

Three easy steps

MSC overturns \$14.9 million verdict for 'Batson' error

POSTED: 10:00 AM Friday, July 9, 2010

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TAGS: Batson v Kentucky, fair cross-section, Heather A. Glazer, John P. Jacobs, Judge Michael J. Callahan, Judicial Tenure Commission, jury selection, peremptory challenges, racial representation on a jury



In an effort to maintain what he felt was a fair racial representation of Wayne County in a jury, Circuit Judge Michael J. Callahan denied the defendant's use of a peremptory challenge on a black juror - despite defendant having articulated a legitimate nonracial rationale for the challenge.

The Michigan Supreme Court held Callahan's denial of the peremptory challenge violated the U.S. Supreme Court precedent in *Batson v. Kentucky* (476 U.S. 79) and remanded the case back to the circuit court for a new trial with a new judge.

"The biggest error this judge made was that he assumed that *Batson* gave him the power to racially proportionize juries in Wayne County," said John P. Jacobs of Jacobs & Diemer, P.C. "It does not. It is not an idiosyncratic measure. It is not an ad hoc measure. It is something that the judicial system as a whole must do."

In *Pellegrino v. AMPCO System Parking* (Lawyers Weekly No. 06-73513, 24 pages), a wrongful death action, Callahan told attorneys before voir dire that his goal was "to have a jury that represented the racial composition of this county."

When AMPCO's attorney, Robert F. MacAlpine of Detroit-based Garan Lucow Miller P.C., tried to peremptorily excuse a black prospective juror, Callahan denied the challenge despite MacAlpine providing a legitimate non-racial rationale that the woman was biased because she had been widowed twice and had recently lost her mother.

Jacobs, who was MacAlpine's co-counsel, said the juror had made statements during voir dire that she would like to be able to give the deceased an estate to leave for her children, like her mother was able to leave to her. The ensuing trial resulted in a \$14.9 million verdict.

On the record, Callahan said he was "going to seek to have this proportional representation on the juries that hear cases in this court."

After the eight-woman jury delivered a verdict for Pellegrino, AMPCO appealed, arguing the court didn't follow the procedure outlined by the U.S. Supreme Court in *Batson*.

Although the Court of Appeals agreed Callahan didn't follow the *Batson* procedures, it nonetheless affirmed, saying it's only a constitutional error when the juror is excluded, and not included, on the basis of race, thus any error was harmless.

The Michigan Supreme Court reversed the Court of Appeals finding in a 5-2 decision, remanding the case back to Wayne County for a new trial with a new judge.

Writing for the majority, Justice Stephen J. Markman rejected the argument that the trial court's ruling merely ensured that the jury reflected a fair cross-section of the community.

"In denying defendant's peremptory challenge, the court expressly took [the juror's] race into account and expressly evaluated her race in light of the race of every other juror on the panel," Markman wrote. "It is hard to conceive of a more flagrant and unambiguous violation of the court rule. ...

"The trial court's process transformed the jury from a group of mere citizens into a group in which a person's racial background became defining, and it transformed the selection process from one that was neutral in terms of race into one that was predicated on race."

Markman said *Batson* and its line of decision show a "'zero tolerance' approach towards racial considerations" in jury selection that applies to both the racially based exclusion and inclusion of a juror.

He said the constitutional violation "requires automatic reversal," so no harmless error analysis applies. He also said some of Callahan's statements "could supply a basis for the Judicial Tenure Commission to investigate whether judicial misconduct has occurred."

In a dissenting opinion, Justice Elizabeth A. Weaver said she thought the appeal was "improvidently granted" and that AMPCO didn't suffer any injustice by the juror's inclusion on the jury.

Justice Diane M. Hathaway joined Weaver in her dissent.

The decision was somewhat interesting in that the majority was joined by justices that don't agree often, said University of Detroit-Mercy Law School professor Lawrence Dubin.

"If you look at the five justices that are in the majority, it certainly was not one of the typical voting blocks of the divided court," he said. "It wasn't the conservatives versus the liberals or vice versa. It was a representative group of both sides to the divided court."

Chief Justice Marilyn Kelly and Justice Michael F. Cavanagh joined in Markman's opinion, and Justices Maura D. Corrigan and Robert P. Young Jr. also were in the majority.

Jacobs, whose practice specializes in second-chairing trials to preserve appellate issues, said the case turned more on Callahan's failure to do a proper *Batson* examination rather than his specific statements. A proper *Batson* determination requires a three step procedure, he said.

First, a party objects, showing the challenge has "some racial tinge that identifies it as prima facie." The challenging party then must provide a legitimate nonracial rationale for the challenge. The judge then decides whether the challenge was racially based and calls out the challenging party on the record if he deems that it was.

According to the opinion, not only did Callahan not find that the challenge was racially based, he specifically stated that he was not calling MacAlpine a racist and should not be accused of racism, yet denied the challenge anyway.

"[Callahan] wanted to jump over two of the larger issues as to how this problem is solved to his satisfaction of having a number of African-American jurors and all women," Jacobs said. "He wanted the goal of making the representation.

"It's up to the system as a whole to make that remediable approach - not a judge."

But Callahan's actions were a constitutional violation, which requires an automatic reversal, so any harmless error analysis was irrelevant, Markman wrote.

Jacobs said the Court of Appeals' harmless error rationale was "not too well thought out."

"A single juror, under Michigan law, if that person is tainted, makes it impossible for the jury to deliberate without the taint of that person's biases," he said.

“[She] is in the jury room articulating her points of view. That taints, and it taints every time. How can it be harmless error when you use race to accomplish an illegal verdict? Do we suspend the 14th Amendment on a harmless [error] rationale?”

Pellegrino’s attorney, Heather A. Glazer, of Fieger, Fieger, Kenney, Johnson & Giroux, P.C., would not respond to *Michigan Lawyers Weekly’s* request for comment for this story.

If you would like to comment on this story, please contact Brian Frasier at (248) 865-3113 or brian.frasier@mi.lawyersweekly.com.

Decision in a nutshell

The Case:

Pellegrino v. AMPCO System Parking (Lawyers Weekly No. 06-73513, 24 pages).

The Facts:

A trial judge denied the defendant’s use of a peremptory challenge in an effort to keep an African-American juror on the panel.

The Decision:

Jurors must be “indifferently chosen” without consideration of race.

“In denying defendant’s peremptory challenge, the court expressly took [the juror’s] race into account and expressly evaluated her race in light of the race of every other juror on the panel. It’s hard to conceive of a more flagrant and unambiguous violation of the court rule.”

“[The juror’s] presence on the jury was thus the result not of being ‘indifferently chosen,’ ... but of having been chosen specifically on the basis of race. As asserted in *Batson* [*v. Kentucky*, 476 US 79], this inflicts harm on defendant, on the prospective juror who was excluded because of [the juror’s] retention, and indeed on the ‘entire community.’”

From The Dissent:

“I am not persuaded that the decision of the Court of Appeals was clearly erroneous or that defendant has suffered any injustice in this case.”