UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7420
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT DONALD STIGLER, Prison #08922-042,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Mississippi (CA-91-158 (CR G88-18))

(January 26, 19 94)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Robert Donald Stigler challenges the district court's denial of his § 2255 motion. We **AFFIRM**.

I.

After the jury was selected for his trial on drug trafficking charges, Stigler moved the district court "to require ... the Government to disclose [its] reason[s]" for striking all but one

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[1] Local Rule 47.5 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

black venire member from the panel.[2] The following colloquy ensued:

> THE COURT: All right. Does the Government wish to respond?
>
> [ASSISTANT UNITED STATES ATTORNEY]: Yes, Your Honor. This is a case where I don't think either side thought about race as an issue. The defendant is white, all of our witnesses are white, as a matter of fact, even all of the defendant's witnesses are white. It's a case where there's not a black person involved. We simply exercised the challenges based on the research we'd done on the jurors and race is not an issue.
>
> As Your Honor knows, we try cases where there's a black defendant where there's any possibility of race being a[n] issue to a key witness, we're careful to go through and set out reasons. I don't think in this case that this set of facts rises to the level even to race as an issue. Race is totally irrelevant in this case.
>
> THE COURT: The argument of the Government is well taken. Motion is denied.

After being convicted, Stigler appealed, contending, *inter alia*, that the jury selection process violated ***Batson v. Kentucky***, 476 U.S. 79 (1986). Our court affirmed his conviction, and, with specific regard to the ***Batson*** claim, stated:

> This claim must fail, as Stigler has failed to show that he is a member of a cognizable racial group and that the prosecutor used his peremptory strikes to remove from the venire members of his race. ***Batson***, 90 L.Ed.2d at 87. *Further, he has wholly failed to state facts and circumstances that raise an inference that those jurors struck were excluded on account of their race*. ***U.S. v. Williams***, 822 F.2d 512, 514 (5th Cir. 1987).

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[2] See note 3, *infra*, concerning the delay in the motion being made. It was not made when the government used its strikes and, instead, took place following the luncheon recess, when the selected jurors were to be impanelled.

United States v. Stigler, No. 89-4073 at 9-10 (5th Cir. March 27, 1990) (*per curiam*; unpublished) (footnote omitted; emphasis added), *cert. denied*, 498 U.S. 827 (1990).

Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364 (1991), decided on April 1, 1991, eliminated the requirement of racial identity between the defendant and excluded juror. ***Id.*** at ___, 111 S. Ct. at 1370-74. On November 27, 1991, Stigler filed a § 2255 motion, seeking a new trial because of his ***Batson*** claim, and citing ***Powers***. In January 1993, the district court denied the motion, without rendering an opinion.

II.

Stigler's appeal amounts to a reiteration of his earlier, direct appeal, with the addition of ***Powers***. But, if ***Powers*** created a "new" constitutional rule of criminal procedure, it is inapplicable to Stigler's case, which became final before ***Powers*** was announced. *See* ***Teague v. Lane***, 489 U.S. 288, 310 (1989).

We need not address this issue of apparent first impression in this Circuit, because our previous holding on Stigler's ***Batson*** claim disposed of the issue not only for lack of standing (absence of racial identity between defendant and excluded venire member), but also because "he ... wholly failed to state facts and circumstances that raise an inference that those jurors struck were excluded on account of their race." ***Stigler***, No. 89-4073 at 10.[3]

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[3] That ruling may, in part, have been based on the following colloquy that preceded defendant's earlier quoted request that the government be required to state its reasons for the challenged strikes. As shown below, following the challenges to jurors, the luncheon recess was held. The ***Batson*** objection was not made until

As a result, our court ruled that Stigler failed to make a

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when the selected jurors were to be impanelled.

> THE COURT: All right, gentlemen, we'll be back at 1:00, but we'll return to the courtroom at 1:15.
>
> (Luncheon recess.)
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> THE COURT: Counsel, I understand you have a motion.
>
> [Defense Counsel]: Yes, sir.
>
> THE COURT: Approach the bench.
>
> (Bench conference.)
>
> THE COURT: What is your motion? I wish you'd have done this earlier.
>
> [Defense Counsel]: We didn't realize at the time that we struck every black from the jury.
>
> [Other Defense Counsel]: A [sic] apologize. If we'd have known --
>
> THE COURT: How many did that strike?
>
> [Defense Counsel]: I don't know. How many did ya'll strike?
>
> [Government Counsel]: I don't know.
>
> [Defense Counsel]: Five out of six.
>
> THE COURT: Well, all right.
>
> [Government Counsel]: I didn't know how many it was.
>
> [Other Government Counsel]: I wasn't keeping up with it that way.
>
> THE COURT: We'll have to take this up in chambers. We'll retire to chambers.

In short, it appears that the conduct of the voir dire and the challenges to the jurors in chambers had not caused defense counsel to feel that the government was engaging in racial discrimination.

prima facie showing that the prosecutor struck a potential juror on the basis of race. *See* ***Hernandez v. New York***, ___ U.S. ___, 111 S. Ct. 1859, 1866 (1991) ("the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race"). Therefore, assuming *arguendo* that ***Powers*** is applicable, we have previously ruled against Stigler on the merits of this appeal. And, "[i]t is settled in this Circuit that issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 Motions." ***United States v. Kalish***, 780 F.2d 506, 508 (5th Cir.) (citation omitted), *cert. denied*, 476 U.S. 1118 (1986).

III.

For the foregoing reasons, the denial of the § 2255 motion is **AFFIRMED.**