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JONES v. PLASTER' 57 E3d 417 (4th Cir. 1995) United States Court of Appeals, Fourth Circuit

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57 F.3d 417 (4th Cir. 1995)
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FACTS

Danny Jones brought a Section 1983[2] action against his employer, Sheriff Harold Plaster of Pittsylvania County, Virginia, when Plaster refused to reappoint him as deputy sheriff.[3] Prior to trial in the Western District of Virginia, Plaster exercised four peremptory strikes which excluded all African-Americans from the jury. Plaster supported the strike of Preston, one of the prospective jurors, by calling him "a follower and not a man who would exercise independent judgment."[4] Jones objected on the basis of *Batson v. Kentucky*,[5] and the court found each of the four strikes impermissible. The court did not rule expressly that the strikes were *Batson* violations. Nevertheless, the court stated that the reasons given were "just not substantial enough" and ordered the parties to conduct a second round of jury selection with the same panel of prospective members.[6]

During the second round of jury selection, Plaster struck Preston again. Preston was the only African-American struck during the second round. When Jones objected to this strike on *Batson* grounds, Plaster responded that Preston lacked "conviction and judgment."[7] After accepting this reason and noting that two African-Americans remained on the panel, the district court overruled Jones' objection to the strike.

The jury returned a verdict in favor of Plaster, and Jones appealed. On appeal, Jones argued that the district court erred by evaluating the second round of peremptory strikes with the same low standard as it had for the first. He argued that the court should have required more than race-neutral reason to defend successfully against a *prima facie* showing of discriminatory intent.[8] Once a *prima facie* case of race-based discrimination is shown, Jones argued, the court should have required Plaster to prove by a preponderance of the evidence that he would have struck Preston regardless of race.[9]

HOLDING

The Court of Appeals for the Fourth Circuit could not decide whether the district court followed the appropriate analysis for evaluating challenges to peremptory strikes as set out in *Batson v. Kentucky*[10] and *Howard v. Senkowski*.[11] Accordingly, the court of appeals remanded the case for clarification. The court instructed the district court to specify whether Plaster exercised the second strike of Preston for a racially discriminatory purpose, and, if so, whether the strike would have been exercised notwithstanding that discriminatory purpose.[12]

ANALYSIS/APPLICATION

The court summarized for the district court the proper analysis under *Batson* as modified by *Howard*. The court of appeals instructed the district court to follow this analysis in evaluating the second peremptory strike of Preston. The court did not rule that a court should examine the reasons for the strike of a juror during a second round of jury selection with a standard of scrutiny higher than *Batson* requires.

I. ANALYSIS UNDER *BATSON* AND *HOWARD*

Traditional *Batson* analysis instructs that the party objecting to a peremptory strike on equal protection grounds must make a *prima facie* case of intentional discrimination using any "relevant circumstances."[13] After the objecting party establishes a *prima facie* case, the party who has exercised the strike must provide a race-neutral reason for the strike.[14] The objecting party can overcome the race-neutral reason if it can show that the reason is mere pretext for a race-based decision.[15] Finally, the court must determine whether the objecting party has proved intentional discrimination by the striking party.[16]

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[1] *Jones v. Plaster*, 57 F.3d 417 (4th Cir. 1995).

[2] 42 U.S.C. §1983 (1979).

[3] *Jones v. Plaster*, 57 F.3d 417 (4th Cir. 1995). Jones alleged that Plaster had violated his First Amendment right to free speech by refusing reappoint him as a result of his campaigning against Plaster's opponent in a recent election. *Id.* at 418.

[4] *Id.* at 419.

[5] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[6] *Jones*, 57 F.3d at 419.

[7] *Id.*

[8] *Jones*, 57 F.3d at 420.

[9] *Id.*

[10] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[11] *Howard v. Senkowski*, 986 F.2d 24 (2d Cir. 1993).

[12] *Jones*, 57 F.3d at 421-22.

[13] *Batson*, 476 U.S. at 96.

[14] *Id.* at 97. *See also Hernandez v. New York*, 500 U.S. 352, 359 (1991).

