

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable R. Ferrell Cothran, Circuit Court Judge

CHRISTOPHER CAMPBELL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000755

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred finding defense counsel was not ineffective for failure to challenge the composition of the jury where there were four black jurors used for jury selection and the state used two of their three peremptory strikes to strike black jurors?

STATEMENT

A Charleston County grand jury indicted petitioner for armed robbery and possession of a firearm during the commission of a violent crime. App. 521-24. On October 21, 2014, petitioner was tried before the Honorable William J. Young and a jury. App. 1. Jason King and Luke Malloy represented petitioner. App. 1. Assistant solicitors, Alexander Ziegler and Benjamin Simpson represented the state. App. 1.

The jury found petitioner guilty as indicted. App. 397, ll. 5-14. Judge Young sentenced petitioner to concurrent terms of eighteen years' imprisonment for armed robbery and five years' imprisonment for possession of a firearm during the commission of a violent crime. App. 407, ll. 1-7.

Thereafter, petitioner filed an application for PCR. App. 415-26; 433-63. On April 8, 2022, an evidentiary hearing was held before the Honorable R. Ferrell Cothran, Jr. App. 437-87. James Falk represented petitioner and Lauren Mims represented the state. App. 437.

On April 18, 2023, Judge Cothran signed an order denying PCR. App. 488-520. The court found testimony of defense counsel was credible and found petitioner failed to show counsel's failure to challenge the composition of the jury was deficient or resulted in prejudice to petitioner. App. 505-06.

This petition follows.

ARGUMENT

The PCR court erred finding defense counsel was not ineffective for failure to challenge the composition of the jury where there were four black jurors used for jury selection and the state used two of their three peremptory strikes to strike black jurors?

Relevant facts

Out of pool of fifty-one jurors there was only one black male used for jury selection.¹ App. 409-14. The solicitor struck three potential jurors out of five. App. 25-29; 409. The solicitor's first strike was juror 393 a black male. App. 25, ll. 21-25; 409. The solicitor's second strike was juror 139 a black female. App. 28, ll. 15-17; 409. The solicitor's final strike was juror 1 a white male. App. 30, ll. 2-5; 409.

Defense counsel struck six potential jurors. App. 409. Defense counsel's first strike was juror 99 a white male. App. 22, ll. 16-21; 409. Counsel's second strike was juror 196 a white female. App. 22, l. 25-23, l. 5; 409. His third strike was juror 83 a black female. App. 23, ll. 17-22; 409. Counsel's fourth strike was juror 104 a white male. App. 24, ll. 10-15; 409. His fifth strike was juror 245 a white female. App. 24, ll. 18-23; 409. Counsel's final strike was juror 317 a white female. App. 26, l. 21-27, l. 2; 409. Defense counsel did not make any challenge to the composition of the jury at the end of jury selection. App. 31, l. 22-32, l. 3.

At the evidentiary hearing defense counsel testified that there were only four black persons used for jury selection. App. 444, ll. 5-7. Counsel agreed the solicitor exercised two strikes on two of four black individuals on the panel. App. 448, ll. 1-4. Counsel acknowledged he did not challenge the composition of the jury in petitioner's trial. App. 448, ll. 5-25. Counsel

¹ Petitioner is a black male. The entire pool included only three black males. App. 409-11.

explained he probably did not think it was “worth making a *Batson*² motion and possibly reshuffling the whole jury” and recollected he must have thought the jury selected was as good as he was going to get. App. 448, ll. 13-23; 471, ll. 17.

Counsel’s testimony regarding jury selection focused on his own strategy in selecting a jury. App. 444-48. Counsel declared he had struck juror 83, a black female, because she had tried to get out of jury service earlier in the day and because she donated to “the Fraternal Order of Police.” App 445, ll. 6-15. Continuing his explanation of striking juror 83, counsel declared “diversity in a jury is a good thing and having a diverse jury is good for a defendant,” but not “at the expense of someone who might be bias for the police.” App. 445, ll. 16-22.

