Touro Law Review

Volume 9 | Number 3 Article 23

1993

Equal Protection

FOURTH DEPARTMENT

People v. Duncan[376]
(decided March 13, 1992)

The defendant appealed his conviction for manslaughter in the second degree and criminal possession of a weapon in the second degree on the ground that the prosecution's discriminatory exercise of peremptory challenges violated his right to equal protection under both the state[377] and federal[378] constitutions. The court held that the defendant's equal protection rights were violated since the prosecutor failed to provide race-neutral reasons for his discriminatory use of his peremptory challenges.[379]

During jury selection, three prospective African-American jurors, one man and two women, were questioned. Subsequently, the prosecutor excused the male juror for cause and exercised two peremptory challenges to remove the two African-American female jurors from the panel.[380] The defense counsel objected to the prosecution's exercise of the peremptory challenges and promptly moved for a *Batson* hearing[381] in order to determine if the challenges were racially motivated. Subsequently, the prosecutor voluntarily offered an explanation for the peremptory challenges. With respect to the first female juror, the prosecutor claimed that she was removed as a result of her tardiness and because "the character of the woman's answers gave the appearance that she was 'feisty, independent, opinionated and too much of a

376. 177 A.D.2d 187, 582 N.Y.S.2d 847 (4th Dep't), *appeal denied*, 79 N.Y.2d 1048, 596 N.E.2d 414, 584 N.Y.S.2d 1016 (1992).

377. N.Y. CONST. art. I, § 11.

378. U.S. CONST. amend. XIV, § 1, cl. 3.

379. *Duncan*, 177 A.D.2d at 194, 582 N.Y.S.2d at 852.

380. *Id.* at 189, 582 N.Y.S.2d at 848.

381. Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the Equal Protection Clause prohibits a prosecutor from challenging potential jurors on account of their race).

leader.'"[382] The second juror was removed because she was a monitor technician at a hospital. Relying on his prior conversations with various hospital employees, the prosecutor concluded that people who work in this type of position "have a lot of different problems in terms of work ethic, honesty, et cetera."[383] Notwithstanding the fact that the prosecutor did not even know whether this juror possessed those qualities, he decided that she "fit that sort of profile" and was therefore an unsuitable juror.[384] Finding that the prosecutor offered race-neutral explanations for exercising the two peremptory challenges, the trial court denied the defendant's motion.[385]

On appeal, the defendant contended that the prosecution failed to rebut his prima facie showing of discrimination by offering race-neutral explanations for the peremptory challenges.[386] Primarily, the court addressed the issue regarding whether the defendant had preserved his claim for appellate review since he neither moved for a mistrial nor excepted to the lower court's ruling.[387] In so doing, the court noted that Criminal Procedure Law (CPL) section 470.05(2)[388] "dispenses with the necessity of an 'exception' and provides that any protest of error clearly indicating appellant's position is sufficient to present a 'question of law' for appellate purposes."[389] Inasmuch as the defendant

---

382. *Duncan*, 177 A.D.2d at 189, 582 N.Y.S.2d at 848-49.

383. *Id.* at 190, 582 N.Y.S.2d at 849.

384. *Id.*

385. *Id.*

386. *Id.* at 189, 582 N.Y.S.2d at 848.

387. *Id.* at 190, 582 N.Y.S.2d at 849.

388. N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 1986). The section provides in pertinent part:

> For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the ruling or instruction or at any time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an "exception" but is sufficient if the party made his position with respect to the ruling or instruction known to the court.

Id.

389. *Id.* at 191, 582 N.Y.S.2d at 849.

promptly moved for a *Batson* hearing and the court ruled on this issue, the court determined that the defendant's claim was properly preserved for appeal. In effect, "there [wa]s no need for defendant to reiterate an exception or to move for a mistrial after the court's ruling on the sufficiency of the prosecutor's explanation."[390]

The appellate division upheld the lower court's factual findings with regard to the first female juror, but found that the prosecutor's explanation for removing the second juror was insufficient to rebut the defendant's prima facie case of purposeful discrimination.[391]

Under both the federal and state constitutions, a prosecutor may not exercise his or her peremptory challenges in a discriminatory manner.[392] At the onset, a defendant must show a prima facie case of intentional discrimination.[393] In *Batson v. Kentucky*,[394] the United States Supreme Court laid out the elements of a prima facie case of intentional discrimination as follows:

> To establish such a case, 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. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, 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

---

390. *Id.* at 191, 582 N.Y.S.2d at 850.

391. *Id.* at 194, 582 N.Y.S.2d at 851.

