

NO. 79143-1
COURT OF APPEALS NOS. 31645-5-II & 31743-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP VICTOR HICKS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Thomas Feltnagle, Judge
The Honorable Brian Tollefson, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

PETITIONER

Rita J. Griffith
Attorney for Appellant

1305 N.E. 45th Street, #205
Seattle, WA 98105-45232
(206) 547-1742

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A. ISSUES ON REVIEW

1. Is the state's removal by peremptory challenge of the only African-American from the jury panel, where the defendant is African-American, sufficient to establish a prima facie case of discrimination?

2. Do the decisions of this Court in State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001), and of the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), preclude abandoning the traditional case-by-case inquiry in determining whether a defendant has been prejudiced by his attorney's deficient performance and adopting a *per se* rule that there can be no prejudice from trial counsel's failure to object to instructing the jury, in a non-capital case, that the death penalty is not at issue whenever the jury acquits of a greater charge, but convicts of a lesser charge?

B. STATEMENT OF THE CASE

The state charged Philip Hicks and his codefendant Rashad Babbs, alternatively, with aggravated murder or felony murder, and with attempted first degree murder. CP 81-84.

A jury convicted Mr. Hicks of the alternative charge of felony murder, but was unable to reach a unanimous verdict on the attempted murder charge. CP 85, 86, 89, 90, 92. A subsequent jury convicted Mr. Hicks of the attempted first degree murder. CP 95-96.

Mr. Hick's defense at trial was diminished capacity and the issue for the jury was whether, based on the evidence presented on his behalf, he lacked the capacity to process reality and act intentionally at the time of the charged crimes.

1. Voir dire for the first trial

During voir dire at the first trial, a prospective juror indicated concern that her beliefs as a Catholic on matters such as contraceptives, abortions, and capital punishment might conflict with her jury service. 3RP 73-74. After an unreported sidebar, the court indicated in front of the entire jury panel that

I wanted to let all of you know with regard to this particular case, you heard me say it's an aggravated murder in the first degree case. This is not a death penalty case. So that is one thing that I suppose could come in conflict with your religious beliefs, but it is not one that is at issue in this case.

3RP 74.

The fact that the case was not a capital case was raised again at other points during voir dire in the context of not having to worry about a person being shown to be innocent after they were put to death, and the need to be careful in reaching a verdict. 3RP 154-155; 4RP 43, 64.

2. Voir dire for the second trial

The state effectively removed all African-American jurors from the jury panel during voir dire at the second trial. The state removed an

African-American man for cause and then used a peremptory challenge to remove the only other African-American in a position to be included on the jury, Juror 9.¹ RP 140, 142, 490, 495.

Counsel for Mr. Babbs described Juror No. 9 as "middle aged, 40ish, 45ish -- [who] seems to be of appropriate intelligence" and noted that Juror 9 had said little. RP 491. Counsel noted further that there was nothing in her questionnaire which could rise to a challenge. RP 495. Counsel for Mr. Hicks joined the Batson challenge to the state's peremptory challenge of Juror 9. RP 492.

Juror 9 stated during voir dire, in response to questions by the prosecutor and defense counsel, that she could follow the law on burden of proof, would not increase the state's burden because the case involved a serious charge, would be able to fire a colleague for misconduct if necessary, would not have a problem deciding the defendants' guilt or innocence and could separate sympathy for the victims from what happened in the case. RP 394, 424, 452, 460.

The trial court found that the defense had established a prima facie case. RP 496. The prosecutor's stated reasons for excusing Juror 9 were

¹ The state successfully challenged for cause juror No. 17, an African-American, because he knew a number of the witnesses and he stated he was 90% sure that he could be open minded about their testimony. RP 123-142.

(1) that Ms. Donovan had a master's degree in education and her type tended to be "more forgiving" and "nurturing," (2) that she was a social worker, and (3) that somebody in her family or a friend had been arrested and served time. RP 496-497.

Based on this rationale by the prosecutor, the court denied the Batson challenge without considering whether the prosecutor's reasons were merely pretextual. RP 498.

C. ARGUMENT

A. EXCUSING THE SOLE AFRICAN-AMERICAN ON THE JURY PANEL SHOULD BE HELD TO ESTABLISH A PRIMA FACIE CASE UNDER BATSON.

In State v. Rhodes, 82 Wn. App. 192, 201, 917 P.2d 149 (1996), the court held that while the exclusion of the only African-American juror on a panel may not be sufficient to conclusively establish discriminatory motivation, "the prosecutor's dismissal of the only eligible African-American juror may *imply* a discriminatory act or motive" for purposes of requiring "the prosecutor to articulate the reason for the challenge." Thus, the Rhodes court held that where the only eligible African-American juror is excused by peremptory challenge, the trial court should have the prosecutor explain the reason for the challenge and "determin[e], based on

the circumstances and that explanation, whether purposeful discrimination did in fact occur." Rhodes, 82 Wn. App. at 201-202.

