Washington and Lee Journal of Civil Rights and Social Justice

Volume 1 | Issue 1 Article 15

Spring 4-1-1995

BUCK v. COMMONWEALTH 443 S.E.2d 414 (Va. 1994). Supreme Court of Virginia

BUCK v. COMMONWEALTH

443 S.E.2d 414 (Va. 1994).
Supreme Court of Virginia

FACTS

George Frederick Buck was convicted in the Circuit Court of Chesterfield County of possession of cocaine with the intent to distribute and sentenced to forty years and a $15,000 fine. He appealed alleging in part that the Commonwealth used its peremptory strikes to remove two of the three African-Americans from the jury panel because of their race in violation of *Batson v. Kentucky*.[1]

A three judge panel of the court of appeals reversed the conviction, concluding that the prosecutor did not overcome the prima facie case of discrimination.[2] In order to establish a prima facie case of purposeful discrimination, the defendant must show that: 1) the defendant is a member of a cognizable racial group; 2) the prosecutor used peremptory challenges to strike members of the defendant's race from the jury pool; and 3) these and any other relevant circumstances raise an inference that the prosecutor excluded members of the jury pool because of their race.[3]

Satisfied that Buck fulfilled this obligation, the panel then analyzed the burden placed on the prosecutor to give race neutral explanations for striking a twenty-eight year old black female and a forty-four year old black male. As to the first of these strikes, the prosecutor evinced concern that the juror's relative youth and lack of children would make her less susceptible to the Commonwealth's viewpoint than a parent with older children.[4] As to the second strike, the prosecutor based his decision on the juror's appearance and residence address as evidence of a heightened toleration for drug offenses.[5]

The panel took issue with the prosecutor's rationale citing *Jackson v. Commonwealth*[6] for the proposition that *Batson* would not be accommodated if the trial judge were simply to "rubber stamp" all of the prosecutor's race neutral explanations. Because the prosecutor neglected to strike a twenty-three year old white female juror, and failed to rationally explain why a person living in a particular area would be more tolerant of drugs, the panel concluded there was insufficient support in the record to find that the explanations given were race-neutral.[7]

The Commonwealth received a rehearing, en banc, and in a six to four decision, the court of appeals reversed the panel and affirmed the trial court. In a brief opinion recounting much of the interchange between the attorneys and the trial judge, the majority cited *Winfield v. Commonwealth*[8] as controlling. There, the court of appeals relied on the United States Supreme Court decision, *Hernandez v. New York*[9] which reaffirmed *Batson* and provided a standard for appellate courts to review trial judges' rulings on peremptory challenges.

Buck appealed his sentence to the Virginia Supreme Court.

HOLDING

The Virginia Supreme Court ruled to affirm the decision of the court of appeals, en banc, citing Rule 5:25, Sup.Ct.Rules,[10] as a procedural bar precluding Buck from raising on appeal arguments not made at trial.[11] In addition, the court refused to conclude that the trial judge's findings were "clearly erroneous," and instead cited *Hernandez* and *Batson* as au-

---

[1] 476 U.S. 79 (1986).

[2] *Buck v. Commonwealth*, 415 S.E.2d 229, 232 (Va. Ct. App. 1992).

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

[4] *Buck v. Commonwealth*, 432 S.E.2d 180, 182 (Va. Ct. App. 1993).

[5] *Id.*

[6] 380 S.E.2d 1, 5-6 (Va. Ct. App. 1989).

[7] *Buck*, 415 S.E.2d at 232-33.

[8] 421 S.E.2d 468 (Va. Ct. App. 1992).

[9] 500 U.S. 352 (1991) (deeming prosecutor's striking of two Spanish-speaking Latinos because he doubted whether they could defer to the official translator to be race neutral).

[10] "Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Va. Sup. Ct. R. 5:25.

