

Case No. WD 67361

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DORIS KESLER-FERGUSON, et al.,

Plaintiff/Respondent

v.

HY-VEE, INC.,

Defendant/Appellant

SUBSTITUTE BRIEF OF APPELLANT HY-VEE, INC.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
HONORABLE MARCO ROLDAN

CIRCUIT COURT NO. 04CV233741

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JURISDICTIONAL STATEMENT

The subject matter of this appeal does not involve any issues within the exclusive jurisdiction of the Missouri Supreme Court under Article V, Section 3 of the Missouri Constitution. Accordingly, this case comes within this Court's general appellate jurisdiction.

STATEMENT OF FACTS

This case arises out of a slip and fall accident that occurred at a Hy-Vee grocery store in Belton, Missouri. (Legal file, 1-2). The Plaintiff/Respondent Doris Kesler-Ferguson ("Respondent") alleges that she slipped and fell either on a wet or broken floor mat and, as a result, broke her hip. (Lf., 2). At the conclusion of voir dire, the parties made their respective peremptory strikes. After Defendant/Appellant Hy-Vee ("Appellant") informed the court of its strikes, Respondent challenged Appellant's strikes pursuant to *Batson*, presumably arguing that Appellant's strikes were racially motivated. (Tr. 8:11-19). Counsel for Appellant articulated race-neutral explanations for each of its strikes. (9:2-11; 10:20-25; 11:1-15; 12:12-13). The court overruled the Respondent's *Batson* challenge as it related to two jurors, but sustained the challenge as to a third. (11:16-25; 12:1-22). That third juror, Juror Number 26, was eventually impaneled, and rendered a verdict against Appellant. (13:14-23).

Hy-Vee appeals the trial court's decision sustaining the Respondent's *Batson* challenge because the trial court: 1) required Appellant to offer more than a race neutral explanation for its peremptory strike, 2) failed to find that Appellant's strike was racially motivated, and 3) improperly shifted the burden of proving purposeful discrimination to

Appellant. Furthermore, assuming for the sake of argument that the court did find that Appellant's strike was racially motivated, it erred because Respondent failed to prove purposeful discrimination.

POINTS RELIED ON

I. The trial court erred in sustaining Respondent's *Batson* challenge because it applied an incorrect standard, in that Appellant was required to offer more than a race neutral explanation for its strike.

Purkett v. Elem, 514 U.S. 765 (1995)

State v. Stanley, 990 S.W.2d 1 (Mo.Ct.App. 1998)

II. The trial court erred in sustaining Respondent's *Batson* challenge because it misapplied the standard, in that it failed to find that Appellant's strike was racially motivated.

Purkett v. Elem, 514 U.S. 765 (1995)

III. The trial court erred in sustaining Respondent's *Batson* challenge because it improperly placed the burden of persuasion on the striking party, in that it required Appellant to justify the strike by providing a negative race neutral explanation.

Purkett v. Elem, 514 U.S. 765 (1995)

State v. Stanley, 990 S.W.2d 1 (Mo.Ct.App. 1998)

IV. The trial court erred in sustaining Respondent's *Batson* challenge because Respondent failed to prove purposeful discrimination, in that Respondent relied solely on the juror's assurances that he could be unbiased.

State v. Parker, 836 S.W.2d 930 (Mo. banc 1992)

State v. Lovell, 506 S.W.2d 441 (Mo. banc 1974)

ARGUMENT

I. Standard of Review

The trial court's determination of whether a peremptory strike constitutes purposeful discrimination will not be disturbed unless clearly erroneous. *Bowls v. Scarborough*, 950 S.W.2d 691, 700 (Mo. Ct. App. 1997) (citing *State v. Shackelford*, 861 S.W.2d 733, 735 (Mo. Ct. App. 1993)). In order to be deemed clearly erroneous, the appellate court must have a firm and definite impression that a mistake has been made. *Id.* at n.5 (citing *State v. Aziz*, 861 S.W.2d 803 (Mo. Ct. App. 1993)). The remedy for a *Batson* violation is a new trial. See *State v. Hampton*, 163 S.W.3d 903, 905 (Mo. banc 2005); *State v. Stanley*, 990 S.W.2d 1, 7 (Mo. Ct. App. 1998).

II. Background

A juror's right to be free from discrimination was recognized by the Supreme Court in *Batson v. Kentucky*, 476 U.S. 79 (1986). Thus, *Batson* challenges are those in which one party objects to another party's peremptory strike on the basis of race or other protected classification. The right to make such challenges was extended to civil litigants in *Edmonson v. Leesville*, 500 U.S. 614 (1991). Absent a *Batson* challenge, a litigant

need not specify the reason for excluding a particular juror through the use of a peremptory challenge.

