STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County
The Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2011-190694

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES R. BYERS,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge's denial of Appellant's Batson motion must be upheld where the judge made credibility findings that the solicitor's race-neutral reasons for her strikes were not pretext for racial discrimination.

STATEMENT OF THE CASE

Appellant was indicted in Cherokee County in October 2009 for distribution of crack cocaine and distribution of crack cocaine within one half-mile of a school. On April 19-20, 2011, he proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Appellant guilty as indicted, and Judge Cole imposed a sentence of life without parole pursuant to S.C. Code Ann. § 17-25-45. A post-trial hearing regarding a note found by a bailiff in the jury room was held on April 21, 2011. At this hearing, Judge Cole denied Appellant's renewed motion for a new trial. A timely notice of appeal was served and filed.

ARGUMENT

The trial judge's denial of Appellant's Batson motion must be upheld where the judge made credibility findings that the solicitor's race-neutral reasons for her strikes were not pretext for racial discrimination.

Background

After Appellant's jury was selected, defense counsel made a Batson motion based upon the solicitor's use of three of her five peremptory challenges to strike black jurors. (R. p. 44-45). With regard to Juror # 83, a black male, the solicitor explained that she struck this juror because the notes from her investigator indicated that the juror had convictions for driving under the influence, criminal domestic violence, possession of marijuana, and possession of stolen goods. (R. p. 46-47). Further, the notes from her investigator also indicated that Juror # 83 had a pending possession with intent to distribute case with her office. (R. p. 46-47). However, after consulting with her investigator, the solicitor discovered that the investigator had mistakenly written the convictions/pending charges information for Juror # 85 in the space beside Juror # 83 on the jury list; therefore, Juror # 83 did not, in fact, have prior convictions and a pending possession with intent to distribute case. (R. p. 48). Instead, Juror # 83 had only a charge for criminal domestic violence with no disposition listed. (R. p. 48-49). Nevertheless, the solicitor affirmed that, at the time she struck Juror # 83, she was unaware that the information she was relying upon regarding his prior convictions and pending charge was incorrect. (R. p. 49). After hearing the solicitor's explanation, the trial judge found that the strike of Juror # 83 was not unconstitutional because the solicitor's stated reason for striking the juror, while clearly based on a mistake, was not a pretext for racial discrimination. (R. p. 49-50).

Regarding Juror # 50, a black female, the solicitor explained that when the juror approached the front of the courtroom, she observed the juror's demeanor. (R. p. 50-51). The solicitor stated that, while Juror # 50 was standing there, she kept her attention focused on the defense table, smiling in that direction, and would not look at the solicitor's table. (R. p. 50-51). The solicitor stated that this made her feel like the juror could not be fair to the State in her disposition of the charges. (R. p. 51, lines 1-3). Defense counsel agreed that the solicitor's stated reason for the strike was race-neutral "on the surface," but he argued that it was "a pretext to strike all of the black jurors that we have." (R. p. 51, lines 8-16). He also stated that "we now have a lily-white jury panel of twelve people with no blacks and nobody, other than Caucasians, on the jury, so I would move to quash." (R. p. 51, lines 18-20). The court then pointed out that there is no constitutional provision or case law providing Appellant with the right to have a jury panel made up of people of his own race or gender. (R. p. 51, lines 21-25). After the court inquired whether defense counsel was arguing that the twelve seated jurors were not fair and impartial, defense counsel stated, "[w]ell, I'm just pointing out for the record that we now have twelve white jurors on the panel as this has unfolded." (R. p. 52, lines 4-9). The court pointed out that the solicitor seated a black juror, Juror # 48, but that Juror # 48 was later excused for unrelated reasons. (R. p. 52, lines 10-14; see *infra*, p. 8, n.1). Nevertheless, defense counsel continued to argue that the strike of Juror # 50 for the solicitor's stated reason was pretext to strike a black juror. (R. p. 52, line 15 – p. 53, line 6).

In response, the solicitor again pointed out that she did seat a black juror (who was later excused by the judge) and stated that she was not making an effort to keep any particular persons off the jury. (R. p. 53, lines 9-10). She stated that, in light of her

burden of proof, her goal in selecting jurors was to ensure that she had at least a 50/50 chance at the beginning of trial. (R. p. 53, lines 12-15). In that vein, she was seeking jurors willing to listen to the evidence. (R. p. 53, lines 11-12). The solicitor explained that when Juror # 50 came up, she appeared to already be leaning toward the defense. (R. p. 53, lines 16-17). She reiterated that the juror "would not look at [her]" when the clerk asked whether or not the State wanted to approve her as a juror, and that the juror kept her attention focused on the defense table and appeared pleased with them. (R. p. 53, lines 18-22). Consequently, the solicitor "did not feel that she would give our side a fair opportunity, and I felt that it was only right to strike her from this case, as I would have done whether she were male, female, black, white." (R. p. 53, line 23 – p. 54, line 1). The solicitor affirmed that her strike of Juror # 50 "did not have to do with her race." (R. p. 53, lines 17-18).