Defense counsel also testified that he might have struck juror 393, a black male, if the state had not struck him. App. 446, ll. 1-25. He explained juror 393 had been selected as a juror for a trial earlier in the week and convicted a person the day before.³ Additionally, juror 393 was a cook which counsel did not think would bode well in petitioner’s case because he was accused of armed robbery of a restaurant. App. 446, ll. 1-4; 447, ll. 8-17. He acknowledged he did not know why the state struck juror 393, a black male, or juror 139, a black female. App. 447, ll. 18-24.

Discussion

For an applicant to be granted PCR because of ineffective assistance of counsel, he must show his counsel failed to render reasonably effective assistance under prevailing professional norms and he was prejudiced by his counsel's ineffective performance. *Strickland v. Washington*, 335 S.C. 586 (1999). To prove prejudice, the applicant must show but for counsel's

² *Batson v. Kentucky*, 476 U.S. 79 (1986).

³ The trial transcript does not indicate that any jurors had been selected for a prior trial.

errors, there is a reasonable probability the result at trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

It is true “jury selection is a process that inherently falls within the expertise and experience” of counsel. *Palacio v. State*, 333 S.C. 506, 517, 511 S.E.2d 62, 67 (1999). Additionally, “a criminal defendant has no right to any particular jury, but only a right to a trial by a competent and impartial jury.” *Id.* However, that does not override or undo the protections of the Equal Protection Clause of the Fourteenth Amendment.

Defense counsel was ineffective for failure to make a *Batson* challenge after jury selection. Counsel did not articulate any strategy regarding his failure to challenge the jury. Instead, counsel testified regarding his own reasons for striking certain jurors, which while valid, did not explain any strategy for failing to challenge the composition of the jury. The closest thing to an explanation given by defense counsel was that he was “content with the jury” and if *Batson* had been granted, he would have to “start picking all over again.” App. 471, ll. 2-5.

Based on counsel’s testimony at the evidentiary hearing, counsel did not even consider the possibility of a *Batson* challenge. *See Foye v. State*, 335 S.C. 586, 592, 581 S.E.2d 265, 268 (1995) (Counsel’s performance did not constitute “valid strategy” where counsel did not even consider the question and thus failed to use discretion in employing an appropriate strategy.). Counsel admitted multiple times that he did not know why the state struck two black jurors. The solicitor’s use of strikes appear, on their face, to have been racially motivated but because there was no *Batson* challenge the reasons for them were not examined.

The United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the prosecution from striking potential jurors on the basis of race. *Batson v.*

Kentucky, 476 U.S. 79 (1986). In a subsequent opinion, the United States Supreme Court held that a criminal defendant may not engage in racial discrimination in exercising peremptory strikes. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992). Two years later, the United States Supreme Court recognized that the Fourteenth Amendment also prohibits the striking of a juror on the basis of gender. *J.E.B. v. Alabama*, 511 U.S. 127, 146 (1994).

The Supreme Court has long recognized “that denying a person participation in jury service on account of his race unconstitutionally discriminates against the excluded juror.” *Georgia v. McCollum*, 505 U.S. 42, 48 (1992). The Court devised *Batson* and its procedures “to remedy the harm done to the dignity of persons and to the integrity of the courts.” *Id.* (internal quotation omitted). When a party strikes a juror based on race, “there can be no doubt that the harm is the same – in all cases, the juror is subjected to open and public racial discrimination.” *Id.* at 49.

When jury selection procedures purposefully exclude African-Americans, public confidence in the criminal justice system is undermined. *Id.* “Be it at the hands of the state or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice – our citizens’ confidence in it.” *Id.* at 49-50 (internal quotation omitted).


Defense counsel was deficient for failure to challenge to composition of the jury by making a *Batson* motion at the conclusion of jury selection. There was a pool of fifty-one persons called for jury duty that day, including six black females and three black males. Out of that pool there was only one black male used for jury selection, juror 393. The solicitor struck the only black male used for jury selection. Additionally, the solicitor struck juror 139, a black female.

Petitioner’s jury consisted of no black males, the racial and gender group within which

petitioner belonged, due to the solicitor's use of his peremptory strikes to eliminate the racial and gender group to which petitioner belonged. Petitioner was prejudiced in violation of the Equal Protection Clause of the United States Constitution.

CONCLUSION

By reason of the foregoing argument, a writ of certiorari should be issued to allow full briefing on the issue.


Sarah E. Shipe
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of August, 2023.