

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY

Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2013-000207

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DEC 18 2017

SC Court of Appeals

THE STATE, RESPONDENT,

v.

RAYMOND YOUNG, APPELLANT.

RETURN

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The Respondent's argument misperceives this Court's ruling. The Respondent's petition rests on "any evidence" and "deference" arguments. In doing so the Respondent overlooks the fact that "any evidence" is not the standard of review, and deference is not required or even appropriate where the trial court failed to apply the proper law. "Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). The judge's findings regarding purposeful discrimination are given great deference and will not be set aside by this court unless clearly erroneous. Evins, 373 S.C. at 416, 645 S.E.2d at 909-10. "This standard of review, however, is premised on the trial court following the mandated procedure for a Batson hearing." State v. Cochran, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct.App.2006). "[W]here the assignment of error is the failure to follow the Batson hearing procedure, we must answer a question of law. When a question of law is presented, our standard of review is plenary." Id. at 312-13, 631 S.E.2d at 297. State v. McMillan, 400 S.C. 298, 734 S.E.2d 171 (S.C. App., 2012). In this case, the issue is whether or not the trial court properly applied the law as to the third stage of its Batson analysis. This is a question of law. Plenary review is therefore appropriate.

This case involves all three steps of the Batson analysis. The trial court erred in the third step. Upon reaching the third step of the analysis the trial court stated: "I'm going to rely on State versus Tucker and Peyton versus Kirk Kearse (ph) that I don't see a discriminatory intent inherent in the proponent's explanation and so I believe those cases *require me to find the reason offered to be deemed race neutral.*" *empahsis added.* As this Court's opinion recognized, the trial court failed to properly apply the law in the third step of its Batson analysis.

Step three of the Batson analysis requires the court to carefully evaluate whether the party asserting the Batson challenge [the defense in this case] has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. State v. Green, 655 So. 2d 272, 290 (La. 1995); *see also* Batson, 476 U.S. at 93-94 (stating that the court must consider "the totality of the relevant facts," including both direct and circumstantial evidence). During step three, the party asserting the Batson challenge must point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race. Edwards, 384 S.C. at 508-09, 682 S.E.2d at 822; *see also* Haigler, 334 S.C. at 629, 515 S.E.2d at 91. In doing so, the party proves that the "originally neutral reason was . . . a pretext because it was not applied in a neutral manner." State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989). State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (2014); State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). Pretext generally will be established by showing that similarly situated members of another race were seated on the jury. Purkett, *supra*; Adams, 322 S.C. at 124, at 123, 470 S.E.2d at 372. State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006); Payton v. Kearse, 495 S.E.2d 205, 329 S.C. 51 (S.C., 1996); State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999). In the present case the solicitor struck three black jurors, two on the stated basis that they lived in an area where some of the witnesses lived. The defense then showed that the solicitor has seated at least one white juror that also resided in an area where some of the witnesses lived. The defense therefore established an uneven application of the reason stated for the strike of two black jurors.

Although the record shows an uneven application of the state's stated reason for the

strikes, the uneven application of a neutral reason does not automatically result in a finding of invidious discrimination if the strike's proponent provides a race-neutral explanation for the inconsistency. See State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995). The explanation must only be "clear and reasonably specific such that the [party asserting the Batson challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the evidence with a bearing on it." Giles, 407 S.C. at 21-22, 754 S.E.2d at 265; see., e.g., id. at 17, 23, 754 S.E.2d at 262, 265-66 (finding that a defendant's explanation that he "did not feel the [struck] jurors were right for the jury," while "technically, semantically and intellectually racially neutral," would not allow the circuit court to "assess the plausibility of the proffered reason for striking the potential jurors")." State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (S.C., 2014). In this case the solicitor failed to clearly articulate a basis for the uneven treatment of similarly situated black and white jurors.¹ This prevented the defense from having a full and fair opportunity to demonstrate pretext. It also prevented the trial judge from fully assessing the plausibility of the solicitor's statements.

Unfortunately, the trial court did not attempt to fully assess the plausibility of the solicitor's stated reasons, and in failing to do so it deviated from the Purkett-Adams procedure in the third step of the Batson analysis. The third step in the Batson analysis required the trial court to conduct an assessment of the state's reason for distinguishing between the addresses of the white juror seated and those of black jurors struck. Rather than considering the state's failure to

¹Black jurors 81 and 215 were both struck for the reason that each lived in an area near witnesses. White juror 106 was also lived in an area near witnesses and was seated. While the State argues about distances and location of neighborhoods on appeal, none of those 'facts' were stated by the solicitor during the hearing, nor are they in the record on appeal.

clearly articulate a race neutral distinction between the addresses of the jurors, the court instead held that it was bound to find the reason offered "to be deemed race neutral" under Tucker and Payton unless discrimination was inherent in the explanation. Although this would be correct for the initial inquiry under step two of the Batson analysis, this was a misstatement of the law as to the analysis required under step three.

