

IN THE SUPREME COURT OF THE STATE OF NEVADA

CEDRIC O'NEAL HOWARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43105
FILED

FEB 14 2005

ORDER OF REMAND

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction pursuant to a jury verdict of one count of burglary. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge. The district court adjudicated appellant Cedric O'Neal Howard a habitual criminal and sentenced him to a life term in the Nevada State Prison with the possibility of parole after ten years.

On appeal, Howard, an African-American, alleged that the district court erred in overruling his objection, made pursuant to Batson v. Kentucky,¹ and allowing the State to peremptorily challenge a juror who was the sole African-American in the panel of potential jurors. Although the district court addressed the first two steps of the Batson analysis, this court concluded that the district court failed to make an adequate record respecting the third step, i.e., whether the opponent of the peremptory challenge proved purposeful racial discrimination.² Consequently, the record was inadequate to demonstrate whether the district court engaged in the required analysis by examining all the evidence concerning the issue of pretext.

¹476 U.S. 79 (1986).

²Purkett v. Elem, 514 U.S. 765, 767 (1995).

As a result, this court remanded the matter and instructed the district court “to hold a hearing and make any further analysis and findings necessary to show a reasoned determination on the issue of the prosecutor’s state of mind in making the peremptory challenge of Ms. King.”³ This court further instructed the district court to address “whether the prosecutor was motivated by Ms. King’s race in light of all the relevant evidence, including any evidence that tends to discredit the prosecutor’s explanations.”⁴

On appeal, Howard contends that the district court did not conduct a meaningful examination of the reasons given by the prosecutor to resolve the Batson challenge and failed to make sufficient inquiry into whether the prosecutor called Ms. King a “racist.”⁵ We agree and remand for further proceedings.

³Howard v. State, Docket No. 40443 (Order of Remand, October 7, 2003) (emphasis added).

⁴Id. (emphasis added).

⁵When asserting his Batson challenge, defense counsel stated:

The only reason why we can see that the State is challenging her is because of her race. She's African-American and our client is African-American.

The reasoning that Miss Brown gave to the court at the bench was that she felt that she was racist because of the statements that she made to the State that she thought the cops were racists, I believe she said, and I think the court overruled that, and said that is not racist enough as a reason to dismiss her.

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This court's concern as expressed in the order of remand was that the record was inadequate to demonstrate whether the district court engaged in the required analysis by examining all the evidence concerning the issue of pretext and making the findings as required by Nevada law.⁶ Libby v. State requires that the analysis be meaningful.⁷ In our order of remand, we instructed the district court to conduct a hearing and "make any further analysis and findings necessary to show a reasoned determination on the issue of the prosecutor's state of mind in making the peremptory challenge of Ms. King." The district court was further directed to address whether the prosecutor was motivated by Ms. King's race in light of all the relevant evidence, including any evidence tending to discredit the prosecutor's explanation.

When a case is remanded for further action, the district court is required to specifically follow our direction.

To resolve this case, we must determine whether the district court complied with our mandate on remand, a question of law that this court reviews de novo. When a reviewing court determines the issues on appeal and reverses the judgment specifically directing the lower court with respect to particular issues, the trial court

... continued

On remand the trial court declined to hold an evidentiary hearing and take testimony from Ms. Quillin, co-counsel for the defense during the trial, and a witness to Ms. Brown's purported statement that she felt the juror was a racist. While the district court indicated an intention to hold an evidentiary hearing, no hearing was held on the issue.

⁶Libby v. State, 113 Nev. 251, 257, 934 P.2d 220, 224 (1997) (Libby I).

⁷115 Nev. 45, 51-52, 975 P.2d 833, 836-37 (1999) (Libby II).

has no discretion to interpret the reviewing court's order; rather, it is bound to specifically carry out the reviewing court's instructions.⁸

The district court did not follow our direction to make a "reasoned determination," nor was a meaningful examination conducted of the evidence tending to discredit the prosecutor's explanation.

Both parties did argue their respective positions before the district court. An in camera conference was also held with the attorneys, but no evidentiary hearing was conducted. The prosecutor whose conduct is in question handled the case on remand and on the record denied making the racist statement. The district court then issued its order again denying Howard's Batson challenge.

