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Equal Protection

EQUAL PROTECTION

N.Y. CONST. art. I, § 11:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof.

U.S. CONST. amend XIV, § 1:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

COURT OF APPEALS

People v. Bolling[244]
People v. Steele
(decided April 3, 1992)

In separate actions decided as companion cases, defendants Bolling and Steele appealed their criminal convictions,[245] claiming that by exercising peremptory challenges in a purposefully discriminatory manner, the prosecution, in each case, violated the Equal Protection Clauses of the state[246] and federal[247] constitutions as defined under *Batson v. Kentucky*.[248] In *People v. Bolling* the court of appeals held that the defendant established a prima facie case that the prosecutor violated the Equal Protection Clauses of the federal and state constitutions by exercising peremptory challenges for discriminatory purposes.[249] However, in

244. 79 N.Y.2d 317, 591 N.E.2d 1136, 582 N.Y.S.2d 950 (1992).

245. *Id.* at 320, 591 N.E.2d at 1138, 582 N.Y.S.2d at 952.

246. N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof.").

247. U.S. CONST. amend. XIV, § 1, cl. 3 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

248. 476 U.S. 79 (1986) (holding that Equal Protection Clause of Fourteenth Amendment of United States Constitution forbids prosecution's use of race-based peremptory challenges).

249. *Bolling*, 79 N.Y.2d at 320, 591 N.E.2d at 1138, 582 N.Y.S.2d at 952.

People v. Steele, the court held that the defendant failed to establish a prima facie case.[250]

In *Bolling*, five of the first twelve potential jurors were African-Americans.[251] After they were examined by counsel, the prosecution struck four of the African-Americans peremptorily and defense counsel struck the remaining African-American.[252] After striking the last African-American, defense counsel objected to the prosecution's use of its peremptory challenges.[253] The trial court did not rule on the objection and two African-Americans were subsequently chosen to serve on the jury.[254]

The following day, defense counsel renewed his objection, stressing the fact that two of the African-Americans struck by the prosecution were "pro-prosecution" since they had ties to law enforcement.[255] The trial court, noting that two other African-Americans had been selected as jurors, determined that there was no attempt by the prosecutor to systematically exclude African-Americans.[256] Defense counsel made no further *Batson* objections and ultimately a jury was selected that included five African-Americans as sitting jurors, and another sitting as an alternate.[257]

In *Steele*, defense counsel objected when the prosecution peremptorily challenged two of the three prospective African-American jurors, arguing a discriminatory motive because the defendant was an African-American female.[258] The defense offered no other evidence of discrimination, and the trial court found that no pattern of discrimination had been established but allowed defense counsel to again object should a pattern develop.[259] Subsequently, the prosecution exercised another

250. *Id.*
251. *Id.* at 322, 591 N.E.2d at 1139, 582 N.Y.S.2d at 953.
252. *Id.* at 322, 591 N.E.2d at 1139-40, 582 N.Y.S.2d 953-54.
253. *Id.* at 322, 591 N.E.2d at 1140, 582 N.Y.S.2d at 954.
254. *Id.*
255. *Id.* (one was a police officer's girlfriend and the other was a security supervisor).
256. *Id.*
257. *Id.*
258. *Id.* at 323, 591 N.E.2d at 1140, 582 N.Y.S.2d at 594.
259. *Id.*

peremptory challenge against an African-American, and again defense counsel objected[260]. The trial court, noting that two of the jurors selected were African-American, found no pattern of discrimination and therefore, overruled the objection.[261] When the prosecution struck a Hispanic woman, defense counsel objected for a third time, claiming exclusion of another minority. Although the trial court noted the objection, it did nothing further.[262]

The appellate division, in both cases, affirmed defendants' convictions. In *Bolling*, the appellate division noted that the final jury was composed of at least five African-Americans and found that defendant had failed to establish a prima facie case of race-based peremptory challenges.[263] In *Steele*, the appellate division also found that the prosecution's use of peremptory challenges was not purposefully discriminatory, as three African-Americans served on the jury.[264]

At issue in each case for the court of appeals was whether a prima facie case was established that the prosecution exercised its peremptory challenges in a discriminatory manner violating the federal and state constitutions, and whether a prima facie case may be established before jury selection is completed.[265] The court used the criteria laid out by the United States Supreme Court in *Batson v. Kentucky*[266] to determine whether a prima facie case of discrimination was established.[267]

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260. *Id.*

261. *Id.*

262. *Id.*

263. *Bolling*, 166 A.D.2d at 203, 564 N.Y.S.2d at 99-100.

264. *Steele*, 171 A.D.2d at 599, 567 N.Y.S.2d at 462.

265. *Bolling*, 79 N.Y.2d at 319-20, 591 N.E.2d at 1138, 582 N.Y.S.2d at 952.

266. 476 U.S. 79 (1986).

