REL: 12/17/2010

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2010-2011

CR-07-1208

Demetrius Avery Jackson, Jr.

v.

State of Alabama

Appeal from Jefferson Circuit Court, Bessemer Division
(CC-06-1620 and CC-06-1621)

WISE, Presiding Judge.

The appellant, Demetrius Avery Jackson, Jr., was convicted of capital murder in connection with the killing of Officer Mary Smith of the Fairfield Police Department. The murder was made capital because he killed Smith while she was on duty as a police officer or because of some official or job-related act or performance. See § 13A-5-40(a)(5), Ala. Code 1975. He was also convicted of attempted murder, a violation of §§ 13A-4-2 and 13A-6-2(a)(1), Ala. Code 1975, with regard to the shooting of Officer Eric Burpo of the Fairfield Police Department. By a vote of 10-2, the jury recommended that Jackson be sentenced to imprisonment for life without the possibility of parole on the capital murder conviction. The trial court overrode the jury's recommendation and sentenced him to death on the capital murder conviction. The trial court also sentenced him to serve a term of life in prison on the attempted murder conviction. This appeal followed.

Jackson raises numerous issues in his brief to this court. However, our initial review of the record reveals that we must remand this case to the trial court for additional action so that we may properly address one of the issues he raises in his brief.

Jackson argues that the prosecution used its peremptory challenges in a racially discriminatory manner, in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed.

2d 69 (1986). Specifically, he contends that the prosecution exercised a large number of challenges to remove black veniremembers, inquired about the race of a veniremember during the voir dire proceedings, struck veniremembers who had nothing in common other than race, and engaged in disparate treatment of similarly situated black and white veniremembers. Jackson also alleges that the Jefferson County District Attorney's Office has a history of discrimination. Therefore, he concludes that we should remand this case for a Batson hearing.

The State notes that Jackson did not raise a Batson objection at trial. Therefore, it argues that we may review his argument only for plain error. See Rule 45, Ala. R. App. P. Plain error is

> "error that is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings. Ex parte Taylor, 666 So. 2d 73 (Ala. 1995). The plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant. Taylor."

Ex parte Trawick, 698 So. 2d 162, 167 (Ala. 1997). The State contends that, "[u]pon information and belief, the black veniremembers struck by the State shared attributes that led to the State to strike them." (State's brief at p. 24.) However, it asserts that, "because these attributes do not appear in the record, the State has no objection to a remand for the limited purpose of holding a hearing on the Batson issue and allowing the State to offer its reasons for striking these venire members." (State's brief at pp. 24-25.)

> "In Batson the United States Supreme Court held that black veniremembers could not be struck from a black defendant's jury because of their race. In Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the court extended its decision in Batson to apply also to white defendants. ... The United States Supreme Court in Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), held that the protections of Batson were also available to defense counsel in criminal trials. The Alabama Supreme Court has held that the protections of Batson apply to the striking of white prospective jurors. White Consolidated Industries, Inc. v. American Liberty Insurance Co., 617 So. 2d 657 (Ala. 1993)."

Grimsley v. State, 678 So. 2d 1194, 1195 (Ala. Crim. App. 1995).

> "The burden of persuasion is initially on the party alleging discriminatory use of a peremptory challenge to establish a prima facie case of discrimination. In determining whether there is a prima facie case, the court is to consider 'all relevant circumstances' which could lead to an inference of discrimination. See Batson, 476 U.S. at 93, 106 S. Ct. at 1721, citing Washington v. Davis, 426 U.S. 229, 239-42, 96 S. Ct. 2040, 2047-48, 48 L. Ed. 2d 597 (1976). The following are

illustrative of the types of evidence that can be used to raise the inference of discrimination:

> "1. Evidence that the 'jurors in question share[d] only this one characteristic -- their membership in the group -- and that in all other respects they [were] as heterogeneous as the community as a whole.' [People v.] Wheeler, 22 Cal. 3d [258,] at 280, 583 P.2d [748,] at 764, 148 Cal. Rptr. [890,] at 905 [(1978)]. For instance 'it may be significant that the persons challenged, although all black, include both men and women and are a variety of ages, occupations, and social or economic conditions,' Wheeler, 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905, n. 27, indicating that race was the deciding factor.
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> "2. A pattern of strikes against black jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors. Batson, 476 U.S. at 97, 106 S. Ct. at 1723.
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> "3. The past conduct of the offending attorney in using peremptory challenges to strike all blacks from the jury venire. Swain [v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965)].
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> "4. The type and manner of the offending attorney's questions and statements during voir dire, including nothing more than desultory voir dire. Batson, 476 U.S. at 97, 106 S. Ct. at 1723; Wheeler, 22 Cal. 3d at 281, 583 P.2d at 764, 148 Cal. Rptr. at 905.

> "5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions. Slappy v. State, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987); People v. Turner, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986); People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 764, 148 Cal.Rptr. 890 [905] (1978).
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> "6. Disparate treatment of members of the jury venire with the same characteristics; or who answer a question in the same or similar manner; e.g., in Slappy, a black elementary school teacher was struck as being potentially too liberal because of his job, but a white elementary school teacher was not challenged. Slappy, 503 So. 2d at 352 and 355.
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> "7. Disparate examination of members of the venire; e.g., in Slappy, a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors. Slappy, 503 So. 2d at 355.
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> "8. Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury. Batson, 476 U.S. at 93, 106 S. Ct. at 1721; Washington v. Davis, 426 U.S. [229,] at 242[, 96 S. Ct. 2040, [2049], 48 L. Ed. 2d 597 (1976)].
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> "9. The offending party used peremptory challenges to dismiss all or most black jurors, but did not use all of his peremptory challenges. See Slappy, 503 So. 2d at 354, Turner, supra."

Ex parte Branch, 526 So. 2d 609, 622 (Ala.1987).