STATE OF NEW JERSEY

v.

V. JAY SINGER,
Defendant - Appellant

A-02-1234-T3

Superior Court, Appellate Division

Submitted April 24, 2003 - Decided May 19, 2003

Before Judges GRIM, REAPER and MERCY.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Cr-02-224.

Billy Joe Hooter argued the cause for appellant (Hock, Schlock & Pricey, L.L.P., attorneys for defendant-appellant, Mr. Pricey, of counsel and on the brief).

Martha Birkenstock, Assistant Mercer County Prosecutor, for the State of New Jersey (Billie Jean King, Mercer County Prosecutor, attorney; Ms. Birkenstock, of counsel and on the brief).

REAPER, J.A.D. joined by GRIM, J.A.D.

The defendant was convicted in the Superior Court, Law Division, Criminal Part, Mercer County, on October 30, 2002, of third-degree burglary, N.J.S.A. 2C:18-2, third-degree theft by unlawful taking, N.J.S.A. 2C:20-3, and fourth-degree criminal mischief, N.J.S.A. 2C:17-3. He was sentenced to three years imprisonment, N.J.S.A. 2C:43-6(a). He appeals his convictions on the basis that the prosecutor exercised her peremptory challenges on constitutionally impermissible grounds to exclude two jurors because of their religion.

We hold that the two jurors were not members of any “cognizable group” that could be the target of presumed group bias in the jury selection process, as required to show that they were impermissibly excluded under State v. Gilmore, 103 N.J. 508. (1986). We also conclude that the jurors' exclusions did not violate the Free Exercise Clause of the First Amendment.

Defendant's convictions, therefore, are affirmed.

The Facts

Because the issues raised on appeal are limited to the jury selection procedures, we need not reprise the facts in detail. According to the indictment and facts elicited at trial, defendant V. Jay Singer became extremely distraught upon learning that he had failed to make the golf team at Colonial College in Augusta, Mercer County, and that a female golfer, Hannika Sorenson, had earned a place on the team. He broke into the women's locker room sometime in the early hours of March 15, 2002, then broke into Ms. Sorenson's locker. Defendant pulled her Calloway driver and seven wood from her golf bag and threw them into the water hazard guarding the ninth green on Colonial's grounds. A security guard on patrol heard the splash and hurried to the scene, where she recognized defendant as he fled across the fairway into a neighboring housing development. Defendant was arrested at his home later that day. He was arraigned on March 16, 2002, where he entered a plea of not guilty.

Trial commenced on October 29, 2002. During the two-day trial, defendant denied his involvement with the crime, contending that the security guard had been mistaken in her identification. After deliberating less than two hours, the jury returned a verdict of guilty on all counts. On November 25, 2002, defendant was sentenced to three years' imprisonment. A notice of appeal was filed by defendant on December 10, 2002.

Defendant's appeal focuses on events that occurred during jury selection on October 29, 2002. Following voir dire of prospective jurors, conducted by the Honorable Lion Forest, neither the defense nor the prosecution sought to have any jurors excused for cause. Thereafter, the defense exercised eight peremptory challenges and the prosecutor exercised six.

Four of the prosecutor's challenges were directed at male jurors. Defendant objected after the prosecutor exercised her fifth peremptory challenge to exclude the fourth male juror, contending that all four jurors had been excluded solely because of their gender. After a sidebar, the trial court ruled that defendant had made a prima facie showing that the prosecution had exercised its peremptory strikes on constitutionally impermissible grounds of presumed group bias. The prosecutor then presented her reasons for striking the four jurors. In defending her peremptory challenges, and specifically her challenge to the fourth male juror, P.T., the prosecutor explained that gender had nothing to do with her decision:

> What matters to the State is that [P.T.] was a seminary student - he was preparing to be a minister. And it's been my experience that jurors who are very religious tend to be more defense-oriented than people who don't display strong religious sentiments - they have a hard time with criminal trials, they don't seem to like to judge other people. And that's why I also used a peremptory strike against, um, let's see, juror [A.S.] - the woman who was evidently a devout Muslim - because of her name and the way she dressed - the court will recall that she was wearing long black robes including a head covering or scarf, I'm not sure

> what it's called - which also indicated that she was very committed to her religious faith. This wasn't about gender, gender had nothing to do with it. I always use peremptory challenges to strike people with a very strong religious bent, people who are very devout in their faith, because they tend to have a sympathetic disposition that could get in the way of giving proper weight to the evidence against the defendant.

