Filed 12/14/06 P. v. Gonzalez CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MELQUIADEZ GONZALEZ, JR.,

Defendant and Appellant.

F049414

(Super. Ct. No. BF110570A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Patricia L. Watkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Louis M. Vasquez and Kathleen A. McKenna, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Dawson, J., and Kane, J.

A jury convicted appellant, Melquiadez Gonzalez, Jr., of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).[1] In a separate proceeding the jury found true a prior prison term enhancement (§ 667.5, subd. (b)), a serious felony enhancement (§ 667, subd. (a)), a great bodily injury enhancement (§ 12022.7), and allegations that he had a prior conviction within the meaning of the three strikes law (§ 667, subds (b)-(i)).

On December 17, 2005, the court sentenced Gonzalez to an aggregate term of 17 years, the aggravated term of 4 years, doubled to 8 years because of Gonzalez's prior strike conviction, a 3-year term on the great bodily injury enhancement, a 5-year term on the serious felony enhancement, and a one-year prior prison term enhancement. On appeal, Gonzalez contends: 1) the court abused its discretion when it denied his *Wheeler/Batson*[2] motion; 2) the court erred when it imposed a one-year prior prison term enhancement; and 3) the court committed *Blakely*[3] error. We will find merit to Gonzalez's second contention and modify the judgment accordingly. In all other respects we will affirm.

FACTS

The Prosecution Case

On May 28, 2005, as Samuel Corral, Jr., exited a store in Bakersfield and walked toward his Jeep, Gonzalez began yelling at Corral and followed him. Corral attempted to leave in his Jeep but Gonzalez blocked him in with his car and then opened Corral's door. Corral responded by getting out of his car and throwing a punch at Gonzalez that missed. Gonzalez then lunged at Corral and stabbed him in the abdomen with a knife, causing Corral's intestines to hang out. Corral required surgery to repair his abdomen and intestines and spent nine days in the hospital.

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1 All further statutory references are to the Penal Code.

2 *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.

3 *Blakely v. Washington* (2004) 542 U.S. 296

DISCUSSION

The Wheeler/Batson Motion

The Voir Dire Proceedings

During voir dire, Prospective Juror Fernando P., a Hispanic male, stated that he worked in data processing, his wife was a teacher's aide, he had two children ages 4 and 15, and he had lived in northeast Kern County for a year and a half, having moved from South San Francisco. Fernando had never served on a jury and was not involved in law enforcement although some of his family worked for the Department of Corrections. Fernando knew Kern County Public Defender Arthur Gonzalez because Gonzalez was his wife's brother. However, he did not see him very much and, according to Fernando, he could be impartial even though Gonzalez was a colleague of defense counsel Dominic Eyherabide, who also worked for the public defender's office. Fernando also stated that if he voted guilty, he would not feel bad or embarrassed when he saw Gonzalez. He further stated that although he never had to defend himself physically, he believed there was nothing wrong with defending oneself. He stated his house was burglarized when he was in college. He had never been arrested for a crime.

During questioning by defense counsel, Fernando P. answered questions relating to a person's right of self-defense.

Prospective Juror Marlene H., a Hispanic female, stated she had been married 15 years to her husband, who was a truck driver. She was a stay-at-home mother with four children, ages 8, 12, 18, and 23. Marlene's first language was Spanish, which she spoke at home. She had spoken English for only 10 years. Although she had trouble understanding some English and could not speak it very well, she understood most things she heard. Marlene worked at the Los Angeles Airport for 10 years but had not worked since her employment there ended 7 years earlier. She spoke Spanish and sometimes English with her supervisor at the airport. She had a few friends who spoke only English and she was able to communicate with them, although she had problems doing so.

Marlene had never been on a jury before, she did not have any family members in law enforcement, and she had not been the victim of a crime.

When the court allowed the parties to exercise their peremptory challenges, the prosecutor exercised his first challenge to exclude Fernando P., his second to exclude Veronica C., a Hispanic female, his third to exclude Soledad S., a Hispanic female, and his sixth to exclude Marlene H.