Once a neutral reason is shown to have been applied in an uneven manner the third step in the Batson analysis requires that the proponent of the strike articulate a valid reason for the uneven treatment and, that the trial judge assess that reason in light of all of the relevant evidence. In the third step of the analysis, the scrutiny of the trial judge and review of all evidence is critical. Here the "persuasiveness of the justification becomes relevant." Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995); State v. Edwards, 649 S.E.2d 112, 374 S.C. 543 (S.C. App., 2007). If the trial judge's analysis is merely to look for discrimination inherent in the solicitor's explanation rather than to assess the explanation in light of all of the evidence, then the law has been misapplied. As this Court correctly points out, the trial court failed to properly conduct the third step of the Batson analysis.

Had the trial court properly applied the proper analysis it would have held that the state failed to provide a valid reason for the uneven treatment between similarly situated white and black jurors. The solicitor failed to articulate why she had a problem seating African American jurors that might live near some of the witnesses, but not with a white juror that lived in an area near witnesses. Although claiming that she had concerns about some addresses but not others, the solicitor specifically stated that she was unfamiliar with the area: "I don't know the geography of Greenville County with enough sophistication to appreciate the minor details of the community

the basis of my strike, Judge." R. 66, ll, 7-9. The solicitor's response clearly failed to explain why one address of two black jurors which were near witnesses, the purported basis of the strikes, was any more or less problematical than the white juror's address which was also near witnesses. Having shown unequal treatment of similarly-situated jurors in this case, the state was required to articulate an explanation that would allow the court to make a determination in light of all evidence bearing on the issue. The state's failure to adequately explain with sufficient clarity to allow judicial review of its reasons negates any otherwise race neutral basis given for the strikes. See State v. Easler, 322 S.C. 333, 471 S.E.2d 745 (S.C. App., 1996) (where defense counsel cited demeanor, an otherwise valid basis for a strike, but failed to point out any specific examples of why he disliked the juror's demeanor.)

It is most important to note that the Solicitor's failure to articulate any difference between the addresses prevented the defense from further demonstrating that the Solicitor's explanation was pretextual.² "The explanation must only be "clear and reasonably specific such that the [party asserting the Batson challenge] has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty [in step three] to assess the plausibility of the reason in light of all the evidence with a bearing on it." Giles, 407 S.C. at 21-22, 754 S.E.2d at 265; *see., e.g., id.* at 17, 23, 754 S.E.2d at 262, 265-66 (finding that a defendant's explanation that he "did not feel the [struck] jurors were right for the jury," while "technically, semantically and intellectually racially neutral," would not allow the circuit court to " assess the plausibility of

²The State's argument now on appeal for the first time as to the difference in distances any of the jurors lived from the Defendant or witnesses is improper as it purports to make statements of fact that are not in the record. The failure of the trial court to conduct a thorough factual inquiry, combined with the vague nature of the solicitor's statements prevented the defense from dispelling the arguments the State now asserts on appeal.

the proffered reason for striking the potential jurors")." State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (S.C., 2014). In this case the solicitor simply failed to articulate any coherent reason for differentiating between addresses of the jurors at issue.

In State v. Oblesby the court stated: "The reason given for striking the black male was sufficiently neutral to withstand the Batson inquiry. The reason given for striking the black females was also neutral. The solicitor negated his reason, however, when he seated a white female juror who was also a patient of the doctor." State v. Oglesby, 379 S.E.2d 891, 298 S.C. 279 (S.C., 1989). Even if the stated basis for the strikes of the African American jurors in the present case appeared otherwise neutral, any validity is negated by the unexplained disparate treatment of at least one similarly situated white juror.

Similarly, in State v. Stewart, 288 S.C. 232, 341 S.E.2d 789 (1986), although the State offered a racially-neutral explanation for striking African American jurors, the court held that it negated the reason by seating similarly-situated Caucasian jurors. *See* Miller-El v. Dretke, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at Batson's third step."); State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989) (finding the solicitor negated his neutral reason when he seated a white female juror who was similarly situated); *id.* ("In this case, an examination of the circumstances shows that the solicitor's originally neutral reason was proven to be a pretext because it was not applied in a neutral manner."). Based on the disparate treatment of white jurors, the strikes in Stewart were held impermissible. Here of course, the trial court never reached an analysis of all of the evidence to determine whether there was purposeful

discrimination.

The determination of whether the minimum quantum of evidence has been produced under this prong is flexible, for the trial court's ruling turns on an examination of the totality of the facts and circumstances in the record, including the credibility and demeanor of the strike's proponent, and the plausibility of a neutral, but otherwise unpersuasive, reason. Casey, 325 S.C. at 452, 481 S.E.2d at 172. In deciding whether the opponent of a strike has carried the burden of persuasion, a court must undertake a sensitive inquiry into the circumstantial and direct evidence of intent. Haigler, 334 S.C. at 629, 515 S.E.2d at 91. A strike must be examined in light of the circumstances under which it is exercised, including an examination of the explanations offered for other strikes. *Id*; State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006). Here the trial court failed to conduct the proper totality analysis or consider all of the relevant facts in record, looking instead only for any discrimination inherent in the solicitor's explanation.

