

STATE OF MICHIGAN
COURT OF APPEALS

JULIUS KELLOGG, DONNA COLLINS and
GREGORY ANDONIAN,

UNPUBLISHED

August 2, 1996

Plaintiffs–Appellees,

v

No. 178760

LC No. 92-217852-NZ

CARL PETERSON, ROBERT ALDERMAN,
ROBERT WARREN and the CITY OF RIVER
ROUGE,

Defendants–Appellants.

Before: O’Connell, P.J., and Gribbs and T. P. Pickard,* JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court’s order granting plaintiffs’ motion for a new trial. We reverse.

Plaintiffs filed an action in Wayne County Circuit Court alleging that they were beaten by Officer Carl Peterson while attending a wedding in River Rouge. The jury found in favor of defendants on all counts. After learning that only one member of the 25 person jury pool impaneled in the case was a City of Detroit resident, plaintiffs moved for a new trial. The trial court granted the motion, holding that the Wayne County jury selection system systematically excludes Detroit residents.

On appeal, defendants contend that the trial court abused its discretion in reaching the merits of plaintiffs’ challenge to the jury array. Generally, objection to the composition of a jury is waived if the objecting party fails to exhaust its peremptory challenges and expresses satisfaction with the jury impaneled. *People v Mann*, 49 Mich App 454, 463; 212 NW2d 282 (1973). See also MCL 600.1354(1); MSA 27A.1354(1). In the instant case, however, the record establishes that plaintiffs did not have sufficient information upon which to base an objection before the jury was sworn. According

* Circuit judge, sitting on the Court of Appeals by assignment.

to an affidavit submitted by plaintiffs in support of their motion for a new trial, plaintiffs's counsel did not learn that Detroit residents were underrepresented in Wayne County jury pools until after trial. Although the Wayne County bench and bar held a meeting to discuss the alleged deficiencies in the jury selection system, the meeting did not occur until April 21, 1994, the same day that voir dire occurred in this case. Even if plaintiffs were aware that their specific jury did not contain a fair cross-section of the community, there is nothing in the record indicating that they had notice that the problem was systemic. It is well-established that proof of underrepresentation in a particular jury venire is not sufficient to establish a fair cross-section violation. See e.g. *United States v Steen*, 55 F3d 1022, 1030 (CA 5, 1995); *Robson v Grand Trunk W.R. Co.*, 5 Mich App 90, 97-99; 145 NW2d 846 (1966). In light of this principle, it was not error for the trial court to have considered the merits of plaintiffs' challenge to the jury selection system.

Although the jury challenge was properly addressed, we find that the trial court abused its discretion in granting a new trial. Challenges to jury selection systems are typically brought under the Sixth Amendment (right to a speedy public trial in criminal actions before an impartial jury), the Fifth Amendment (right to indictment by a grand jury in federal felony actions), or the Due Process and Equal Protection clauses of the Fourteenth Amendment. See *Haas v United Technologies Corp.*, 450 A2d 1173, 1182-1183 (Sup Ct Del, 1982). Regardless of the grounds upon which a jury selection challenge is based, courts generally utilize either equal protection or Sixth Amendment fair cross-section analysis in considering the claim. See e.g. *United States v Ortiz*, 897 F Supp 199, 202-203 (E.D. Penn, 1995); *Mitchell v Morgan*, 844 F Supp 398, 402-403, aff'd 41 F3d 1508 (1994). Here, plaintiffs allege that the Wayne County jury selection system violates the Sixth Amendment fair cross-section requirement.¹

A prima facie violation of the fair cross-section guarantee requires proof that (1) the group alleged to be excluded is a 'distinctive' group in the community, (2) the representation of the group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664, 668; 58 L Ed 2d 579, 586-587 (1979); *People v Guy*, 121 Mich App 592, 599; 329 NW2d 435 (1982). Systematic exclusion is defined as exclusion "inherent in the particular jury selection system utilized." *Duren, supra*, 439 US 366.

Plaintiffs contend that City of Detroit residents are systematically excluded from Wayne County jury pools because they return jury questionnaires at a substantially lower rate than non-Detroit residents. We disagree. Plaintiffs do not dispute the fact that the jury selection is neutral on its face. That a certain segment of Detroit residents chose not to respond to questionnaires cannot be considered "inherent" to the jury selection process. See *Guy, supra*, 121 Mich App 600. Although those Detroit residents who fail to respond to jury questionnaires are excluded from service, they can hardly be said to constitute a "distinctive" group within the community. *Id.* See also *Orvitz, supra*, 897 F Supp 204. While inaction by jury officials in the face of knowledge of a system's underrepresentativeness may constitute proof of systemic exclusion, *New Jersey v Ramseur*, 524 A2d 188, 239 (N.J. Sup Ct,

1987), plaintiffs presented no evidence of a long standing statistical disparity between Detroit and non-Detroit jurors. Moreover, the record indicates that Wayne County has begun taking steps to correct problems caused by the selection system implemented in 1993. Accordingly, we find that the trial court abused its discretion in granting plaintiffs' motion for a new trial.

Reversed.

/s/ Peter D. O'Connell

/s/ Roman S. Gibbs

/s/ Timothy P. Pickard

¹ The Sixth Amendment guarantee applies only to criminal defendants. US Const, Am VI. The prima facie tests for an equal protection and a fair cross-section claim, however, are virtually identical. *United States v Tuttle*, 729 F2d 1325, 1327 n 2 (CA 11, 1984). Moreover, this Court has recognized a civil litigant's right to a jury drawn from a fair cross-section of the community. *Robson, supra*, 5 Mich App 97-99, and the fair cross-section test has been applied in civil cases. See e.g. *Mitchell, supra*, 844 FSupp 403.