[Cite as *State v. Hunt*, 2010-Ohio-5839.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93080

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

NINA HUNT

DEFENDANT-APPELLANT

JUDGMENT:
APPLICATION DENIED

Cuyahoga County Common Pleas Court
Case No. CR-518149
Application for Reopening
Motion No. 435462

RELEASE DATE: December 1, 2010

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MARY J. BOYLE, J.:

{¶ 1} Nina Hunt has filed a timely application for reopening pursuant to App.R. 26(B). Hunt is attempting to reopen the appellate judgment that was rendered in *State v. Hunt*, Cuyahoga App. No. 93080, 2010-Ohio-1419, which affirmed her conviction and sentence for one count of felonious assault. We decline to reopen Hunt's appeal for the following reasons.

{¶ 2} The Supreme Court of Ohio, in *State v. Smith*, 95 Ohio St.3d 127, 2002-Ohio-1753, 766 N.E.2d 588, has once again examined the standards that

must be applied to an application for reopening as brought pursuant to App.R. 26(B). In *Smith*, the Supreme Court of Ohio specifically held that:

{¶ 3} "Moreover, to justify reopening his appeal, [applicant] 'bears the burden of establishing that there was a "genuine issue" as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal.' *State v. Spivey*, 84 Ohio St.3d at 25, 701, N.E.2d 696.

{¶ 4} "*Strickland* charges us to 'appl[y] a heavy measure of deference to

{¶ 5} counsel's judgments,' 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674, and to 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' Id. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Moreover, we must bear in mind that appellate counsel need not raise every possible issue in order to render constitutionally effective assistance. See *Jones v. Barnes* (1983), 463 U.S. 745, 103 S.Ct 3308, 77 L.Ed.2d 987; *State v. Sanders* (2002), 94 Ohio St.3d 150, 761 N.E.2d 18." *State v. Smith*, 95 Ohio St.3d 127, 766 N.E.2d 588, 2002-Ohio-1753, at 7.

{¶ 6} In addition, the Supreme Court of Ohio, in *State v. Spivey*, 84 Ohio St.3d 24, 1998-Ohio-704, 701 N.E.2d 696, held that:

{¶ 7} "In *State v. Reed* (1996), 74 Ohio St.3d 534, 535, 660 N.E.2d 456, 458, we held that the two-prong analysis found in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674, is the appropriate

standard to assess a defense request for reopening under App.R. 26(B)(5). [Applicant] must prove that his counsel were deficient for failing to raise the issues he now presents, as well as showing that had he presented those claims on appeal, there was a 'reasonable probability' that he would have been successful. Thus [applicant] bears the burden of establishing that there was a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." Id., at 25.

{¶ 8} Herein, Hunt has raised one proposed assignment of error in support of her claim of ineffective assistance of appellate counsel. Hunt argues that consideration of her proposed assignment of error would have resulted in a reversal of her conviction for the offense of felonious assault. A review of Hunt's proposed assignment of error, however, fails to support the claim of ineffective assistance of appellate counsel.

{¶ 9} Hunt's sole proposed assignment of error is that:

{¶ 10} "The trial court erred when it allowed the State to use a peremptory challenge in a racially discriminatory fashion in contravention of *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1721. Fourteenth Amendment, United States Constitution; Section 16, Article I, Ohio Constitution. (February 19, 2009 Transcript, p. 191-193)."

{¶ 11} Hunt, through her sole proposed assignment of error, argues that the prosecutor engaged in a pattern of racial discrimination by exercising three peremptory challenges during the jury selection process, which resulted in the exclusion of three black females from the jury. Hunt argues that the conduct of the prosecutor, in exercising the three peremptory challenges, violated *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69.

{¶ 12} In *Batson*, the United States Supreme Court held that in order to establish a prima facie case of purposeful discrimination in selecting a jury, the accused must affirmatively demonstrate that: (1) members of a recognized racial group were peremptorily challenged; and (2) the facts and circumstances raise an inference that the prosecutor employed the peremptory challenge to exclude jurors based upon their race. Id. at 96, 106 S.Ct. at 1723, 90 L.Ed.2d at 87. Once a prima facie case of purposeful discrimination is established, the State bears the burden of providing a neutral explanation. Id. at 95, 106 S.Ct. at 1724, 90 L.Ed.2d at 88. However, the explanation "need not rise to the level justifying exercise of a challenge for cause." Id. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d 88. The crucial issue is whether a discriminatory intent is contained within the explanation for the peremptory challenge and discriminatory intent is present if the prosecutor's explanation for the peremptory challenge is simply pretext

for exclusion on the basis of race. Id. at 98, 106 S.Ct. at 1723, 90 L.Ed.2d at 88; *Hernandez v. New York* (1991), 500 U.S. 352, 363, 111 S.Ct. 1859, 1868, 114 L.Ed.2d 395. Finally, when reviewing a trial court's ruling on a *Batson* challenge, this court will not disturb the court's decision, unless we find the decision to be clearly erroneous. *State. v. Were,* 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263.

