IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-30,077-01

Ex parte MARK ROBERTSON, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. W89-85961-NL-(A) IN CRIMINAL DISTRICT COURT NO. 5 DALLAS COUNTY

KELLER, P.J., filed a dissenting opinion in which KEEL, J., joined.

Applicant is a white male who claims that his own trial attorney violated *Batson*[1] by striking black jurors on the basis of race (or agreeing with the State on such strikes). His claim is that this behavior by his attorney constituted ineffective assistance of counsel. He raised this claim in his initial habeas application, and we rejected it. In rejecting his claims, we adopted the habeas court's findings, which included Finding 44, that Applicant has not satisfied the ineffective-assistance-of-counsel requirement of showing prejudice.[2] Applicant contends that we should grant reconsideration of his ineffective-assistance claim because (1) previously unavailable portions of the habeas record

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[2] The trial court's Findings of Fact and Conclusions of Law were numbered 1 through 86 and do not separate findings from conclusions. Finding 44 therefore appears to be a combination of findings and conclusions.

now substantiate the factual basis for the claim, (2) this Court's later decision in *Ripkowski v. State*[3] first recognized that an ineffective-assistance claim could be used to get around invited error, (3) *Batson* error is structural, and this status exempts the error from the usual ineffective-assistance requirement of showing prejudice, and (4) the Supreme Court's later decisions in *Buck v. Davis*[4] and *Pena-Rodriguez v. Colorado*[5] exempted race-based claims from estoppel or waiver and required granting relief.[6] As we shall see below, these contentions are either inaccurate or fail to refute the habeas court's determination of no prejudice in Finding 44.

A. The Habeas Court's "No Prejudice" Finding

Findings 39, 42, and 43 serve as some background for Finding 44.[7] In Finding 39, the habeas court concluded that applicant could not complain of any *Batson* error "because he himself invited the error. A defendant may not create reversible error by his own manipulation." In Findings 42 and 43, the habeas court relied upon *Mata v. Johnson*[8] for the proposition that a defendant can waive a *Batson* claim if the defense colludes with the State to exclude members of a racial group from the jury. The habeas court pointed out that the defendant confessed to killing his victims and never alleged that he was innocent. The habeas court concluded that, as in *Mata*, a defendant who has

---

[3] 61 S.W.3d 378 (Tex. Crim. App. 2001).

[4] 137 S. Ct. 759 (2017).

[5] 137 S. Ct. 855 (2017).

[6] I present and evaluate these claims in what I perceive to be their logical order, rather than the order presented by Applicant.

[7] In Findings 40 and 41, the habeas court summarizes some contentions and authorities presented by Applicant.

[8] 99 F.3d 1261 (5th Cir. 1996), *vacated on other grounds*, 105 F.3d 209 (5th Cir. 1997).

never alleged innocence should not be permitted to benefit (by getting a new trial) from a *Batson* error that he invited.

In Finding 44, the habeas court addressed whether an ineffective-assistance-of-counsel claim could be used to get around waiver or invited error. Under the usual *Strickland* standard, a convicted person is entitled to relief if he can show that (1) his attorney engaged in deficient performance and (2) he suffered prejudice as a result.[9] The habeas court concluded that Applicant did not show that he was entitled to relief because he could not show harm:

> The Court finds that applicant attempts to avoid the waiver of his constitutional rights by asserting that his trial counsel were ineffective for making this alleged agreement. But the Court finds that even if there was an agreement to excuse all African-American veniremembers from the jury panel or even if defense counsel's reason for agreeing to excuse any specific veniremember was race-based, because applicant would have made this choice deliberately, his constitutional right to a jury selected without regard to race had been waived. Furthermore, the Court finds that applicant cannot establish ineffective assistance of counsel, because he cannot establish that he suffered any harm as a result of his attorney's decision. Finally, because applicant did not object at the time of his trial to his attorney's alleged decision to enter into such agreement or make jury selections based on race, the Court finds that he cannot establish that his desires differed from his attorney's. *See United States v. Boyd.*[10] Thus, the Court concludes as a matter of law that applicant cannot complain of alleged constitutional error that he invited.[11]

In a written order, we adopted the habeas court's findings of fact in their entirety.[12]

B. Factual Basis

---

[9] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[10] 86 F.3d 719, 722-23 (7th Cir. 1996).

[11] Citation moved to footnote. *See supra* at n.10.