The trial judge first noted that demeanor is an appropriate consideration for a party to consider when determining whether to exercise a peremptory strike. (R. p. 54, lines 4-6). He then indicated that it is often difficult to say whether a strike related to a juror's demeanor is pretext or not. (See R. p. 54, lines 4-7). However, the judge concluded that, having heard the explanation for the strike in this case, the solicitor did not exercise her peremptory challenge against Juror # 50 in an unconstitutional fashion. (R. p. 54, lines 7-10). The trial judge found credible the solicitor's explanation for the strike and found that it was not mere pretext for racial discrimination. (R. p. 54, lines 24). Therefore, the judge ruled that the strike was constitutionally valid. (R. p. 54, lines 23-24).

Regarding the third black juror struck, Juror # 27, the solicitor explained that she struck the juror because he had advised the court that he had a prior conviction for DUI.

(R. p. 55, lines 1-5). Defense counsel stated that he had "no complaints" about this strike and indicated that he accepted the explanation as race-neutral. (R. p. 55, lines 6-8). With that, the trial court denied the defense's motion to quash the panel based upon the unconstitutional exercise of peremptory challenges. (R. p. 55, lines 9-11).

Defense counsel then indicated that he had another objection to the seating of the jury panel. (R. p. 55, lines 12-14). He moved to quash the panel and start the jury selection process anew based upon the fact that Jurors # 43 and # 48 both had to be excused after they had been selected as jurors,[1] and he argued that this changed the "dynamics" of his use of peremptory challenges. (See R. p. 55-57). Counsel argued that "the only fair solution" was to start the jury selection process over again with Jurors # 43 and # 48 out of the potential pool of jurors. (R. p. 57, lines 20-24).

The trial court noted that Juror # 43 was properly excused and pointed out that the defense agreed to his excusal. (R. p. 58, lines 18-20). The trial court also indicated that a defendant is entitled to fair and impartial jurors, and that regardless of the strikes of Jurors # 43 and # 48, Appellant now had a jury panel containing twelve fair and impartial jurors. (See R. p. 59, lines 1-5). The court thus denied Appellant's second motion to quash the jury panel. (R. p. 59-60).

Standard of Review and Applicable Law

"After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation." State v. Evins, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007). The race-neutral reason need not be "persuasive, or even plausible." Purkett

[1] Juror # 43, a white male, was excused from the jury after he disclosed that his prior dealings with the sheriff's department would prevent him from being fair and impartial in the case. (R. p. 30-35). Appellant's counsel agreed that Juror # 43 was properly excused. (R. p. 34-35). Juror # 48, a black female, was excused from the jury because she indicated that she was uncomfortable judging another person and stated that she would be unable to render a verdict in the case. (R. p. 35-41). Despite the fact that Juror # 48 affirmatively stated that she would be unable to carry out the role of a juror, defense counsel objected to her excusal. (R. p. 39-40).

v. Elem, 514 U.S. 765, 768 (1995).[2] "A court addressing this issue must keep in mind the fundamental principle that 'official action will not be held unconstitutional solely because it results in a racially disproportionate impact.... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.' 'Discriminatory purpose' ... implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... selected ... a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Hernandez v. New York, 500 U.S. 352, 359-60 (1991) (citations omitted). "Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality." Id. at 362.

"Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly-situated members of another race were seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment." Evins at 415, 645 S.E.2d at 909 (citing State v. Adams, 322 S.C. 114, 123-24, 470 S.E.2d 366, 371-72 (1996)).

"The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike." Evins at 415, 645 S.E.2d at 909 (citing State v. Haigler, 334 S.C. 623, 515 S.E.2d 88 (1999)). "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." Batson v. Kentucky, 476 U.S. 79, 96 (1986). "In deciding whether the opponent of a

[2] In 1996, the South Carolina Supreme Court adopted the Purkett standard in State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996). The decision in Adams eliminated the requirement that the proponent of the strike present a "reasonably specific" and "legitimate" racially-neutral reason; instead, the reason need only be, on its face, unrelated to race. Adams at 123-124; 470 S.E.2d at 371-373. At the third step of the Batson procedure, the trial court determines whether to believe the facially race-neutral reason offered by the proponent of the strike. Id. The purpose of the Adams decision was to ensure that the burden to prove purposeful discrimination rests squarely on the opponent of the strike. See id.

strike has carried the burden of persuasion, a court must undertake a sensitive inquiry into the circumstantial and direct evidence of intent." State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 91 (1999). "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. (citation omitted).

The outcome of a Batson motion will normally turn upon "whether counsel's race-neutral explanation for a peremptory challenge should be believed." Evins at 415-16, 645 S.E.2d at 909. "[T]he trial court's findings regarding purposeful discrimination necessarily will rest largely on the evaluation of demeanor and credibility of counsel." Id. at 416, 645 S.E.2d at 909. Therefore, on appeal from a Batson issue, "the appellate courts give deference to the findings of the trial court and apply a clearly erroneous standard." State v. Cochran, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct. App. 2006). "At the appellate level, [the court] view[s] issues like a Batson challenge through the lens of hindsight, and from that perspective, [the court] must remain sensitive to the vagaries and burdens facing trial judges. Accordingly, [the appellate court is] not easily persuaded to second-guess a trial court's discretionary calls." Id. at 313, 631 S.E. 2d at 297. Indeed, the "evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" Hernandez, 500 U.S. at 365 (citation omitted).

Discussion

In this case, the trial judge's denial of Appellant's Batson motion was proper and must be upheld. The solicitor struck Juror # 83 because, at the time of the strike, she believed that the juror had several convictions and a pending charge with her office. (See R. p. 45-50). The fact that the information upon which the solicitor relied turned out to

be incorrect is immaterial where the trial judge believed that the solicitor relied upon the mistaken information in good faith at the time she made the strike and found that her reason for the strike was not a pretext for racial discrimination. (R. p. 49-50). See U.S. v. Watford, 468 F.3d 891, 914-15 (6th Cir. 2006) (after discussing the deferential standard of review, the Sixth Circuit upheld the trial court's denial of the defendant's Batson motion regarding the strike of a black juror because, although the prosecutor made a mistake in relying upon incorrect information noted on his jury list, the trial court accepted the prosecutor's representation that it was an honest mistake); State v. Bass, 81 S.W.3d 595, 611 (Mo.App. 2002) ("The issue in a Batson challenge ... is not whether the reason given for a strike is true in fact, but whether the striking party believes it to be true, even if only a hunch, and the strike is not inherently racial on its face."). Notably, defense counsel never argued below that the solicitor's stated reason was mere pretext for racial discrimination and at one point actually agreed that the reason was not pretext. (R. p. 46, lines 13-14; see p. 46-50). Appellant cites no authority supporting his argument - made for the first time on appeal - that the trial judge should have quashed the jury panel simply because the solicitor made a mistake. (See Brief of Appellant, p. 12). See, e.g., State v. Jones, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) ("Additionally, 'short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.'") (citation omitted); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). Therefore, the trial court's finding that the strike of Juror # 83 was not unconstitutional must be upheld. See Evins at 415-16, 645 S.E.2d at 909; Cochran at 312, 631 S.E.2d at 297; Hernandez, 500 U.S. at 365 (all holding that the

appellate courts must give great deference to the trial court's evaluation of demeanor and credibility of counsel regarding his or her explanation for the strike of a juror).

For the same reasons, this Court must also uphold the strike of Juror # 50. The trial judge found credible the solicitor's race-neutral explanation that the juror's demeanor when she stood before the court gave the solicitor concern that the juror was "already leaning toward the defense" and that she would be unable to give the State a fair chance at trial. (See R. p. 50-54). See, e.g., Cochran, 369 S.C. at 317, 631 S.E.2d at 299 ("The demeanor of a prospective juror is generally a race-neutral reason for employing a peremptory challenge.") (citation omitted); see also State v. Wright, 304 S.C. 529, 533, 405 S.E.2d 825, 827 (1991); State v. Wilder, 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991); State v. Tucker, 334 S.C. 1, 8, 512 S.E.2d 99, 102 (1999); State v. Smalls, 336 S.C. 301, 309, 519 S.E.2d 793, 797 (Ct.App.1999); State v. Guess, 318 S.C. 269, 273, 457 S.E.2d 6, 8 (Ct.App.1995). The solicitor could properly rely on her perceptions of the juror's demeanor in determining whether to exercise a peremptory challenge. See State v. Cochran, 369 S.C. at 318, 631 S.E.2d at 300 ("Our decision today in no manner diminishes the continuing critical role of counsel's (or a party's) perception of a prospective juror's demeanor and disposition in the exercise of peremptory challenges. In the absence of an express and contrary finding by the trial court, a party's striking of a juror based on demeanor and disposition should be upheld by the trial court."); id at 322, 631 S.E.2d at 302 n2 ("Perceptions and perceived biases - whether true or not - are at the heart of virtually every peremptory challenge. The striking of a juror based on perceptions of bias will generally be upheld unless it is established that the reason for the strike is impermissibly based on race or gender."); see also U.S. v. Uwaezhoke, 995 F.2d 388, 394 (3rd Cir. 1993) ("Peremptory challenges are intended for those situations in

which counsel cannot demonstrate . . . a specific conflict, but has some reason to believe a prospective juror *may* be less desirable from his or her perspective as contrasted with other jurors likely to be called in the event of a peremptory challenge.") (emphasis in original).

Further, contrary to Appellant's argument on pages 12-13 of his Brief, the trial court was not required to make a finding regarding his observations of Juror # 50's demeanor where he found to be credible the solicitor's assertions about the juror's demeanor. Compare Cochran, 369 S.C. at 317, 631 S.E.2d at 299-300 (where a party's strike is based solely upon a specific aspect of a juror's demeanor, *if* the trial judge makes an *express and contrary* finding about the demeanor of the juror, the trial judge's finding controls). Notably, the defense never denied that Juror # 50 smiled in the direction of the defense table and refused to look at the prosecution; in fact, defense counsel appeared to agree that the juror was "grinning in the direction of the defendant." (See R. p. 52, lines 15-16; see p. 50-54). In sum, there is no basis to overturn the trial court's conclusion that the strike of Juror # 50 was constitutionally valid. See Cochran at 322, 631 S.E.2d at 302 (the striking of a juror based upon perceived bias will generally be upheld unless it is established that the reason for the strike was impermissibly based on race or gender).

Appellant also asserts that there was a pattern of the solicitor striking solely jurors from a single racial group. (Brief of Appellant, p. 13). First, as the trial judge noted at trial, the solicitor did indeed seat a black juror, Juror # 48, who was later excused by the judge because she said she would be unable to render a verdict. (See R. p. 52, lines 10-12; see also p. 35-41). That the solicitor did seat a black juror undermines the existence of a pattern of racial discrimination. However, in any event, there is no such "pattern" of discrimination in this case because, as discussed above, each strike was based upon

proper, race-neutral considerations. Appellant also mentions that the final jury panel was "clearly not diverse." (Brief of Appellant, p. 13). However, the fact that the jury panel ultimately consisted of all white jurors is beside the point where the jurors were all properly selected and where the solicitor's strikes were not racially motivated. See Hernandez, 500 U.S. at 359-60 (official action will not be held unconstitutional solely because it results in a racially disproportionate impact; instead, proof of racially discriminatory purpose is required to show a constitutional violation; discriminatory purpose means that the party made the strike at least in part because of - not merely in spite of - its adverse effects upon an identifiable group). As the trial judge pointed out, Appellant is entitled to a fair and impartial jury, but he is not entitled to a particular jury or the jury of his choosing. (R. p. 59, lines 1-5). See State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 823 (2009) ("[A] defendant is not entitled to the jury of her choice.") (citation omitted); State v. Adams, 322 S.C. 114, 126, 470 S.E.2d 366, 373 (1996) ("A defendant has no right to trial by any particular jury.") (citation omitted).

Finally, Appellant argues that "additional prejudice" exists in this case because of a note of unknown authorship found by the bailiff in the jury room following deliberations. (See Brief of Appellant, p. 14). First, the note found in the jury room has nothing to do with the Batson issue being appealed.[3] Second, the trial judge properly concluded that the note did not "in any way" indicate that the defendant was denied any fundamental fairness or that the jury failed to follow the law. (See R. p. 73-75). The judge pointed out that the note could have been made the moment the jurors walked into the jury room, and that the jurors deliberated for several hours, reached a unanimous verdict, and upon individual polling all affirmed the verdict. (See R. p. 74). In short, the

[3] Obviously, Appellant has not appealed the trial court's denial of his new trial motion based upon the finding of the note. (See R. p. 71-75).

note found in the jury room provides no basis for this Court to overturn the trial judge's proper denial of Appellant's Batson motion.

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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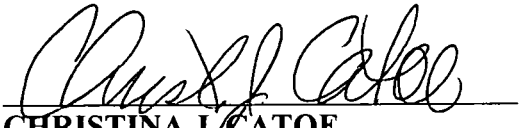

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ATTORNEYS FOR RESPONDENT

September 17, 2012

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THE STATE OF SOUTH CAROLINA,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.

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AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Dayne C. Phillips**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **17th** day of **September, 2012.**

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SWORN to before me this 17th day of September, 2012.

Notary Public for South Carolina.
My Commission Expires: 4/28/2014