The defendant then objected to the peremptory challenges of both the male juror, P.T., and the female juror, A.S., arguing that they were impermissibly based on religion and impermissibly burdened the jurors' free exercise of religion.[1] The prosecution took the position that jurors who were strongly religious persons were not protected in the same way that persons of a specific race or gender were. The trial court indicated that it was inclined to agree but asked if the prosecutor had any grounds specific to the two jurors for exercising her peremptory challenges.

With respect to P.T., the prosecutor stated that she had concerns about the insular quality of P.T.'s experience:

> His existence was just so, well, cloistered, it made me feel he couldn't handle the demands of jury deliberation. It wasn't just his religious studies, but besides that, the juror said he spent most of time reading the Bible and materials related to the ministry. His limited experience of the outside world - well, I just didn't think he'd relate very well to the other jurors, or be able to make the kinds of “real-life” judgments jurors need to make. Jurors need to be able to judge other people, and all of his education and experience is to forgive them.

The prosecutor said she also challenged A.S. because of what she regarded as reasons that were more cultural than religious:

> In the case of [A.S.], my reasons really aren't religious as much as they're, I guess the word I want is cultural. I mean, I am concerned about a Muslim teaching, but not a Muslim religious belief. She's obviously a member of a group that, as I understand it, regards women as inferior to men or teaches that women should be submissive to men. In this case, that kind of attitude would be a major problem. We've got a he said-she said between a male defendant and a female security guard, we've got a woman victim, we've even got a male defense lawyer and a female prosecutor.

---

1. Defendant has conceded that the prosecutor struck all of the excused jurors for gender-neutral reasons and, in this appeal, presses only the arguments that the jurors P.T. and A.S. were impermissibly struck because of their religion.

The trial judge then ruled that defendant had failed to show that the prosecutor's reasons for excusing A.S. and P.T. were impermissibly based on presumed group bias, and rejected the claim that striking the jurors infringed on their free exercise rights.

Discussion

Defendant brings two issues of first impression in New Jersey before this court. First, he asks this court to find that a prosecutor's exercise of peremptory challenges to exclude from a jury persons who hold strong religious beliefs violates the constitutional guarantee of equal protection as it impacts upon a defendant's right to an impartial jury. Second, he asks this court to find that the rights of the prospective jurors themselves to the free exercise of their religious beliefs was violated here.[2] We disagree on both counts.

Certainly, a prosecutor's use of peremptory challenges "to remove potential petit jurors who are members of a cognizable group on the basis of their presumed group bias" violates the New Jersey Constitution. State v. Gilmore, 103 N.J. 508, 517 (1986). Cognizable groups, for purposes of constitutional analysis, "include those defined on the basis of religious principles, race, color, ancestry, national origin, and sex (all of which are suspect or semi-suspect classifications triggering strict or intermediate scrutiny under federal equal protection analysis)." Id. at 526 n.3. Defendant urges us to find that the jurors here excluded should be considered members of a cognizable group based on religious principles. Our reading of Gilmore, as well as the decisions of other jurisdictions that have directly addressed this question, convinces this court that A.S. and P.T. were not members of any such cognizable group. We therefore reject defendant's contention that these two jurors were impermissibly excluded from the jury.

State v. Gilmore was decided in the wake of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), in which the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits a prosecutor from exercising peremptory challenges to remove jurors solely on the basis of their race. While the Gilmore decision was based on the state constitutional right to trial by an impartial jury, the Court noted that the same result was compelled on federal grounds under Batson's interpretation of the Equal Protection Clause. Indeed, that clause is directly implicated in our Court's delineation of the minimal "core cognizable groups" for the purposes of impartial jury analysis, since they comprise the "suspect" and "semi-suspect" classifications accorded heightened scrutiny under federal equal protection analysis. State v. Gilmore, 103 N.J. at 526 n.3.

