17-3794-pr
Johnson v. Gonyea, Attica Correctional Facility

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of October, two thousand eighteen.

PRESENT: PETER W. HALL,
GERARD E. LYNCH,
Circuit Judges,
WILLIAM F. KUNTZ,
*Judge.**

Jason Johnson,

Petitioner-Appellee,

v. No. 17-3794-pr

Paul M. Gonyea, Attica Correctional Facility,

Defendant-Appellant,

Superintendent, Attica Correctional Facility,

Defendant-Appellant.†

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*Judge William F. Kuntz of the United States District Court for the Eastern District of New York, Sitting by Designation.

† The Clerk of Court is requested to amend the caption to conform to the above.

For Appellee: DAVID CLIFFORD HOLLAND, New York, New York

For Appellant: ALICE WISEMAN, Assistant District Attorney (Susan Gliner, Assistant District Attorney, *on the brief*), New York County District Attorney's Office, New York, New York

Appeal from a judgment of the United States District Court for the Southern District of New York (Hellerstein, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **REVERSED.**

Defendant-Appellant Paul M. Gonyea, Attica Correctional Facility, appeals the district court's grant of a writ of habeas corpus to Petitioner-Appellee Jason Johnson pursuant to 28 U.S.C. § 2254. Johnson's federal habeas petition alleged that the prosecution's use of its peremptory strikes to eliminate four African Americans on the venire during jury selection for Johnson's 2008 trial for second-degree murder, first-degree kidnapping and robbery, and fourth-degree conspiracy amounted to intentional discrimination in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The district court agreed, holding that "the trial court's determination that petitioner failed to show purposeful discrimination in selecting jurors was clearly erroneous." J. App. 306. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"We review the district court's grant of an application for a writ of habeas corpus *de novo*, and its underlying findings of fact for clear error." *Cardoza v. Rock*, 731 F.3d 169, 177 (2d Cir. 2013) (internal citations omitted). Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), "when a state court adjudicates a petitioner's habeas claim on the merits, a

district court may only grant relief where the state court's decision was 'contrary to, or involved an unreasonable application of, clearly established Federal law,' or was 'based on an unreasonable determination of the facts in light of the evidence presented.'" *Waiters v. Lee*, 857 F.3d 466, 477 (2d Cir. 2017), *cert. denied sub nom. Waiters v. Griffin*, 138 S. Ct. 385 (2017) (quoting 28 U.S.C. § 2254(d)). As relevant here, a federal court may not overturn a decision of the state court applying federal law "unless that court applied [*Batson*] in an objectively unreasonable manner." *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015) (internal quotation marks omitted). "[A] state-court decision is not unreasonable if fairminded jurists could disagree on [its] correctness." *Id.* at 2199 (internal quotation marks omitted). "Nevertheless, the state court's finding might represent an unreasonable determination of the facts where, for example, reasonable minds could not disagree that the trial court misapprehended or misstated material aspects of the record in making its finding, or where the court ignored highly probative and material evidence." *Cardoza*, 731 F.3d at 178 (internal quotation marks and citations omitted).

As an initial matter, the district court failed to adhere to AEDPA's highly deferential strictures in its analysis of Johnson's *Batson* claim. While the court recited the appropriate statutory standard in its written order, *see* J. App. 304—05, it went on to state that at step three of the *Batson* analysis, "[I must] defer to state court factual findings unless [I] conclude that they are clearly erroneous." J. App. 306 (quoting *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008))). The district court's reliance on *Foster* was misplaced. There, the Supreme Court was tasked with reviewing the Georgia Supreme Court's denial of a "Certificate of Probable Cause" necessary for Foster to pursue in state court an appeal of the denial of his petition for a writ of habeas corpus. The operative question was

whether Foster's *Batson* claim had "arguable merit," as provided in Georgia's state court rule of procedure. *Foster*, 136 S. Ct. at 1745. To answer that question, the Supreme Court reviewed the state court's three-step *Batson* inquiry, and, citing the standard articulated in *Snyder*, 552 U.S. 472, announced that it would "defer to state court factual findings unless we conclude that they are clearly erroneous." *Id.* at 1747. *Snyder*, however, was a direct appeal from the Louisiana Supreme Court, and thus the "clearly erroneous standard" it announced, and which the district court applied, is inapposite where, as here, the propriety of the *Batson* finding is analyzed through AEDPA's lens. *See Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (*per curiam*) (explaining that the "clearly erroneous" standard applies on direct review but that the standard under AEDPA is highly deferential, requiring that state courts be afforded the benefit of the doubt); *Rice v. Collins*, 546 U.S. 333, 338 (2006) (distinguishing between reviewing a *Batson* challenge for "clear error" on direct review versus AEDPA's narrower inquiry).

