request the Judge to instruct the jury to disregard that remark, and I also ask for a mistrial.

BY THE COURT: Ladies and gentlemen, the response of the witness of "a bad habit of running," I am instructing you to disregard that response. And I need to ask you this, if you can disregard that response, would you indicate that by holding up your hand for me, please.

(JURORS RAISED HANDS.)

BY THE COURT: All right. Thank you. The record will show the jury is unanimous. Motion for a mistrial is overruled.

¶16. "It is well settled that evidence of flight or escape is admissible as an exception to Mississippi Rule of Evidence 404(b) in order to show guilty knowledge." *Davis v. State*, 722 So. 2d 143, 145 (¶6)(Miss. 1998)(citations omitted). "While evidence of flight is admissible under Rule 404(b), it must be filtered through Mississippi Rule of Evidence 403." *Id.* (citations omitted).

¶17. While the evidence offered is not proper evidence of flight, it has as its apparent purpose to place the

question of flight before the jury. Therefore, the State's contention that its attorneys would have been derelict in their duties if they had not explained the delay in arresting Lard does not pass muster. That the State did not request a flight instruction is of no consequence because the jury still heard the improper flight evidence. Because Lard's attorney made a timely objection, which was sustained by the trial judge and accompanied by an admonition to the jury to disregard that evidence, this Court finds such error to be harmless. We, therefore, find no merit in this assignment of error.

¶18. THE JUDGMENT OF THE LAUDERDALE COUNTY CIRCUIT COURT OF CONVICTION OF DELIVERY OF COCAINE AND SENTENCE TO SERVE A TERM OF THIRTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS TO RUN CONSECUTIVELY WITH THE SENTENCE IMPOSED IN CAUSE NUMBER 197-91 AND ORDER TO PAY \$246 IN COURT COSTS AND A \$10,000 FINE IS AFFIRMED AND REMANDED FOR A *BATSON* HEARING. IF UPON REMAND THE TRIAL COURT DETERMINES A *BATSON* VIOLATION OCCURRED, IT IS DIRECTED TO GRANT A NEW TRIAL. IF IT FINDS NO VIOLATION, IT IS DIRECTED TO CERTIFY THE SAME TO THIS COURT ALONG WITH A COPY OF THE RECORD. ALL COSTS OF THIS APPEAL ARE ASSESSED TO LAUDERDALE COUNTY.

McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, DIAZ, IRVING, LEE, MOORE, PAYNE, AND THOMAS, JJ., CONCUR.

1. Two black potential jurors, Jurors Fifty-One and Fifty-Two, were among the first twelve jurors presented by State. The State accepted Juror Fifty-One but challenged Juror Fifty-Two. One other black potential juror was excused for cause.
2. The trial judge who presided over *Shelton* also presided over the trial of the instant matter.