

[J-66-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 391 CAP
	:	
Appellee	:	
	:	Appeal from the Judgment of Sentence
	:	entered on August 22, 2002, in the Court
v.	:	of Common Pleas, Criminal Division,
	:	Philadelphia County at Nos. 0993, 0994
	:	and 00995 July Term 2001
LESTER FLETCHER,	:	
	:	
Appellant	:	SUBMITTED: April 1, 2004

CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: November 18, 2004

I concur in the majority's disposition of Appellant's claims and write only to express my position respecting the claim of alleged discriminatory practices on the part of the prosecution in jury selection.

In this regard, the majority initially concludes that Appellant has not established a prima facie case under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986), because he failed to comply with this Court's full and complete record requirement, deriving from Commonwealth v. Spence, 534 Pa. 233, 627 A.2d 1176 (1993). Although the majority acknowledges that the United States Court of Appeals for the Third Circuit has held that the Spence requirements are an unreasonable application of federal law, it declines to reconsider them, since neither this Court nor the United States Supreme Court have overruled our precedent. See Majority Opinion, Slip Op. at 14 n.15 (citing

Holloway v. Horn, 355 F.3d 707, 728-29 (3d Cir.), cert. denied, Beard v. Holloway, 73 U.S.L.W. 3266 (2004). I have, however, previously expressed my agreement with the Third Circuit's approach, at least in the context of Appellant's circumstance, namely, a direct appeal from a trial court's refusal to cognize a timely objection asserting a prima facie Batson violation. See Commonwealth v. Uderra, ___ Pa. ___, ___ n.12, ___ A.2d ___, ___ n.12, 2004 WL 2363725 (2004) (footnote attributed to this author only).¹ My

¹ In the direct appeal setting, obligating a defendant to identify the race of the jurors who served and the race of the jurors acceptable to the Commonwealth who were stricken by the defense is at odds with Batson, as,

[t]he final composition of the jury (or even the composition of the jury at the time the Batson objection is raised) offers no reliable indication of whether the prosecutor intentionally discriminated in excluding a member of the defendant's race. Indeed, the composition of a jury is decided by many factors, including the defendant's use of peremptory challenges, challenges for cause, and jurors' claims of hardship. Thus, a Batson inquiry focuses on whether or not racial discrimination exists in the striking of a black person from the jury, not on the fact that other blacks may remain of the jury panel. A defendant can make a prima facie case of discrimination without reference to the jury's racial makeup.

Likewise, evidence of the race of jurors acceptable to the Commonwealth who were stricken by the defense finds no place in the prima facie case, as defense strikes are irrelevant to the determination of whether the prosecutor has engaged in discrimination. Batson nowhere suggests that a defendant must support his challenge to the prosecutor's actions by showing that he has clean hands, or by admitting that he too struck black jurors from the jury

Holloway, 355 F.3d at 728-29 (citations and internal quotations omitted). I would therefore not reject a Batson claim on direct appeal based on the Appellant's failure to develop information extraneous to that necessary to establish an inference of discrimination.

(continued . . .)

position aligns with that of the majority in relation to the application of the Spence requirements to Appellant's situation solely because he has not undertaken to challenge them in this appeal.²

(...continued)

As Uderra explained, however, the reasoning in Holloway is less persuasive in connection with an ineffectiveness claim stemming from the failure to lodge a Batson challenge at trial. See Uderra, ___ Pa. at ___, ___ A.2d at ___. In that situation, requiring either a full and complete record, or proof of actual, purposeful discrimination, is consistent with the burden under the Post Conviction Relief Act, 42 Pa.C.S. §§9541-9546, and/or the ineffectiveness standard. See id. at ___, ___ A.2d at ___.

² Under Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726 (2002), any ineffectiveness dynamic pertaining to any failing on the part of Appellant's counsel relative to the Spence requirements is a subject for post-conviction review.