In Gilmore, the Court established a three-step procedure for the trial court to determine whether a prosecutor has used peremptory challenges in an impermissible manner. First the defendant must make out a prima facie showing of purposeful discrimination by demonstrating that the potential jurors wholly or disproportionately

2. We accept for purposes of this appeal that the defendant has the requisite standing to raise the issue of the rights of the jurors.

excluded were members of a cognizable group and that there was substantial likelihood that the peremptory challenges resulting in the exclusion were based on assumptions about group bias rather than situation-specific bias. State v. Gilmore, 103 N.J. at 535-37. Second, upon the defendant's prima facie showing, the burden shifts to the prosecution to present evidence that the peremptory challenges under review are justifiable on the basis of prosecutorial concern about situation-specific bias. Finally, the trial court must weigh all of the circumstances and determine whether the defendant established purposeful discrimination. Id. at 537-38.

Thus, a prosecutor's exercise of peremptory challenges is subject to review only if the defendant can show that the struck jurors were members of a “cognizable group” within the meaning of the representative cross-section rule, whereby a jury drawn from a representative cross-section of the community “vindicate[s] the defendant's right to trial by an impartial jury in our heterogeneous society.” State v. Gilmore, 103 N.J. at 525. However, not every group or class constitutes a “cognizable group” for purposes of Gilmore. To the contrary, a group may be considered cognizable only if it is “objectively identifiable from the rest of the community, ... large enough that the general community recognizes it as an identifiable group, and its members share ethnic and cultural traditions and customs, and, perhaps most important, share discrimination because of their identity and `differentness.'” State v. Guerra-Reyna, 549 N.W.2d 779, 781 (Wis. 1996).

In particular, the Gilmore Court's references to religion-based “cognizability” suggest that only individuals who share a common religious affiliation, or a common set of religious beliefs, constitute a “cognizable group” for the purposes of impartial jury selection. Such is the language of the constitutional and statutory provisions that Gilmore cited in support of its holding: Article 1, Paragraph 5 of the New Jersey Constitution prohibits discrimination in the enjoyment of any civil or military right on the basis of “religious principles”; and, taken together, Paragraphs 5, 9, and 10 of Article 1 “guarantee that . . . the defendant is entitled to trial by an impartial jury without discrimination on the basis of *religious principles*.” State v. Gilmore, 103 N.J. at 524 (emphasis added). Similarly, N.J.S.A. 2A:72-7 prohibits the disqualification of jurors on the basis of “creed” - a statute the Court held was “congruent” with Article 1, Paragraphs 1 and 5, taken together, “as to the impermissible bases of discrimination in the exercise of civil rights.” State v. Gilmore, 103 N.J. at 526.

Certainly, A.S., a Muslim, and P.T., a Christian, do not share the same “creed,” a term that suggests membership in a particular sect or denomination. This implication is made explicit in the Court's declaration that the use of peremptory challenges “to remove potential jurors on the basis of presumed 'group bias' or mere '*group affiliation*'” is impermissible. State v. Gilmore, 103 N.J. at 531 (emphasis added) (adopting the analysis of the California Supreme Court in People v. Wheeler, 22 Cal.3d 258, 276 583 P.2d 748, 761 (Cal. 1978)). The Court also cited with approval the distinction made in McCray v. Abrams, 750 F.2d 1113, 1132 (2d Cir. 1984), cert. granted and judgment vacated on other grounds, 478 U.S. 1001 (1986), between peremptory strikes impermissibly made “on the basis of the individual venireperson's group *affiliation*” and

those exercised based on "situation-specific bias." State v. Gilmore, 103 N.J. at 536 (emphasis added).