Applying AEDPA's standard to Johnson's petition, the proper question for the district court was not whether the state court's conclusion that Johnson failed to show purposeful discrimination in his jury selection process was clearly erroneous but, rather, whether the trial judge's finding rested on "an unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2), *i.e.*, "if it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge," *Rice*, 546 U.S. at 338. The exercise of our *de novo* review leads to the invariable conclusion that "[r]easonable minds reviewing the record might disagree about the prosecutor's credibility" in defending Johnson's *Batson's* application. *Davis*, 135 S. Ct. at 2201. On federal habeas review, this militates a denial of Johnson's petition.

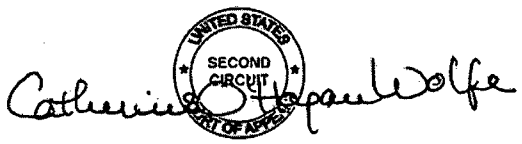
While Johnson points to places in the transcript of the state court proceeding where the prosecution offered seemingly suspect or contradictory statements about its decision to eliminate certain African American jurors while neglecting to exercise its peremptory challenges for similarly situated non-black jurors, the prosecution offered a race-neutral reason for each of the challenged strikes which the trial court accepted and which we may not disturb. The state trial court was in the best position to evaluate the prosecutor's veracity, and neither this Court's nor the district court's disagreement with those findings "suffice[s] to supersede the trial court's credibility determination." *Id.* By deciding instead that "the prosecutor's stated reasons for the strikes of four black jurors were inconsistent, shifting, and pretextual," J. App. 306, the district court impermissibly substituted its judgment for that of the trial court. *See Wood v. Allen*, 558 U.S. 290, 301 (2010) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.").[1]

We are not unsympathetic to the district court's concerns with the manner in which certain jurors were excluded from Johnson's venire. However, neither this Court nor the district court is empowered to overturn the state trial judge's findings based on a finding of clear error alone. Because Johnson's section 2254 petition fails to demonstrate that the trial court "applied [*Batson*] in an objectively unreasonable manner," *Davis.* 135 S. Ct. at 2198, or that it based its conclusion

[1] While the district court apparently believed that the trial judge failed to recognize that a certain statement made by the prosecutor about one of the challenged jurors, Carlo Williams, was "demonstrably false," J. App. 307, the district court misattributed a statement made by a different prospective juror to Ms. Williams in making this charge, *see* J. App. 170—71 (voir dire of Enid Kelly). We are unable to conclude that the trial judge "misapprehended or misstated material aspects of the record" so as to have rendered an "unreasonable determination of the facts" warranting a grant of the petition. *Cardoza*, 731 F.3d at 178 (internal quotation marks and citations omitted).

at step-three of the *Batson* inquiry "on an unreasonable determination of the facts in light of the evidence presented," 28 U.S.C. § 2254(d)(2), the district court erred in granting the petition. Accordingly, we **REVERSE** the judgment of the district court and **DENY** Johnson's petition for a federal writ of habeas corpus.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JASON JOHNSON,

Plaintiff,

-against-

DALE ARTUS,

Defendant.

ORDER GRANTING PETITION FOR A WRIT OF HABEAS CORPUS

16 Civ. 8686 (AKH)

ALVIN K. HELLERSTEIN, U.S.D.J.:

Petitioner Jason Johnson ("Petitioner") filed a timely petition for a writ of habeas corpus on November 11, 2016. *See* 28 U.S.C. § 2254. Oral argument was held on October 11, 2017. For the reasons stated on the record, and supplemented herein, the petition is granted. I find that the trial court's decision that petitioner failed to show purposeful discrimination during jury selection was clearly erroneous.

Governing Principles

A federal court may not grant a habeas petition based on a claim that was "adjudicated on the merits in State court proceedings," unless the state court's decision (i) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (ii) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (d)(2). This is a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). State court factual findings "shall be presumed to be

correct," and a petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

A state court decision is "contrary" to clearly established federal law if "the state court arrives at a conclusion opposite to that reached by the Court on a question of law or if the state court decides a case differently that the Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A decision involves an "unreasonable application" of Supreme Court precedent "if the state court identifies the correct governing legal principle from the Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. It is not enough to show that the state court decision was "wrong." The petitioner must show that "no fairminded jurist could agree with the state court's application" of federal law. *Davis v. Ayala*, 135 S. Ct. 2187, 2203 (2015).

