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Summary of Foster v. State, 121 Nev. Adv. Op. 20

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Foster v. State, 121 Nev. Adv. Op. 20, 111 P.3d 1083 (2005).¹

CRIMINAL LAW - APPEALS

Summary

Troy Anthony Foster, appellant, was charged with four counts of sexual assault and one count of kidnapping. A jury found Foster guilty of three counts of sexual assault and acquitted him on one count of sexual assault and of kidnapping. Foster appealed his conviction asserting five assignments of error. The Nevada Supreme Court rejected Foster's contentions concluding in part the evidence presented at trial was more than sufficient to sustain the jury's verdict.

Foster then filed a post-conviction petition for a writ of habeas corpus in district court, claiming ineffective assistance of both trial and appellate counsel. The district court appointed counsel to represent Foster and conducted an evidentiary hearing. On January 28, 2004 the district court entered an order rejecting all of Foster's claims and denying the petition for a writ of habeas corpus.

Foster again filed an appeal to the Nevada Supreme Court asserting a number of claims of error in the district court's denial of Foster's post-conviction petition for a writ of habeas corpus. Although Foster asserted a number of claims, the Nevada Supreme Court focused primarily on Foster's claim that his Sixth Amendment right to effective assistance of counsel was violated. Foster claimed his counsel failed to assign any error on direct appeal with regard to the trial court's finding that defense counsel violated *Batson v. Kentucky*.²

The Nevada Supreme Court affirmed the district court's order denying Foster's post-conviction habeas petition. The court concluded Foster's contentions that the district court erred in rejecting his claims of ineffective assistance of trial and appellate counsel were without merit. The court reasoned that Foster had failed to show the prejudice necessary to establish any entitlement to relief on any of his claims relating to his trial counsel's failure to object to the trial court's *Batson* decision and remedy or appellate counsel's decision to assert any claims of error on appeal with the trial court's remedy of the *Batson* issue. The court further reviewed the remainder of Foster's claims of error in connection with the denial of the post-conviction habeas corpus petition and thereto found that Foster failed to show the prejudice necessary to establish any entitlement to relief on the basis of ineffective assistance of counsel. However, the court did reserve for a more appropriate case a more definitive decision of what remedy best serves to vindicate in Nevada courts the multiple interests that *Batson* protects.³

¹ By Debra L. Pieruschka

² 476 U.S. 79 (1986).

³ The holding in *Batson* serves to protect three interests that are threatened by discriminatory jury selection: (1) the defendant's right to equal protection, (2) the excluded juror's equal protection rights, and (3) the public's confidence in the fairness of our system of justice. *Id.* At 86-87.

Issue and Disposition

Issue

Does a violation of *Batson* infringe upon a defendant's Sixth Amendment right to effective counsel when on direct appeal counsel fails to assign any error to the trial court's remedy of reseating the juror who had been improperly peremptorily challenged?

Disposition

No. The Nevada Supreme Court affirmed the district court's decision in rejecting Foster's post-conviction habeas petition claiming ineffective assistance of counsel because Foster failed to demonstrate prejudice sufficient to entitle relief. Therefore, Foster's Sixth Amendment right to effective counsel was not violated.

Commentary

State of the Law Prior to *Foster*

In Nevada, a claim of ineffective assistance of counsel is subject to independent review.⁴ Independent review is proper where the claim presents a mixed question of law and fact.⁵ A claim of ineffective assistance of counsel is a mixed question of law and fact.⁶ The key for the court in evaluating "an ineffectiveness claim is whether the proper function of the adversarial process was so undermined by counsel's conduct that the reviewing court cannot trust that the trial produced a just result."⁷

To prevail on a claim of ineffective assistance of counsel, a petitioner must meet the test established in *Strickland v. Washington*.⁸ In *Strickland*, the test starts with a strong presumption that counsel's conduct falls within reasonable professional assistance. The petitioner must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defense.⁹ However, if a petitioner fails to make a sufficient showing on either prong of the test, the court does not need to consider the remaining prong.¹⁰ The habeas corpus petitioner must carry the burden of proving the disputed factual allegations underlying the claim of ineffective assistance of counsel by a preponderance of the evidence.¹¹

The *Strickland* test applies to reviews of claims asserting ineffective assistance of appellate counsel.¹² To establish prejudice based on deficient assistance of appellate counsel, the petitioner must show that the omitted issue would have had a reasonable probability of success

⁴ *Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001).

⁵ *Id.*

⁶ *Id.*

⁷ *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

⁸ *Id.* at 687.

⁹ *Id.*

¹⁰ *Kirksey v. State*, 112 Nev. 980, 998, 923 P.2d 1102 (1996).

¹¹ *Means v. State*, 120 Nev. 101, _____, 103 P.3d 25, 33 (2004).

