STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from York County

Honorable Daniel D. Hall, Circuit Court Judge

RECEIVED

JAN 06 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TRAVIS LAMONT GATHERS,

APPELLANT

APPELLATE CASE NO. 2018-001727

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred when it determined that the state's reason for striking Juror 175 was proper where the solicitor's reason for striking juror 175 was because he did not like "young females" on juries in serious cases because, according to the solicitor, "young females" were less capable of making hard decisions?

STATEMENT OF THE CASE

During the November 2017 term, the York County Grand Jury indicted Appellant for possession of cocaine with intent to distribute. R. 106. During trial that indictment was amended to the lesser included offense of possession of cocaine. R. 106; R. 97, l. 21 – 98, l. 5.

Appellant proceeded to trial on August 21-23, 2018, before the Honorable Daniel D. Hall, and a jury. R. 1. Bryson J. Barrowclough and Philip Smith represented Appellant. Id. Misti Horton Shelton and Sharon Joseph Ohayon represented the state. Id.

Appellant was found guilty of possession of cocaine. R. 99, l. 17 – 100, l. 3. Appellant was sentenced to three years' imprisonment.

This appeal follows.

STANDARD OF REVIEW

"In the typical appeal from the granting or denial of a Batson motion, 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). "This standard of review, however, is premised on the trial court following the mandated procedure for a Batson hearing." Id. "Here, where 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.

ARGUMENT

The trial court erred when it determined that the state's reason for striking Juror 175 was proper where the solicitor's reason for striking juror 175 was because he did not like "young females" on juries in serious cases because, according to the solicitor, "young females" were less capable of making hard decisions.

Relevant Facts

On March 14, 2017, an armed robbery occurred at a First Citizen's Bank in Rock Hill and Appellant was a suspect. Id. Appellant drove a "light" SUV similar to the one used in the armed robbery and Appellant "matched" the description of the armed robber. R. 9, l. 4 – 10, l. 3. The eye witnesses of the armed robbery at the First Citizen's Bank could not provide identifiable characteristics of the suspect. Id.

Later that day, police officers stopped Appellant in the parking lot of his girlfriend's apartment building. R. 2, l. 18 – 5, l. 2. During the stop, police asked Appellant to step out of the car and patted Appellant down. R. 5, l. 14 – 6, l. 23. Nothing was found on Appellant's person. R. 8, ll. 9 – 24. However, during the stop police saw an open beer can in the car. R. 4, l. 12 – 5, l. 2. They asked Appellant for consent to search his car, Appellant declined. R. 6, ll. 6 – 23.

Appellant was on parole at the time of the search. Id. The searching officers called Dwight Burns at probation, parole, and pardon services. Id. Burns told the officers that they could search the car without probable cause or reasonable suspicion because Appellant was on parole. Id. The officers searched Appellant's car and found cocaine. R. 7, ll. 3 – 19.

During trial, at the jury selection phase, the state used "three of their four strikes on African Americans," and defense counsel made a Batson motion. R. 50, ll. 16 – 24. The inquiry was on the state's strikes to Juror 175 and 86. Id.

The solicitor explained that Juror 86 was struck because he was the victim in another case and refused to cooperate with the state's investigation. R. 51, ll. 18 – 24. However, the reason for striking Juror 175 was that the solicitor does not like "young females" as jurors in serious cases because they, "have a hard time making those decisions." R. 51, ll. 4 – 16.

The court held that the reasons given by the solicitor were not race related and were "clearly articulable," reasons for striking the jurors. R. 52, ll. 3 – 7.

Appellant's trial proceeded and he was convicted for possession of cocaine. R. 99, l. 17 – 100, l. 3.

Discussion

In this case when the solicitor struck juror 175 because of a gender-based classification, the state violated Appellant's Constitutional right to a fair trial. See U.S. Const. Amend. VI; see also S.C. Const. art. I, § 14; J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).

That right to a fair trial includes the right to a jury selection process that is unbiased and fair to Appellant and the jurors. See Powers v. Ohio, 499 U.S. 400, 410 – 416 (1991).[1] The United States Supreme Court has 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), or gender. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994).

Batson and its progeny "protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venire person's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." State v. Rayfield, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (2006). Therefore, "[t]he Constitution *forbids striking even a single prospective juror for a discriminatory purpose*." Snyder v. Louisiana, 552 U.S. 472 (2008).

(emphasis added)

In Purkett v. Elem, 514 U.S. 765, 767 (1995), the United States Supreme Court set forth the procedures for a trial court to follow when a party challenges a peremptory strike. The South Carolina Supreme Court has adopted that procedure. See State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014). Batson challenges follow a three step process: (1) the opponent of the strike requests a hearing and asserts a *prima facie* case of racial or gender discrimination; (2) the proponent of the strike must offer a race or gender neutral explanation; and then (3) the opponent must show the race or gender neutral explanation was mere pretext. Giles, at 18, 754 S.E.2d at 263.