This distinction also accords with the rulings of other state courts that have directly addressed challenges to the use of peremptory strikes on religious grounds. These courts have consistently held that a venireperson cannot be dismissed on the basis of religious affiliation, although peremptory strikes may be exercised based on a juror's "relevant specific opinion," even though such opinions may be founded in religion. State v. Purcell, 199 Ariz. 319, 328, 18 P.3d 113, 122 (Ariz. App. Ct. 2001). Thus the Mississippi Supreme Court held that the peremptory strike of a juror "solely because she was a member of the Holiness Faith" violated its state constitution. Thorson v. State, 721 So.2d 590, 595 (Miss. 1998). The Connecticut Supreme Court upheld the use of a peremptory challenge to excuse a Muslim from jury service, finding that he was not dismissed on the basis of his religious affiliation but in part because of the prosecution's concern that the teachings of his particular sect would prevent him from rendering a verdict in accordance with the law. State v. Hodge, 248 Conn. 207, 246-247, 726 A.2d 531, 554 (Conn. 1999), cert. denied, 528 U.S. 969, 120 S.Ct. 409 (1999).

A.S. and P.T. share neither a common set of religious beliefs nor membership in a particular sect of denomination. Indeed, we do not know to which Muslim or Christian sect, respectively, these individuals belong. The only thing they would appear to have in common, for purposes of impartial jury analysis, is the depth of their religious convictions, the fact that each is a devoted follower of her or his respective faith. We fail to see how people with strong but heterogeneous religious beliefs can constitute a "*discrete*, cognizable group" for purposes of impartial jury analysis." State v. Gilmore, 103 N.J. at 526 (emphasis added).

Because we conclude that A.S. and P.T. do not belong to a "cognizable group," the defendant has failed to make the required *prima facie* showing of purposeful discrimination. Even if the jurors were among a cognizable group, we are satisfied that the prosecutor had "genuine and reasonable grounds for believing that [these] potential jurors might have situation-specific biases" that would prevent them from serving in a fair and impartial manner. Id. at 537. As numerous courts have noted, the proper exercise of peremptory challenges is often "more art than science," drawn from trial counsel's "legitimate 'hunches' and past experience," "feel and intuition." State v. Eason, 336 N.C. 730, 736-37, 445 S.E.2d 917, 921 (N.C. 1994) (internal quotations and citations omitted), cert. denied, 513 U.S. 1096, 115 S.Ct. 764 (1995). Here, the prosecutor legitimately relied on her past experience, inferences based on information about the jurors' background and attitudes, and observations about their demeanor and conduct to conclude that A.S. and P.T. might "have some slight bias that would not support a challenge for cause but that would make excluding [them] desirable." McCray v. Abrams, *supra*, 750 F.2d at 1132.

Defendant also contends that the peremptory dismissals of these two jurors violate the Free Exercise Clause of the First Amendment. This clause imposes strict scrutiny on "law[s] that target[] religious conduct for *distinctive treatment* or advance[] legitimate

governmental interests *only* against conduct with a religious motivation." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546, 113 S.Ct. 2217, 2233 (1993) (emphasis added). But the "conduct" that was the basis of these peremptory challenges - a sympathetic disposition toward defendants - is not unique to people with strong religious convictions. Such sympathy may spring from moral or personal "motivations" associated with other aspects of an individual's life experience. Accordingly, the prosecution may also permissibly strike a prospective juror whose brother was convicted of a crime or one whose profession - social worker, substance abuse counselor or teacher - suggests she may be extremely "liberal" in her political views. Consequently, we fail to see how the peremptory exclusions of either A.S. or P.T. "burden[ed their] religious practice" by singling them out for "distinctive treatment." Id.

Thus concluding that the peremptory exclusions of A.S. and P.T. were permissible, we uphold the verdict of the trial court. Defendant's convictions are affirmed.

MERCY, J.A.D., dissenting

The majority today holds that an individual may be denied her civil right to serve on a jury because of her religious convictions. Because I find this idea irreconcilable with both equal protection principles and with the Free Expression Clause of the First Amendment, I respectfully dissent.

