

## Court says man's race kept him off jury

By: Donna Walter ◉ February 27, 2009

The fact that a black man asked a question during jury selection kept him off the jury.

But on Tuesday, the Missouri Court of Appeals Eastern District, in a 2-1 decision, ordered a new trial for convicted murderer Tyrone C. Bateman, saying the prosecutor mischaracterized the would-be juror's question.

"It's still not a final decision; anything could happen," Jessica Hathaway, Bateman's public defender, said Thursday.

"The attorney general will often file motions for rehearing. Given that there's a dissent, there might be some other judges who want to join in on that and hear it en banc," she said.

The prosecutor, Trent Mitchell, asked whether the potential jurors could apply the law to the facts of the case based upon the trial court's instructions. Benjamin Thompson, the subject of this *Batson v. Kentucky* challenge, said he believed he could and then asked what the prosecutor meant by first degree or second degree.

The assistant circuit attorney explained that "certain things need to be sustained before it's murder in the first degree or to make it murder in the second degree." Thompson then had a follow-up question: "I mean, is that like more of a harsher sentence?"

At the end of the exchange, Thompson said, yes, he would be able to follow the court's instruction about the degrees of the case even if his personal beliefs differed.

The majority – which consisted of opinion author Judge George W. Draper III and Judge Nannette A. Baker – noted that the state objected to what Mitchell termed Thompson's "initiative" at asking the question but didn't object to a white juror, Bob Brindell, who also asked a question during jury selection.

Brindell wanted to know why the jury wouldn't be allowed to consider the death penalty if it found Bateman guilty. "Not that we would necessarily go for that, but why would we eliminate some of the punishment possibilities from the deliberation?" he asked. The prosecutor explained that the St. Louis Circuit Attorney's Office had decided not to pursue the death penalty and that the jury would not be imposing any sentence in Bateman's case.

In the end, Bateman, a black man now 39 years old, was convicted of first-degree murder and sentenced to life in prison.

During the *Batson* hearing, Mitchell explained he wanted to strike Thompson from the jury "because I take that initiative that he showed as, you know, maybe a sign that he has a more lenient bend to his personal disposition in this matter or in criminal matters."

The appellate majority disputed the prosecutor's account of Thompson taking the initiative, saying instead that he was responding to a direct question.

"Even if Thompson's follow up question could be construed as 'initiative,' then one would surmise Brindell likewise took 'initiative' when he inquired about the range of punishment after being invited to do so by the prosecutor's open-ended question when voir dire resumed," Draper wrote. "Additionally, nothing contained within Thompson's response or question demonstrated an apparent disposition toward leniency; the same can be said for Brindell based upon his question about the range of punishment."

The majority also pointed out that St. Louis City Circuit Judge Joan L. Moriarty didn't try to clarify Thompson's statements or compare what he said to what Brindell said.

"We will not speculate about the possible motivations underlying the venirepersons' questions, and in the absence of this evidence, we find the venirepersons were similarly situated with nothing to distinguish them other than their race," Draper wrote.

Mitchell was in a deposition Thursday afternoon and could not be reached for comment. Travis Ford, spokesman for Attorney General Chris Koster, did not return telephone calls seeking comment.

In a dissent, Judge Kenneth M. Romines said the majority judges "gloss over the substance of the questions, concluding for the trial judge that there was no way to interpret from either venireman any bent toward leniency, harshness, or otherwise."

"However, it is clear the trial judge *did* see the bent to their questions, and this was the trial judge's question to determine. *That is where we as an appellate court must stop,*" Romines said, using italics and an underline to emphasize his point.

The judge noted that the prosecutor used five of its six peremptory challenges to remove black members of the panel and that the defense lawyer, Annette Llewellyn, used all six challenges to remove white jurors from the main panel as well as two more challenges she had available to strike from the alternates.

The state objected to just one of the defense strikes, and Moriarty sustained the challenge, he said. The defense challenged all five of the state's strikes, and Moriarty upheld the challenge, he said. The final jury, including the two alternates, had three black jurors, he said.

The case is *State v. Bateman*, ED89968, and the opinion may be found on the judiciary's Web site, [www.courts.mo.gov](http://www.courts.mo.gov).

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