After the prosecutor challenged Marlene H., defense counsel made a *Wheeler/Batson* motion which was heard out of the presence of the remaining prospective jurors. In arguing in favor of the motion defense counsel noted that the prosecutor excused four Hispanics. He also conceded that although the prosecutor might arguably have a valid reason for excluding Fernando because his brother-in-law was defense counsel's colleague, defense counsel did not see any possible reason for the exclusion of Marlene H. and the two other prospective Hispanic jurors.

After hearing argument from the prosecutor, the court ruled that defense counsel had made a prima facie case. The court then asked the prosecutor to explain her reasons for her challenges and stated that the court would take into account that the prosecutor passed when other Hispanics were on the panel.

The prosecutor then stated that the basis for excluding Fernando P. was that he worked in data processing and that his brother-in-law, Art Gonzalez, had been a public defender for many years. With respect to Marlene H., the prosecutor stated that she was excluded because she indicated she was having trouble understanding the court and the prosecutor believed Marlene H. had trouble with English to the extent that it required her prior supervisor to speak with her in Spanish. Additionally, her body language indicated that in her responses to the court she was trying to "appease"[4] the court. Thus, based on

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4 Although the prosecutor used the word "appease," we find from the context in which she used this word that she misspoke and meant to say "please."

Marlene H.'s difficulty in understanding English and that she appeared to be trying to "appease" the court in answering questions, the prosecutor did not feel that she would be a good juror.

Defense counsel replied that the court should not accept the prosecutor's explanation that she excluded Marlene H., in part, because of her body language, unless the court noticed some obvious mannerisms indicating that Marlene H. was being deceptive. Defense counsel also argued that although Marlene H. expressed difficulty with English, she had adequate language skills.

Defense counsel did not make any argument with respect to Fernando P.

In denying the *Wheeler/Batson* motion the court stated,

> "As to [Fernando], I don't think it's my place to say whether or not a data processor in this particular case is a good thing or bad thing. Perhaps he'd be a great juror on what we call a paper case or embezzlement case. I don't know.
>
> "I noted he did say his brother-in-law is Art Gonzalez, although he didn't see him that much. However, I could, with those two in combination, I could understand, and I think [it] is a race-neutral reason why the people have excused him."

With respect to Marlene H., the court found that she clearly had an "issue" with English and that combined with the body language reason this provided a race-neutral reason for excusing her. The court also noted that the prosecutor passed on two Hispanic jurors.

Analysis

Gonzalez contends that the record does not support the court's conclusion that the prosecutor challenged Prospective Jurors Fernando P. and Marlene H. based on race-

neutral reasons.[5] We disagree.

> "In [*People v. Wheeler*, *supra,* 22 Cal.3d 258] we held that 'the use of peremptory challenges to remove prospective jurors on the sole ground of group bias' violates a defendant's right under the California Constitution to a trial by jury drawn from a representative cross-section of the community. [Citation.] We recognized there is a general presumption 'that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground,' but went on to explain that the presumption is rebuttable, formulating a three-step test for establishing a claim of *Wheeler* error. [Citation.] In the final analysis, the party raising the claim bears the burden of showing '*from all the circumstances of the case* . . . a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias.' [Citation.] We further recognized that we must 'rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' [Citation.] The high court has agreed, explaining that 'the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility,' and for that reason 'a reviewing court ordinarily should give those findings great deference.' [Citation.]" (*People v. Reynoso* (2003) 31 Cal.4th 903, 907.)

> "The United States Supreme Court has given this explanation of the process required when a party claims that an opponent has improperly discriminated in the exercise of peremptory challenges: '[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.' [Citation.]" (*People v. Silva* (2001) 25 Cal.4th 345, 384.)

> "The proper focus of a *Batson/Wheeler* inquiry, of course, is on the subjective genuineness of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons. [Citation.]

