IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2163
Summary Calendar

CHARLES R. DILLARD,

Petitioner-Appellee,

VERSUS

JAMES A. COLLINS,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-0707)

(December 10, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

In this state habeas corpus proceeding brought pursuant to 28 U.S.C. § 2254, the state appeals a writ of habeas corpus granted by the district court and based upon that court's holding that the state trial court had engaged in a violation of Batson v. Kentucky, 476 U.S. 79 (1986). Concluding that there was no

[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

constitutional error in the state proceedings and that the district court's reasoning is seriously flawed, we reverse.

I.

In 1987, the petitioner, Charles Dillard, was found guilty by a jury of aggravated robbery and sentenced to life imprisonment. His conviction was affirmed on direct appeal. He then filed two habeas petitions in state court; these were denied, without written order, by the Texas Court of Criminal Appeals in, respectively, 1988 and 1989.

Dillard then filed, in 1992, the instant habeas petition, asserting that the prosecutor had struck all blacks from the venire with a racially discriminatory intent, in violation of Batson. The state moved for summary judgment. The district court, without a hearing, denied summary judgment, granted the writ, and reversed the conviction, stating its reasons in an eleven-page opinion.

II.

After the jury was selected but before it was sworn, Dillard's attorney raised a timely Batson challenge to the peremptory challenges made by the prosecutor, asserting that "the prosecutor has systematically excluded all the blacks available on the jury panel." Although Dillard has not included anything in the record that indicates which veniremen were black, the prosecutor gave the following explanations for his strikes:

(1) Juror No. 4 is employed by an ambulance service and thus "may not think there was much of a serious aggravated robbery because there was not a serious injury." "[H]is wife is a mental patient and he may have other things on his mind other than the trial." (2) Juror No. 8 is a schoolteacher, and "schoolteachers tend to be forgiving sort of individuals and as I have discovered in prior trials I've been involved with, my three years in the District Attorney's office as such, did not consider a strong juror for the punishment phase of the trial." (3) Juror No. 10 has a brother on felony probation. (4) Juror No. 19 stated he would have some problem convicting Dillard on the testimony of only one witness, which is all the state intended to present; the juror also was unemployed. (5) Juror No. 22 works in the medical field, and "both as to the guilt phase and the punishment phase I've had problems with people both in the medical fields and the educational fields." (6) Juror No. 24, whom the state claims is white, "indicated he was going to require the State to make a stronger case because of the fact that the defendant had been to the penitentiary twice before. Additionally he was in the medical field as well." (7) Juror No. 26 is a nurse's aide. "Again, I've had problems in the past with people in medical fields and I've had problems with people as young as . . . 24 years of age being able to consider the length of punishment that I'll be asking for in this case." (8) Juror No. 28 is a public schoolteacher who "indicated initially that she might want a little more proof than just one witness . . . ." (9) Juror No.

34 "indicated the same thing relative to require more than one witness when I spoke to him on voir dire and he just seemed uncomfortable with the idea." (10) Juror No. 35 "indicates that [his] religion is that of Pentecostal" and would not be an appropriate juror at the punishment stage because "it was the belief in their religion to forgive people for the things they had done."

After hearing this explanation, the state trial court rejected the Batson challenges. The court held that the peremptory challenges to both black and white veniremen "were not made with any racial implications."

III.

In its written opinion, the federal district court made a number of erroneous statements concerning the law to be applied to Batson challenges. The court stated,

> . . . [In order to constitute a proper ground for a peremptory challenge,] the bias must be the individual bias of the venire, not a group bias associated with the venire's profession, religion or occupation. Moreover, it cannot be the bias of the prosecutor.
>
> A prosecutor's reliance upon "intuitions" or "gut-feelings" in excluding a venire is no more than a use of colloquial euphemism constituting the very same impermissible group bias outlawed. Moreover, failing to ask questions of a venire before striking them is also suggestive of impermissible bias. Similarly, explanations of what the venire was wearing, his demeanor, his body language, the type of job held, and the religion that he practices border on being euphemisms for improper racial stereotyping.

. . . .

. . . In short, what the prosecutor does during the voir dire process is as important, if not more so, than what he says after the process is concluded.

. . . .

. . . Without asking [Juror No. 4] a question about these areas of concern, if any he had, the prosecutor merely assumed that the venire was biased against the prosecutor and would not follow the law. What arrogance!; particularly in light of the fact that the venire is black.