[15] *Purkett v. Jimmy Elem.*, 115 S. Ct. 1769, 1772 (1995) (citing *Batson*). *See also United States v. Brooks*, 66 F.3d 317, 317 (4th Cir. 1995).

[16] *Batson*, 476 U.S. at 98. *See also Hernandez*, 500 U.S. at 359.

In *Jones*, the Fourth Circuit joined the Second and Sixth Circuits in adopting *Howard*'s "dual motivation" analysis for *Batson* violations.[17] Dual motivation analysis allows a strike exercised for a racially discriminatory purpose to stand if the striking party can show that the improper purpose was "only part, and not the decisive part, of the motivation" behind the strike.[18] The Fourth Circuit's adoption of *Howard* adds a step to the *Batson* scheme by providing an affirmative defense to a *Batson* violation. In *Jones*, the Fourth Circuit held that a strike which violates *Batson* will stand nevertheless if the striking party proves by a preponderance of the evidence that it would have exercised the strike notwithstanding an improper purpose.[19]

II. THE DISTRICT COURT'S ANALYSIS AND THE COURT OF APPEALS' INTERPRETATION

In *Jones*, the district court failed to follow either the traditional *Batson* analysis or *Batson* analysis as supplemented by *Howard*. The district court judge overruled Jones' objection to the Preston strike with the following statement:

> The history of the thing troubles me some . . . but lack of conviction and lack of leadership aren't exactly the same thing, and the information is he did sorta go with the flow is I assume what you're saying to me and did not perhaps stand up for what he believed in, and that was the basis of it, and particularly given the fact that two blacks are left on the panel and the fact that the plaintiff struck one of the other blacks.[20]

Based on this reasoning, the court of appeals could not sustain the district court's decision to overrule Jones' objection.[21] The statement may have meant that Plaster's reason for striking Preston was race-neutral and that Jones failed to prove discriminatory intent. On the other hand, the statement may have meant that Jones proved discriminatory intent but that Plaster would have struck Preston regardless. The court of appeals could not determine the dispositive factors of the district court's ruling.

Despite the lack of clarity in the district court's statement, the court of appeals had the latitude to interpret it.[22] The court may have avoided interpreting the statement because it wished to avoid reversing the district court. The court of appeals certainly could not have sustained the district court's ruling under any reasonable interpretation of the district court's statement.

The court of appeals could not have sustained the district court's ruling based on a conclusion that "lack of conviction" was race-neutral. In order to have sustained the ruling, the court of appeals would have had to concluded that the reason offered for the first strike of Preston was different than the reason offered for the second strike. The district court did not articulate the difference between the reason offered for the first strike (Preston was "a man who would not exercise independent judgment"), and the reason offered for the second strike (Preston was a man who lacked "conviction and judgment"). The district court rejected the former reason, stating, "[Mr. Preston] wouldn't be a [school] principal unless he had some leadership abilities. It's too coincidental to let stand . . . ."[23] The district court found that the first strike had a discriminatory purpose and that the reason supplied was a pretext for that purpose.

Conversely, the district court seemed to accept "lack of conviction" as at least part of a permissible basis on which to sustain the second strike. First, the court recharacterized the reason offered for the first strike as "lack of leadership." Then the court stated simply that "lack of leadership" and "lack of conviction" were different. In light of a trial court's "first-hand knowledge and observation of the critical events," an appellate court must give great deference to the trial court's conclusions regarding discriminatory intent.[24] The difference between "a man who would not exercise independent judgment" and a man who lacked "conviction and judgment" was not apparent to the court of appeals. Because the district court failed to articulate any difference, the court of appeals could not have affirmed the district court's ruling; however, it did not reverse the court's ruling. Instead, the court of appeals remanded for clarification.

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[17] *United States v. Peraza*, 25 F.3d 1051 (6th Cir. 1994). Following the Fourth Circuit, the Eighth Circuit adopted *Howard* in *United States v. Darden*, 70 F.3d 1507 (8th Cir. 1995). The Court of Appeals of South Carolina adopted *Howard* in *Payton v. Kearse*, 460 S.E.2d 220 (S.C. Ct. App. 1995).

[18] *Howard*, 986 F.2d at 27.