An examination of the facts and circumstances in the present case shows that the solicitor's stated basis, even if originally appearing neutral was proven to be a pretext because it was not applied in a neutral manner. *See* State v. Oglesby, 379 S.E.2d 891, 298 S.C. 279 (S.C., 1989); Garrett v. Morris, 815 F.2d 509 (8th Cir.1987) *cert. denied*, --- U.S. ---, 108 S.Ct. 233, 98 L.Ed.2d 191 (1987) (prosecutor's asserted reason for excluding black prospective jurors was a pretext for racial discrimination in light of prosecutor's decision not to strike white jurors who differed in no significant way from black jurors who were excused). The same was true in Oglesby where the solicitor was adamant in his articulation of his reason for striking the black females, yet he did not strike a white female with the same characteristic. There the court said: "If the State were allowed to prevail despite the application of such blatantly inconsistent

standards, Batson would be left without substance. Accordingly, appellant's conviction is reversed and this case is remanded for a new trial." State v. Oglesby, 379 S.E.2d 891, 298 S.C. 279 (S.C., 1989).

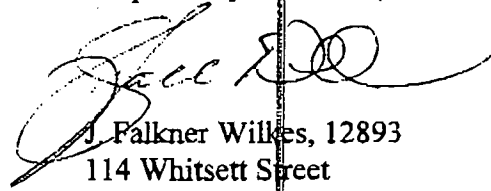
Here the court failed to consider the solicitor's failure to articulate any basis for distinguishing between the addresses of jurors, the purported basis of the strikes. Step three of the analysis requires the trial court to carefully evaluate all of the evidence to determine whether the party asserting the Batson challenge has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for a discriminatory intent. State v. Green, 655 So.2d 272, 290 (La.1995); *see also* Batson, 476 U.S. at 93-94, 106 S.Ct. 1712 (stating that the court must consider "the totality of the relevant facts," including both direct and circumstantial evidence). During step three, the party asserting the Batson challenge should point to direct evidence of racial discrimination, such as showing that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race. Edwards, 384 S.C. at 508-09, 682 S.E.2d at 822; *see also* Haigler, 334 S.C. at 629, 515 S.E.2d at 91. In doing so, the party proves that the "originally neutral reason was ... a pretext because it was not applied in a neutral manner." State v. Oglesby, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989). State v. Inman, 409 S.C. 19, 760 S.E.2d 105 (S.C., 2014). Here the defense established the pretextual nature of the state's strikes by showing uneven treatment between similarly situated jurors.

The state was provided the opportunity yet failed to provide a race neutral reason for the uneven treatment of similarly situated jurors. The solicitor stated that the black jurors were struck because each lived near witnesses, yet a white juror that lived near witnesses was seated. When challenged, the solicitor could not articulate any meaningful difference between the three jurors.

The only difference discernable from the record between the jurors was that the two jurors that were struck were black and the one that was seated was white. While the state argues that one of the black jurors was an alternate, that fact does not affect the outcome of the case. "Once it is found that the exercise of even one peremptory challenge is racially motivated, this in and of itself gives rise to an inference of discriminatory purpose and violates the mandates of Batson, which explicitly prohibits the State from exercising strikes in a racially discriminatory manner. To hold otherwise, I believe, completely guts the notion of pretext, and offends the policies underlying Batson. *Id.* at 299-300, 460 S.E.2d at 421." Payton v. Kearse, 495 S.E.2d 205, 329 S.C. 51 (S.C. 1996).

The state gave no basis, much less a racially neutral one, for the disparate treatment between races. The record shows that the strikes were discriminatory, and therefore in violation of Batson v. Kentucky and its progeny. Based on the record, the trial court erred in denying the defense's Batson motion. "When the opponent of the strike proves the proponent of the strike practiced purposeful racial discrimination, the trial court must quash the entire jury panel and initiate another jury selection *de novo*. See State v. Jones, 293 S.C. 54, 58, 358 S.E.2d 701, 704 (1987), *abrogated on other grounds by State v. Chapman*, 317 S.C. 302, 306, 454 S.E.2d 317, 320 (1995); *see also State v. Heyward*, 357 S.C. 577, 580, 594 S.E.2d 168, 169 (Ct.App.2004)." State v. Cochran, 631 S.E.2d 294, 369 S.C. 308 (S.C. App., 2006). The trial court therefore committed reversible error in denying the defense's Batson motion. This Court's decision was well reasoned and therefore, the petition of the State should be denied.

Respectfully submitted,



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December 18, 2017.

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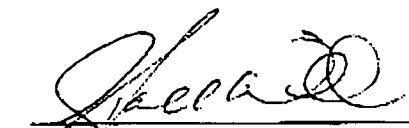
v.

RAYMOND YOUNG APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Return of Appellant in the above referenced case has, on the 18th day of December, 2017, been served upon the Respondent by placing a copy of same in the U.S. Mail, first class postage affixed addressed as follows:

J. Benjamin Alplin, Senior Asst Dept Atty Gen
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201..



J. Falkner Wilkes, 12893
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December 18, 2017.