[11] *Buck v. Commonwealth*, 443 S.E.2d 414, 416 (Va. 1994).

thority imposing on the defense the burden of proving purposeful discrimination.[12]

ANALYSIS/APPLICATION

I. How meaningful an inquiry?

In a six to one decision, the Virginia Supreme Court referred to the opportunity provided at trial for Buck to explain why the reasons proffered by the prosecutor were pretextual.[13] Since Buck failed to inform the trial judge that "the reasons advanced were pretextual because they were inconsistently applied" and that the reasons were grounded on "an improper assumption of toleration for drug-related crimes, or erroneous inferences drawn from the wearing of an athletic jacket," he was precluded from asserting them on appeal.[14]

Prior to the Virginia Supreme Court's consideration of *Buck*, there appeared to be a fundamental difference of opinion on how to apply the language of *Batson* once a prima facie case was shown. The United States Supreme Court has made it the duty of the trial court "to determine if the defendant has established purposeful discrimination."[15] How this obligation is to be carried out was of principal importance to some of the dissenters in the appellate court's en banc decision, and to the majority of the panel finding a *Batson* violation in *Buck*.

The court of appeals viewed the role of the trial judge in exposing purposeful discrimination as an affirmative duty requiring a "meaningful review." Although the trial judge had access to the jury lists containing information concerning the remaining white jurors, he "made no further inquiry of the prosecutor," nor did he "state even in a perfunctory fashion the trial tactic that he found to be 'legitimate' and furthered by the strike."[16] As Judge Koontz noted in his dissent, "[a]t a minimum, a meaningful review requires that the explanation given by the prosecutor for finding a member of one race objectionable is equally applied to a member of another race."[17]

The contrasting views on the role of the trial judge in a case where purposeful discrimination is alleged is starkly highlighted by a comparison of the court of appeal's handling of *Buck* and its treatment of *Broady v. Commonwealth*[18] decided only two months earlier. In *Broady*, the Commonwealth used all of its peremptory strikes to eliminate four black jurors from the jury pool. Broady, an African-American, asserted a *Batson* challenge. The reason given by the prosecutor as to three of the stricken jurors was that their ages were in the same range as the defendant's. Such proximity in age, the prosecutor claimed, would tend to make the prospective jurors more sympathetic to the defendant.

According to the *Broady* court, "*Batson* places upon the trial courts the burden of weighing the explanations tendered by prosecutors justifying their use of peremptory strikes, assessing their genuineness, and determining whether they bespeak discriminatory motives."[19] Although review of the trial court's decision should be upheld if supported by credible evidence, the court noted that "when it is further demonstrated that facially non-racial reasons are applied systematically to blacks but not whites, the Commonwealth has not overcome the presumption that the strikes were racially motivated."[20] Broady was granted a new trial because three white jurors in the defendant's age group were not struck by the prosecutor.

The principal difference between the three strikes in *Broady* and the strike of the young childless female in *Buck* is that defense counsel alerted the trial judge in *Broady* that there were whites left remaining on the jury who were similarly situated to the blacks removed by the prosecutor. It was only then that the trial court's failure to make "further inquiry" did not "overcome the presumption of racial motivation for striking only black jurors."[21] It is clear that *Buck* permitted the court of appeals to highlight its review of the *Batson* analysis and its view of where the burden falls in a determination of purposeful discrimination. Similarly, the Virginia Supreme Court's handling of Buck's appeal sends this message loud and clear, particularly since it relied on a procedural bar, a mechanism applied selectively by the court as the lone dissenter points out.[22]

---

[12] *Id.*

[13] *Id.* at 415. The defense conceded that the reasons given by the prosecutor were race-neutral, therefore, the review by the Virginia Supreme Court was limited to whether these reasons though race-neutral were challengeable as being pretextual. See *United States v. Joe*, 928 F.2d 99, 103 (4th Cir. 1991).

[14] *Buck*, 443 S.E.2d at 416.

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

[16] *Buck*, 432 S.E.2d at 184 (Benton, J., dissenting).

[17] *Id.* at 188 (Koontz, J., dissenting).

[18] 429 S.E.2d 468 (Va. Ct. App. 1993).

[19] *Id.* at 470-71.

[20] *Id.* at 471.

[21] *Id.*

[22] *Buck*, 443 S.E.2d at 418.

