

7/1/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00552 COA

*IRENE FLEMING APPELLANT*

v.

*CITY OF YAZOO CITY PUBLIC SERVICE*

*COMMISSION APPELLEE*

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. ROBERT LEWIS GIBBS

COURT FROM WHICH APPEALED: YAZOO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT: JOHN S. KNOWLES

ATTORNEY FOR APPELLEE: JOSEPH L. MCCOY

NATURE OF THE CASE: CIVIL- TORT

TRIAL COURT DISPOSITION: JUDGMENT FOR PLAINTIFF/APPELLANT IRENE FLEMING

BEFORE McMILLIN, P.J., COLEMAN, AND DIAZ, JJ.

McMILLIN, P.J., FOR THE COURT:

Irene Fleming was awarded damages by a Yazoo County Circuit Court jury for injuries sustained when she stepped into a water meter box belonging to Yazoo City's Public Service Commission. Fleming, though she prevailed in her claim, was apparently dissatisfied with the amount of damages awarded by the jury. She appealed to this Court, seeking remand for a new trial on the basis that the trial court's denial of two of her peremptory challenges was reversible error. The challenges were denied as being improperly based upon racial considerations in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and subsequent United States Supreme Court cases addressing the issue of improper use of peremptory challenges. Yazoo City cross-appealed, complaining of the award of pre-judgment interest. This Court, in an earlier opinion, decided the cross-appeal on pre-judgment interest in favor

of Yazoo City. As to Fleming's direct appeal on the *Batson* issue, the Court temporarily remanded this case to the Yazoo County Circuit Court with directions to the trial court to make on-the-record findings as to the court's basis for disallowing the peremptory challenges.

On January 15, 1997, the trial court conducted the *Batson* hearing pursuant to the mandate of this Court and proceeded to state on the record reasons in support of its finding that two peremptory challenges by Fleming were based upon improper racial considerations.

After review of the supplemental record, we determine that the trial court did not abuse its discretion in finding the facially race neutral reasons offered by Fleming for her peremptory challenges were actually pretextual and racially motivated. Therefore, we affirm the existing judgment.

## I.

### The Legitimacy of Fleming's Peremptory Challenges

The trial court, in determining whether a party has improperly used peremptory strikes in a racially discriminatory manner, is guided by the procedure established by the Supreme Court in *Batson*. *Stewart v. State*, 662 So. 2d 552, 557 (Miss. 1995). This analysis is applicable in both criminal and civil cases. *See Edmonson v. Leeville Concrete Co.*, 500 U.S. 614, 630 (1991). First, the party objecting to the strike is required to make a prima facie showing of purposeful discrimination, *i.e.*, that "race was the criteria for the exercise of the peremptory challenge." *Stewart*, 662 So. 2d at 557. The trial court, if it finds a prima facie case of discrimination to exist, must then proceed to the second step. The court must require the party exercising the peremptory challenge to state an affirmative non-racial reason for the challenge. After inquiry, the trial court must then determine "whether the objecting party has met their [sic] burden to prove there has been purposeful discrimination in the exercise of the peremptory." *Id.* at 558. In this third step, the trial court must reject all offered reasons that are facially based upon improper racial considerations; however, the court's inquiry must also extend to the issue of whether the reasons offered, though facially unrelated to race, are merely a pretext for the true purpose of the strike, *i.e.*, to remove the potential juror because of race. *Purkett v. Elem*, 115 S. Ct. 1769, 1771 (1995).

In this case, Fleming requested race neutral reasons for peremptory strikes exercised by counsel opposite, stating that the City "just went through and struck all the black people." In response to the trial court's request for race neutral reasons for his strikes, counsel for the City stated, "Your honor, we'd be happy to, but we'd like to hear Mr. Knowles' race neutral reasons because he went through and struck all the white people." The trial judge then requested that both parties supply race neutral reasons for all jurors that had been stricken. Though not articulated by the trial court in the record, it seems evident the court was convinced that the contrasting racial makeup of the two parties' lists of challenged jurors made out a prima facie case of discrimination by both sides. On the facts of this case, we do not find that to be an abuse of discretion. The trial court, therefore, properly required both parties to state race neutral reasons for exercising their peremptory strikes. Our focus turns necessarily to the trial court's findings relative to the race neutral explanation offered by Fleming for striking the two jurors in question.

On review, this Court affords the trial court "great deference in determining whether the offered explanation under the unique circumstances of the case is truly a race neutral reason." *Stewart*, 662 So. 2d at 558. A trial judge's findings in regard to a showing of purposeful discrimination will not be reversed unless they are clearly erroneous or against the overwhelming weight of the evidence. *Stewart*, 662 So. 2d at 558 (citing *Lockett v. State*, 517 So. 2d 1346, 1349-50 (Miss. 1987)); *Davis v. State*, 660 So. 2d 1228, 1242 (Miss. 1995).

Fleming exercised her first peremptory strike on juror Dudley Baker Pillow, a white male, stating as her race neutral reason that Pillow was a self-employed farmer. Fleming also claimed that Pillow would not look at counsel and sat with his arms crossed during voir dire, and was thus, not a very receptive potential juror. The court stated that its observation of Pillow was different from that of Fleming, and that it did not perceive any lack of concern on Pillow's part. The court also found counsel's characterization that Pillow avoided eye contact to be factually inaccurate. Fleming offered no logical explanation as to how Pillow's self-employment figured in the decision to strike him. The trial court proceeded to find, on the record, that Fleming's challenge of Pillow was not actually for the reasons recited, but that the reasons offered were merely pretextual to disguise the racial motivation for the strike. The court stated that the reasons offered by Fleming were not "legitimate, nondiscriminatory reasons," and Pillow's right to serve as a juror would be violated if not placed back on the jury.

Counsel for Fleming also struck juror William S. Perry. The attorney gave as race neutral reasons Perry's age, and the fact that Perry was an insurance agent who might have "some sort of insurance dealings with these people [presumably city officials]." The trial court stated, "It is clear to the court that when called upon to give a reason for this strike, the plaintiff had to reach for one. This case does not involve insurance, and the plaintiff did not explain how an insurance agent's presence would prejudice her case." In addition, the court noted that there was no explanation offered as to how Mr. Perry's age would affect his ability to sit as a juror in the case. The court then found that the reasons offered to strike juror Perry were pretextual and placed him back on the jury. Finding that a facially neutral reason is really a pretext to disguise racial animus is essentially a subjective determination by the trial court, depending on such difficult-to-quantify matters as the demeanor of the person advancing the reason. Because of the trial court's first-hand observation of the proceeding and the attendant unique opportunity to best make these difficult assessments, such findings are viewed with great deference on appeal. *Stewart*, 662 So. 2d at 558. An appellate court may interfere only upon reaching the conclusion that the trial court was manifestly in error in its ruling. *Id.* Under this limited standard of review, we cannot find error in the lower court's holding on these two challenges. The trial court's decision appears to be in accord with the observation by the United States Supreme Court that "implausible and fantastic justifications," are likely to be "pretexts for purposeful discrimination." *Purkett v. Elem*, 115 S. Ct. at 1171. Accordingly, we affirm the judgment of the Yazoo County Circuit Court.

**THE JUDGMENT OF THE CIRCUIT COURT OF YAZOO COUNTY IS AFFIRMED.  
COSTS ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK,  
JJ., CONCUR. HERRING AND HINKEBEIN, JJ., NOT PARTICIPATING.**