392. *See* Batson v. Kentucky, 476 U.S. 79, 85-88 (1986); People v. Scott, 70 N.Y.2d 420, 422, 516 N.E.2d 1208, 1209, 522 N.Y.S.2d 94, 95 (1987) (court reversed the conviction of an African-American defendant after defendant established a prima facie claim that the prosecutor used its peremptory challenges to exclude African-Americans from the jury).

393. *See Batson*, 476 U.S. at 93. The Court stated that "[a]s in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.'" *Id.* (quoting Whitus v. Georgia, 385 U.S. 545, 550 (1967)).

394. 476 U.S. 79 (1986).

> jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.[395]

The *Duncan* Court held that the defendant satisfied his burden of showing a prima facie case of intentional discrimination. Inasmuch as the prosecutor removed the two Black female jurors using peremptory challenges and another juror for cause, the defendant demonstrated a prima facie case sufficient to shift the burden to the prosecution.[396]

In addressing the issue concerning whether the prosecution's explanations were race-neutral, the court relied on the New York Court of Appeals' decision in *People v. Hernandez*[397] and the United States Supreme Court's decision in *Batson*. Specifically, the *Duncan* Court noted that "[t]he prosecutor's explanation must be supported by legitimate race-neutral reasons, that is, reasons 'rooted in principles of jury selection, responsibility and function.'"[398] Deferring to the trial court's factual assessment of the prosecutor's motivation, the court found that the prosecutor had legitimate concerns with respect to the first female juror's tardiness.[399] The appellate division has consistently "recognized as a legitimate race-neutral explanation, a prosecutor's concern about the attentiveness of a prospective juror as reflected by that person's tardiness during court proceedings."[400] Therefore, the first juror was properly removed from the panel.

---

395. *Id.* at 96 (citations omitted). *But see* Powell v. Ohio, 111 S. Ct. 1364 (1991) (white criminal defendant had standing to challenge peremptory challenge of venireman who was a member of a racial minority). *See also* People v. Scott, 70 N.Y.2d 420, 423, 522 N.E.2d 1208, 1210, 522 N.Y.S.2d 94, 96 (1987).

396. *Duncan*, 177 A.D.2d at 193, 582 N.Y.S.2d at 851.

397. 75 N.Y.2d 350, 552 N.E.2d 621, 553 N.Y.S.2d 85 (1990).

398. *Duncan*, 177 A.D.2d at 193, 582 N.Y.S.2d at 851 (quoting People v. Hernandez, 75 N.Y.2d 350, 358, 553 N.Y.S.2d 85, 88, 552 N.E.2d 621, 624 (1990)).

399. *Id.*

400. *Id. See also* People v. Burnett, 152 A.D.2d 910, 544 N.Y.S.2d 744 (1989); People v. Merritt, 166 A.D.2d 912, 561 N.Y.S.2d 666, *lv. denied*, 76 N.Y.2d 988, 565 N.E.2d 526, 563 N.Y.S.2d 777 (1990), *cert. denied*, 111 S. Ct. 2264 (1991).

However, the court reversed the lower court's findings with regard to the removal of the second female juror.[401] The prosecutor's explanation, namely, that the juror would be inadequate because she worked as a monitor technician, did not rebut defendant's prima facie case of purposeful discrimination.[402] The prosecutor made no connection to this juror's employment and any adverse observations the prosecutor made during this juror's questioning. Rather, "the proffered reason was grounded in a stereotype of dubious validity, and there is no evidence that the prospective juror possessed the qualities supposedly inherent in that stereotype."[403]

The dissent in *Duncan* contended that the defendant never preserved his claim for appellate review.[404] Specifically the dissent stated that the defendant never met his burden of proving a *Batson* violation.[405] Under this view, the mere fact that the two Black jurors were peremptorily challenged does not amount to a prima facie showing that the prosecutor's challenges were racially motivated. Therefore, the dissent would have affirmed the lower court's ruling.

In conclusion, it is clear that a prosecutor's use of race-based peremptory challenges during jury selection violates the criminal defendant's equal protection rights under the state and federal constitutions.

People v. Eastman[406]
(Decided March 13, 1992)

Defendant claimed that his right to equal protection under both the state[407] and federal[408] constitutions violated because the

401. *Duncan*, 177 A.D.2d at 194-95, 582 N.Y.S.2d at 851-52.
402. *Id.* at 194, 582 N.Y.S.2d at 851.
403. *Id.* at 195, 582 N.Y.S.2d at 852.
404. *Id.* (Pine, J., dissenting).
405. *Id.* at 196, 582 N.Y.S.2d at 853 (Pine, J., dissenting).
406. 181 A.D.2d 1050, 582 N.Y.S.2d 586 (4th Dep't 1992).
407. N.Y. CONST. art. I, § 11.
408. U.S. CONST. amend. XIV, § 1, cl. 3.