A federal court may not entertain a habeas petition unless the "state prisoner . . . exhaust[s] available state remedies before presenting his claim to federal habeas court." *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). Petitioner has done so. The Appellate Division denied his appeal on grounds similar to those presented here, and the New York Court of Appeals denied review. *People v. Johnson*, 117 A.D.3d 637, 638 (App. Div. 2014); *appeal denied*, 26 N.Y.3d 930 (2015).

Additionally, "a federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule." *Davila*, 137 S. Ct. at 2064. If the state court decision contains "a clear and express statement of reliance on a state procedural bar," the federal court may not review the state court decision. *Jimenez v. Walker*, 458 F.3d 130, 145 (2d Cir. 2006).

Discussion

As I held on the record of argument, the trial court's determination that petitioner failed to show purposeful discrimination in selecting jurors was clearly erroneous. *Batson v. Kentucky*, 479 U.S. 79, 96–98 (1986) analyzes purposeful discrimination in three steps: "(1) the defendant must make a prima facie case that the prosecution exercised its peremptory challenge in a discriminatory manner; (2) once the defendant establishes its prima facie case, the prosecution must assert a race-neutral reason for the challenge; and (3) the trial court must then determine whether the defendant has established 'purposeful discrimination,'" *Walker v. Girdich*, 410 F.3d 120, 123 (2d Cir. 2005) (quoting *Batson*, 476 U.S. at 96–98), "based on all the facts and circumstances." *Messiah v. Duncan*, 435 F.3d 186, 195 (2d Cir. 2006) (internal quotation marks omitted) (quoting *Jordan v. Lefevre*, 206 F.3d 196, 200 (2d Cir. 2000)). The parties agree that the first two steps of *Batson* were met. The issue at bar focuses on the third step, and "[I must] defer to state court factual findings unless [I] conclude that they are clearly erroneous." *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)).

As I held at the argument, the prosecutor's stated reasons for the strikes of four black jurors were inconsistent, shifting, and pretextual, and the trial judge's acceptance of such reasons was unduly deferential and clearly erroneous. Three of the four strikes were explained by suggesting that the juror was not mentally fit to serve, a reason that had no basis in fact and should have alerted the trial judge to the presence of intentional discrimination. As to Freda Bell, the prosecutor initially stated that she seemed "mildly retarded," but later offered a secondary explanation based on the criminal record of her domestic partner. The trial judge credited the prosecutor's second justification, stating that there was "[c]ertainly no requirement

and no difficulty with not picking somebody whose living with a person that has a murder conviction." *See* Ex. 4, at 311. However, the trial judge did not probe the initial, more inflammatory justification offered by the prosecutor, and then failed to probe the prosecutor's pretextual reasons for his strikes.

For Carlo Williams, the prosecutor justified his strike by stating that she was of college age and not mature enough to handle the case. This explanation is belied by the fact that the prosecutor did not strike similarly situated non-black jurors, and struck a 22-year-old white college student, Enid Kelly, only because her boyfriend had been convicted of statutory rape. *See Miller–El v. Cockrell*, 537 U.S. 322, 339 (2003). In evaluating the prosecutor's justification, the trial judge stated that "the fact that somebody can vote [and] is eligible for jury service . . . [d]oesn't mean they have to be selected." *See* Ex. 4, at 311. The trial judge's cursory review ignored the comparison evidence between Carlo Williams and other similarly situated non-black jurors, such as Enid Kelly, Mr. Wong, and Mr. Berlind, all of whom were young college students. Specifically, Mr. Wong and Mr. Berlind were both non-black college students, ages 20 and 21 respectively, that the prosecutor did not strike. The prosecutor's explanation that he had fewer peremptory strikes left by this point in voir dire, and was therefore being less selective, appears contrived. Moreover, the prosecutor's suggestion that Carlo Williams had never been employed, unlike Mr. Wong and Mr. Berlind, was demonstrably false. *See* Ex. 4, at 247 (in which Carlo Williams stated that she was an office assistant and a student). In sum, a more thorough investigation by the trial judge would have revealed the inadequacy and inconsistency of the prosecutor's justifications, which were pretextual and intended to mask the presence of intentional discrimination.

