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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 56

DWANE ESTWICK,

Appellant.

20 Eagle Street
Albany, New York
April 18, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUSTICE STAN PRITZKER

Appearances:

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1 CHIEF JUDGE WILSON: The last case on today's
2 calendar is People v. Estwick.

3 MR. SAWYER: Good afternoon, and may it please
4 the court. Martin Sawyer, Appellate Advocates for
5 appellant Dwane Estwick. The exclusion of even a single
6 juror for discriminatory reasons violates the federal and
7 state constitutions.

8 CHIEF JUDGE WILSON: Do you wish to save any time
9 for rebuttal?

10 MR. SAWYER: Yes, Your Honor; thank you for
11 reminding me. Five minutes, please?

12 CHIEF JUDGE WILSON: Five, yes.

13 JUDGE GARCIA: Counsel, it seems to me in this
14 record, the court comes up with something that we will be a
15 neutral reason, but I never see the People come up with
16 one; is that incorrect?

17 MR. SAWYER: That is absolutely correct. And
18 you're referring to the second juror here, which is K.S.
19 Which asked - - - when the court proceeded to step two with
20 K.S., the - - - the prosecutor never said a word and the
21 court supposed a reason for the prosecutor, and - - -

22 JUDGE TROUTMAN: And so if the prosecutor doesn't
23 say why, how can the - - - the court assess whether it's a
24 race-neutral reason or not?

25 MR. SAWYER: That's - - - that's exactly correct.

1 Batson is a burden-shifting legal - - - legal regime and -
2 - -

3 JUDGE CANNATARO: It has been short circuited.

4 MR. SAWYER: Right. Well, it's Batson by the
5 judge providing the reason. Yes, it does short circuit
6 Batson, but also the prosecutor failed to sustain their
7 burden at step two here by not - - -

8 JUDGE SINGAS: So what - - - what's the remedy
9 then? What's the remedy? Do we send it back for a step
10 two analysis or is it a new trial?

11 MR. SAWYER: It's a new trial here, Your Honor.
12 And that's because at step two, the prosecutor did not
13 provide a reason, did not say anything to confirm that the
14 court's speculation was correct.

15 JUDGE TROUTMAN: And this is unlike an instance
16 where the defense fails to set forth a prima facie
17 violation of Batson in the first instance. That the court
18 - - - if - - - if they didn't meet their initial burden,
19 then the court could stop it there.

20 MR. SAWYER: That - - - that's exactly right,
21 Your Honor. If - - - and that gets to Judge Singas'
22 question, too. At step one, the correct remedy when the
23 court incorrectly determines whether a movant has met its
24 burden, then it goes back down for the prosecutor, put the
25 reasons on the record at step two, and there's a whole new

1 process. It's not a full reversal, it's a remand. Here,
2 the judge proceeded to step two and then proceeded to step
3 three after speculating its own reason that the prosecutor
4 never confirmed here on this record.

5 And this - - - this juror was a twenty-year
6 employee of the NYPD; there was nothing in the record - - -
7 even if you were to accept that this record - - - that this
8 reason was the real reason that the prosecutor was set,
9 there was absolutely nothing in the record supporting this
10 supposed bad vibe that the prosecutor got for this - - -
11 from this juror. There was nothing made, no notes made
12 contemporaneously about her demeanor.

13 The judge, in saying that this was the reason for
14 this strike also didn't say anything about her demeanor.
15 I'd note that a genuine bigot could have a bad vibe about
16 someone that arises from bigotry, so there's no way of
17 distinguishing a bad vibe as being pretextual or not
18 pretextual without some description of the juror's
19 demeanor. And this court, when it has upheld demeanor-
20 based strikes in the past, including in Hecker and in
21 Malloy, has - - - has credited trial judges who have put
22 into the record specific facts about the juror's demeanor,
23 for example, being austere or being hostile.

24 JUDGE SINGAS: And can we talk about M.G. for a
25 minute?

1 MR. SAWYER: Yeah. I'm happy to, Your Honor.

2 JUDGE SINGAS: Yeah. So is it your position that
3 the prosecutor's mistake would always render their
4 reasoning pretextual, or is your position that they didn't
5 make a mistake here and they were not telling the truth
6 about that?