The Court of Appeals in this case expressly "departed" from Rhodes and held that "the party challenging the strike does not meet its burden simply by pointing out that the challenged juror is the venire's only member of a particular group."² Slip op. at 15. Further, the Court of Appeals disregarded the fact that Mr. Hicks is African-American and the excused juror an African-American, and speculated about jury venires with "one potential juror from each of several different constitutionally cognizant groups." Slip op. at 15.

The conflict between the decision in this case and the holding of Rhodes should be resolved by reaffirming Rhodes.

The United States Supreme Court in Batson v. Kentucky, 476 U.S. 79, 95, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), clearly held that "a consistent pattern of official race discrimination is not a necessary predicate to a violation of the Equal Protection Clause. A single invidious discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." "[T]he

² The Court of Appeals disregarded the holding of Hernandez v. New York, 500 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), that once the trial court has found that the defense made out a prima facie case and ruled on reasons, the question of the sufficiency of the prima facie case is moot on appeal.

exclusion of even a single venireperson on the basis of race is a violation of the Equal Protection Clause." Jones v. Ryan, 987 F.2d 960, 972 (3rd Cir. 1993); United States v. Vasquez-Lopez, 22 F.3d 900, 902 (9th Cir. 1994).

Thus, the reasoning of the Court of Appeals in this case is in conflict with Batson itself; and, if, as the court speculated, the state is regularly excluding from jury participation the lone members of constitutionally cognizable groups from our diverse communities, entertaining Batson challenges would appear to be more rather than less necessary to assure equal protection for the minority members and the defendant. Requiring the state to provide race-neutral reasons and evaluating those reasons is not onerous in light of the constitutional rights of both the accused and the public.³ If these members of cognizable groups are being excluded in violation of the Equal Protection Clause, their rights are no less important than the rights of other members of the community.

In any event, numerous appellate courts have held that exercising a peremptory challenge to excuse the sole African-American, Hispanic or

³ The speculation by the Court of Appeals is unsupported by any authority suggesting that trial courts are being burdened with Batson challenges from diverse groups or that parties are routinely excluding sole members of a variety of cognizable groups. Counsel, in the course of conducting the research for this case, found cases involving excusing all of the African-Americans, Hispanics or Native Americans.

Native-American juror establishes a prima facie case under Batson. See Parrish v. State, 540 S.2d 870 (Fla.2d DCA 1989); Pearson v. State, 514 S.2d 374, 375 (Fla. DCA 1987), United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987); United States v. Roan Eagle, 867 F.2d 436, 441 (8th Cir. 1989); United States v. Iron Moccasin, 878 F.2d 226, 229 (8th Cir. 1989); Heard v. State, 910 S.W.2d 663 (Ark. 1995); Duram v. State, 363 S.E.2d 607 (Ga.App. 1987); McCormick v. State, 631 N.E.2d 1108 (Ind. 2004); State v. Katzorke, 810 P.2d 597 (Ariz.App.Div.2 1990); United States v. Shelby, 26 M.J. 921 (C.M.R. 1988)(excusal of sole minority member from court martial panel made a prima facie case).

Many reported cases discuss the sufficiency of the prosecutor's reasons when the defendant raised a Batson challenge after the state used a peremptory challenge to exclude the sole black citizen on the panel. See e.g. McCurdy v. Montgomerly County, 240 F.3d 512 (6th Cir. 2001); State v. Lopez, 544 N.W.2d 845 (Neb. 1996); State v. McDonough, 631 N.W.2d 373 (Minn. 2001); State v. Pink, 20 P.3d 31 (Kan. 2001); Woodall v. Com., 63 S.W.3d 104 (Ky. 2001). Unlike the Court of Appeals in this case, none revisited the issue of whether a prima facie case had been established by excusing the sole African-American juror. See e.g., State v. White, 709 N.E.2d 140 (Ohio 1999) (does not decide whether

striking one juror makes out a prima facie case, but holds that the issue is moot once the trial court decides that it does).

