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Is *Batson* now too much of a challenge?

Some appellate judges worry it's nearly impossible to win

By: Allison Retka September 27, 2009

Frequently used and rarely successful, the *Batson* challenge is supposed to ensure minority jurors aren't unfairly excluded from a jury panel because of their race, ethnicity or gender.

But Missouri appellate courts recently have split and struggled over one crucial element needed to prove a party peremptorily struck a juror for her race: The same party did not strike a juror of another race who was "similarly situated" as the struck juror.

Now the Missouri Supreme Court has the chance to take up the appeal of a St. Louis murder conviction where the trial judge overruled the defendant's *Batson v. Kentucky* challenge and allowed the prosecutor to strike a black juror from the jury pool.

In a Sept. 1 decision, nine judges on the Missouri Court of Appeals, Eastern District, ruled the trial judge in *State v. Bateman* (ED89968-01) was right in rejecting the plaintiff's use of the 23-year-old jury selection tool. The black juror was not similarly situated as a white juror who also inquired about possible sentences during jury selection, so racial discrimination played no role in the strike, the majority ruled.

But two judges – the only minority judges on the Eastern appellate bench – disagreed and urged a new trial for Tyrone C. Bateman. Their dissents act as an alert about the ever-steeper standards that make it nearly impossible for a Missouri defendant to raise a successful *Batson* challenge based on similarly situated white jurors.

"The protection of *Batson* and its lowered burden of proof is being eroded by a developing trend to justify the striking of minorities by pointing to insignificant and minuscule distinctions between the minority and the Caucasian venireperson," wrote Judge Nannette A. Baker.

Judge George W. Draper III also noted the same "troubling trend."

Judge Patricia L. Cohen, while concurring with the majority in this "close case," also said she shared the dissent's concern that Missouri courts should not force *Batson* challengers to prove the jurors are "identical in all respects."

On Sept. 16, Bateman's public defender, Jessica Hathaway, filed an application to transfer the case to the Missouri Supreme Court. The high court hasn't issued a response to the application.

"*Batson* has always been a high hurdle," said Peter Joy, a criminal justice law professor at Washington University in St. Louis. "The court is struggling to find the appropriate height of the hurdle."

The hurdle is high because courts have long respected the right of attorneys to wield peremptory strikes as a trial tactic, Joy said. Attorneys have the right to respond to a gut feeling and strike a juror for little or no reason.

"Many attorneys say it should be difficult to prevail on *Batson*," Joy said. "But it shouldn't be impossible.

"For *Batson* to be meaningful, the hurdle cannot be unscalable."

Clear record, clear error

Baker and Draper twice ruled that Bateman deserved a new trial because of St. Louis Circuit Judge Joan Moriarty's handling of *Batson* challenges in his 2007 murder trial.

They formed the majority in a 2-1 decision in February when the court first considered Bateman's appeal as a three-judge panel, along with Judge Kenneth M. Romines.

Romines wrote a colorful dissent that described Bateman's alleged crime. After a 2005 argument in the street over a pair of shoes, Bateman grabbed a shotgun and followed his cousin home, where he "kicked in the front door, and blew his cousin to his eternal reward," Romines wrote.

The judge accused Baker and Draper of drawing conclusions about the two potential jurors on behalf of the trial judge. That's not the role of an appellate court, Romines wrote.

"We did not see the demeanor – we did not actually hear the answers; the trial court did," he wrote. "Our standard requires the record to prove clear error, and there simply is none."

It's true that when it comes to *Batson* challenges, appellate courts generally defer to a trial judge's decisions during jury selection, said Sue McGraugh, a law professor and supervisor of Saint Louis University's criminal defense clinic.

McGraugh said the Eastern District's decision in Bateman's case shows the importance of attorneys making a clear record about why they're raising *Batson* challenges, the opposing side's response and the trial judge's reason for granting or overruling the challenge.

"Because the trial court doesn't always give their reason in *Batson* challenges," she noted.

'Cookie-cutter' jurors

In jury selection for Bateman's trial, 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 the *Batson* 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 prosecutor, Mitchell, didn't return a call for comment.

When Mitchell used a peremptory strike on Thompson, the defense raised a *Batson* challenge to the strike. According to a trial transcript in the appellate opinion, the prosecutor said he struck Thompson because his questions about the different degrees of murder charges indicated "a more lenient bend … in criminal matters."

The defense insisted the strike was racially motivated and pointed to a white juror, Bob Brindell. During jury selection, Brindell asked the prosecutor why the jury wouldn't be allowed to consider the death penalty if it found Bateman guilty.

A majority of Eastern District appellate judges decided Brindell and Thomason were not similarly situated. While both potential jurors asked questions about punishment ranges, their questions implied different attitudes the case, the majority ruled.

The dissent insisted the jurors both asked questions about punishment and are similarly situated. Draper's dissent referenced *Miller-El v. Dretke*, a 2005 U.S. Supreme Court decision that emphasized a defendant doesn't need to prove a black juror and white juror are exactly identical to win a *Batson* challenge.

"Jurors are not products of a set of cookie cutters," the nation's high court ruled, overturning a Texas man's death sentence because of racial bias in the jury selection for his murder trial.

"You're never going to find two exactly similarly situated jurors," said McGraugh, the St. Louis law professor. "As long as you're going to require that, no one's going to win a *Batson* challenge."

Western District case

In a 2007 case, the Missouri Court of Appeals, Western District, split itself trying to determine if a prosecutor struck a black female venireperson in a Jackson County murder trial because of her race.

The majority in the 6-5 decision in *State v. Livingston* (WD64677) upheld the defense's *Batson* challenge and decided the black juror was similarly situated to a white juror. Both jurors disclosed they had bowled in leagues at the same bowling alley where the alleged murder took place, but prosecutors had only struck the black juror.

The prosecutor claimed the jurors were not similarly situated. The black female juror was not only familiar with the bowling alley, but also, a decade earlier, she had bowled there on Sunday nights and the murder occurred on a Sunday night.

The Missouri Attorney General's Office appealed the Livingston case to the Missouri Supreme Court in 2007, but the high court denied transfer.

Juror rights v. attorney rights

While it's raised in many criminal appeals, *Batson v. Kentucky* actually protects a citizen's constitutional right to serve on a jury. But *Batson* challenges often drift into fair trial issues, because minority defendants have the right to face a jury of their peers, said McGraugh the law professor.

As a criminal defense attorney two decades ago, McGraugh said she frequently would represent minority clients who faced an entire panel of white jurors. They'd ask her, "Why aren't there any other persons of color on my jury?"

It's important that minorities aren't excluded from jury service because they bring different life experiences and perspectives to the deliberation room, said Eric Selig, a St. Louis criminal defense attorney with Rosenblum, Schwartz, Rogers & Glass.

In a criminal case based on witness identification, the hairstyle of the alleged criminal can play a role, Selig said. Minority jurors might have more knowledge than white jurors about the difference between dreadlocks and braids, he said.

Eric Zahnd, the Platte County prosecutor, said he trains his assistant prosecutors to make certain race isn't a factor when they strike jurors. He noted that prosecutors can and do raise Batson challenges, but they're rarely seen at the appellate level because the state can't appeal a not guilty verdict or a hung jury.

"The very fact *Batson* exists probably diminishes the problem of jurors being struck for impermissible grounds," he said.

Zahnd said it's also important for courts to allow lawyers to do what they do best: pick fair and impartial juries.

"As long as they're not doing it on illegitimate grounds, we ought to allow that to happen," Zahnd said. "That is part of the adversarial system that allows us to pick good and fair juries."