Under Missouri law, civil litigants are entitled to peremptorily challenge three jurors. Mo. Rev. Stat. § 494.480.1. The only limitation on the exercise of those challenges is that a party cannot remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race. Mo. Rev. Stat. § 494.400; *State v. Marlowe*, 89 S.W.3d 464, 468 (Mo. banc 2002). In this case, Appellant exercised its peremptory challenges in a non-discriminatory fashion. Despite this, the trial court sustained Respondent's *Batson* challenge.

Missouri Courts follow a three-step process when a *Batson* challenge is made. *State v. Edwards*, 116 S.W.3d 511, 525 (Mo. banc 2003) (citing *State v. Cole*, 71 S.W.3d 163 (Mo. banc 2002)); *Bowls*, 950 S.W.2d at 700 (citing *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992)). First, the objecting party must identify the cognizable racial group to which the juror belongs. *Bowls*, 950 S.W.2d at 700 (citing *Parker*, 836 S.W.2d at 939)). Second, the striking party must offer a race neutral explanation for the strike. *Bowls*, 950 S.W.2d at 700 (citing *Parker*, 836 S.W.2d at 939). Third, the objecting party has the burden of proving that the proffered reason for the strikes was merely pretextual and that the strikes were racially motivated. *Bowls*, 950 S.W.2d at 700 (citing *Parker*, 836 S.W.2d at 939).

At the second step, the striking party's explanation need not be persuasive, or even plausible. *Purkett v. Elem*, 514 U.S. 765, 768 (1995); *Bowls*, 950 S.W.2d at 700 (citing *Perkins v. Runyan Heating and Cooling Svcs.*, 933 S.W.2d 837, 840 (Mo. Ct. App.

1996)). The explanation will be deemed race neutral unless a discriminatory intent is inherent in the explanation. *Purkett*, 514 U.S. at 768; *Bowls*, 950 S.W.2d at 700 (quoting *Perkins*, 933 SW.2d at 840) (quotations omitted). Furthermore, the striking party's explanation need not rise to the level of a "for cause" challenge; rather, it merely must be based on a juror characteristic other than gender or race. *See Purkett*, 514 U.S. at 767.

Following the third step, the trial court "must decide if purposeful racial discrimination has been proven" by the objecting party. *Stanley*, 990 S.W.2d at 6. In determining whether the strikes were pretextual, "the chief consideration should be the plausibility of the [striking party's] explanations in light of the totality of the facts and circumstances surrounding the case." *Parker*, 836 S.W.2d at 939. The plausibility analysis is informed by a variety of factors, including: 1) the existence of similarly situated white jurors who were not struck, 2) the degree of logical relevance between the proffered explanation and the case to be tried, 3) the striking party's demeanor or statements as well as those of the excluded jurors during voir dire, and 4) the court's past experiences with the party exercising the peremptory challenge. *Id.*

The following is a summary of the three-step *Batson* challenge process that took place in the instant case:

Step 1: Objecting party (Mr. Accurso) must identify the cognizable racial group to which the juror belongs:

MR. ACCURSO: Jurors No. 8, 9 and 26 all listed themselves as black, all three have been stricken by the peremptory challenges, and I think the burden is now on them to give racially neutral reasons why they were struck.

Tr. at p. 8, lines 15-19.

Step 2: Striking party (Mr. Callahan) must offer race neutral reasons for the strike:

MR. CALLAHAN: 26 had an affiliation with No. 31.

Tr. at p. 9, lines 8-9.

Step 3: Objector must show that the proffered reasons for the strikes were merely pretextual and that the strikes were racially motivated:

MR. ACCURSO: Mr. Turner [No. 26] also pointed out that he could reach his conclusion independently of any acquaintanceship or friendship with No. 31, and she said likewise.

Tr. at p. 10, lines 14-17.

The following colloquy then occurred between Appellant and the court:

MR. CALLAHAN: Your Honor, may I?

THE COURT: You may respond.

MR. CALLAHAN: For the record, Your Honor,

... [Discussion about other jurors is omitted] ...

And I think we're allowed to strike, and we have the right to strike jurors for any reason or no reason as long as it isn't racially motivated. And I can represent to the Court that it wasn't."

THE COURT: What was your basis for No. 26?

MR. CALLAHAN: He's the fellow, Judge, that had a relationship with Juror 31. That made us a little uncomfortable. And other than that, really, we got to a point where we just had a toss up, so.

