No. 23329 - State of West Virginia v. Dominique Rahman

Cleckley, Justice, concurring:

I completely agree with the majority's analysis and join the opinion. I am nevertheless dubitante not because of any concern as to its reasoning or its reading of Batson and its progeny but, rather, because I simply cannot understand why lower courts in West Virginia appear so confounded in their treatment and application of the basic analytical framework of Batson. In this departing concurring opinion, I will attempt to explain its ease of application. I start by reiterating the "great deference" standard that obtains when appellate courts review a Batson determination of the trial court. See Purkett v. Elem, ___ U.S. ___, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam). Then, before moving to specifics, I discuss in general terms the duties and obligations of the lawyers and lower court to make and defend against a Batson objection.

The Equal Protection provisions of Fourteenth Amendment to the United States Constitution and Article 3 § 10 of the West Virginia Constitution proscribe racial and gender discrimination in the selection of juries:

> **"Equal opportunity to participate in the fair administration of justice is fundamental to our**

democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law - that all citizens, regardless of race ethnicity, or gender, have the chance to take part directly in our democracy…. When persons are excluded from participation in our democratic processes solely because of race or gender, this promise deems, and the integrity of our judicial system is jeopardized." J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 1430, 128 L.Ed.2d 89 (1994)(citation omitted).

Not only does this proscription apply to prosecutors but it applies to defense counsel as well:

"`[B]e 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.' Just as public confidence in criminal cases is undermined by a conviction in a trial where racial discrimination has occurred in jury selection, so is public confidence

undermined where a defendant assisted by racially discriminatory peremptory strikes obtains an acquittal." Georgia v. McCollum, 505 U.S. 42, 49, 112 S.Ct. 2348, 2354, 120 L.Ed.2d 33 (1992)(citation omitted).

In its recent per curiam opinion in Purkett, the United States Supreme Court refined the procedural steps in the trial litigation. After the prosecutor struck two African-American panelists, the defendant made a Batson challenge. The prosecutor explained the challenge by suggesting that two prospective jurors had long unkempt hair and a beard. The prosecutor concluded by saying "I don't like the way they looked, with the way the hair is cut both of them. And the mustaches and the beards look suspicious to me." Further, one of the two panelist had once been the victim of a robbery with a sawed-off shotgun and the prosecutor expressed concern that he would therefore regard the unarmed robbery being tried as a robbery. The trial court overruled the Batson objection. On federal habeas following the conviction, the Eighth Circuit found the trial court had not complied with Batson because the prosecutor's statement did not explain how the objectionable features would affect each person's ability to perform duties as a juror in the case.

The Supreme Court reversed. In Purkett the Court indicated that Batson claims require a three step procedure in the trial court: (1) a prima facie

case of discrimination by the claimant, (2) a neutral explanation for the strike in question by the party exercising the challenged strike, and (3) a showing of purposeful discrimination by the claimant. According to the Court, the court of appeals erroneously combined steps (2) and (3). Step (2) merely requires that the explanation be nondiscriminatory. The Court stated that it does not require that the explanation must relate to trial strategy. Once a nondiscriminatory explanation is provided, then the burden shifts to the Batson claimant to show purposeful discrimination. So long as the step (2) explanation is race neutral, it does not matter that it is "silly or superstitious." Such an explanation may fail, but only at step (3) and only as part of the conclusion that the claimant has shown purposeful discrimination.[1]

[1]It is not until step (3) that the persuasiveness of the justification becomes relevant. At that stage, implausible or fantastic justification may (and probably will) be found to be pretexts for purposeful discrimination.

Although I totally agree with the dissenting opinion by Justice Stevens in Purkett,[2] I can accept for purposes of West Virginia jurisprudence the analysis of the majority in Purkett because in the final analysis the result will always be the same. To be clear, I do not believe that Purkett's acceptance of a facially neutral explanation, even if implausible or fantastic, sound the death knell for Batson in all but the most flagrant cases. Under Purkett, substantial discretion is given to the trial court to find purposeful discrimination based solely on the pretextual nature of the strike. See Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457

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[2]Justice Stevens dissented as follows:

> "In my opinion, preoccupation with the niceties of a three-step analysis should not foreclose meaningful judicial review of prosecutorial explanations that are entirely unrelated to the case to be tried. I would adhere to the Batson rule that such an explanation does not satisfy step two. Alternatively, I would hold that in the absence of an explicit trial court finding on the issue, a reviewing court may hold that such an explanation is pretextual as a matter of law. The Court's unnecessary tolerance of silly, fantastic, and implausible explanations, together with its assumption that there is a difference of constitutional magnitude between a statement that `I had a hunch about this juror based on his appearance,' and `I challenged this juror because he had a mustache,' demeans the importance of the values vindicated by our decision in Batson." Purkett, ___ U.S. at ___, 115 S.Ct. at 1775-76.

S.E.2d 152 (1995); Skaggs v. Elk Run Coal Company, Inc., ___ W.Va. ___, ___ S.E.2d. ___ (No. 23178, 7/11/96).