267. *Bolling*, 79 N.Y.2d at 320, 591 N.E.2d at 1138, 582 N.Y.S.2d at 952. *See also* People v. Jenkins, 75 N.Y.2d 550, 554 N.E.2d 47, 555 N.Y.S.2d 10 (1990) (court used *Batson* criteria to determine that defendant established prima facie case of prosecution's use of peremptory challenges in discriminatory manner); People v. Scott, 70 N.Y.2d 420, 516 N.E.2d 1208, 522 N.Y.S.2d 94 (1987) (prima facie case established after prosecution struck all prospective African-American jurors); People v. Kern, 75 N.Y.2d 638, 554

In *Batson*, the Supreme Court held that the Equal Protection Clause forbids the prosecution's use of peremptory challenges to exclude jurors solely because of their race or on the assumption that an African-American juror would be partial toward an African-American defendant.[268] The Court stated that although "a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race,' the defendant does have the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria."[269]

Also at issue in *Batson*, was the burden of proof a defendant had to meet to establish his or her claim.[270] Prior to the Court's decision, an African-American defendant could make out a prima facie case by showing the prosecutor used peremptory challenges "'for reasons wholly unrelated to the outcome of the particular case on trial,' or to deny to [African-Americans] 'the same right and opportunity to participate in the administration of justice enjoyed by the white population.'"[271] This was interpreted by lower courts to mean that a defendant needed to prove repeated challenges to African-Americans over a number of cases.[272] Calling this burden of proof "crippling," the Court rejected it as inconsistent with its current Equal Protection Clause jurisprudence.[273]

N.E.2d 1235, 555 N.Y.S.2d 647 (1990) (court applied *Batson* to defense's use of peremptory challenges, holding that defendant may not exercise peremptory challenges in discriminatory manner).

268. *Batson*, 476 U.S. at 89. For subsequent Supreme Court cases related to *Batson* see Georgia v. McCollum, 112 S. Ct. 2348 (1992) (Equal Protection Clause also prohibits criminal defendant from exercising peremptory challenges in discriminatory manner); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991) (holding that litigants in a civil action may not use peremptory challenges in a discriminatory manner); Powers v. Ohio, 111 S. Ct. 1364 (1991) (holding that criminal defendant may object to race-based peremptory challenges whether or not defendant and challenged jurors are of different races).

269. *Batson*, 476 U.S. at 85-86 (quoting Strauder v. West Virginia, 100 U.S. 303, 305 (1880) and citing Martin v. Texas, 200 U.S. 316, 321 (1906)).

270. *Id.* at 90.

271. *Id.* at 91 (quoting Swain v. Alabama, 380 U.S. 202, 224 (1965)).

272. *Id.* at 92.

273. *Id.* at 92-93.

To establish a case of purposeful discrimination under *Batson*, "the defendant must first show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."[274] Also, "the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors . . . raises the necessary inference of purposeful discrimination."[275] If the defendant establishes a prima facie case of discrimination, the burden shifts to the prosecution to offer race-neutral explanations for the challenges.[276] However, the prosecution cannot simply deny a discriminatory motive or allege good faith in his or her rebuttal, nor claim that the jurors would be biased toward the defendant because they were of the same race.[277]

The court of appeals in *Bolling* concluded that a defendant may establish the exercise of peremptory challenges in a purposefully discriminatory manner at any time, even if jury selection has not been completed.[278] The court noted that the *Batson* rule should serve to eliminate discrimination, not simply reduce its incidence, and it is of no consequence that the prosecution ultimately allows African-Americans to sit on the jury.[279] "The wrong may occur after only one strike and the prosecution cannot defer the objection and later overcome it with evidence that the jury, as finally selected, contained a proportionate number of African-Americans."[280]

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274. *Id.* at 96.

275. *Id.*

276. *Id.* at 97.

277. *Id.* at 97-98. The Supreme Court stated that "[t]he core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were [it] to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race." *Id.*

278. *Bolling*, 79 N.Y.2d at 321, 591 N.E.2d at 1139, 582 N.Y.S.2d at 953.

279. *Id.*

280. *Id.*

The court ruled that both defendants satisfied the first two *Batson* requirements.[281] They were both African-Americans, and the prosecution used peremptory challenges to strike African-American jurors.[282] To satisfy the third requirement, the defendants alleged that the prosecution used a "pattern" of strikes against African-Americans and that this raised an inference of discrimination.[283]

Regarding defendant Bolling, the court of appeals held that an inference of discrimination was raised because of the "disproportionate number of challenges to African-American prospective jurors coupled with defendant's uncontested assertion that two of the four jurors excused by the Assistant District Attorney had pro-prosecution backgrounds . . . ."[284] Therefore, according to the court, the trial court should have required the prosecutor to offer racially neutral reasons for the challenges.[285] If the prosecutor was unable to do so, the trial court "should have sustained the objection, and seated the juror notwithstanding the prosecutor's challenge."[286]

Regarding defendant Steele, however, although the prosecutor challenged three African-Americans, without "other facts and circumstances supporting a prima facie case," this alone was not enough.[287] Consequently, defendant Steele "failed to establish a

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281. *Id.* at 320, 591 N.E.2d at 1139, 582 N.Y.S.2d at 953.

