State ex rel. Azeez v. Mangum
No. 22221

McHugh, Chief Justice, dissenting:

I dissent only to that portion of the majority's opinion which concerns the State's use of a peremptory challenge to remove a black juror from the jury panel. More specifically, I disagree with the majority's conclusion that the appellant failed to establish a prima facie case of racial discrimination pursuant to the law enunciated in Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) and adopted by this Court in State v. Marrs, 180 W. Va. 693, 379 S.E.2d 497 (1989).

Purposeful discrimination against a cognizable racial group in any context should be prohibited. This is particularly true, however, in judicial proceedings where it is of utmost importance that

society have confidence that justice is being meted out with an even hand.

Through the years courts have slowly been forced to acknowledge that they must continue to take an active role in forcing the participants in the criminal justice system to act in a non-discriminatory manner. As early as 1880 the Supreme Court of the United States held that a State could not purposefully exclude members of a defendant's race from the jury without violating a black defendant's right to equal protection. Stauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664 (1880).

More recently, as stated by the majority, the Supreme Court of the United States in Batson v. Kentucky, supra, held that it is a violation of the equal protection clause for a prosecutor to peremptorily strike a potential juror solely because of his race.

Batson further elaborates that a defendant may prove a prima facie case of discrimination by showing that he or she is a member of a cognizable racial group and that the prosecutor has used his or her peremptory challenges to remove a potential juror of the defendant's race. Id. In arriving at its conclusion, the Supreme Court of the United States explained that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." Id. at 87, 106 S. Ct. at 1718, 90 L. Ed. 2d at 81.

We adopted Batson in State v. Marrs, 180 W. Va. 693, 379 S.E.2d 497 (1989):

2. To establish a prima facie case for a violation of equal protection due to racial discrimination in the use of peremptory jury challenges by the State, 'the defendant first must 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.' [Citations omitted.] Batson v. Kentucky, 476 U.S. 79 at 96, 106 S. Ct. 1712 at 1722, 90 L. Ed. 2d 69 (1986).

3. The State may defeat a defendant's prima facie case of a violation of equal protection due to racial discrimination in selection of a jury by providing non-racial, credible reasons for using its peremptory

> challenges to strike members of the defendant's race from the jury.

Syllabus points 2 and 3 of Marrs, supra.

The majority maintains that the appellant has failed to establish a prima facie case for violation of equal protection due to racial discrimination in the use of peremptory jury challenges by the State because he is not a member of the same cognizable racial group as the juror who was stricken. More specifically, the majority acknowledges that the appellant was from a cognizable racial group by virtue of his Indian ethnicity; however, the majority maintains that because the juror who was removed from the jury was African-American, he was not a member of the appellant's racial group, making Marrs inapplicable. I disagree with the majority's narrow application of the test set forth in Marrs, supra.

The record in the case before us reveals that the appellant's skin color was almost as dark as the black lawyer representing him in the habeas proceeding:

> Q [by appellant's attorney] . . . How would you describe your color and race?
>
> A [by appellant] I am of a non-white race, more toward black.
>
> Q In this particular country, have people referred to you as being black?
>
> A Oh, I've been - - I've had people come up to me and call me nigger several times.
>
> Q The -- for the record, Mr. Azeez [the appellant], are you lighter or darker than I am, the attorney talking to you?
>
> A We're about the same color. I may be a little, a shade lighter than you.
>
> Q How much lighter are you?
>
> A Not much.

Q I mean, how would you describe that for the record?

A We are the same color, about the same color.

In fact, during the State's cross-examination the appellant makes it clear that his skin color is black:

Q [by the State] Mr. Azeez [the appellant], are you Negro; do you call yourself Negro?

A I'm not white.

Q Do you call yourself Negro?

A I do not know how to answer the question.

Q You don't know? When you fill out forms, and you have choices, like Caucasian, Negro, do you check, 'I don't know'?

A If there is white or black, I put black.

After further questioning by the State, the appellant testified that if it was an option he would choose Indian; otherwise, he would put black when he was filling out forms.

I fail to see how the majority could conclude from the above testimony that the appellant was not a member of the same racial group as the juror who was stricken. Indeed, the pictures of the appellant introduced at the habeas corpus proceeding clearly reveal that he is not a Caucasian. Furthermore, as appellant's testimony illustrates, he is no stranger to racially discriminatory slurs historically used to degrade and belittle individuals of African-American descent. Clearly, then, the fact that the appellant is of Indian descent and not African descent is a distinction without a difference. Accordingly, I find that the appellant has established a

prima facie case for a violation of equal protection due to racial discrimination in the use of peremptory jury challenges pursuant to Marrs, supra.

Furthermore, I am not convinced, unlike the trial judge in the habeas proceeding below, that the prosecutor articulated a "non-racial, credible reason[] for using its peremptory challenge[] to strike members of the [appellant's] race from the jury." Syl. pt. 3, Marrs, supra. As pointed out by the majority, the prosecutor explained that "[t]he State made the strike . . . on the basis that he [the black juror] said he knew Cedric [the investigating officer]. We speculated that maybe Cedric had arrested him, we don't know."

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[1]I recognize the importance of preemptory challenges; however, their use in a racially motivated manner cannot be condoned.

In Marrs, we found that the prosecutor failed to articulate credible reasons for striking the only black potential juror remaining on the jury venire. The prosecutor stated that based on the black juror's last name, she thought he may have been related to someone who had criminal charges pending against him. Thus, the prosecutor struck the black juror from the jury. In concluding that the prosecutor failed to articulate a credible reason for striking the black potential juror, this Court has quoted the following from Batson: "If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.'" Marrs, at 696, 379 S.E.2d at 500 (quoting Batson, 476 U.S. at 98, 106 S. Ct. at 1723, 90 L. Ed. 2d at 88). This Court pointed out that the prosecutor did not ask the black

potential juror directly whether or not he had a relative who had a criminal warrant pending against him.

Likewise, in the case before us, the prosecutor's speculation that the black potential juror may have been arrested by the investigating officer is too speculative and general to be a credible statement. Indeed, three other potential jurors stated that they knew the investigating officer. The prosecutor questioned them and discovered that one potential juror, who was ultimately selected for the jury panel, was at one time a neighbor of the investigating officer. Another potential juror knew the investigating officer in his official capacity because of her teenage son, and another potential juror knew the investigating officer because he grew up in her neighborhood. Oddly, the prosecutor failed to question the black potential juror about how he knew the investigating officer.

This is a situation where a trial court should have conducted an evidentiary hearing:

> A trial court should conduct an evidentiary hearing if, after considering the prosecutor's representations regarding the reasons for using a peremptory strike to exclude the only remaining black juror, the court deems that the circumstances surrounding the prosecutor's representations warrant such a hearing to determine whether the explanations offered by the prosecutor in exercising said strike were racially neutral or discriminatory in nature. The determination on whether to conduct an evidentiary hearing is within the sound discretion of the trial court.

Syl. pt. 9, State v. Kirkland, 191 W. Va. 586, 447 S.E.2d 278 (1994). Allowing the State to give a speculative reason for striking the black potential juror without conducting an evidentiary hearing was a clear abuse of discretion by the trial judge in the case before us.

Accordingly, based on the above discussion, I respectively dissent. I am authorized to state that Justice Neely joins me in this dissent.