The State's assumption, without asking, that the ambulance driver was preoccupied is not based on any fact, but upon the unfounded bias of the prosecutor. This bias . . . suggests yet another impermissible group bias behind the State's challenge, i.e., working-class bias.

It is the Court's conclusion that this trait or characteristic that the State offered as fatal to venire number four, while it may be facially adequate, is not borne out by the record. What is obvious is that the prosecutor concluded, based on his own bias, that venire number four was unfit. The reasons for striking venire number four did not relate to the case at bar, the parties on trial, or the law of the case. This single violation of the defendant's "equal protection" rights taints the entire jury selection process.

It is also clear . . . that the stated reasons [for striking Juror Nos. 8, 10, 22, 26, and 35] had no relationship to the case, or were refuted by the record. What is strikingly apparent in this record is the fact that the prosecutor used his subjective state of mind to eliminate prospective jurors; particularly those that are blacks. A decision is subjective if it reflects the state of mind or feelings or temperament of the person making the decision, rather than the nature or character of the person being observed.

. . . .

The defendant's "equal protection" rights were violated by the prosecutor through his bias and prejudice but also because the trial judge, in failing to handle the proceeding properly, denied the defendant a clear record of just what mischief the prosecutor was

engaged in . . . . [Citations omitted.]

In the first instance, we observe that the district court is misled if it believes the central concern of Batson is with "the defendant's `equal protection' rights." In Georgia v. McCollum, 112 S. Ct. 2348, 2357 (1992), the Court made plain that even "a defendant's discriminatory exercise of a peremptory challenge is a violation of equal protection" because it "unconstitutionally discriminates against the excluded juror." Id. at 2353. Thus, the excluded juror's equal protection rights are at stake, as well.

More importantly for the case at hand, we find no constitutional infirmity in the handling of the jury selection process by the state trial court. The prosecutor's reasons given for excluding veniremen are the same general types of reasons this court and others have found to pass muster.

Most recently, in United States v. Bentley-Smith, 2 F.3d 1368 (5th Cir. 1993) (per curiam), we emphasized that, directly contrary to the reasoning of the district court a quo, intuitive assumptions and subjective considerations such as eye contact and demeanor, even standing alone, are sufficient reasons to withstand a Batson challenge. Id. at 1374-76. We specifically noted that blanket exclusions of veniremen with certain occupations have been upheld in this circuit. Id. at 1374 n.6 (citing, inter alia, United States v. Romero-Reyna, 889 F.2d 559, 560-61 (5th Cir. 1989) (upholding exclusion of all pipeline operators); United States v. Moreno, 878 F.2d 817, 820-

21 (5th Cir.) (upholding strike based upon intuitive assumption that all commercial artists would have sympathy for persons involved with drugs), cert. denied, 493 U.S. 979 (1989)). Accord United States v. Cartlidge, 808 F.2d 1064, 1071 (5th Cir. 1987) (upholding exclusion of black juror who appeared to have low-income occupation).

In Bentley-Smith, we emphasized that the proper test for a trial court to employ is "to decide whether the attorney, despite the reasons given for the peremptory strikes, actually engaged in purposeful discrimination in making [his] strikes." 2 F.3d at 1374. "[T]he ultimate inquiry for the judge is not whether counsel's reason is suspect, or weak, or irrational, but whether counsel is telling the truth in his or her assertion that the challenge is not race-based." Id. at 1375. Thus, the district court erred in stating that "whether the explanation is facially adequate or refuted by the record are [sic] questions of law and do not depend upon the credibility or believability of the state prosecutor."

A trial court's "determination is entitled to great deference, since findings in this context largely turn on an evaluation of the credibility or demeanor of the attorney who exercises the challenge." Id. at 1373 (citing Batson, 476 U.S. at 98 n.21; Hernandez v. New York, 111 S. Ct. 1859, 1869 (1991)). As in United States v. Lance, 853 F.2d 1177, 1181 (5th Cir. 1988), in which we affirmed a denial of a Batson challenge, "[w]e must accept the judge's credibility choice and affirm his finding

on these facts."

The state argues that it is entitled to the additional presumption of correctness that is accorded to a state court's findings by § 2254(d). We need not apply that presumption here, for it is obvious that the federal district court, in upholding the Batson challenge, was merely substituting its own credibility judgments for those of the state trial court. The proffered reasons are within the permissible ambit of an attorney's judgment, and the state trial court determined that they were not presented as pretexts for racial discrimination.

Accordingly, the judgment is REVERSED, summary judgment is RENDERED in favor of the state respondent, and the habeas petition is DISMISSED with prejudice.