Other courts have articulated a more general principle that excusing all of the members of the race by peremptory challenge establishes a prima facie case. United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989) (challenge of two minorities, the only Hispanic juror and the only Hispanic alternate, is in and of itself not enough to establish a prima facie case, but it is a sufficient showing if these are the only Hispanics on the panel); United States v. Thompson, 827 F.2d 1254, 1256-1257 (9th Cir. 1987)(all four members challenged); United States v. Alcantar, 832 F.2d 1175, 1177 (9th Cir. 1987)(challenge to all three members of the racial minority on the panel); People v. Crittenden, 885 P.2d 887 (Cal. 1994).

This Court should adopt the view of a majority of courts considering the issue that excusion by peremptory challenge of all the members of a race, even where there is only one member on the venire, is sufficient to establish a prima facie case. Any other rule cannot protect the rights of the defendant and the prospective jurors against invidious discrimination. This rule will provide a bright-line rule that will not prove unnecessarily burdensome. It will, in fact, be less burdensome in implementation than having the trial court evaluate the circumstances in advance of having the state provide race-neutral reasons. There may be times when it will appear

from the record that the state has a race-neutral reason for excusing a juror which falls short of grounds for a challenge for cause. In those instances, the defense will not likely mount a Batson challenge. If the defense does, however, it will be easy for the state to articulate a reason and the record will be complete. When the voir dire itself is ambiguous, having the state provide reasons will augment the record for appeal in case the challenge is denied.

A Batson challenge where the sole member of a group is stricken by peremptory challenge need be no more time-consuming or burdensome than ruling on an evidentiary objection. Entertaining such a challenge and having the reasons for excusing the juror on the record best protects the rights of the accused and the juror and provides a record for review on appeal. For these reasons, this Court should resolve the conflict between Rhodes and the Court of Appeals in this case in favor of the holding in Rhodes and should clarify that excusing one or all of the members of a constitutionally cognizable group can make out a prima facie case under Batson. This will further the goal of equal protection in a diverse society and give clear notice that reasons may be expected.

B. A CASE-BY-CASE CONSIDERATION OF WHETHER A DEFENDANT IS PREJUDICED BY HIS ATTORNEY'S INEFFECTIVENESS IN FAILING TO OBJECT TO THE TRIAL COURT'S INSTRUCTING THE JURY THAT THE DEATH PENALTY IS NOT AT ISSUE IN A NON-CAPITAL CASE SHOULD CONTINUE TO BE THE APPROPRIATE STANDARD.

In State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001), this Court held that it is error to inform the jurors during voir dire in a non-capital case that the death penalty is not at issue: "This strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence of a jury's deliberations."

The holding in Townsend derives from the long-standing rule that "the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases." State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1969); Shannon v. United States, 512 U.S. 573, 579, 129 L. Ed. 2d 459, 114 S.Ct. 2419 (1994)("[i]t is well established that when a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentence might be imposed," quoting Rogers v. United States, 422 U.S. 35, 40, 45 L. Ed. 2d 1, 95 S. Ct. 2091 (1975) (improper to agree to accept jury verdict "guilty as charged with extreme mercy of court"; jury should have been instructed that it should reach a verdict without regard to sentence).

Instructing a jury about sentencing consequences of conviction may taint the impartiality of the jurors, unfairly influence deliberations and invade the province of the jurors. Shannon, 512 U.S. at 579; Townsend, 142 Wn.2d at 846.

Because trial counsel did not object to the court's instructing the jury that the case was not a death penalty case, this Court held in Townsend that counsel's performance was not only deficient, but that "[t]here was no possible advantage to be gained by defense counsel's failure to object to the comments regarding the death penalty. On the contrary, such instructions, if anything, would only increase the likelihood of a juror convicting the petitioner." Townsend, 142 Wn.2d at 847. Thus, the failure to object met the first prong of the two-part test of Strickland v. Washington, 466 U.S. 668, 08 L. Ed. 2d 674m 104 S. Ct. 2052 (1984), because there was no legitimate strategic or tactical reason for failing to object. Townsend, at 847.

Specifically, the prejudice identified in Townsend was that "if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Townsend, at 846; Shannon, 512 U.S. at 579, Rogers, 422 U.S. at 40.

The Townsend Court then determined that the second prong of Strickland's test for ineffective assistance of counsel had not been met because of the ample evidence of premeditation presented to the jury in the case. Townsend, at 848-849.

Rather than follow the analysis set out in Townsend and Strickland, to consider whether there was a reasonable probability that absent counsel's deficient performance the result would have been different, Townsend, at 847; Strickland, 466 U.S. at 693-696, the Court of Appeals in this case followed what they appear to have interpreted as a *per se* rule set out in State v. Murphy, 86 Wn. App. 667, 937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002 (1998), that counsel's performance cannot be deficient if the defendant is convicted of a lesser charge. Slip op. at 24.