The Virginia Supreme Court's desire not to rule on the merits implies it used *Buck* to send a resounding message to practitioners in Virginia: Once a prima facie case has been shown, it is incumbent upon the moving party maintaining a *Batson* challenge to assert specific reasons why explanations proffered by the opposition are pretextual. This pronouncement is especially prominent given *Buck's* comparison to *Broady* and the treatment of the prosecutor's justifications by other courts.[23]

II. The limiting principle of *Hernandez*

Relied upon in both the court of appeals and the Virginia Supreme Court decisions, *Hernandez v. New York* established a standard for appellate courts to review peremptory challenges. Justice Kennedy, writing for the plurality in *Hernandez*, contended that "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed."[24] Because there will rarely be evidence sufficient to decide the issue, Kennedy believed the best evidence to demonstrate an explanation's believability required observation of the attorney exercising the challenge. "As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'"[25]

Hernandez linked the deference afforded federal district court judges' findings of intentional discrimination in federal civil cases to state courts' findings connected to a federal constitutional claim.[26] Likewise, the standard of review applied by appellate courts in federal and state court judgments of intentional discrimination is the same; factual findings of the trial court will be upheld unless "clearly erroneous."

Some have interpreted the effect of the Supreme Court's decision in *Hernandez* to constrict the viability of the *Batson* challenge. Justice Stevens, in his *Hernandez* dissent, perceived the decision as imposing "on the defendant the added requirement that he generate evidence of the prosecutor's actual subjective intent to discriminate."[27] An analysis of lower federal court decisions involving *Batson* challenges since *Hernandez* revealed two pertinent statistical points: a decrease from 22.5% to ten percent in the number of decisions where prima facie cases of discrimination were found and an increase from thirty-six percent to sixty-two percent in the number of decisions where race-neutral reasons were accepted.[28]

Although at least one Virginia appellate court judge has argued that *Hernandez* should not prevent a state from using its own procedures and rules of evidence to decide, as a matter of state law, whether a prosecutor's explanations are race-neutral,[29] this view does not appear to have much support. Both the court of appeals and the Virginia Supreme Court appear to have adopted *Hernandez's* federal standard of appellate review.

CONCLUSION

In this case the Virginia Supreme Court definitively states the law on the role of counsel and of the trial judge in cases once a *Batson* challenge has been maintained. It is henceforth the affirmative duty of the party asserting purposeful discrimination to proffer reasons why explanations given are pretextual; only then must the trial judge make the appropriate review.

Armed with the United States Supreme Court's treatment of *Hernandez*, the Virginia Supreme Court selected a less intrusive appellate review. Application of the "clearly erroneous" standard to state courts' findings of intentional discrimination has, in effect, licensed the containment of the *Batson* inquiry. This principle is easily likened to the Supreme Court's use of the contemporaneous-objection rule in the treatment of federal habeas cases. Both have the "effect of making the state trial on the merits the 'main event' so to speak, rather than a 'tryout on the road' for what will later be the determinative . . . hearing."[30] Whether reversal will be awarded to only the most blatant violations remains to be seen, yet the net result is a tightening of procedure in resolving issues of purposeful discrimination.

---

[23] *See Thomas v. State*, 555 So.2d 320 (Ala. Crim. App. 1989) (holding the striking of unmarried jurors is suspect and insufficient to justify a strike unless all single venire members are struck); *Williams v. State*, 548 So.2d 501 (Ala. 1989) (ruling that living in a high crime area insufficient as justification for peremptory strike).

[24] *Hernandez*, 500 U.S. at 365 (citing *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)).

[25] *Id.*

[26] *Id.* at 365-366.

[27] *Id.* at 378 (Stevens, J., dissenting).

[28] Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters*, 1994 Wis. L. Rev. 511, 605 (1994).

[29] *Winfield*, 421 S.E.2d at 476 (Coleman, J., dissenting).

[30] *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977).

In dealing with peremptory challenges, the ongoing struggle is to find an appropriate balance between the protection of the constitutional rights of identifiable racial groups in the selection of jurors, and a standard of appellate review which maintains the stability of the judicial process by conferring great deference to a trial court's findings.[31]

For the present, the Virginia Supreme Court has struck the balance in favor of greater deference to the trial court and has firmly placed the burden of proving purposeful discrimination on the challenger in the process.

Summary and Analysis Prepared by:
J. Scott Kulp

---

[31] *Buck*, 432 S.E.2d at 188 (Koontz, J., dissenting).