[19] *Jones*, 57 F.3d at 421 (*citing Howard*, 986 F.2d at 26-30).

[20] *Id.* at 419.

[21] *Id.* at 421.

[22] *See United States v. Darden*, 1995 WL 689372 (8th Cir. 1995). This recent Eighth Circuit opinion illustrates an appellate court's willingness to interpret a garbled ruling by a district court. The district court in *Darden* stated:

> [Counsel's] reason for striking a young black woman was not a racially neutral reason and I still say that, that cause that are non-racially—they are racially neutral—the other reasons you stated . . . . For that reason I'm allowing the strike . . . . [T]he other reasons you gave give the basis for being a strike.

Id. at *17. The Circuit Court held that the court's decision was "equivalent to a finding that the prosecutor would have exercised the strike even without the one non-racially neutral motive." *Id.*

[23] *Jones*, 57 F.3d at 419.

[24] *United States v. Grandison*, 885 F.2d 143, 146 (4th Cir. 1989), *cert. denied*, 495 U.S. 934 (1990).

Likewise, the court of appeals could not have sustained the district court's ruling based on a conclusion that Jones had proved discriminatory intent but that Plaster would have struck Preston regardless. By that the district court's statement could have meant that the district court had used dual motivation analysis, the court of appeals implied that the *Howard* analysis had been available to the district court even though *Jones* was the first Fourth Circuit case to adopt it. Presumably, the district court would have been unlikely to adopt *Howard* on its own. Hence, the court of appeals may have been suggesting to the district court that its ruling might be different with an added step in the *Batson* analysis.[25]

In order to reach the *Howard* step of the *Batson* analysis, a court must acknowledge that an attorney's reasons for striking a prospective juror are race-based but that the attorney had sufficient permissible reasons for the strike. The attorney must prove by a preponderance of the evidence that he would have struck the prospective juror regardless of the juror's race. The record in *Jones* does not reflect that Plaster met this burden of proof. The only other reason that Plaster offered for the strike was in reference to the makeup of the final jury.

The district court observed that two African-Americans remained on the final jury and that Jones had struck one African-American from the panel. If the court of appeals had concluded that either observation was a dispositive factor in the district court's ruling, it would have been obliged to reverse based on *United States v. Joe*.[26] In *Joe*, the Fourth Circuit reversed a district court's denial of a *Batson* motion when the denial was based on the district court's observation that black persons were in the final jury. The district court in *Joe* stated that because "black jurors were seated and participated on the jury no *Batson* violation could occur."[27] The Fourth Circuit responded:

> [W]hile the fact that black jurors were seated is entitled to substantial consideration, it is not dispositive of this issue and does not preclude a finding that defendants established a prima facie violation of *Batson*.[28]

The composition of the final jury is only one of the many relevant factors that a court may consider before ruling on discriminatory intent. Hence, the presence or absence of black jurors cannot be dispositive of discriminatory intent in a peremptory strike.[29] If the district court's statement in *Jones* meant that the final composition of the jury precluded a finding of discriminatory intent, the court of appeals would have been obliged to reverse based on *Joe*. Therefore, if the court of appeals for *Jones* had interpreted the district court's statement as fulfilling the *Howard* analysis, it would have had to reverse the district court ruling.

The court of appeals could have interpreted the district court's according to *Batson* or *Howard*, but any interpretation would have beckoned a reversal of the district court's ruling. Clearly, the court of appeals wished to avoid reversing the district court. Clearly, it did not understand how the district court could declare the first strike impermissible on *Batson* grounds and allow the second strike to stand.

The district court's statement in *Jones* indicates that it at least considered the first *Batson* violation before ruling on the second strike ("[t]he history of the thing bothers me"). The "history of the thing" must have included the court's finding that the striking attorney had exercised a race-based strike specifically against Preston. The "history of the thing" also must have included the court's knowledge that the reason Plaster had supplied for the first strike was pretext for racially discriminatory intent. Although the court found that Plaster had intended to strike Preston based on race during the first round of jury selection, the court failed to find this intent during the second round. In fact, the discriminatory intent proved for the first strike of Preston had little impact on the court's appraisal of the second strike of Preston.

