

COPY

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

STEVE RONCALI

APPELLANT

VS.

FILED

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NO. 2006-KA-1224-COA

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SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE ISSUES

- I. THE TRIAL COURT PROPERLY REFUSED TO ACCEPT RONCALI'S PEREMPTORY STRIKE OF JUROR NO. 1.**
- II. RONCALI'S DOUBLE JEOPARDY CLAIM IS BOTH PROCEDURALLY BARRED AND WITHOUT MERIT.**

STATEMENT OF THE FACTS

On December 16, 2005, Deputy Hezzie Murry with the Sunflower County Sheriff's Department was on patrol when he observed a vehicle driven by Steve Roncali speeding and weaving in and out of traffic. T. 54. Deputy Murry pulled Roncali over and asked to see his driver's license. T. 54. Roncali informed Deputy Murry that his driver's license was suspended and that he had no proof of insurance. T. 54, 63. Deputy Murry noticed that Roncali was fidgeting and then saw what appeared to be a baggie of crystal meth in the passenger seat. T. 55, 65. Deputy Murry ordered Roncali to hand over the drugs, but Roncali grabbed the baggie off of the seat, balled it up in his hands, and stated, "I ain't going back to jail." T. 56, 65. Deputy Murry reached in the car to

confiscate the contraband, and Roncali punched Deputy Murry in the stomach, knocking the wind out of him. T. 56-57. Roncali swallowed the drugs as Deputy Murry caught his breath. T. 57. Deputy Murry then attempted to place Roncali under arrest, but Roncali put up a fight, and the two wrestled in the car. T. 57. Deputy Woody Spencer was the first back-up officer to arrive and assist. T. 69. Deputy Spencer testified that Roncali continued to resist arrest, and after a brief struggle, Deputy Spencer was able to pull him out of the car and handcuff him. T. 177.

Roncali was indicted for Count I possession of amphetamine and Count II simple assault on a police officer. C.P. 7. A Sunflower County Circuit Court jury was unable to reach a verdict on Count I, but found Roncali guilty on Count II.

SUMMARY OF THE ARGUMENT

The State made out a *prima facie* of purposeful discrimination when Roncali used his first two peremptory strikes against the only white potential jurors on the panel. Although Roncali presented a facially valid race-neutral reason for attempting to strike juror number 1, the State ultimately proved that the stated reason was pretextual.

Roncali's double jeopardy claim is both procedurally barred and without merit.

ARGUMENT

I. THE TRIAL COURT PROPERLY REFUSED TO ACCEPT RONCALI'S PEREMPTORY STRIKE OF JUROR NO. 1.

During jury selection, the State raised a *Batson* objection after defense counsel exercised its first two peremptory strikes against jurors number 1 and 17, the only white jurors on the panel. T. 38-39. Defense counsel's race neutral reason for striking juror number 1 was that he allegedly looked away when asked a question by defense counsel, and because defense counsel believed he was a city clerk. T. 39. The prosecutor responded that juror number 1 was in fact a fish farmer, not a city clerk, and that she did not observe the juror turn away from defense counsel when questioned. T. 40. The prosecutor further opined that she believed defense counsel's stated reason was pretextual. T. 40. The trial court noted that juror number 1 was sitting on the front row, and that the trial court did not observe him turn away from defense counsel. T. 40. When asked if defense counsel had further reason to strike juror number 1, she stated, "I'm uncomfortable when I ask a juror to -- just ask -- you ask the juror to answer you, to speak up, when I'm noticing that when the jurors turn away from me, they're reading books, doing crossword puzzles, I'm uncomfortable." T. 41. The court noted that he was asking only about juror number 1, who was not reading a book or doing crossword puzzles, to which defense counsel continued to maintain that he turned away from her. T. 41. After repeating that the juror never appeared to turn away, the trial court found that defense counsel's stated reason was pretextual. T. 41. The trial court did, however, accept defense counsel's race neutral reason for striking juror number 17. T. 42.

Roncali claims on appeal that the trial court erred in failing to accept his "race neutral" reason for striking juror number one. He emphasizes in his brief that he is white and juror number 1 was also white. This fact is of no consequence to a *Batson* analysis because it is unconstitutional to

exclude jurors based on race through the use of peremptory challenges regardless of whether or not the defendant and the excluded jurors share the same race. *Powers v. Ohio*, 499 U.S. 400, 415 (1991). The *Powers* court reasoned that “racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process, and places the fairness of a criminal proceeding in doubt.” *Id.* at 411 (internal quotations and citations omitted). “*Batson* was designed not only to protect individual defendants from discrimination in the selection of jurors, but also to protect the rights of potential jurors and to ensure continued public confidence in the judicial system.” *Branch v. State*, 882 So.2d 36, 58-59 (¶57) (Miss. 2004) (quoting *Mata v. Johnson*, 99 F.3d 1261, 1269 (5th Cir. 1996)).

The *Prima Facie* Case

Traditionally under *Batson*, the opponent of the peremptory strike(s) was required to make out a *prima facie* case of purposeful discrimination by showing,

1. That he is a member of a “cognizable racial group;”
2. That the proponent has exercised peremptory challenges toward the elimination of veniremen of his race; and
3. That facts and circumstances raised an inference that the proponent used his peremptory challenges for the purpose of striking minorities.

Puckett v. State, 788 So.2d 752, 756 (¶10) (Miss. 2001). However, in light of the supreme court’s holding in *Powers*, the first two elements of the test were essentially eliminated. *Id.* Accordingly, in the present case, the State was simply required to show that the facts and circumstances raised an inference that Roncali struck juror number 1 based on his race.

