IN THE COURT OF APPEALS 5/16/95

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-01464 COA

ONNIE McKEAN 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. BILLY JOE LANDRUM

COURT FROM WHICH APPEALED: JONES COUNTY CIRCUIT COURT SECOND JUDICIAL DISTRICT

ATTORNEY FOR APPELLANT: J. RONALD PARRISH .

ATTORNEYS FOR APPELLEE: OFFICE OF ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: JEANNENE PACIFIC, GRAY BURDICK

NATURE OF THE CASE: CRIMINAL: SALE OF METHAMPHETAMINE

DISPOSITION BELOW: 10 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

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

DIAZ, J., FOR THE COURT:

Onnie McKean was indicted and convicted of the sale of methamphetamine. On appeal, McKean

argues the trial court erred in allowing the State to exercise peremptory challenges on five black jurors. We remand to the trial court for a *Batson* hearing to allow McKean an opportunity to show a prima facie case of purposeful racial discrimination by the State in its exclusion of the five black jurors.

FACTS

On March 4, 1993, the Leaf River Drug Task Force (LRDTF) was involved in an undercover drug operation in Laurel, Mississippi. Jeff Haynes, an undercover operative, went to the Rack Bar and Lounge to buy illegal controlled substances. He was successful in buying two half-grams of crystal methamphetamine from McKean and another individual.

ISSUE

The sole issue presented by McKean on appeal is whether the trial court erred in not requiring the State to provide race-neutral reasons for the striking of black jurors.

THE *BATSON* CHALLENGE

McKean argues that the trial court incorrectly allowed the State to exercise five peremptory challenges on black jurors without requiring the State to give a racially-neutral reason for these challenges. The following transpired during jury selection:

> MR. PARRISH: We would like for the record to reflect that the State's challenges S-1, 2, 3, 4, 5 are all blacks, and we move to quash the jury panel unless they can tell us a racially neutral reason for exercising those challenges that's related to the case being tried here.
>
> MR. BURDICK: Let the record reflect that the defendant is white. The State has accepted Juror No. 2 on Panel 1, a black female; the State has accepted Juror 3 on Panel 1, a black male; the State has accepted Juror 7 on Panel 1, a black male; the State has accepted Juror 12 on Panel 1, a black female; the State has accepted Juror No. 5 on Panel 2, a black female.

THE COURT: I believe Mr. Holifield was white?

MR. BURDICK: Yes.

THE COURT: Y'all just have five challenges?

MR. BURDICK: Six.

THE COURT: Let's see. I've got --

MR. BURDICK: -- I don't know how many there are, Your Honor.

THE COURT: Okay, y'all struck --

MR. BURDICK: -- 9, 10 and 11.

THE COURT: Nine, 10 and 11?

MR. BURDICK: On Panel 2.

THE COURT: You struck 2 and 3?

MR. BURDICK: Two and 3 and then Holifield.

We have accepted five blacks.

THE COURT: Motion be overruled.

The trial judge overruled the defense motion to quash the jury panel and did not require the State to give race-neutral reasons for striking the five black jurors. The State also struck a black alternate, to which defense counsel made the same motion under the *Batson* rule.

BATSON AND ITS PROGENY

A state's use of peremptory challenges to exclude members of a racially-cognizable group from the venire was addressed in the United States Supreme Court case of *Batson v. Kentucky*, 476 U.S. 79, 96, 106 S. Ct. 1712, 1722-23, 90 L. Ed. 2d 69, 87 (1986). The Court in *Batson* created a three-pronged test to determine whether the state's actions in striking from the venire members of the same racially-cognizable group as the defendant was an act of purposeful discrimination. *Batson*, 476 U.S. at 96. In 1991, the Court modified the first prong of *Batson* to, in effect, allow any defendant, regardless of race, to challenge the state's use of peremptory challenges to exclude from the venire members of a racially-cognizable group. *Powers v. Ohio*, 499 U.S. 400, 402, 111 S. Ct. 1364, 1370-73, 113 L. Ed. 2d 411, 425-28 (1991). In order to fully examine the issue presented on appeal, this Court will briefly discuss the *Batson* analysis as it led to the holding in *Powers*.

In 1986, the United States Supreme Court created a three-pronged test to be used in establishing a prima facie case of purposeful discrimination in selection of jurors:

> To establish such a [prima facie] case, the defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Batson v. Kentucky, 476 U.S. 79, 96, 106 S. Ct. 1712, 1722-23, 90 L. Ed. 2d 69, 87 (1986). The trial court should consider all relevant circumstances in determining if the defendant has made the

requisite prima facie showing of purposeful racial discrimination. *Id.* If the trial court determines that the defendant has made a prima facie showing of discrimination, the burden shifts to the State to provide a race-neutral explanation for challenging each potential black juror. *Id.* at 97. The prosecutor's reasoning need not rise to the level of justifying the State's exercise of a challenge for cause. *Id.* The defendant is then allowed to rebut the reasons offered by the prosecution. *Bush v. State*, 585 So. 2d 1262, 1268 (Miss. 1991) (citing *Taylor v. State*, 524 So. 2d 565, 566 (Miss. 1988)) . If there is no rebuttal, the court must examine only the prosecutor's reasons. *Id.* (citing *Johnson v. State*, 529 So. 2d 577, 584 (Miss. 1988)); *see also Harper v. State*, 635 So. 2d 864, 867 (Miss. 1994). The trial court then must determine if the defendant has established actual and purposeful discrimination. *Batson*, 476 U.S. at 98. The trial court must make an on-the-record factual determination of the merits for each of the State's race-neutral reasons for exercising peremptory challenges against potential jurors. *Hatten v. State*, 628 So. 2d 294, 298 (Miss. 1993).

The Court has further broadened the first prong of the *Batson* test by holding that a white defendant now has standing to challenge the exclusion of black jurors. *Powers v. Ohio*, 499 U.S. 400, 402, 111 S. Ct. 1364, 1370-73, 113 L. Ed. 2d 411, 425-28 (1991); *see also Nixon v. State*, 641 So. 2d 751, 755 (Miss. 1994), *cert. denied*, 115 S. Ct. 922, 130 L. Ed. 2d 802 (1995); *Hansen v. State*, 592 So. 2d 114, 127 (Miss. 1991), *cert. denied*, 112 S. Ct. 1970, 118 L. Ed. 2d 570 (1992). "In essence, the first factor required by *Batson* has been eliminated." *Bush v. State*, 585 So. 2d 1262, 1267 (Miss. 1991).

The Mississippi Supreme Court has adopted the *Batson* test and has recognized the importance of credibility issues raised by a defendant's *Batson* challenge:

> We today follow the lead of other courts who have considered this issue and hold that a trial judge's factual findings relative to a prosecutor's use of peremptory challenges on minority person's are to be given *great deference and will not be reversed unless they appear clearly erroneous or against the overwhelming weight of the evidence.*

Simon v. State, No. 91-DP-00353-SCT, slip op. at 35 (Miss. Feb. 9, 1995) (quoting *Lockett v. State*, 517 So. 2d 1346, 1350 (Miss. 1987) (emphasis added), *cert. denied*, 487 U.S. 1210 (1988). The *Lockett* opinion also listed in its appendix several examples of acceptable race-neutral reasons that the State could use to justify using its peremptory challenges. *Lockett*, 517 So. 2d at 1356-57. "As long as the trial court was within its authority when it determined that the State articulated a 'neutral, non-race based explanation,' we will not reverse." *Willie v. State*, 585 So. 2d 660, 672 (Miss. 1991) (quoting *Chisolm v. State*, 529 So. 2d 635, 639 (Miss. 1988)). Mississippi trial courts are given great deference in their factual findings regarding a *Batson* challenge. *Willie*, 585 So. 2d at 672; *see also Carr v. State*, No. 90-DP-01106-SCT, slip op. at 38 (Miss. Feb. 2, 1995). The court has also reminded trial judges "of the danger in failing to allow counsel to place sufficient evidence in the record either proving or rebutting *Batson* issues." *Griffin v. State*, 607 So. 2d 1197, 1203 (Miss. 1992). The State should give full and complete responses when their peremptory challenges are subjected to a *Batson* review. *Id.* "Race-neutral explanations satisfy *Batson*, but only when they are not a smokescreen behind which the State is, in reality, exercising discriminatory challenges." *Id.*

BATSON APPLIED

In the present case, McKean is white and the five potential jurors whom the State peremptorily struck are black. The first prong of the *Batson* test was met under the *Batson-Powers* holding. McKean, as a white defendant, had standing to challenge the exclusion of prospective black jurors.

The second prong of *Batson* states that the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." McKean also met the second prong of the *Batson* test. The Mississippi Supreme Court, on at least three occasions, has stated that a defendant met the first *and* second prongs of the *Batson* test. *See Carr v. State*, No. 90-DP-01106-SCT, slip op. at 38 (Miss. Feb. 2, 1995); *Porter v. State*, 616 So. 2d 899, 907 (Miss. 1993); *Govan v. State*, 591 So. 2d 428, 430 (Miss. 1991) (stating the defendant was entitled to rely on the truism of the second *Batson* prong). In each of these cases, the defendant was black and the challenged jurors were also black. These decisions might be read to mean that the second prong is met only when both the defendant and excluded jurors are black. However, considering both the *Powers* decision and the language of the second *Batson* prong itself, we hold that McKean is able to rely on the truism of the second prong, even though she is of a different race than the challenged black jurors. She is still entitled to rely on the fact that a peremptory challenge is a jury selection practice that allows those who are of a mind to discriminate. Therefore she met the second prong, even though she is white and the challenged jurors are black.