THE COURT: Okay. Let the record reflect as follows:

... [ruling on other jurors omitted] ...

No. 26, though, I see no -- No. 26, the basis, Mr. Callahan, that you've given is that they know -- or he knows No. 31.

MR. CALLAHAN: He dated her friend, Your Honor. I think that's the same guy.

THE COURT: And to that question, it was only people that responded in the positive to that question that they knew each other. The strike will be denied. There's no other—there's no neutral reason that I can see other than that they know each other. There was nothing negative out of that.

You'll have an opportunity to strike somebody else, Mr. Callahan.

MR. CALLAHAN: Okay.

Tr. p 10, line 18 to p. 12, line 23.

III. THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT'S *BATSON* CHALLENGE BECAUSE IT APPLIED AN INCORRECT STANDARD, IN THAT APPELLANT WAS REQUIRED TO OFFER MORE THAN A RACE NEUTRAL EXPLANATION FOR ITS STRIKE.

The trial court committed clear error when it required the striking party, Appellant, to provide more than a race neutral reason for its strike. As noted above, the three-step process for a *Batson* challenge requires that the striking party provide a race neutral reason for the strike at step two that need not be persuasive or plausible. *Purkett*, 514 U.S. at 768. In this case, the trial court required the striking party to give a **negative**, race neutral reason—a reason that would negatively affect the juror's ability to serve. The trial court's requirement that the striking party give more than a race neutral explanation is exactly the requirement that was struck down by the United States Supreme Court in *Purkett v. Elem*.

In *Purkett*, the prosecutor used peremptory challenges to strike two black jurors and the defendant challenged those strikes pursuant to *Batson*. *Id.* at 766. The court required the prosecutor to give race neutral explanations of the strikes and he responded that he did not like the way the jurors looked because one had long hair and both had facial hair. *Id.* The trial court overruled the objection finding no intentional discrimination. *Id.* The Missouri Court of Appeals affirmed the *Batson* challenge finding. *Id.*

The defendant filed a *habeas corpus* petition and the District Court concluded that there was no purposeful discrimination. *Id.* at 766-67. On appeal, however, the Eighth Circuit Court of Appeals reversed, finding intentional discrimination. The court of appeals stated that the prosecutor “must at least articulate some plausible race neutral reason for believing that those factors will somehow affect the person’s ability to perform his or her duties as a juror.” *Id.* at 767 (quoting *Purkett v. Elem*, 25 F.3d 679, 683 (8th Cir. 1994)).

The Supreme Court reversed the court of appeals stating that the second step of the *Batson* challenge does not require “an explanation that is persuasive or even plausible.” *Id.* The Court held that it is reversible error to require the explanation at step two to be not only race neutral but also minimally persuasive or plausible. *Id.*

The Court explained that step three is an assessment of the “*genuineness*” of the explanation given, not the “*reasonableness*.” *Id.* at 769. “[A] ‘legitimate reason’ is not a reason that makes sense, but a reason that does not deny equal protection.” *Id.* at 769 (quoting *Hernandez v. New York*, 500 U.S. 352, 359 (1991)). The Court remanded the

case to the court of appeals to assess whether the record supported a finding of no racial motive. *Id.*

The instant case is highly similar to *Purkett* because the trial court applied the wrong standard when it required Appellant to give more than a race neutral explanation for striking Juror Number 26. The discussion between the striking party (Mr. Callahan) and the trial court of the strike was as follows:

THE COURT: No. 26, though, I see no -- No. 26, the basis, Mr. Callahan, that you've given is that they know -- or he knows No. 31.

MR. CALLAHAN: He dated her friend, Your Honor. I think that's the same guy.

THE COURT: And to that question, it was only people that responded in the positive to that question that they knew each other. The strike will be denied. There's no other—**there's no neutral reason that I can see other than that they know each other. There was nothing negative out of that.**

You'll have an opportunity to strike somebody else, Mr. Callahan.

Tr. at p. 12, lines 9-22 (emphasis added). The trial court correctly concluded that the explanation given by Appellant—that Juror Number 26 knew Juror Number 31—was neutral when it stated, “there’s no neutral reason that I can see **other** than that they know each other.” *Id.* (emphasis added). However, the court stated that Appellant’s race neutral explanation was insufficient because “[t]here was nothing negative out of that.” *Id.* Thus, the trial court wrongfully required Appellant to provide a race neutral explanation that would negatively affect the person’s ability to be a juror.