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[5] Although in the trial court defense counsel also challenged the exclusion of Prospective Hispanic Jurors Veronica C. and Soledad S., on appeal Gonzalez does not challenge the prosecutor's reasons for excluding them.

> So, for example, if a prosecutor believes a prospective juror with long, unkempt hair, a mustache, and a beard would not make a good juror in the case, a peremptory challenge to the prospective juror, sincerely exercised on that basis, will constitute an entirely valid and nondiscriminatory reason for exercising the challenge. [Citation.] It matters not that another prosecutor would have chosen to leave the prospective juror on the jury. Nor does it matter that the prosecutor, by peremptorily excusing men with long unkempt hair and facial hair on the basis that they are specifically biased against him or against the People's case or witnesses, may be passing over any number of conscientious and fully-qualified potential jurors. All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. '[A] "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. [Citations.]' " (*Id*. at pp. 855-866.)
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> "[Further], [t]he proper function on review [is] to determine whether the trial court's conclusion-that the prosecutor's subjective race-neutral reasons for exercising the peremptory challenges at issue . . . were sincere, and that the defendants failed to sustain their burden of showing 'from all the circumstances of the case' [citation.] a strong likelihood that the peremptory challenges in question were exercised on improper grounds of group bias-is supported by the record when considered under the applicable deferential standard of review." (*Id*. at p. 866.)

Here, the prosecutor's reasons for peremptorily excusing Fernando P. were that he worked in data processing and that his brother-in-law had worked for the Kern County Public Defender for many years. Neither reason was attacked by defense counsel who conceded that the prosecutor had a valid reason for striking Fernando P. based on his relationship to defense counsel's colleague, Arthur Gonzalez. Nevertheless, with respect to Fernando P.'s employment we note that in *Reynoso* the court stated, "If a prosecutor can lawfully peremptorily excuse a potential juror based on a hunch or suspicion, or because he does not like the potential juror's hairstyle, or because he observed the potential juror glare at him, or smile at the defendant or defense counsel, then surely he can challenge a potential juror whose *occupation*, in the prosecutor's subjective

estimation, would not render him or her the best type of juror to sit on the case for which the jury is being selected." (*People v. Reynoso*, *supra*, at pp. 940-941.)

Further, the court could reasonably find that, notwithstanding Fernando's affirmation that he could be objective, the prosecutor might view him as being more sympathetic with the defense because of Fernando's long-term relationship with Arturo Gonzalez, defense counsel's colleague. Thus the record supports the court's finding that the prosecutor's reasons for striking Fernando were race-neutral.

With respect to Prospective Juror Marlene H., the prosecutor's stated reasons for excusing her were that she had difficulty with English and that her demeanor indicated to the prosecutor that she tailored her answers to "appease," i.e., please the court. Difficulty with English is obviously a relevant concern with any juror because it impacts the juror's ability to engage in deliberations. (Cf. *People v. Jurado* (2006) 38 Cal.4th 72, 108 [Court found that prosecutor's belief that a prospective juror might have trouble understanding English was proper reason for exclusion].) Further, the record amply supports the prosecutor assertion that Marlene H. had difficulty communicating in English. During questioning she stated that she had spoken English for only 10 years, that at her previous job she spoke Spanish with her supervisor and *sometimes* English, she conceded that she did not understand everything she heard in English, and she admitted not speaking it very well and having problems communicating with her friends who spoke only English.

In *Reynoso* the court stated "Since the trial court was in the best position to observe the prospective jurors' demeanor and the manner in which the prosecutor exercised his peremptory challenges, the implied finding, that the prosecutor's reasons for excusing [a prospective juror], including the demeanor-based reason, were sincere and genuine, is entitled to 'great deference' on appeal." (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 926.) This is particularly true here where Gonzalez has not cited any

evidence that undermines the court's finding that the prosecutor's demeanor-based reasons for excluding Marlene H. were race-neutral.