On remand, the district court found that the State challenged Ms. King for three reasons: (1) she had a bad experience with law enforcement, (2) she could not take off three days from her job as a clerk in a public school, and (3) she did not want to be there. Surprisingly, the district court did not list another reason previously given—that she gave an unacceptable answer to the question of whether the truth takes few words. Perhaps the reason was not listed again because we found it "dubious" since other prospective jurors had given similar answers to the ones Ms. King had given, and the other prospective jurors had not been perempted. In conclusion, the district court made general findings that the prosecutor's explanations were not pretexts for purposeful discrimination, the reasons were race neutral, there was no evidence of discriminatory intent inherent in the prosecutor's explanation, and the

⁸Wheeler Springs Plaza, LLC v. Beemon, 119 Nev. 260, 263-64, 71 P.3d 1258, 1260 (2003) (citation omitted).

challenge had some basis in accepted trial strategy. The district court also found that the race-neutral explanations given by a non-prosecuting attorney did not play into its analysis.

Again, the district court did not conduct a meaningful hearing or an analysis of each reason given by the prosecutor's use of a peremptory against Ms. King as required by Libby II. When a prosecutor exercises a peremptory challenge against the only minority on a panel, he or she must give specific reasons for that action, and the district court is then required to make specific findings about the validity of each reason.⁹ In our order of remand, we were concerned about the dubious nature of the second (employment problem) and third (the truth takes few words question) explanations and, in part, remanded for those specific findings to be made for each reason given. This was not done. The work issue and the claim that Ms. King did not want to be there were both negated by further individual voir dire. Ms. King indicated that she could not think of a reason why she would be unable to serve as a fair and impartial juror, and she mentioned no work-related problem. Nowhere did Ms. King state that she just didn't want to be there, and this reason is unsupported by the record.

The district court's generalized findings that all three reasons were race neutral is inadequate because the district court failed to make express findings on each reason. This is something the district court was specifically instructed to do. After reviewing the record and not giving the generalized findings deference because of their inadequacy, three reasons appear to be pretextual and not supported by the record and one reason

⁹Batson, 476 U.S. at 97.

may be race neutral. Without giving deference to the district court's findings, it is impossible for us to conclude that the prosecutor was race neutral in exercising her peremptory challenge against Ms. King.


In our order of remand, we were also concerned about the claim that the prosecutor wanted to excuse Ms. King because she was a "racist." We stated that whether this alleged statement was made was relevant to the third step when concerning the prosecutor's credibility in asserting race-neutral motives. We specifically instructed that "if the court determines that the prosecutor initially gave the reason that Ms. King was racist, then the court should address the effect of this evidence on its determination." In its order, the district court stated that it had previously found that the public defender's allegation was unsupported. Unfortunately, that finding was not considered at an evidentiary hearing and we remanded, in part, for further exploration of this issue.

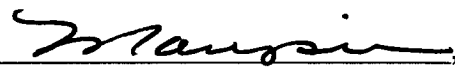
At the hearing after remand, the prosecutor stated that she had not made that statement. The deputy public defender had a witness ready to testify that this is exactly what the prosecutor said. However, the trial court stated that an evidentiary hearing was unnecessary, even though there was an apparent issue of fact presented. As we indicated, this issue was relevant because it had bearing on the motive and intent of the prosecutor, and we had directed that this issue be explored on remand. While we did not expressly direct an evidentiary hearing on the matter, the way things developed left no other way to decide this issue. Since this inquiry was relevant and the district court was instructed to make it, the failure to conduct an evidentiary hearing and issue appropriate findings was error.

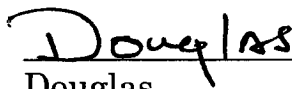
The district court did not engage in the required “meaningful” analysis, did not review the totality of evidence as is required by Batson¹⁰ (particularly when three of the four reasons seem pretextual), and did not follow our direction on remand. Since this court is provided with little more than what we had when we said the record was inadequate, we will again remand for specific findings to be made on each reason given and for an evidentiary hearing regarding the alleged “racist” comment.

The evidentiary hearing and the specific analysis and finding of fact shall be concluded in 90 days from the date of this order.

Accordingly, we ORDER this matter REMANDED to the district court for proceedings consistent with this order.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. John S. McGroarty, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁰Id. at 93-94.