282. *Id.* at 320-21, 591 N.E.2d at 1139, 582 N.Y.S.2d at 953.

283. *Id.* at 320, 519 N.E.2d at 1139, 582 N.Y.S.2d at 953. The court stated several methods by which an inference of discrimination may be raised. In addition to a "pattern of strikes or questions and statements made by the prosecution during voir dire suggesting discriminatory motives," the defendant may create an inference by showing "a disproportionate number of strikes challenging members of a particular racial group within a venire." *Id.* at 324, 591 N.E.2d at 1141, 582 N.Y.S.2d at 955. Furthermore, a defendant may rely on the fact "that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Batson*, 476 U.S. at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

284. *Bolling*, 79 N.Y.2d at 325, 591 N.E.2d at 1141, 582 N.Y.S.2d at 955.

285. *Id.*

286. *Id.*

287. *Id.* at 325, 591 N.E.2d at 1142, 582 N.Y.S.2d at 956.

pattern of purposeful exclusion sufficient to raise an inference of discrimination."[288]

The court of appeals decision in *Bolling* is consistent with previous decisions regarding the discriminatory use of peremptory challenges. In *People v. Jenkins*[289] and *People v. Scott*[290] the court used the criteria from *Batson* in ruling that defendants established a prima facie case of the prosecution's use of race-based peremptory challenges.[291] Furthermore, in *People v. Kern*,[292] the court used the reasoning of *Batson* to hold that the use of racially based peremptory challenges by the defense is prohibited by the Equal Protection and Civil Rights Clauses of the state constitution.[293]

In *Jenkins*, the jury venire consisted of ten African-Americans and thirty-seven white and Latino surname prospective jurors.[294] The prosecution used peremptory challenges to strike seven of the ten African-Americans, but only three of the thirty-seven non-African-Americans.[295] The court found the disproportionate number of African-Americans excluded and the heterogeneous nature of the group were sufficient to establish an inference that the prosecution used its peremptory challenges to strike the prospective jurors because of their race.[296] The court rejected the prosecution's argument that because they did not challenge all African-Americans present, its use of peremptory challenges was

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288. *Id.*

289. 75 N.Y.2d 550, 554 N.E.2d 47, 555 N.Y.S.2d 10 (1990).

290. 70 N.Y.2d 420, 516 N.E.2d 1208, 522 N.Y.S.2d 94 (1987).

291. *Jenkins*, 75 N.Y.2d at 555-60, 554 N.E.2d at 49-52, 555 N.Y.S.2d at 12-15; *Scott*, 70 N.Y.2d at 423-25, 516 N.E.2d at 1211, 522 N.Y.S.2d at 97.

292. 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990).

293. *Id.* at 653-58, 554 N.E.2d at 1246, 555 N.Y.S.2d at 658. *See also* N.Y. CONST. art I, § 11 (providing that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof," and "[n]o person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by any state or any agency or subdivision of the state").

294. *Jenkins*, 75 N.Y.2d at 553, 554 N.E.2d at 48, 555 N.Y.S.2d at 11.

295. *Id.* at 556, 554 N.E.2d at 50, 555 N.Y.S.2d at 13.

296. *Id.*

not discriminatory.[297] The court stated that "[a] *Batson* violation is not avoided . . . simply because notwithstanding the discriminatory use of peremptory strikes, the prosecutor leaves some [African-Americans] on the jury . . . ."[298]

In *Scott*, the prosecution struck all five African-Americans that were on the jury venire.[299] The defense offered evidence that these five people constituted a heterogeneous group which included different sexes, social backgrounds, and occupations.[300] Furthermore, three of the five excluded jurors had backgrounds that showed a potential bias toward the prosecution.[301] The court held that under the *Batson* test, this gave rise to an inference that the prosecution excluded the potential jurors because of their race, and thus the defendant established a prima facie case of discrimination.[302]

In *Kern*, the issue was whether the defense's use of racially motivated peremptory challenges was constitutionally prohibited.[303] The court held this type of discrimination to be forbidden by the Equal Protection and Civil Rights Clauses of the New York State Constitution.[304] Although *Batson* did not address defendants' use of racially motivated peremptory challenges, the court of appeals, stating that such use constitutes state action for equal protection purposes, held that *Batson* is applicable to this situation.[305]

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297. *Id.* at 557, 554 N.E.2d at 50, 555 N.Y.S.2d at 13.

298. *Id.*

299. People v. Scott, 70 N.Y.2d 420, 424, 516 N.E.2d 1208, 1210, 522 N.Y.S.2d 94, 96 (1987).

300. *Id.* at 424, 516 N.E.2d at 1210-11, 522 N.Y.S.2d at 96-97.

301. *Id.*

302. *Id.* at 425, 516 N.E.2d at 1211, 522 N.Y.S.2d at 97.

303. 75 N.Y.2d 638, 649-50, 554 N.E.2d 1235, 1241, 555 N.Y.S.2d 647, 653 (1990).

304. *Id.* at 650, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653.

305. *Id.* at 655-57, 554 N.E.2d at 1246, 555 N.Y.S.2d at 658.