¹² *Kirksey*, 112 Nev. at 998, 923 P.2d at 1113.

on appeal.¹³ The Nevada Supreme Court has noted that appellate counsel need not raise every issue to provide effective assistance but is entitled to make tactical decisions to limit the scope of an appeal to issues the counsel determines have the highest probability of success. As the Nevada Supreme Court has stated “a tactical decision . . . is ‘virtually unchallengeable absent extraordinary circumstances.’”¹⁴

The petitioner must establish the counsel’s deficient performance prejudiced the defense. Specifically, the petitioner must make a showing there is a reasonable probability that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.”¹⁵ A reasonable probability is one that is sufficient to undermine the confidence in the outcome.¹⁶ The assessment of counsel’s performance is reviewed under the circumstances and from counsel’s perspective at the time of action; not from hindsight.¹⁷

The Nevada Supreme Court acknowledged it had not previously addressed the appropriate remedy for a *Batson* violation. A *Batson* violation is one where counsel uses a peremptory challenge to exclude a potential juror based on race¹⁸ or gender.¹⁹ In determining whether peremptory challenges have been used in a discriminatory manner, the complaining party “must [first] make a prima facie showing of intentional discrimination.” Next the party accused of discriminatory challenges must offer a gender or race-neutral explanation for striking the jurors. The trial court must then decide whether the complaining party has carried his burden of proving purposeful discrimination. The *Batson* decision did not specify the appropriate remedy when a violation has been proven.²⁰

Other Jurisdictions

The Nevada Supreme Court noted the *Batson* decision expressly left to the state courts how best to implement its holding. State courts have generally used three approaches in implementing the *Batson* holding.²¹ Some jurisdictions mandate trial courts to disallow a peremptory strike made in violation of *Batson* or to reseal the improperly stricken juror.²² Other jurisdictions require the trial court to discharge the venire and commence a new jury selection from an entirely different venire.²³ However, the majority of courts have delegated the determination of the appropriate remedy for a *Batson* violation to the discretion of the trial judge.²⁴

¹³ *Lara v. State*, 120 Nev. 177, 183-84, 87 P.3d 528, 532 (2004) (citing *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114).

¹⁴ *Doleman v. State*, 112 Nev. 843, 848, 921 P.2d 278, 280-1 (1996).

¹⁵ *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

¹⁶ *Id.*

¹⁷ *Evans v. State*, 117 Nev. 609, 622, 28 P.3d 498, 508 (2001).

¹⁸ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁹ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *U.S. v. De Gross*, 913 F.2d 1417 (9th Cir. 1990); *Libby v. State*, 115 Nev. 45, 975 P.2d 833 (1999).

²⁰ *Walker v. State*, 113 Nev. 853, 867, 944 P.2d 762, 771 (1997) (citing *Batson*, 476 U.S. at 96).

²¹ *See Jones v. State*, 683 A.2d 520, 525 (Md. 1996).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

In the case at bar, the remedy the trial court exercised, reseating the challenged juror has been held to be an appropriate means of addressing a *Batson* violation.²⁵ The Nevada Supreme Court found the trial court offered Foster's counsel the choice of starting over with an entirely new venire or of continuing with the same venire with the last juror reinstated to the panel. Foster's counsel made a strategic decision to continue with the same venire – all of which was done out of the presence of the venire. Under the particular circumstances of this case, the reinstatement of the juror in question did not offend Foster's rights under the United States Constitution.

Effect of *Foster* on Current Law

The *Foster* court concluded Foster failed to establish the prejudice necessary to entitle him to relief on his claim that appellate counsel was ineffective for failing to assign error with respect to the trial court's resolution of the *Batson* violation. However, the court expressed its preference that the trial courts in the state should follow the American Bar Association Standard recommending that all peremptory challenges to the jury venire should be exercised outside the presence of the venire.²⁶

The court further expressed if the juror whom the peremptory challenge was exercised against is reseated and a curative instruction requested, the curative instruction should be given on the record for purposes of review.

Unanswered Questions

The court held Foster failed to prove the trial court erred by reseating the challenged juror as an appropriate remedy for a *Batson* violation. However, the court declined to engage in a comprehensive analysis of the appropriate remedy for a *Batson* violation in the context of a post-conviction appeal. The court explicitly limited its holding in *Foster* and reserved for another more appropriate case a definitive decision on what remedy best serves the multiple interests *Batson* protects.

Conclusion

Although the Nevada Supreme Court affirmed the district court's denial of Foster's post-conviction petition of writ of habeas corpus, it limited the holding to those facts and circumstances of this case that reseating the challenged juror was an appropriate remedy. The court left open the door for a future case to determine the appropriate remedy for a *Batson* violation.

²⁵ See e.g., *Jones*, 683 A.2d 520 (concluding that reseating improperly challenged jurors was an appropriate remedy for a *Batson* violation committed by defense counsel).

²⁶ See ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY 15-2.7(a) (3d ed. 1996).