III. NO NEW REMEDY FOR A BATSON VIOLATION

Despite this understandable confusion, the court of appeals made no comment on the district court's remedy for the violation of *Batson* during the first round of jury selection. The court of appeals simply stated that granting a second round of jury selection was within the district court's discretion.[30] The court of appeals could have recommended a different remedy to the district court.[31] It could have recommended that the district court evaluate the second strike of Preston under higher standard on remand, in compliance with Jones' suggestion.

The court of appeals elected not to affirm a ruling that was logically obscure. The court did not attempt to

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[25] The court of appeals may have been suggesting that the district court's ruling should, in fact, be different under a *Howard* analysis.

[26] *United States v. Joe*, 928 F.2d 99 (4th Cir. 1991), *cert. denied*, 502 U.S. 816 (1991).

[27] *Id.* at 102.

[28] *Id.* at 103.

[29] *Batson*, 476 U.S. at 97 (stating that a "'pattern' of strikes against black jurors . . . might give rise to an inference of discrimination").

[30] *Chandler*, 57 F.3d at 419 n. *.

[31] "In light to the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." *Batson*, 476 U.S. at 99 n. 24.

piece together the district court ruling because reversal would have been imminent under any interpretation. Instead, the court of appeals gave the district court the opportunity to reconsider its holding and to make a cohesive ruling.

CONCLUSION

Both the district court and the court of appeals opinions fail to give *Batson* violations any meaningful regard. In Jones, despite the district court finding the race-neutral reason to be pretext for a *Batson* violation, the court gave the violating attorney a second chance to use his peremptory strikes. The district court judge's only comment to Plaster's counsel was a weak admonishment: "When you strike a black this go-round you're going to have to have a sound articulable reason for doing so other than race."[32] The district court judge rewards the violating attorney by allowing the second strike of the same prospective juror to stand.

After *Jones*, a prior *Batson* violation within the trial in which the current *Batson* violation is challenged is simply one factor among all the factors in traditional *Batson* analysis. It is not a factor weightier than others in determining whether or not further *Batson* violations have occurred. This apparent lack of concern is not uncommon in federal courts. For example, race-neutral reasons need not be strong to rebut a *prima facie* case of discriminatory intent.[33] In addition, one challenge to a jury strike sustained on *Batson* grounds will not establish the validity of other *Batson* challenges.[34] *Jones* demonstrates that district courts residing in the Fourth Circuit must adhere closely to *Batson* analysis.[35] On the other hand, *Jones* demonstrates that attorneys can thwart *Batson*'s purpose without much trouble.

Jones is one case in a line of jurisprudence which relaxes the equal protection demands on attorneys who exercise peremptory strikes. For example, *Batson* had required that a race-neutral reason be "clear and reasonably specific"[36] and related to the case to be tried[37] in order to rebut a *prima facie* case of discriminatory intent. Since the holding in *Purkett v. Elem.*, however, the race-neutral reason does not have to be persuasive, plausible, or even related to the issues of the case.[38] The reason must not even make sense.[39] It must be merely "a reason that does not deny equal protection."[40] Moreover, *Batson* unambiguously stated that "the Equal Protection Clause forbids [an attorney] to challenge potential jurors solely on account of their race."[41] *Howard* holds, on the other hand, that even when race is a factor in an attorney's decision to strike a juror, the strike will stand if the attorney can articulate an appropriate alternative defense.[42] In addition, the court in *Doss* considered the prior *Batson* violations within the trial but did not give those violations any noteworthy weight.[43] Finally, in *Jones*, the *Batson* violation for the first round of strikes did not visibly affect the ruling in the second round of strikes.

Each case is a step away from the *Batson* court's goal of eliminating equal protection violations due to impermissible peremptory strikes. Each case tends to confirm a fear which Justice Marshall articulated in his *Batson* concurrence: that attorneys are essentially "free to discriminate against blacks in jury selection provided that they hold that discrimination to an 'acceptable' level."[44]

The Court of Appeals for the Fourth Circuit should strengthen *Batson*'s bite by intensifying the consequences of violating the *Batson* standard. First, courts should give serious consideration to prior *Batson* violations within a trial. For instance, the district court in *Jones* should have weighed its previous identification of a *Batson* violation heavily against the striking attorney's race-neutral reason supplied in the second round of jury selection. In addition, courts should consider sanctioning attorneys who use their peremptory strikes to commit *Batson* violations.