Our state constitution is emphatic in declaring that discrimination on the basis of "religious principles" violates the guarantees of equal protection. As my colleagues note, Article 1, paragraphs 5, 9, and 10, read together, guarantee a defendant the right to trial by an impartial jury. Paragraph 5 makes clear that such protections extend to both defendant and juror: "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right . . . because of *religious principles*, race, color, ancestry or national origin" (emphasis added). Our Supreme Court also preferred this term in listing the "core cognizable groups for purposes of impartial jury analysis" as including, at minimum "those defined on the basis of *religious principles*, race, color, ancestry, national origin, and sex." State v. Gilmore, 103 N.J. 508, 526 n.3 (1986) (emphasis added).

This majority would shoehorn the expansive term "religious principles" into the narrow confines of particular denominations. It would protect Baptists, but not Protestants; Catholics, but not the devout generally. I see nothing in State v. Gilmore that suggests that the term should be read so narrowly. Surely the devout are a cognizable group within our diverse society, no less worthy of protection against discrimination as those targeted because of race or gender. By that standard, only those peremptory strikes that are based on the juror's "*relevant* religious views" are permissible and only when such beliefs might interfere with a juror's ability to serve. People v. Martin, 75 Cal. Rptr.2d 147, 150 (Cal. Ct. App. 1998) (emphasis added) (upholding the peremptory strike of a Jehovah Witnesses based on church members' difficulty in passing judgment). In the case at bar, however, jurors A.S. and P.T. were excluded solely on the basis of their

perceived religiosity, not on the basis of any *particular* religious beliefs that might be "relevant" to their ability to render impartial jury service.

Indeed, the prosecutor's exercise of peremptory challenges was based on nothing more than the outward signs of these jurors' religious faith, certainly not upon the content of their opinions and attitudes. During voir dire, both jurors expressly affirmed, in response to the judge's questions, that they did not have any personal religious beliefs, political ideas, or other personal convictions that would make it difficult for them to follow the law as given by the court, or to sit in judgment in the case. The prosecutor did not register any skepticism about these professions, nor did she urge the court to probe their views more closely.[3]

Moreover, the prosecutor's purportedly "religion-neutral" reasons for striking the jurors are hardly convincing. In P.T.'s case, there was a presumption that, because this young man was receiving a Christian religious education in a relatively protected environment, he would be inclined to forgive someone who committed a crime rather than judge him. And with respect to A.S., we have the prosecutor's attribution of certain beliefs to a juror based on her perceived religious affiliation. These beliefs, in turn, on based on the prosecutor's highly speculative view of Islam, to the effect that its purported chauvinism might render A.S. unfit for jury service.

These are precisely the kinds of "discriminatory assumptions" about religious beliefs, based on "invidious, archaic, and overbroad stereotypes," that necessitate constitutional constraints on the use of peremptory challenges. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 131, 114 S.Ct. 1419, 1422 (1994). Even if P.T.'s Christian faith inclines him to forgive in other contexts, he stated that nothing in his religious beliefs would interfere with his ability to serve as a juror. And even if the prosecutor's impressions of Islam bore some resemblance to that religion's official doctrine, it is illogical to presume that every

3. Indeed, specific inquiry into the jurors' religious beliefs might well have been improper, as this is generally considered permissible only where religious issues are expressly presented in the case, or where a religious organization is a party to the litigation. Coleman v. United States, 379 A.2d 951, 954 (D.C. 1977). More recently, in Bader v. State, 344 Ark. 241, 40 S.W.3d 738 (Ark. 2001), the Arkansas Supreme Court upheld the trial court's limitation of a voir dire inquiry intended to remove jurors the appellant-murder defendant considered "too religious." Id. at 245. The court held that the proposed questions, as to jurors' denominational affiliations and the number of times they attended religious services each month, "would range far beyond those needed to evaluate the qualifications of venirepersons to serve as impartial jurors." Id. at 247. The Arkansas Supreme Court also concluded that the trial court acted properly in limiting the voir dire to an inquiry similar to that of the court below in the case at bar: whether any of the jurors possessed religious beliefs, convictions, or philosophical ideas so strong that they would interfere with their ability to objectively consider the evidence, follow the court's instructions, and rule as the evidence dictated. Id. at 247. The Bader ruling suggests that inquiries into a juror's "religious affiliations" are a proxy for discovering jurors who are "too religious" - i.e.. too sympathetically disposed to one party or the other.