[12] *Ex parte Robertson*, No. 30,077-01, slip op. at 2 (Tex. Crim. App. November 18, 1998) (not designated for publication) ("Having reviewed the record, we adopt the trial court's finding of fact and conclusions of law and find that neither the facts nor the law support Applicant's allegations.").

Applicant contends that the Court's records show that the reporter's record from the 1997 writ hearing, and the exhibits that were admitted, were never transmitted to this Court.[13] Applicant contends that this evidence shows defense counsel's desire to strike black jurors and the State's awareness of this desire. He contends that there were "competing versions" about whether the State and the defense had an agreement, he points to notes from defense counsel in which the names of black jurors were underlined, and he points to a recording of a conversation between prosecutors that suggests the State was aware of defense counsel's desire to strike black jurors.

However, Finding 44, concluding that Applicant had not shown prejudice, explicitly assumed that defense counsel struck jurors on the basis of race or that there was an agreement with the State to do so. Because the truth of Applicant's race-basis allegations was assumed, additional evidence supporting those allegations cannot affect the no-prejudice finding. Consequently, even if Applicant were correct that this Court had an incomplete picture of the habeas evidence regarding the parties' use of race in striking jurors, this would not disturb the no-prejudice finding that the habeas court made and that we adopted.

C. *Ripkowski*

Applicant states that we explained for first time in *Ripkowski* (in applicant's words) that "a defendant may get around waiver or estoppel issues by alleging ineffective assistance of counsel, so long as the defendant can establish that counsel 'procured' the error 'without a valid trial strategy.'" In *Ripkowski*, defense counsel sought to waive the mitigation special issue in a capital case and

---

[13] Applicant further states that he "recognizes that there is some possibility that the Court has either lost or misfiled these records, but the absence of the transcript and exhibits strongly suggests that the court never received them."

succeeded in persuading the trial court to allow the waiver.[14] The defendant complained that waiver of the mitigation special issue was not authorized by law.[15] We declined to address whether the law allowed such a waiver and held, instead, that the defendant was barred by the doctrine of invited error from complaining about the waiver.[16] In footnote 48, we suggested that a defendant could make the waiver of the mitigation special issue the basis for a claim of ineffective assistance of counsel "if it is discovered that a particular attorney procured the omission of [the] issue without a valid trial strategy."[17]

Ripkowski did indeed suggest that an ineffective-assistance claim could, in appropriate circumstances, be used to obtain relief where defense counsel had invited error. But that suggestion is not a new holding; it is merely an observation of how ineffective assistance of counsel works. In theory, any attorney error can give rise to a successful ineffective-assistance claim if the appropriate showing has been made (ordinarily meeting the two-part *Strickland* test). The "failure of counsel . . . to comply with a procedural rule" can result in relief on a finding of ineffective assistance.[18] And even before Applicant's initial application, we had recognized ineffective-assistance claims based on a waiver or an affirmative election made by the defendant.[19] Applicant concedes that other

---

[14] 61 S.W.3d at 388.

[15] *Id.*

[16] *Id.* at 388-89.

[17] *Id.* at 391 n.48.

[18] *Ex parte Coy*, 909 S.W.2d 927, 928 (Tex. Crim. App. 1995).

[19] *Ex parte Dunham*, 650 S.W.2d 825, 826-27 (Tex. Crim. App. 1983) (ineffective-assistance claim in connection with waiver of jury trial); *Jackson v. State*, 766 S.W.2d 504, 509-10 (Tex. Crim. App. 1985), *vacated on other grounds*, 475 U.S. 1114 (1986), *different result reached on remand*

jurisdictions had held, prior to his initial application, that an ineffective-assistance claim could, in appropriate circumstances, overcome the invited error doctrine.[20]

Applicant contends that the habeas court concluded that he "could not overcome invited error with an IAC [ineffective assistance of counsel] claim." That is incorrect. In Findings 39, 42, and 43, the habeas court found that the underlying *Batson* claim was barred by invited error, but the habeas court did not find such a bar to Applicant's ineffective-assistance claim. Rather, in Finding 44, the habeas court concluded that Applicant's ineffective-assistance claim lacked merit because Applicant could not show prejudice.

In finding no prejudice, the habeas court did cite Applicant's failure to object to his attorney's conduct as preventing him from showing "that his desires differed from his attorney's." Applicant seems to construe this statement as requiring him to contemporaneously object to his counsel's conduct to preserve an ineffective-assistance claim. He reads too much into the habeas court's statement. We have never held that a defendant's own conduct is always irrelevant to an ineffective-assistance claim. Under some circumstances, a defendant can doom an ineffective-assistance claim by preempting his attorney's sound strategy and insisting on a disastrous course of action.[21] And in some circumstances, when the defendant has personal decision-making authority with respect to the

---

on other grounds, 766 S.W.2d 518 (Tex. Crim. App. 1988) (ineffective-assistance claim in connection with electing jury punishment).