The facts of this case demonstrate why a *per se* rule should be rejected. First, such a rule is inconsistent with Strickland, which sets out a specific standard to be applied case-by-case. Strickland, 466 U.S. at 693-696. Second, the issue for the jury in Mr. Hick's case was not whether his "confession provided ample evidence of his involvement," as set out by the Court of Appeals, but whether he had presented sufficient evidence to support his diminished capacity defense. Slip op. at 24. Given that the jury acquitted him of aggravated murder and were unable to agree on the charge of attempted first degree murder, it can be inferred that the jurors

were far from convinced that he had the requisite mental state necessary for criminal conviction. Jurors who were otherwise inclined to hold out for acquittal on the felony-murder charge or entertained doubts that Mr. Hicks had a culpable criminal mental state, could have more readily compromised and convicted him of felony murder.

Moreover, the fact that the jurors did not continue deliberating to a verdict on the charge of attempted first degree murder is very significant. Had the jury not been told that the case did not involve the death penalty, the jurors might have been more deliberative and able to reach a verdict of acquittal on that charge. While attorneys may know that the death penalty is never involved in an attempted murder charge, it is very likely that most jurors did not know that. Thus, the jury's unwillingness or inability to deliberate to a conclusion on the attempted murder count is evidence that they were affected by the court's instruction that the death penalty was not involved. It is also evidence that the jury may have compromised rather than determine the primary issue it had before it in Mr. Hick's case -- whether he had the capacity to form criminal intent to commit the crimes charged against him.

This Court's most recent decision in State v. Mason, No. 77507-9 (filed July 19, 2007), should not alter the analysis in this case. Mason reaffirms the holding in Townsend that a trial court errs, in a non-capital

case, in instructing the jury that the case did not involve the death penalty. This Court noted that any challenge to the holding of Townsend and claim that there are strategic or tactical reasons for giving the instruction should be fully litigated in an adversarial proceeding at trial. Most importantly, unlike Townsend and Mr. Hicks' case, Mason did not involve a claim of ineffective assistance of counsel because trial counsel, in Mason, objected to instructing the jury that the case did not involve the death penalty. When the trial judge invited the defense attorney who objected to it to identify the prejudice of the instruction, however, defense counsel responded in a manner that may have actually encouraged the judge to give the instruction. On this record, the Mason Court held that error in giving the instruction was harmless.⁴ Thus, Mason did not involve an analysis under the second prong of Strickland, and this Court did not consider whether within reasonable probability the error affected the outcome of the trial. Townsend, at 847; Strickland, 466 U.S. at 693-696. It is this analysis under the second prong of Strickland which should remain a case-by-case determination.

⁴ The harmless error analysis in Mason appears to be akin to an invited error analysis. Where defense counsel is aware of the law prohibiting instructing the jury that the case does not involve the death penalty and encourages the giving of it, in spite of an objection, it may be deemed to be unfair to allow defense counsel to build in error in this way.

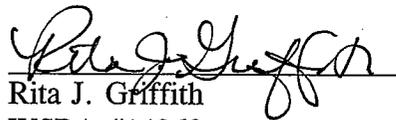
This court should reject a bright-line rule and reverse Mr. Hicks' conviction because of his attorney's ineffectiveness in not objecting to instructing the jury that the death penalty was not involved. Within reasonable probabilities, the jurors might have reached a different result had Mr. Hicks' attorney not been deficient in his performance.

D. CONCLUSION

Petitioner respectfully submits that his convictions should be reversed and his case remanded for retrial because of the Batson error and the error in instructing the jury that the death penalty was not at issue at trial.

DATED this 30th day of July, 2007.

Respectfully submitted,



Rita J. Griffith

WSBA #14360

Attorney for Petitioner

Certification of Service

I, Rita Griffith, attorney for Phillip Hicks, certify that on July 30, 2007 I mailed to each of the following persons a copy of the document on which this certification appears:

Kathleen Proctor
Pierce County Prosecutor's Office
930 Tacoma Ave. S., Rm. 946
Tacoma, WA 98402

David Bruce Koch
Nielsen Broman & Koch PLLC
1908 E. Madison Street
Seattle, WA 98122-2842

Phillip Victor Hicks
DOC #793210
1313 N. 13th Avenue
Walla Walla, WA 99362

Dated this 30th day of July, 2007.



Rita J. Griffith Seattle, WA
WSBA no. 14360