belief held by a religion is held by all of its members. While “[t]he showing of situation-specific bias need not rise to the level required to have a juror excused for cause,” the prosecution's explanations should at least rise above the level of the “presumed group bias” that would allow peremptory challenges to “restrict unreasonably” the possibility that the jury will represent a cross-section of the community.” State v. Gilmore, 103 N.J. at 529.

And even if, somehow, the strikes of these jurors could be considered to survive an equal protection challenge, in my view they still cannot survive constitutional scrutiny. An *individual's* right to the free exercise of religion is *also* unquestionably a fundamental right, under the Free Exercise Clause of the First Amendment. This right certainly includes expressions of religious belief, such as attire and career or calling, the bases for the prosecution's peremptory exclusions of jurors A.S. and P.T.

The State infringes upon the free exercise of religion when it denies an important state benefit because of an individual's religious beliefs or practice. Sherbert v. Verner, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794 (1963). Such actions are subject to “the most rigorous of scrutiny.” Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546, 113 S.Ct. 2217, 2233 (1993). Consequently, the Supreme Court has struck down programs that forced people to choose between their right to receive important state benefits and their right to religious expression. “Where the state . . . denies [an important] benefit because of conduct mandated by a religious belief . . . a burden upon religion exists.” Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 717-18, 101 S.Ct. 1425, 1432 (1981) (holding that the state's denial of unemployment compensation benefits to a Jehovah's Witness who had quit his job because his religious beliefs forbade his participation in the production of armaments violated his First Amendment rights). McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322 (1978) (striking down a Tennessee constitutional provision that prohibited clergymen from serving as delegates to a State constitutional convention.)

Jury service has been consistently recognized as an important benefit of citizenship. “[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.” Powers v. Ohio, 499 U.S. 400, 407, 111 S.Ct. 1364, 1369 (1991). Peremptory challenges based on religion are therefore subject to strict scrutiny under the Free Exercise Clause, as they deny benefits on the basis of an individual's religious beliefs, status, or other means of expression.

As a result, the permissibility of peremptory challenges based upon the juror's First Amendment exercise of religious expression is determined by balancing the government's interest against the infringement of this fundamental right. Sherbert, *supra*, 374 U.S. at 406. The only governmental interest furthered by this discriminatory treatment of potential jurors is the litigants' unfettered discretion in exercising peremptory challenges. And the right to exercise peremptory challenges is not a constitutional right, but “merely a 'statutory' incident of the constitutional right to trial by an impartial jury.” State v. Gilmore, 103 N.J. at 529 (citations omitted). Consequently, any conflict with the

fundamental First Amendment right of a prospective juror must be resolved in favor of the juror's constitutionally protected right of religious expression. The Free Exercise Clause of the First Amendment provides an alternate basis for concluding that these peremptory exclusions are constitutionally impermissible.

Both on equal protection grounds and on grounds of the effect of such challenges on free exercise of religion, I would hold that the peremptory exclusions of A.S. and P.T. violated the United States Constitution and the New Jersey Constitution. I would therefore vacate the Defendant's conviction and remand the case to the Law Division for a new trial.

I dissent.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

A-03-345

STATE OF NEW JERSEY,	:	
	:	
v.	:	**ORDER**
	:	
V. JAY SINGER,	:	
	:	
Defendant-Appellant.	:	
_____	:	

This matter having been brought before the Court on May 30, 2003, by the defendant-appellant, it is, on this 2nd day of June 2003, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with the Court on or before July 14, 2003.

STEPHEN W. TOWNSEND, Clerk
For the Court