[20] He cites a case as old as 1978. *See United States v. Bosch*, 584 F.2d 1113, 1124 (1st Cir. 1978).

[21] *Ex parte McFarland*, 163 S.W.3d 743, 755 n.35 (Tex. Crim. App. 2005) (quoting *McFarland v. State*, 845 S.W.2d 824, 848 (Tex. Crim. App. 1992)) ("When a defendant preempts his attorney's strategy by insisting that certain evidence be put on or kept out, no claim of ineffective assistance can be sustained.").

right in question, he can complain about his attorney's conduct without having to show prejudice, but only if he contemporaneously expressed his disagreement with that conduct.[22] This was the case in *Turner*, when the defendant contemporaneously expressed disagreement with his attorney's strategy to concede guilt of the offense of murder.[23]

The habeas court's statement in the present case seems to have something like the *Turner* situation in mind. After its statement, the habeas court provided a "see" cite to *United States v. Boyd*. *Boyd* explained that an ineffective-assistance claim could be a way around waiver in the *Batson* context but concluded that the defendant had not shown prejudice because his attorney had a strategy for excluding jurors based on race for the defendant's benefit.[24] Then the *Boyd* court discussed a second possible way around waiver advanced by the defendant: that the defendant had a personal decision-making right to decide whether jurors would be struck.[25] The *Boyd* court held that, even if this were true, the defendant's claim would fail because he failed to contemporaneously object to his attorney's conduct.[26] The habeas court seems to be suggesting that, to the extent that a defendant's personal desire not to discriminate on the basis of race could be a "harm" flowing from defense counsel's deliberate use of race to strike jurors, a defendant would be expected to have

---

[22] *See Turner v. State*, 570 S.W.3d 250, 274-76 (Tex. Crim. App. 2018) (discussing *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (counsel conceding defendant's guilt against defendant's express wishes was reversible error without a harm analysis because the issue was the client's autonomy, not counsel's competence). I am not saying that every personal decision-making right is necessarily immune to a prejudice analysis, just that at least some of these sorts of rights are.

[23] *Id.*

[24] 86 F.3d at 722.

[25] *Id.*

[26] *Id.* at 722-23.

contemporaneously expressed his disagreement with the attorney's trial strategy. The defendant's failure to do so would not foreclose some *other* type of harm, if it could be shown on the record.[27]

D. Structural Error / *Strickland* prejudice

Applicant contends that the racially motivated removal of jurors by the defense constitutes structural error that requires automatic reversal. But that contention was explicitly rejected in *Batiste v. State*.[28] In that case, we assumed, without deciding, that *Batson* error was the type of error that was structural, meaning that it was exempt from a harm analysis if preserved and raised on direct appeal.[29] However, we held that defense counsel's failure to assert *Batson* error was subject to the prejudice prong of *Strickland*.[30] And we concluded that, "A jury of any racial makeup is presumptively capable of providing the impartial tribunal necessary to ensure proper functioning of the adversarial process. That no defendant may 'ever prove prejudice' is a better reason, it seems to us, to reject a standard of presumed prejudice than to embrace it."[31]

We may have cast some doubt on that holding in *Johnson v. State* by saying that a structural error is subjected to a more limited-than-usual prejudice inquiry within the context of an ineffective-

---

[27] Applicant contends that the habeas court has misconstrued the holding in *Boyd* and that, in any event, the Seventh Circuit abrogated it in a later case. *See Winston v. Boatright*, 649 F.3d 618 (7th Cir. 2011). The habeas court's citation of *Boyd* in Finding 44 seems to be consistent with my discussion above, and, whatever significance might be ascribed to *Winston*, it is not binding authority on this Court.

[28] 888 S.W.2d 9 (Tex. Crim. App. 1994).

[29] *Id.* at 13-14.

[30] *Id.* at 14-17.

[31] *Id.* at 16.

assistance claim.[32] However, the Supreme Court's subsequent decision in *Weaver v. Massachusetts*[33] makes clear that even some structural errors are subjected to the prejudice prong of *Strickland* when raised via an ineffective-assistance claim.

