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ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2009-2010

CR-08-0696

Donald Dwayne Whatley

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-07-1107)

WISE, Presiding Judge.

The appellant, Donald Dwayne Whatley, was convicted of capital murder for the killing of Pravinbhai Patel. The murder was made capital because he committed it during the course of a first-degree robbery, see § 13A-5-40(a)(2), Ala.

Code 1975. By a vote of 10-2, the jury recommended that Whatley be sentenced to death. The trial court accepted the jury's recommendation and sentenced him to death. Whatley did not file any post-judgment motions. This appeal followed.

Whatley 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.

Whatley argues that it appears 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, engaged in little or no voir dire examination of the black veniremembers it struck, engaged in disparate treatment of similarly situated black and white veniremembers, and struck veniremembers who had nothing in common other than race. Whatley also alleges that the Mobile 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 Whatley 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).

> "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.
>
> "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.
>
> "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)].

"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).

"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.

"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.

"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)].

> "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).

Because Whatley did not raise a Batson objection at trial, the State did not have an opportunity to respond to his allegations and, if required by the trial court, to state its reasons for its exercise of its peremptory challenges. Also, the trial court, which is in a better position to evaluate such arguments because it was present during the jury selection proceedings, did not have an opportunity to hear and rule on the allegations. Finally, based on the limited record before us, we cannot properly review Whatley's allegations.

Nevertheless, our review of the record indicates that, if the defense had filed a Batson motion at trial raising the arguments he now raises, the trial court would have been obligated to require the prosecution to state the reasons for each of its peremptory challenges. Although the State may very well have race-neutral and nondiscriminatory reasons for its challenges, we conclude that a remand for a Batson hearing is necessary in light of the many levels of judicial scrutiny

that occur when a defendant is convicted of a capital offense and sentenced to death.

Accordingly, we remand this case to the trial court for that court to conduct a Batson hearing and to make written findings regarding Whatley's allegations. If the prosecution cannot provide race-neutral reasons for its use of peremptory challenges against black veniremembers, Whatley shall be entitled to a new trial. See, e.g., Lewis v. State, 24 So. 3d 480 (Ala. Crim. App. 2006), aff'd, 24 So. 3d 540 (Ala. 2009). The trial court shall take all necessary action to see that the circuit clerk makes due return to this court at the earliest possible time and within 84 days after the release of this opinion. The return to remand shall include a transcript of the Batson hearing and the trial court's written findings of fact.

REMANDED WITH INSTRUCTIONS.

Welch, Kellum, and Main, JJ., concur. Windom, J., recuses herself.