Batson is a not only a constitutional standard, but also a procedural standard which attorneys must uphold. Because the *Batson* contains a procedural component, nothing prevents courts from holding attorneys who violate *Batson* in contempt. If a court finds that a striking attorney has committed a *Batson* violation, the opposing attorney should move the court to hold the striking attorney in contempt. If the court elects to send the violating attorney to prison, it should suspend the sentence

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[32] *Jones*, 57 F.3d at 419 (quoting from the district court opinion).

[33] *See United States v. Lorenzo*, 995 F.2d 1448 (9th Cir. 1993) (upholding an exclusion based on a Hawaiian or Polynesian juror's long hair, long beard, and general hippie-like appearance). *See also Purkett*, 115 S.Ct. at 1771 (upholding exclusion based on hair length and facial hair); *United States v. Sandoval*, 997 F.2d 491 (8th Cir. 1993) (accepting youthfulness, being a cosmetologist, and lack of high education as race-neutral reasons); *United States v. Uwaezhoke*, 995 F.2d 388 (3d. Cir. 1993) (upholding an exclusion of a black juror based on her being a single parent, working as postal worker, and living on rental property).

[34] *Doss v. Frontenac*, 14 F.3d 1313, 1317 (8th Cir. 1994) (citing *United States v. Baker*, 855 F.2d 1353) 1360 (1988)).

[35] But *see supra*, note 22.

[36] *Batson*, 476 U.S. at 98 n. 20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981)).

[37] *Batson*, 476 U.S. at 98.

[38] *Purkett*, 115 S.Ct. at 1771 (1995).

[39] *Id.* at 1771.

[40] *Id.*

[41] *Batson*, 476 U.S. at 89.

[42] *Doss*, 14 F.3d at 1317.

[43] *Howard*, 986 F.2d at 27.

[44] *Batson*, 476 U.S. at 105 (Marshall, J., concurring).

until after the conclusion of the trial. By holding a violating attorney in contempt, a court can punish that attorney while bypassing the client of that attorney.[45]

The opposing attorney also should ask the court to order the violating attorney to pay reasonable expenses, including attorney's fees, caused by the violation.[46] In addition, the opposing attorney should ask the court to allow the juror in question to sit; to take one peremptory strike from the violating attorney; and to grant that strike to the opposing attorney. This arrangement both prevents the violating attorney from getting a "second chance" with the impermissible strike and balances the number of jurors on the final panel. It would bring our system closer to the *Batson* court's goal of eliminating equal protection violations in peremptory strikes.

Justice Marshall has suggested that the only way to eliminate racial discrimination completely from peremptory strikes is to eliminate peremptory strikes completely.[47] His concurring opinion in *Batson* emphasized that "the right of peremptory challenge is not of constitutional magnitude."[48] Decidedly, no court has indicated that it intends any such drastic end to peremptory strikes.

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[45] Other remedies for violations of *Batson* are available only with the danger of skewing the trial at the expense of one party. For example, a court could remove the violating attorney's peremptory strikes altogether in a second round of jury selection, and it could grant them to the opposing attorney. Alternatively, a court could limit the number of peremptory strikes available to the violating attorney in a second round of jury selection. A court also could require the violating attorney to rebut a *prima facie* case of discriminatory intent with a reason that is better than race neutral. For example, a court could take the plaintiff's suggestion in *Jones* and skip to the *Howard* step of the *Batson* analysis once a party shows a *prima facie* case of discriminatory intent. Each of these alternative remedies risk prejudicing the violating attorney's client. Holding the violating attorney in contempt with the sentence suspended until after the conclusion of the trial, however, minimalizes this risk.

[46] See Rule 37 of the Rules of Civil Procedure for the United States District Courts for similar sanctions which courts may impose on attorneys and parties for failure to comply with the rules of discovery.

[47] *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

[48] *Id.* at 108 (Marshall, J., concurring).