At issue in *Weaver* was the defendant's right to a public trial.[34] Defense counsel raised no objection at trial, so the public-trial issue was raised as part of an ineffective-assistance claim.[35] The Supreme Court observed that the violation of the right to a public trial is structural error.[36]

But in deciding whether a particular structural error is subject to the prejudice prong of *Strickland*, the Supreme Court found it relevant to determine why the error has been deemed structural.[37] The Supreme Court set out three separate rationales for finding an error to be structural:

> [1] the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest,
>
> [2] the effects of the error are simply too hard to measure, [and]
>
> [3] the error always results in fundamental unfairness.[38]

Some structural errors may involve more than one rationale.[39] The Supreme Court expressed particular interest in determining whether the error in question "counts as structural because it always

---

[32] 169 S.W.3d 223, 228 (Tex. Crim. App. 2005).

[33] 137 S. Ct. 1899 (2017).

[34] *Id.* at 1905-07.

[35] *Id.* at 1906.

[36] *Id.* at 1908.

[37] *Id.*

[38] *Id.* (bracketed material added, intervening text between numbered elements omitted).

[39] *Id.*

leads to fundamental unfairness or for some other reason."[40]

The Court observed that the public-trial right had exceptions, that at least some violations of it were easily curable if timely brought to the trial court's attention, that violation of the public trial right does not render the trial fundamentally unfair in every case, and that the public-trial right protects some interests that do not belong to the defendant.[41] The Court found that the discussion of these factors "confirm[s] the conclusion the Court now reaches that, while the public-trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint."[42] The Supreme Court also considered finality interests in concluding that the public-trial right should be subjected to a prejudice requirement in an ineffective-assistance inquiry:

> When an ineffective-assistance-of-counsel claim is raised in postconviction proceedings, the costs and uncertainties of a new trial are greater because more time will have elapsed in most cases. The finality interest is more at risk, and direct review often has given at least one opportunity for an appellate review of trial proceedings. These differences justify a different standard for evaluating a structural error depending on whether it is raised on direct review or raised instead in a claim alleging ineffective assistance of counsel.[43]

Consequently, the Court held that the defendant claiming that his attorney's deficient performance caused him to be deprived of his right to a public trial had to demonstrate prejudice by showing either a "reasonable probability of a different outcome but for counsel's failure to object" or "that

---

[40] *Id.*

[41] *Id.* at 1909-10.

[42] *Id.* at 1910.

[43] *Id.* at 1912.

counsel's failure to object rendered the trial fundamentally unfair."[44]

In passing, the Supreme Court suggested that a *Batson* violation was a structural error, but the Court did not express an opinion as to how prejudice for it, or other structural errors, should be evaluated when raised in an ineffective-assistance claim.[45] Nevertheless, it seems obvious from our statements in *Batiste* that a *Batson* error would not always result in unfairness to the defendant, that it often involves interests apart from the defendant (such as preventing unfair discrimination against the jurors themselves), and that it may be structural in part due to the difficulty of conducting a harm analysis. Because *Batson* error does not always unfairly prejudice a defendant, we should continue to adhere to our holding in *Batiste* that the prejudice prong of *Strickland* applies when a *Batson* error is raised as part of an ineffective-assistance claim. *Weaver* might suggest a modification of *Batiste* to allow prejudice to be satisfied upon a showing that the jurors that were excluded were the same race as the defendant, because it might be said in such a case that the defendant has suffered the effects of racial discrimination. But such a modification would not help Applicant, a white person complaining about the exclusion of black individuals.[46] The Supreme Court's decision in *McCoy*, in combination with *Weaver*, might also suggest a modification to allow prejudice to be satisfied

---

[44] *Id.* at 1913. Allowing the defendant to demonstrate prejudice by showing "fundamental unfairness" may make the Supreme Court's standard consistent with our statement in *Johnson* about the limited prejudice inquiry applicable to structural errors. *See supra* at n.32.

[45] 137 S. Ct. at 1911-12 ("This Court, in addition, has granted automatic relief to defendants who prevailed on claims alleging race or gender discrimination in the selection of the petit jury, though the Court has yet to label those errors structural in express terms. The errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal. And this opinion does not address whether the result should be any different if the errors were raised instead in an ineffective-assistance claim on collateral review.") (citations omitted).