Finally, we note that with respect to both prospective jurors the court properly considered that the prosecutor passed one time while there were two Hispanics on the panel. "Although not a conclusive factor, 'the passing of certain jurors may be an indication of the prosecutor's good faith in exercising his peremptories, and may be an appropriate factor for the trial judge to consider in ruling on a *Wheeler* objection. . . .' " (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 926.)

In challenging the exclusion of Fernando H., Gonzalez suggests that the court abdicated its duty to determine whether there was a race-neutral reason for his exclusion when it stated that it was not for the court to "say" whether, in the instant case, being a data processor would be a "good thing or a bad thing." We disagree. The court correctly stated that its role is not to determine whether a given juror would be a good or bad juror in a particular case. Instead, as noted earlier, the court's role in ruling on a *Wheeler/Batson* motion is to determine whether a prosecutor's reasons for excluding a juror are race-neutral.

Gonzalez also cites several of Fernando's statements to contend that they show that Fernando would have been an objective juror. However, the prosecutor was not required to accept these statements at face value.

Additionally, Gonzalez contends that the court was obligated to inquire into why the prosecutor believed that Fernando P.'s employment in processing data made him an unacceptable juror. Not so. If the prosecutor's stated rationales are neither contradicted by the record nor inherently implausible, as occurred here, the trial court is not required to conduct any further inquiry before accepting it or to make more explicit findings regarding its sincerity and legitimacy. (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 924.) This is particularly true here where defense counsel conceded that the prosecutor had legitimate grounds for excluding Fernando P.

With respect to Potential Juror Marlene H., Gonzalez contends that the record does not support the conclusion that she had problems with English. This contention is refuted by the evidence of Marlene H.'s problems with English which was discussed above.

Gonzalez also contends that body language is insufficient to constitute a race-neutral reason for excluding her in the absence of more evidence detailing the behavior and logically connecting it to a particular state of mind. Gonzalez is wrong. Again, as noted earlier, the trial court was in the best position to observe Marlene H.'s demeanor and manner and its implied finding that it was a race-neutral reason for excluding her is entitled to " 'great deference,' " particularly in the absence of countervailing evidence. (*People v. Reynoso*, *supra*, 31 Cal.4th at p. 926.) Accordingly, we reject Gonzalez's contention that the court erred when it denied his *Wheeler/Batson* motion.

The Prior Prison Term Enhancement

Gonzalez cites *People v. Jones* (1993) 5 Cal.4th 1142, in contending that the court erred when it imposed a serious felony enhancement and a prior prison term enhancement based on the same prior conviction. Respondent concedes and we agree.

Gonzalez's serious felony enhancement and his prior prison term enhancement were both based on his 1997 Kern County assault conviction. In *People v. Jones*, *supra*, 5 Cal.4th 1142 the Supreme Court held,

> "Section 667 . . . does not specifically state whether only the greater enhancement available under sections 667 and 667.5 is available, as opposed to both. . . . In our view, however, the most reasonable reading of subdivision (b) of section 667 is that when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply." (*Id*. at pp. 1149-1150.)

In accord with *Jones*, we find that the court erred when it imposed a prior prison term enhancement based on Gonzalez's 1997 assault conviction.

The Alleged Blakely Issue

Citing *Blakely v. Washington*, *supra*, 542 U.S. 296, Gonzalez contends it was error for the trial court to impose the upper term on his conviction based on facts not found true by a jury nor admitted by him. *People v. Black* (2005) 35 Cal.4th 1238 is dispositive of this issue. In *Black*, our Supreme Court held that *Blakely* does not invalidate California's sentencing scheme. (*Id*. at pp. 1255-1256.) The imposition of the upper term based on facts determined by the trial court, not admitted by Gonzalez or found by a jury, does not deprive Gonzalez of his constitutional right to a jury trial or his right to have all facts legally essential to his sentence proved beyond a reasonable doubt. (*Ibid*.) In accord with *Black*, we reject Gonzalez's claim of *Blakely* error.

DISPOSITION

The judgment is modified to strike the prior prison term enhancement. The trial court is directed to prepare an amended abstract of judgment consistent with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.