The third prong of the *Batson* test requires a finding that the facts and circumstances of the State's exercise of peremptory challenges created an inference of purposeful racial discrimination. The trial court failed to give McKean an opportunity to show that the State used peremptory challenges to purposefully exclude these five jurors because they were black. She must be given a chance to make a prima facie showing of racial discrimination. The State can then offer race-neutral reasons for its peremptory challenges if a prima facie case of discrimination has been made that the State excluded jurors on the basis of their race.

A *BATSON* HEARING REMAND

The most recent Mississippi Supreme Court decision on the issue of a remand for a *Batson* hearing is *Thorson v. State*, No. 90-DP-00015-SCT (Miss. Dec. 8, 1994). In *Thorson*, there were thirteen blacks on the venire, seven of whom were challenged by the State. *Thorson*, No. 90-DP-00015-SCT, slip op. at 20 (Miss. Dec. 8, 1994). Four blacks ultimately sat on the jury, and two blacks were alternates. *Id.* The trial court overruled Thorson's motion to require the State to give race-neutral reasons for the challenges, holding that *Batson* did not apply, since the defendant was not of a minority class controlled by *Batson*. *Id.* On appeal, the Mississippi Supreme Court held that it was error for the trial court to fail to inquire into whether the State had race-neutral reasons for peremptorily challenging those blacks. *Id.* The court held that Thorson was entitled to a *Batson* hearing and remanded the case solely for that purpose. The *Thorson* majority did not address the issue of whether Thorson had raised the inference that the State used its peremptory challenges to exclude blacks from the venire based on their race, yet the majority held that the State was required to offer racially neutral reasons for excluding the seven blacks from the venire. *Id.*

Under the authority of *Thorson*, this matter is remanded for a *Batson* hearing to allow McKean to

establish a prima facie case of purposeful racial discrimination. McKean must show that all three prongs of *Batson* have been met to establish a prima facie case. Particularly important is the requirement that she raise an inference of purposeful racial discrimination. If successful, the State must present neutral, non-race-based reasons for each challenge. The appellant can then have the opportunity to rebut these reasons. If the trial court then finds purposeful discrimination violating *Batson*, a new trial must be ordered. If no impermissible discrimination is found, the trial court should certify the case by opinion and order, along with the record of the hearing and finding of fact, to the Mississippi Court of Appeals.

In the future, to avoid the possibility of remand for a *Batson* hearing, a trial judge who overrules a *Batson* challenge should state, on the record, whether the facts and circumstances show an inference of purposeful racial discrimination and, thus, if a prima facie case has been established. The prosecutor might also present (for the record) the State's race-neutral reasons for its exclusion of jurors, regardless of whether or not a prima facie case has been shown. If a prima facie case has been established and the State is required to provide reasons for its strikes, the judge must then allow the defense to rebut any reasons given. Finally, the court should rule on the record as to whether or not purposeful discrimination has been shown. This process would make clear whether or not the *Batson* criteria were met and allow the State to proffer its race-neutral reasons for striking any juror.

CONCLUSION

This Court finds that this case must be remanded to the trial court to allow McKean the opportunity to establish a prima facie case of purposeful racial discrimination under the three-pronged test of *Batson v. Kentucky*.

THIS MATTER IS REMANDED TO THE JONES COUNTY CIRCUIT COURT FOR A PERIOD OF NINETY (90) DAYS WITHIN WHICH THE TRIAL COURT IS DIRECTED TO CONDUCT A *BATSON* HEARING. IF THE TRIAL COURT FINDS DISCRIMINATION IN JURY SELECTION IN VIOLATION OF THE REQUIREMENTS OF *BATSON*, THE TRIAL COURT IS DIRECTED TO ORDER A NEW TRIAL. IF A NEW TRIAL IS ORDERED OR THE CASE IS OTHERWISE FULLY DISPOSED OF AT THE TRIAL LEVEL, THE TRIAL COURT SHALL FORWARD TO THIS COURT A CERTIFIED COPY OF THE ORDER FOR A NEW TRIAL OR OTHER DISPOSITION. IF, AFTER THE *BATSON* HEARING, THE TRIAL COURT DETERMINES THERE WAS NO DISCRIMINATION, THE TRIAL JUDGE SHALL CERTIFY THE MATTER TO THIS COURT WITH A TRANSCRIPT OF THE *BATSON* HEARING, WITH FINDINGS OF FACT STATED ON THE RECORD OR SEPARATELY ENTERED IN WRITING. UPON REVIEW OF THE ORDER AND TRANSCRIPT OF THE *BATSON* HEARING, THIS COURT WILL RESUME PROCEEDINGS ON APPEAL. IF ADDITIONAL TIME IS NEEDED TO CARRY OUT THIS JUDGMENT, THE TRIAL COURT SHALL CERTIFY TO THIS COURT THE REASON FOR THE NEED AND LENGTH OF ADDITIONAL TIME NEEDED.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, MCMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.