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State v. Boston, 132 Nev. Adv. Op. 20 (March. 31, 2016)

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CRIMINAL LAW: SIXTH AMENDMENT, BATSON

Summary

After a jury trial, Defendant was convicted of two counts of first-degree murder with the use of a deadly weapon, one count of conspiracy to commit murder, and related crimes. Defendant was sentenced to death of each murder. The district court denied Defendant's motion to suppress statements he made in two interviews with police after his initial appearance before a magistrate. The Supreme Court reversed, holding (1) the district court did not err in denying Defendant's motion to suppress, as his Sixth Amendment right to counsel attached at his initial appearance before the magistrate, but Defendant waived his right to have counsel present at the subsequent interviews; but (2) the district court clearly erred when it rejected Defendant's objection under *Batson v. Kentucky* to the State's use of a peremptory challenge to remove an African American from the venire during jury selection. Reversed and remanded.

Background

Defendant McCarty was arrested for murder with the use of a deadly weapon, kidnapping, conspiracy and battery causing substantial bodily harm. Five days after the arrest, he appeared before a magistrate and was denied bail. Eight days later, he appeared for arraignment when he was appointed with counsel. During the eight days between his initial appearance and arraignment, McCarty was interrogated by the State. McCarty contends that the statements he made during the interrogations should have been suppressed because detectives deliberately elicited incriminating statements after his Sixth Amendment right to counsel attached. The State contends that McCarty's Sixth Amendment right to counsel did not attach until the district attorney filed "formal" charges, which was the same day when McCarty appeared for arraignment and appointed counsel. The district court denied a motion to suppress the statement.

McCarty also contended that the State engaged in discriminatory jury selection when it exercised peremptory strikes to remove two African-American prospective jurors from the venire.

¹ By Nancy Snow.

At the beginning of McCarty's trial, the State exercised ten peremptory challenges, using two of them to strike two of the three remaining African Americans in the venire. McCarty objected to those two peremptory challenges as discriminatory, focusing primarily on prospective juror number 36, a married 28-year-old African-American mother of two who was a full-time college student. The State conducted independent research into her background based on her responses to questions during voir dire that her brother had been incarcerated. During the course of the investigation, the State used a Shared Computer Operations for Protection and Enforcement (SCOPE) background check mechanism and found that she held a valid work card for an adult nightclub.² Referring to that information, the prosecution moved to remove juror 36 from the panel.

During trial, McCarty raised *Batson* objection³ and argued that the State used prospective juror 36's work card as pretext for purposeful discrimination. The district court interrupted defense counsel's argument and held that the argument is for the Supreme Court and then continued with the peremptory challenges and jury sworn in proceeding.

Discussion

On the issue of motion to suppress McCarty's statements made during the interrogations, the Court disagreed with the State's argument that attachment of the right to counsel requires that a public prosecutor (as distinct from a police officer) be aware of the initial proceeding or involved in its conduct, and held that the right to counsel attaches at the initial appearance before a judicial officer.⁴ The Court explained that under the federal standard, an accusation filed with a judicial officer is sufficiently formal, and the government's commitment to prosecute it sufficiently concrete, when the accusation prompts arraignment and restrictions on the accused's liberty to facilitate prosecution.⁵ Since an "initial appearance" has been characterized by the Court as a hearing at which a magistrate informs the defendant of the charge and various rights in further proceedings and determines the conditions for pretrial releases, McCarty's Sixth Amendment right to counsel attached on May 30, 2006.

² The investigation failed to uncover any information about the prospective juror's brother.

³ *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.")

⁴ *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 199 (2008).

⁵ *Id.* at 210.

However, the Court did not find McCarty's Sixth Amendment right was violated because McCarty has failed to demonstrate that his *Miranda* waiver was not voluntary, knowing, and intelligent. The Court held that "...when a defendant is read his *Miranda* rights (which includes the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick" because even though the *Miranda* rights have their foundation in the Fifth Amendment, a *Miranda* advisement is sufficient to apprise a defendant of the nature of his Sixth Amendment rights and the consequences of abandoning those rights."⁶

The Court applied *Batson* three-step analysis set forth by the United States Supreme Court in its evaluation of Defendant's equal protection challenge to the State's exercise of a peremptory challenge.⁷ The three steps are: the opponent of the peremptory challenge must first make out a prima facie case of discrimination; then the production burden shifts to the proponent of the challenge to assert a neutral explanation for the challenge that is "clear and reasonable specific." Finally, the trial court must decide whether the opponent of the challenge has proved purposeful discrimination. The final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rest with, and never shifts from, the opponent of the strike. A district court may not unreasonably limit the defendant's opportunity to prove that the prosecutor's reasons for striking minority veniremembers were pretextual.⁸ The district court should sustain the *Batson* objection and deny the peremptory challenge if it is more likely than not that the challenge was improperly motivated.⁹

Because the district court's decision at step one is moot, and Defendant does not argue that the State's explanations for striking the prospective jurors were facially discriminatory, the Court only addressed the third step of the *Batson* inquiry here.

⁶ *Montejo v. Louisiana*, 556 U.S. 778, 797 (2009).

⁷ *Kaczmarek v. State*, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004); *see also Purkett v. Elem*, 514 U.S. 765, 767 (1995) (summarizing the three-step *Batson* analysis).

⁸ *Conner v. State*, 130 Nev., Adv. Op. 49, 327 P.3d 503, 509 (2014).

⁹ *Johnson v. California*, 545 U.S. 162, 170 (2005); *see also Williams v. Beard*, 637 F.3d 195, 215 (3d Cir. 2011).

The State's explanation for striking prospective juror 36 was that the State was uneasy about her possession of a valid work card for an adult nightclub. However, this information was uncovered after the State had conducted the SCOPE background check on her. The State's original reason for conducting the independent background investigation was her disclosure of her brother's criminal history.

The Court concluded that the State's strip-club explanation implausible because the State did not make any inquiry on whether the remaining 34 prospective jurors had also obtained a valid work card of similar kind. The Court reasoned that if prospective juror 36's possession of a valid work card for an adult nightclub indeed made the State uneasy, it should have also been worried about the other 34 prospective jurors on whom it did not conduct a SCOPE background check to determine whether they had obtained a valid work card within the last three years. The Court held that this disparate treatment supports the conclusion that it is more likely than not that the reason given for striking prospective juror 36 were mere pretext for purposeful discrimination.¹⁰

Further, the district court admitted it was concerned about the State's independent investigation into prospective juror 36's background, but it nevertheless disregarded Defendant's attempt to show that it was unlikely prospective juror currently worked at an adult nightclub. The Court held that the district court failed to undertake the sensitive inquiry into all the relevant circumstances required by *Batson* and its progeny before rendering its decision.¹¹

Conclusion

The Court concluded that the district court clearly erred by allowing the State to exercise a peremptory challenge to dismiss prospective juror 36. Because this error is structural,¹² the Court reverse the judgment of conviction and remand this matter to the district court for proceedings consistent with this opinion.

¹⁰ See *Miller-El v. Dretke*, 545 U.S. 231, 244 (2004).

¹¹ See *Batson*, 476 U.S. at 93, 96.

¹² *Diomampo v. State*, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008).