This requirement is identical to the Eighth Circuit Court of Appeals' requirement in *Purkett* that was rejected by the Supreme Court. The Eight Circuit required the striking party to establish that the race neutral explanation "will somehow affect the person's ability to perform his or her duties as a juror." *Purkett*, 514 U.S. at 767 (quoting *Purkett v. Elem*, 25 F.3d 679, 683 (8th Cir. 1994)). The Court in *Purkett* found that requiring more than a race neutral explanation was reversible error. *Id.* at 769. The same error in this case entitles Appellant to a new trial. *Stanley*, 990 S.W.2d at 7.

Also like *Purkett*, the trial court incorrectly analyzed the reasonableness of Appellant's race neutral explanation rather than the genuineness. The court's demand for something "negative" in addition to the race neutral explanation given by Appellant clearly indicates that the trial court assessed whether Appellant's strike was justified or reasonable. The Court in *Purkett* held that such analysis was reversible error in a *Batson* challenge. *Purkett*, 514 U.S. at 769-70. Because the trial court committed the same error in this case, Appellant is entitled to a new trial.

Because the trial court erred when it required Appellant to give more than a race neutral explanation for its strike of Juror Number 26, Appellant is entitled to a new trial.

IV. THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT'S *BATSON* CHALLENGE BECAUSE IT MISAPPLIED THE STANDARD, IN THAT THE TRIAL COURT FAILED TO FIND THAT APPELLANT'S STRIKE WAS RACIALLY MOTIVATED.

The trial court sustained Respondent's *Batson* challenge without finding that Appellant's strike was racially motivated. This is clearly a misapplication of the law.

As noted above, at the third step of a *Batson* challenge the opponent of the strike must show that the explanation for the strike was pretextual and thus racially motivated. *Stanley*, 990 S.W.2d at 6. Following the third step, the trial court “must decide if purposeful racial discrimination has been proven” by the objecting party. *Id.* In determining whether the strikes were pretextual, “the chief consideration should be the plausibility of the [striking party’s] explanations in light of the totality of the facts and circumstances surrounding the case.” *Parker*, 836 S.W.2d at 939. In a *Batson* challenge, the trial court must focus on whether a juror’s rights to equal protection have been violated by a racially motivated strike. *Purkett*, 514 U.S. at 769.

The trial court in this case, however, failed to find that purposeful racial discrimination was proved, and therefore applied the incorrect standard to the *Batson* challenge. The record indicates that the trial court did not consider Respondent’s argument that Appellant’s race neutral explanation was pretextual. Nor did it consider any of the factors Missouri courts use to determine if the opponent of the strike has proved pretext. Nor was it focused on the juror’s right to equal protection. The trial court did not find that Respondent proved racial discrimination, but rather held that Appellant failed to provide a race neutral reason that negatively affected the juror’s ability to serve. Tr. at p. 12, lines 17-20. Clearly this is an incorrect standard on a *Batson* challenge and a misapplication of the law.

The trial court failed to find that Appellant’s strike of Juror Number 26 was racially motivated and thus wrongfully sustained Respondent’s *Batson* challenge. Appellant is thus entitled to a new trial.

V. THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT'S BATSON CHALLENGE BECAUSE IT IMPROPERLY PLACED THE BURDEN OF PERSUASION ON THE STRIKING PARTY, IN THAT THE COURT REQUIRED APPELLANT TO JUSTIFY ITS STRIKE BY PROVIDING A NEGATIVE RACE NEUTRAL EXPLANATION.

The trial court's requirement that Appellant provide more than a race neutral explanation for striking Juror Number 26 wrongfully shifted the burden of persuasion to the striking party.

In *Purkett*, the Supreme Court held that requiring the striking party to provide an explanation that affects the person's ability to serve as a juror is reversible error because it "violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S. at 768. At the third step, the opponent of the strike must carry the burden of proving purposeful discrimination. *Stanley*, 990 S.W.2d at 6. "To require otherwise or allow the [opponent of the strike] to stand silent in the face of race neutral reasons, instead places the burden on [the striking party] to show a lack of pretext." *Id.* The striking party "is not required to carry such a burden." *Id.*

In this case, the trial court required Appellant to provide more than a race neutral explanation for the strike, which was the same conduct that *Purkett* held wrongfully shifted the burden of persuasion to the striking party. The trial court failed to consider Respondent's argument for pretext at all. Instead, the trial court found Appellant's explanation to be race neutral but nonetheless insufficient because the explanation did not negatively affect the juror's ability to serve. Thus the trial court placed the burden of

persuasion on Appellant, the striking party, rather than on Respondent, the opponent of the strike.