Reviewing courts defer to the trial court’s factual findings under *Batson* and will not disturb those findings unless clearly erroneous or against the overwhelming weight of the evidence. *Manning v. State*, 765 So.2d 516, 519 (¶8) (Miss. 2000) (citing *Thomson v. State*, 721 So.2d 590, 593 (¶4) (Miss. 1998)). The trial court found that the State made out a *prima facie* case by pointing

out that the defendant exercised his first two peremptory strikes against the only white jurors on the panel. In *Henley v. State*, the supreme court found, in light of the standard of review, that the trial court did not err in finding that the State made out a *prima facie* of discrimination because the defendant used his first three peremptory strikes against white females. 729 So.2d 232, 239 (¶35) (Miss. 1998). The *Henley* court noted that the number of strikes on a particular class and the ultimate ethnic makeup of the jury are relevant considerations in determining whether a *prima facie* case of purposeful discrimination has been shown. *Id.* at 240 (¶35). Further, because of the highly deferential standard of review, reviewing courts have refused to find error where the trial court did not make an explicit finding that the opponent had established a *prima facie* case before requiring the proponent to give a race neutral reason for the strikes. See *Humphrey v. State*, 759 So.2d 368, 385 (¶53) (Miss. 2000) (overruled on other grounds). The trial court's finding that the State made a *prima facie* case of discrimination is not clearly erroneous nor against the overwhelming weight of the evidence.

Race Neutral Reasons

So long as the race neutral reason provided by the proponent of the strike is not facially discriminatory, it will be accepted as race neutral. *Flowers v. State*, 947 So.2d 910, 917 (¶9) (Miss. 2007) (citing *Randall v. State*, 716 So.2d 584, 588 (¶16) (Miss. 1998)). The State acknowledges that lack of eye contact has been deemed a sufficient race neutral reason for a peremptory strike. *Carter v. State*, 932 So.2d 850, 855 (¶15) (Miss. Ct. App. 2006). As such, Roncali's stated reason for striking juror number 1 was arguably sufficiently race neutral. The supreme court has noted that passing the second step of the *Batson* inquiry is the "easiest burden in the entire *Batson* test," and "the difficult question is not whether the proponent of the strike can present a reason which is not facially racist or sexist, but whether the proffered reason will ultimately prove to be pre-textual."

Randall, 716 So.2d at 588 (¶19).

Pretext

After race neutral reasons have been articulated, the trial court must then decide if the objecting party has met its burden in proving that the reasons given were pretexts for discrimination. *Flowers* at 917 (¶9) (citing *McFarland v. State*, 707 So.2d 166, 171 (¶14) (Miss. 1997)). Although Roncali claimed that juror number one turned away from her when questioned, both the State and trial court stated on the record that juror number one, who was sitting on the front row, had remained attentive and had not turned away during questioning. After the trial court articulated its finding, it gave defense counsel yet another opportunity to give a valid reason for striking juror number one, to which defense counsel responded, "I'm uncomfortable when I ask a juror to -- just ask -- you ask the juror to answer you, to speak up, when I'm noticing that when the jurors turn away from me, they're reading books, doing crossword puzzles, I'm uncomfortable." T. 41. The court noted that the reasoning was wholly inapplicable to juror number one, as he had not turned away and was not reading a book or working a crossword puzzle. Accordingly, the trial court found that defense counsel's stated reason for exercising a peremptory strike against juror number 1 was in fact pretextual.

The trial judge, as the finder of fact, was in the best position to weigh the facts and circumstances of the peremptory challenge, including whether juror number 1 in fact turned away from defense counsel. The trial court's *Batson* ruling must be affirmed as it was not clearly erroneous or against the overwhelming weight of the evidence. *Manning* at 519 (¶8).

II. RONCALI'S DOUBLE JEOPARDY CLAIM IS BOTH PROCEDURALLY BARRED AND WITHOUT MERIT.

Roncali claims that his ticket for resisting arrest and subsequent conviction of simple assault

on a police officer stem from the same criminal act and, therefore, amount to double jeopardy. Roncali's double jeopardy claim is procedurally barred because he failed to object to Count II of the indictment and failed to raise a double jeopardy claim before the trial court. *Sessums v. State*, 899 So.2d 903, 904 (¶3) (Miss. Ct. App. 2005); *Johnson v. State*, 848 So.2d 906, 909 (¶9) (Miss. Ct. App. 2003); *Stidham v. State*, 750 So.2d 1238, 1242 (¶17) (Miss. 1999). Furthermore, although the record reflects that Deputy Murry initially wrote Roncali a ticket for resisting arrest, the record contains no indication as to whether Roncali was ever prosecuted for that charge. However, should the Court reach the merits of Roncali's claim, the State advances the following argument.

The Double Jeopardy Clause of the state and federal constitutions prohibits successive prosecutions for the same criminal offense. *Powell v. State*, 806 So.2d 1069, 1074 (¶8) (Miss. 2001). The "same elements" test is used to determine whether multiple offenses are the same for double jeopardy purposes. *Id.* (citing *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932)). A conviction is not violative of a defendant's right to be free from double jeopardy where each offense contains an element not contained in the other. *Id.* at (¶12). A person is guilty of resisting arrest if he (1) obstructed or resisted (2) his lawful arrest or that of another person (3) by any state, local or federal law enforcement officer (4) by force, violence, threats or any other manner. Miss. Code Ann. § 97-9-73. A person is guilty of simple assault against a police officer if he (1) attempts to cause or purposely, knowingly or recklessly causes (2) bodily injury (3) to a law enforcement officer (4) who is acting within the scope of his duty, office or employment. Miss. Code Ann. § 97-3-7. The offenses of resisting arrest and simple assault on a police officer clearly contain elements lacking in the other. As such, no double jeopardy violation occurred.

Roncali's second argument is both procedurally barred and meritless.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Roncali's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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