The "second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett, 514 U.S. at 767-68. The South Carolina Supreme Court recognized that the proponent of the strike does not carry "any burden of presenting reasonably specific, legitimate explanations for the strikes. Adams, 322 S.C. at 123, 470 S.E.2d at 371; See Purkett, 514 U.S. at 768 (finding unless discriminatory intent is inherent in the explanation, it is deemed race neutral at step two).

During the third step, the moving party "must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." Cochran, 369 S.C. at 315, 631 S.E.2d at 298 (citing Adams, 322 S.C. at 124, 470 S.E.2d at 372). "This burden is generally established by showing similarly situated members of another race were seated on the jury." Id. "Unless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext." Id.

However, "[u]nder some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge may determine the explanation was mere pretext, even

without a showing of disparate treatment." Edwards, 384 S.C. at 508-09, 682 S.E.2d at 822. Accordingly, if the trial judge determines the race and *gender-neutral* explanations were mere pretext, then the trial court must quash the jury panel and select a new jury. See State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990) (finding the composition of the jury panel is also a factor that may be considered when determining whether a party engaged in purposeful discrimination).

In J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994), the Supreme Court of the United States held that the decision in Batson, that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges by the state in a criminal trial, extended to gender discrimination. J.E.B., at 128 – 129. The underlying trial was a paternity and child support case. Id. at 129. On appeal, J.E.B. argued that the state's strikes during jury selection were improper because the state used nine of its ten peremptory challenges to remove male jurors. Id. The trial court rejected J.E.B's claim that the state's jury strikes were improper because "Batson [did not] extend to gender-based peremptory challenges." Id. at 130.

The United States Supreme Court likened gender-based peremptory challenges to race-based challenges because the state's rationale for striking the male jurors in J.E.B.'s case assumed that "gross generalizations that would be deemed impermissible if made on the basis of race are somehow permissible when made on the basis of gender." Id. at 139 – 40. The Court emphasized the impropriety of gender-based peremptory challenges because when state uses peremptory challenges in reliance on gender stereotypes, they reinforce prejudicial views of the relative abilities of men and women. Id. at 140. "These stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection 'invites cynicism respecting the jury's neutrality and its obligation to adhere to the law.'" Id. (quoting Powers v. Ohio, 499 U.S., 400 at 412 (1991)).

The J.E.B. Court's reasoning touched *exactly* on the solicitor's improper strike in this case because, "Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny." Id. at 145. According to the Court, a gender-based reason for striking a juror would function as a "pretext" for racial discrimination. Id.; Therefore, just like the state cannot strike a juror because of their race, they cannot strike a juror based on their gender.

In this case, the court erred between step two and three of the Batson process when it determined that it was proper for the state to strike Juror 175 because she was a "young female" and less capable of making hard decisions. R. 51, ll. 4 – 16; State v. Giles, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014). Trial counsel completed step one by making the inquiry into the state's reasons for striking Juror 175. R. 50, ll. 16 – 24. The solicitor's response to the Batson inquiry for striking Juror 175 was not a pretext because it was an improper gender-based reason on its face. R. 51, ll. 4 – 16. Accordingly, the lower court erred when it allowed the solicitor to strike Juror 175 from the juror pool because she was a "young female." R. 52, ll. 3 – 7.

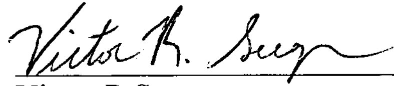
The solicitor reasoned that he struck Juror 175 because he did not like having young female jurors on juries in "serious cases" because he believed them incapable of making hard decisions, ostensibly compared to their male counterparts. R. 51, ll. 4 – 16. That reason is not permissible under J.E.B. because a gender-based reason to strike a juror is as discriminatory as a race-based reason. J.E.B., at 146. "As with race, the 'core guarantee of equal protection, ensuring citizens that their State will not discriminate…, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' [gender].'" Id., quoting Batson, 476 U.S., at 97 – 98.

The solicitor did not say he struck Juror 175 because she was simply a young *person*, he said he struck her because she was a young *female* and because young women would, "have a hard time making [tough] decisions." R. 51, ll. 4 – 16. The solicitor's strike was premised on stereotypes about women and "the soft bigotry of low expectations.[1]" Therefore, the lower court erred when it allowed the state's improper gender-based reason to strike Juror 175 such that Appellant's conviction for possession of cocaine should be vacated and his case remanded for a new trial.

[1] The "soft bigotry of low expectations" is a quote attributed to President George W. Bush in a speech given to the NAACP in 2000. http://www.washingtonpost.com/wp-srv/onpolitics/elections/bushtext071000.htm (last visited Sep 13, 2019).

CONCLUSION

By reason of the foregoing arguments, Appellant respectfully requests that this Court vacate his conviction and remand his case to the York County Court of General Sessions for a new trial.



Victor R Seeger
Appellate Defender

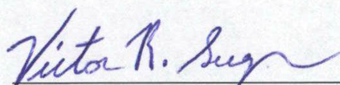
ATTORNEY FOR APPELLANT

This 6th day of January, 2020.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability with Rule 211 (b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



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This 6th day of January, 2020.

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