[46] I note that Applicant's habeas application does not cite or discuss *Batiste* or *Weaver*.

upon a showing that counsel thwarted an expressed desire by the defendant not to discriminate against black jurors.[47] But that modification would also not help Applicant because he did not contemporaneously express disagreement with such discrimination. Because Applicant was not discriminated against and did not contemporaneously express disagreement with discriminating against jurors, he has no basis under *Weaver* for presuming or showing harm.[48]

E. *Buck* and *Pena-Rodriguez*

In *Buck*, the defendant's own expert witness testified that the defendant was statistically more likely to be violent because he was black.[49] This evidence was introduced by his attorney.[50] The Court concluded that the defendant's attorney performed deficiently in introducing this testimony—especially in light of the jury's duty to determine whether the defendant was a future danger to society.[51] The Court also found that the defendant had demonstrated prejudice because the evidence appealed to a powerful racial stereotype of violent black men, because it was a characteristic of the defendant that would never change, and because it was the one piece of evidence that showed dangerousness both inside and outside of prison while the remaining evidence showed

---

[47] *See supra* at n.22 and accompanying text (citing and discussing *Turner* and *McCoy*).

[48] The concurring opinion suggests that violating the rights of jurors to participate in a trial on the basis of race constitutes the pervasive undermining of the systemic requirements of a fair and open judicial process. But the *Weaver* Court indicated that "fundamental fairness" in the ineffective-assistance-of-counsel context should be judged from "the defendant's standpoint." 137 S. Ct. at 1910. Jurors do not have a right to effective assistance of counsel; only defendants do.

[49] 137 S Ct. at 767.

[50] *Id.*

[51] *Id.* at 775.

the defendant to be dangerous in romantic relationships that would not exist in prison.[52] The Court also found that the source of the evidence—an expert appointed by the Court and proffered by the defense—enhanced the prejudicial effect.[53]

Buck involved the introduction against a black defendant of evidence that being black was more likely to make him dangerous. The Supreme Court found prejudice under the traditional *Strickland* prejudice framework. *Buck* does not stand for the proposition that a white defendant can obtain relief by showing discrimination against other individuals (prospective jurors) who were black. It also does not stand for the proposition that the existence of racial discrimination somewhere in the case exempts the defendant from having to show that he was harmed.

In *Pena-Rodriguez*, the defense discovered after trial that a "juror had expressed anti-Hispanic bias toward the defendant and the defendant's alibi witness.[54] In a motion-for-new-trial hearing, the defense introduced affidavits attesting to this fact, but the trial court held that it could not consider the affidavits because Rule of Evidence 606(b) prohibited juror testimony about jury deliberations.[55] The Supreme Court held that, "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee."[56]

---

[52] *Id.* at 776.

[53] *Id.* at 777.

[54] 137 S. Ct. at 861.

[55] *Id.* at 862.

[56] *Id.* at 869.

The Supreme Court cautioned that "[n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry."[57] Rather, the statements at issue must "exhibit[] overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict."[58] Such a statement "must tend to show that racial animus was a significant motivating factor in the juror's vote to convict."[59]

Pena-Rodriguez also does not stand for the proposition that the presence of racial bias in the case obviates the need to assess whether the defendant was harmed. The defendant was a Hispanic individual who was judged by a juror who exhibited animus toward Hispanics. As in *Buck*, the defendant was not only a member of the group being discriminated against but there was a showing that his case before the jury was impacted by the discrimination. But in the present case, Applicant was not a member of the discriminated-against group and there has been no showing that his case was impacted in any way by the discrimination.[60]

F. Conclusion

---

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] The concurring opinion cites *Ramos v. Louisiana*, 140 S. Ct. 1390, 1393–94 (2020), for noting the roots of racism as part of its justification for overruling precedent allowing for non-unanimous jury verdicts. To the extent racist reasons behind the laws in two states allowing a less-than-unanimous verdict had an impact on the Court's decision to recognize a right to a unanimous verdict, it is nevertheless true that a defendant who is convicted on a less than unanimous verdict is affected by a rule that allows a less-than-unanimous verdict. The same cannot automatically be said for a defendant convicted after jurors are improperly struck on the basis of race because the defendant could (and likely would) still have been tried by properly qualified jurors. *Cf. Jones v. State*, 982 S.W.2d 386, 392-94 (Tex. Crim. App. 1998) (improper exclusion of juror for cause harmless if the defendant otherwise had a lawfully constituted jury).

In summary, applicant claims that new facts and new law justify reconsidering his initial application, but some of the law is not new, and the facts and law that are new do not refute the habeas court's conclusion that Applicant failed to show prejudice. And Applicant's failure to show prejudice is fatal to his claim. I respectfully dissent.

Filed: July 1, 2020

Publish