{¶ 13} "Trial courts are to apply a three-step procedure for evaluating claims of racial discrimination in peremptory challenges. *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶64. First, the opponent of the peremptory strike must make a prima facie case of racial discrimination. Id. 'To make a prima facie case of such purposeful discrimination, an accused must demonstrate: (a) that members of a recognized racial group were peremptorily challenged; and (b) that the facts and any other relevant circumstances raise an inference that the prosecutor used the peremptory challenges to exclude jurors on account of their race.' (Internal citations and quotations omitted.) *State v. Hill* (1995), 73 Ohio St.3d 433, 444-445, 653 N.E.2d 271.

{¶ 14} "Second, if the trial court finds that the opponent has set forth a prima facie case, then the proponent of the strike must come forward with a racially neutral explanation for the strike. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d

433, ¶106. The explanation need not rise to the level justifying exercise of a challenge for cause. Id.

{¶ 15} "Third, 'if the proponent puts forward a racially neutral explanation, the trial court must decide, on the basis of all the circumstances, whether the opponent has proved purposeful racial discrimination.' *State v. Herring*, 94 Ohio St.3d 246, 256, 2002-Ohio-796, 762 N.E.2d 940. This final step involves

{¶ 16} evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but 'the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'" *Collins v. Rice* (2006), 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824, quoting *Purkett v. Elem* (1995), 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (per curiam). The trial court, however, may not simply accept a proffered race-neutral reason at face value; it must examine the prosecutor's challenges in context to ensure that the reason is not merely pretextual. *Frazier*, 115 Ohio St.3d at ¶65. * * *

{¶ 17} "In reviewing a trial court's ruling on a *Batson* challenge, we will not disturb the court's decision unless we find it to be clearly erroneous. See *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶61. This deferential standard arises from the fact that step three of the *Batson* inquiry turns largely on the evaluation of

credibility by the trial court. See *Herring*, 94 Ohio St.3d at 252, citing *Batson*, 476 U.S. at 98." *State v. Moseley*, Cuyahoga App. No. 92110, 2010-Ohio-3409, ¶32.

{¶ 18} In the case sub judice, Hunt argues that the prosecutor failed to articulate specific and reasonable racially neutral explanations for the peremptory challenges as employed with regard to three African-American females. Specifically, Hunt argues that the trial court's determination, that the prosecutor had met the burden under *Batson*, with regard to the peremptory challenges employed to remove "Ms. M," "Ms. W," and "Ms. C," was clearly erroneous. Hunt asks this court to vacate her conviction and remand the matter for a new trial.

{¶ 19} Initially, we find that Hunt has failed to make any argument with regard to the peremptory challenges employed to remove Ms. M and Ms. W from the prospective jury. In addition, our review of the transcript of the voir dire, and the inquiry made by the trial court, demonstrates that the prosecutor provided a race neutral explanation as to the peremptory challenge employed against Ms. C. The prosecutor stated that Ms. C "comes across as a little, I don't want to say flighty, but I just have reservations about her. She's fanning herself. * * * There are still African-Americans on the jury and another one will be replacing one of the jurors that I would like to excuse with my peremptory. * * * No. I know it's not -- it's not a very clear

reason, it's just I didn't get a good sense from her. * * * That she would follow the law. * * * I would believe so. She seems a little too free-spirited." Tr. p. 191.

{¶ 20} *Batson* determinations, as made by the trial court, are granted great deference, and a trial court's finding of no discriminatory intent will not be reversed on appeal unless error is clearly demonstrated. Herein, the prosecutor's explanation for a peremptory challenge, as applied to Ms. C., clearly represented a race-neutral explanation and was based upon something other than the race of the juror. *Hernandez v. New York*, supra. See, also, *State v. Boyton*, Cuyahoga App. No. 93598, 2010-Ohio-4248; *State v. Walls*, Cuyahoga App. No. 93942, 2010-Ohio-3317; *State v. Bankston*, Cuyahoga App. No. 92777, 2010-Ohio-1576. The trial court's finding of no discriminatory intent, with regard to the peremptory challenge employed against Ms. C, is not clearly erroneous. *State v. Were*, supra. We find that consideration of Hunt's sole proposed assignment of error on appeal would not have resulted in a reversal of her conviction for the offense of felonious assault. Hunt has failed to demonstrate, through her claim of ineffective assistance of appellate counsel, any prejudice. Thus, we must decline to reopen her original appeal.

{¶ 21} Application for reopening is denied.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR