

No. 93408-8

FILED
August 26, 2015
Court of Appeals
Division I
State of Washington

No. 73754-6-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MATTHEW ALEX ERICKSON, Petitioner,

v.

CITY OF SEATTLE, Respondent,

REPLY TO CITY'S ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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A. INTRODUCTION

Mr. Erickson will reply to the City's arguments in the order in which they appear in the Answer. To avoid repetition, Mr. Erickson will not reply to points that are already fully addresses in his previous motion.

B. ARGUMENT

I. RAP 2.3(d) (1), (2), and (3) Warrant Review of Mr. Erickson's Conviction Because the Trial Court Erred by Finding No *Prima Facie* Showing of Racially Motivated Peremptory Challenges.

The City correctly cites *State v. Meredith*, 178 Wn.2d 180, 184, 306 P.3d 942 (2013), *cert. denied*, 134 S. Ct. 1329 (2014) for the proposition that "something more" is needed to substantiate a *Batson*¹ challenge. However, unlike Mr. Rhone, who merely stated that the one and only person of the same race as him was stricken from the venire², Mr. Erickson has shown that "something more". Mr. Erickson has affirmatively shown that Juror 5 was stricken for a race based reason--that Juror 5 had a bad experience with law enforcement because of his race. VRP 205. Because of this "something more", Mr. Erickson has shown factors (3) and (4) of the *Rhone* factors.³

¹ *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69, 106 S. Ct. 1712 (1986).

² *State v. Rhone*, 168 Wn.2d 645, 652-53, 229 P.3d 752 (2010).

³ *Id.* at 656.

The City misleadingly states that the prosecutor in this case "exercised only one strike against African-Americans, did not use challenges to remove minorities from the jury and this prosecutor had no history of discriminatory use of peremptory challenges." *Answer*, 11. First, as the record shows, there was definitively only one member of the venire who was black, the same race as Mr. Erickson. VRP 180, 193. Second, the record is silent as to the racial makeup of the other venire members stricken by the City, but here, the only member of the same race as Mr. Erickson was stricken from the venire. Third, the record is silent as to any record of the prosecutors discriminatory use of peremptory challenges, but that only is one factor the Court may consider--it is not dispositive in and of itself. *Rhone*, 168 Wn.2d 656.

Finally, Juror 5 did present to the Court a situation steeped in racism which ultimately led to his dismissal from the venire. Juror 5 stated that he felt profiled by law enforcement investigating a church theft. VRP 152. In explaining this, Juror 5 stated that he was stopped by police because he "fit the description" of the suspect in that theft. *Id.* However, Juror 5 explained that the officers refused to tell him how he fit any description. *Id.* Though not explicitly stated by Juror 5, it is not difficult to read between the lines and glean that Juror 5 stated his belief that he was unfairly profiled by police for being black, a belief which ultimately led to

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his exclusion from the venire. Such a strike, when coupled with the factors elucidated in *Rhone*, show that Mr. Erickson has made the *prima facie* showing for purposeful discrimination. The Washington Supreme Court has held that racism is often "unintentional, institutional, or unconscious" and held that it is imperative to strengthen *Batson* jurisprudence to "recognize these more prevalent forms of racism." *State v. Saintcalle*, 178 Wn.2d 34, 35, 309 P.3d 326 (2013). This Court should find that the actions by the City in Mr. Erickson's case do make a *prima facie* showing for purposeful discrimination.

II. Insufficient Evidence Supports Mr. Erickson's Conviction for Unlawful Use of a Weapon.

The superior court erred in concluding that sufficient evidence existed to convict Mr. Erickson of possession of a dangerous weapon, thus denying Mr. Erickson his constitutional right to due process. There are not competing views as to if the evidence was sufficient; the record simply does not support a conviction for this charge. "[T]he State [must] prove every element of a crime beyond a reasonable doubt." *State v. Zeferino-Lopez*, 179 Wn. App. 592, 599, 319 P.3d 94 (2014).

No evidence before the Court suggests that the webbings on the knife constitute metal knuckles under SMC 12A.14.010. Here, the evidence showed that the knife handle had "webbings" on top of it, which

Officer Clay Asserted were "brass knuckles." VRP 302-03. At no point in his testimony did Officer Clay state that these webbings were designed to protect a hand while striking, or to increase the force of a blow stuck with the handgrip--at best, he testifies that the handgrip went around a wearer's fingers allowing them to make a fist to punch someone. VRP 283. Without more, such testimony does not support a finding of possession of a dangerous weapon beyond a reasonable doubt.

Further, the City failed to present sufficient evidence that the knife opened automatically or ejected into position by force of gravity, or a particular thrust. Taking all the facts educed in a light most favorable to the City, the knife possessed by Mr. Erickson was a knife that opened with a "spring assist" via the use of a lever to *slide* the blade. VRP 285-86. In fact, direct testimony by Officer Clay indicated that the knife did not have a button that quickly released the blade or that "releases a spring" that deployed the knife. VRP 299-300. Merely having a spring mechanism does not make a blade a switchblade; it must spring automatically with the press of a button, not slide out when slid forward. With such minimal testimony, the City did not present sufficient evidence to support Mr. Erickson's conviction.

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Appellant,)	
v.)	REPLY TO CITY'S ANSWER TO MOTION
)	FOR DISCRETIONARY REVIEW
CITY OF SEATTLE,)	
Respondent.)	
_____)	

CERTIFICATE OF SERVICE

I certify that on this date, I electronically the foregoing document with the Clerk of the court and also placed in the mail a copy of this motion to the following:

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EXECUTED this 26th day of August, 2015, at Tukwila, Washington.

_____/s/ Philip Chinn_____
Philip A. Chinn
WSBA # 47864
On Behalf of Matthew Alex Erickson, Petitioner

KIRSHENBAUM & GOSS, INC., P.S.

August 26, 2015 - 1:14 PM

Transmittal Letter

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Case Name: Matthew Alex Erickson v. City of Seattle

Court of Appeals Case Number: 73754-6

Party Represented: Matthew Erickson

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