As to Patricia Caliste, the prosecutor's statement that she was making "hissing noises" and might have been having an internal conversation with herself was demonstrably false, as shown during voir dire, and clearly pretextual. Commenting on the prosecutor's strike, the trial judge stated that Ms. Caliste had a cold, causing her to breathe heavily into the microphone, but nonetheless preserved the strike. In so doing, the trial judge stated that "[t]heir issue was whether he was not telling the truth when he said he heard [the hissing]. Whether he is misunderstanding the significance is irrelevant." *See* Ex. 4, at 313. When a prosecutor gives such a patently false and inflammatory justification for a strike, the trial judge cannot, consistent with *Batson*, simply credit the justification without meaningful scrutiny. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) ("[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.").

Finally, as to Shameka Riddy, the prosecutor struck her despite her background in law enforcement. The prosecutor's stated reason that the juror might have encountered drug users while working as a security guard, and therefore could not fairly evaluate testimony from an expected witness, also appeared to be contrived. The evidence adduced during voir dire showed that Ms. Riddy worked as a security guard at a rehabilitation center for individuals released from jail who had mental problems. There were no facts indicating that her work connected her with drug users, and her background in law enforcement should have otherwise made her a useful juror for the prosecution. In his perfunctory review, the trial judge stated that he was "ready to put in the security guard" until the prosecutor pointed out that she had "intimate familiarity with halfway house residents." *See* Ex. 4, at 311. The trial judge's undue deference to the prosecutor illustrates the clearly erroneous quality of the trial judge's findings.

Petitioner also advances two other grounds for relief, neither of which has merit. Petitioner argues that his Fifth Amendment rights, as articulated by *Miranda v. Arizona*, 384 U.S. 436 (1966), were violated. However, the trial record is clear that petitioner was given an adequate oral Miranda warning. Petitioner also contends that his rights under the Confrontation Clause were violated through the introduction of Detective Melino's testimony. Because the relevant statements were introduced for the nonhearsay purpose of explaining the reasons for and the progress of the investigation, this argument also fails. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985))).

In any event, the Appellate Division held that petitioner's Fifth and Sixth Amendment arguments were not properly preserved, applying New York's Contemporaneous Objection rule. *See People v. Johnson*, 117 A.D.3d 637, 637–39 (2014); *see also* N.Y. Crim. Proc. Law § 470.05(2). This adequate and independent state ground is sufficient. *Whitley v. Ercole*, 642 F.3d 278, 292 (2d Cir. 2011).

The clerk shall enter judgment granting the petition, reversing the judgment of conviction, and remanding the case to the New York Supreme Court for a new trial. If respondent fails to timely appeal or initiate trial proceedings within 30 days after this order becomes final, petitioner shall be freed.

SO ORDERED.

Dated: October 30, 2017
New York, New York

ALVIN K. HELLERSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JASON JOHNSON,

Plaintiff,

16 **CIVIL** 8686 (AKH)

-against-

JUDGMENT

DALE ARTUS,

Defendant.

----------X

Petitioner Jason Johnson having filed a timely petition for a writ of habeas corpus pursuant to § 2254. Oral argument was held on October 11, 2017, and the matter having come before the Honorable Alvin K. Hellerstein, United States District Judge, and the Court, on October 31, 2017, having rendered its Order stating that the Appellate Division held that Petitioner's Fifth and Sixth Amendment arguments were not properly preserved, applying New York's Contemporaneous Objection rule. See People v. Johnson, 117 AD.3d 637, 637-39 (2014); see also N.Y. Crim. Proc. Law§ 470.05(2). This adequate and independent state ground is sufficient. Whitley v. Ercole, 642 F.3d 278, 292 (2d Cir. 2011); and directing the clerk to enter judgment granting the petition, reversing the judgment of conviction, and remanding the case to the New York Supreme Court for a new trial. If respondent fails to timely appeal or initiate trial proceedings within 30 days after the order becomes final, petitioner shall be freed, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Order dated October 31, 2017, the Appellate Division held that petitioner's Fifth and Sixth Amendment arguments were not properly preserved, applying New York's Contemporaneous Objection rule. See People v. Johnson, 117 AD.3d 637, 637-39 (2014); see also N.Y. Crim. Proc. Law§ 470.05(2). This adequate and independent state ground is sufficient. Whitley v. Ercole, 642 F.3d 278, 292 (2d Cir. 2011); judgment is entered and the petition is

granted, the judgment of conviction is reversed, and the case is remanded to the New York Supreme Court for a new trial. If respondent fails to timely appeal or initiate trial proceedings within 30 days after the order becomes final, petitioner shall be freed.

DATED: New York, New York
October 31, 2017

RUBY J. KRAJICK

Clerk of Court

BY: kmango

Deputy Clerk

Additional material from this filing is available in the Clerk's Office.