While I am mindful that this case is being remanded so that the prosecutor may have an opportunity to explain why it did not strike a similarly situated juror, I feel compelled to make a comment on the facts of this matter based upon the record before this Court. Although the majority opinion captures the structure of the problem posed by the prosecutor's peremptory strike in this case, I do not believe the opinion wrestles with the essence of this problem. In the final analysis, this case demands that we examine the meaning of the state and federal constitutional phrase "jury of one's peers."

In doing so, I intend to show that the trial court would not have abused its discretion in finding "purposeful discrimination based solely on the pretextual nature of the strike" in this case.

Let me begin with the basics. This was a drug prosecution case. At least two venirepersons, one white and the other black, had what appears to be qualitative and therapeutic prior experiences with this subject and people involved with the use of illegal drugs. The record does not disclose that either venireperson indicated that their prior work in this area would prejudice their ability to fairly

and impartially hear the issues of this case and decide them on the merits. With that being so, it seems to me that both venirepersons embodied the essence, on one level, of what is meant by "jury of one's peers." That is, neither venireperson was an "armchair quarterback" with absolutely no background or experience with people involved with illegal drugs. In other words, before we even reach the issue of whether or not Mr. Foxworth was struck because of his race, which is a constitutional level of a denial of a jury of one's peers, there exists a fundamental nonracially grounded denial of the defendant's right to a jury of his peers based upon the experience and background Mr. Foxworth brought to the jury panel. Of course, I am not oblivious to the fact that the law has yet to reach the stage of requiring carpenters to sit as jurors for defendants who are carpenters, or physicians to sit as jurors for defendants who are doctors. However, when a juror has an articulated nonprejudicial experience or background that is central to charges against a defendant, I believe the full meaning of "jury of one's peers" is manifested. In fact, I would not be surprised if the prosecutor understood this point and grounded its decision not to strike Ms. Bator because of it. That is, Ms. Bator's prior, nonprejudicial experience made her a "peer" of the defendant in the true sense of the term. She was not some alien brought back from the latest Mars expedition and propped down in the jury box and told to hear and decide issues she could not conceptualize or articulate.

While it seems the prosecutor appreciated and understood the value of Ms. Bator's prior experience and made certain not to remove her, not so was the case with Mr. Foxworth. Instead, the prosecutor reached into the air and lamented about some preposterous and groundless "onesided experience" Mr. Foxworth had. Where came such nonsense? The record nowhere discloses that Mr. Foxworth indicated his prior experience with a particular aspect to the drug world was such that he could not fairly and impartially hear the evidence in this case. Because of the fact that Mr. Foxworth shared a similar prior experience or background with Ms. Bator, it was unequivocally necessary for the record to have indicated Mr. Foxworth stated his prior experience would not allow him to fairly and impartially hear and decide the evidence in this case, or some other equivalent hard evidence. This being so, I believe the trial court could have very easily determined, without ever asking the prosecutor to explain why it did not strike the similarly situated Ms. Bator or shifting the burden to the defendant to show purposeful discrimination, that the prosecutor's proffered reason for striking Mr. Foxworth was pretextual. Race aside, Mr. Foxworth's prior experience made him the essence of a juror peer for the defendant in this case, to the exact degree of that of Ms. Bator. What was the wildcard in this case? Mr. Foxworth's clothing? his race? his cologne? the length of his fingernails? Remanding this case to have the prosecutor explain why it did not strike Ms. Bator, while necessary, will not

answer the wild card question in this particular case. This is because, all things considered, the prosecutor will proffer some explanation that satisfies not striking Ms. Bator. However, if we remove Ms. Bator from the formula and simply remain focused on the nonracial peer experience Mr. Foxworth brought to this case, we can very easily dispense with the proffered "onesided experience" pretext and reasonably conclude that Mr. Foxworth's race was the only reason he was not allowed to bring that valuable experience to this prosecution.

To suggest that the evidence appears to tilt toward a finding of impermissible peremptory race striking, does not end the drama in this case, if upon further review by the trial court this proves to be true. Central to this issue, and the larger national legal arena in which it is played out, is a fundamental matter that too often is never articulated. What does it mean to strike a juror because of race? Embroiled in this question is a walking conclusive presumption that too many prosecutors have that African-Americans want drug dealers, murderers, thieves, rapists--criminals--to remain free in their midst. African-Americans want and demand nothing more or less than justice. They do not walk the streets of our cities and the halls of our government with some innate desire to become a victim of murder, theft, rape--a victim of any crime. African-Americans want safe homes, neighborhoods, towns, cities, states--like all

other Americans, they want an America that is free of crime. They do not wear a badge that says "We will not convict another African-American." They wear the same badge that most other Americans wear that says, "We will convict the guilty upon proper proof and free the innocent when such proof is wanting." Is this not the essence of our legal system? Somewhere down the road our legal system must rid itself of the unspoken lie that African-Americans want to be victims of crime and therefore will not convict criminals. While no lie may live forever, this one has lived too long. With these words of "wisdom," I pass the torch.