The trial court's shifting of the burden to Appellant is identical the court of appeals' requirement in *Purkett* that the Supreme Court rejected. The same error in this case entitles Appellant to a new trial. *Stanley*, 990 S.W.2d at 7.

VI. THE TRIAL COURT ERRED IN SUSTAINING RESPONDENT'S *BATSON* CHALLENGE BECAUSE RESPONDENT FAILED TO CARRY ITS BURDEN OF PROOF IN PROVING PURPOSEFUL DISCRIMINATION, IN THAT RESPONDENT RELIED SOLELY ON THE JUROR'S ASSURANCES THAT HE COULD BE UNBIASED.

As stated above, the record indicates that the trial court did not consider whether the strike was pretextual, but instead incorrectly considered the reasonableness of the strike. *See* Tr. at pp. 11-12. However, assuming for the purposes of this argument that the Court found that Appellant's strike of Juror Number 26 was racially motivated, it clearly erred because Respondent did not meet its burden to show purposeful discrimination.

As explained above, the burden is on the opponent of the strike to show that the striking party's explanation for the strike was pretextual. After hearing the argument for pretext, the trial court must consider whether the opponent of the strike met its burden. In doing so it is to consider several factors such as: 1) the existence of similarly situated white jurors who were not struck, 2) the degree of logical relevance between the proffered explanation and the case to be tried, 3) the striking party's demeanor or statements as well as those of the excluded jurors during voir dire, and 4) the court's past

experiences with the party exercising the peremptory challenge. *Parker*, 836 S.W.2d at 939. The trial court should not depend solely on the assurances of a juror that he or she can set aside potential biases. *See State v. Lovell*, 506 S.W.2d 441, 444 (Mo. banc 1974) (citing *State v. Jones*, 384 S.W.2d 554, 558 (Mo. 1964)) (stating, in the context of a challenge for cause, that a trial court is “not be allowed to depend upon the conclusions of the juror whether he could or would divest himself of a prejudice he admitted to exist in his mind”).

In this case, the only evidence that Respondent offered to prove that Appellant’s strike was racially motivated was that “[Juror Number 26] also pointed out that he could reach his conclusion independently of any acquaintanceship or friendship with No. 31, and she said likewise.” Tr. at p. 10, lines 14-17. Respondent could not prove that there were similarly situated white jurors that were not struck because there were none. Juror Number 31 was clearly similarly situated, but she was black. Likewise, Respondent did not raise the relevance of Appellant’s explanation to the issues in the case. Respondent’s attempt to show pretext relied solely upon Juror Number 26’s assurances that the acquaintance would not affect his ability to serve. This evidence is insufficient to prove purposeful discrimination, a burden which the opponent of the strike must carry before a *Batson* challenge is sustained.

The trial court clearly erred when it determined that Respondent met its burden to show pretext. Appellant’s strike was clearly not racially motivated and, therefore, Appellant is entitled to a new trial.

CONCLUSION

The trial court erred in sustaining respondent's *Batson* challenge because the court: 1) required Appellant to offer more than a race neutral explanation for its peremptory strikes, 2) failed to find that Appellant's strikes were racially motivated, and 3) improperly shifted the burden of proving purposeful discrimination to Appellant. Furthermore, assuming for the sake of argument that the court did find that Appellant's strike was racially motivated, it erred because Respondent failed to prove purposeful discrimination. Because of these errors, Appellant is entitled to a new trial.

Respectfully submitted,

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Certificate of Service and Compliance with Court Rules

Pursuant to Missouri Supreme Court Rules 84.05 through 84.07 and Special Rule XXXII of the Missouri Court of Appeals for the Western District ("Court"), the undersigned hereby certifies that on the ____ day of _____, 2007, the original and 7 copies of the Brief of Appellant and a floppy disk were filed at the Court and that on this

same date two copies of the Brief and a floppy disk were served on counsel for the Respondent by first-class U.S. Mail at the address shown below:

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The undersigned further certifies that:

(1) Pursuant to Rule 84.06(c), the original and all copies of the Substitute Brief of Appellant include the information required by Rule 55.03, including the signature of an attorney of record for Appellant on the original Brief; that the Brief complies with the limitations contained in Rule 84.06(b); and that the Brief contains 4067 words, as reflected in the word count of the Microsoft Word word-processing system used to prepare the Brief; and

(2) Pursuant to Mo. S. Ct. R. 84.05(g), the undersigned further certifies that the floppy disks containing the Brief of Appellant filed with the Court and served on opposing counsel have been scanned for viruses and are virus-free.

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