7 MR. SAWYER: My - - my position is that a mistake
8 is not a per se reversal on the facts of this case, where
9 the prosecutor had just raised a cause challenge as to this
10 supposed reason, and the judge said no, I have taken
11 careful notes about this; that the juror that you're trying
12 to exclude for cause here was not one of the jurors who was
13 problematic. And then for the prosecutor to - - - a couple
14 pages later in the record - - - to say that was my reason
15 and for that to be the sole reason, there's no reasonable
16 basis - - -

17 JUDGE RIVERA: What if - - - what if the
18 prosecution believes that the judge is mistaken, or if they
19 believe they're right and the judge is mistaken. Doesn't
20 want to harp on it because they're not going to change the
21 judge's mind?

22 MR. SAWYER: That's an excellent question. And
23 here, there were several instances when the judge was
24 making the record that the prosecutor could have intervened
25 and say hey, you omitted Juror No. 1. You said Jurors 4,

1 6, 11, 13, and 16. I saw 1 raise their hand three
2 different times. The judges said it, for the record. Not
3 once did the prosecutor say it. After the cause challenge,
4 there's a protocol here where if a - - - if a party
5 disagrees with the judge's observations - - -

6 JUDGE RIVERA: If - - - if - - - if - - - if - -
7 - I'm sorry. So if that record didn't exist and what you
8 just gave, that example, those examples weren't - - - not
9 in the record, would it then be appropriate for a judge to
10 determine that it's not pretext?

11 MR. SAWYER: Well, here there's a - - -

12 JUDGE RIVERA: What counsel - - - prosecutor
13 appears to disagree with what the lawyer has - - - with
14 what the judge has said.

15 MR. SAWYER: Well, if there's a genuine
16 disagreement here - - - and I'll remind the court that what
17 the - - - what was attributed to this juror was deeply
18 unfavorable to the prosecutor in light of the evidence in
19 this case, where there was no forensic evidence presented
20 like DNA, and was a reason that this juror was not
21 qualified. If there's a disagreement, that party is
22 entitled to ask for that juror to come back in so that they
23 can resolve the disagreement. The prosecutor did not do
24 that here, and that is strong circumstantial evidence that
25 the prosecutor did not genuinely believe that this juror

1 had raised her hand to these questions.

2 So I'd - - - I'd like to move on briefly and
3 address something that Judge Garcia brought up in the last
4 argument, which was this kind of difference in standards
5 for who's supposed to say what in this process. And I - -
6 - I think that there's - - - that the case law makes clear
7 that there is a kind of a rhyme to this reason or reason to
8 this rhyme. So at step two, it's the prosecutor's - - - or
9 the nonmoving party's obligation to put forward the reasons
10 for a strike. And then those reasons are what are
11 evaluated at step three. But this court has made clear
12 again and again that at step three, the judge can consider
13 all of the evidence in the record. So in Hecker, the judge
14 looks for record support. In - - - in Payne, the judge
15 doesn't even need to listen to argument to consider the
16 whole record.

17 So what happens on appeal is we are looking at
18 the whole record, and we are looking at whether that record
19 supports the - - - the reasons specifically given at step
20 two. So I think that that answers the question, and I want
21 to note for the court that this court, in - - - in its
22 preservation doctrine, has never found that a step three
23 claim is unpreserved when the trial court ruled at step
24 three with respect to the juror in question that's being
25 brought on appeal. Ordinary preservation principles

1 suggest that when the court considers and rules upon an
2 issue at trial, that that issue is fully preserved for
3 appeal. A litigant does not need to specifically marshal
4 facts in a certain way for those facts to be considered on
5 appeal. Preservation under 470.05 applies to legal claims
6 and issues, not arguments, and I think that there is some
7 confusion in the Appellate Division about that right now -
8 - -

9 JUDGE SINGAS: Are you speaking generally about
10 objections or in jury selection?

11 MR. SAWYER: Specifically in the Batson context.
12 A Batson step three claim that has been considered and
13 ruled upon by the court below is preserved on appeal for
14 this court's consideration. And the - - - People v. Allen,
15 a case that the - - - the People cited in this case, there
16 - - - there's something that's brought up in that case,
17 which is in a pure disparate treatment claim. The - - -
18 the record that the court is evaluating on appeal might not
19 be able to differentiate between what is pretext and what
20 is not pretext, because in People v. Allen, there was - - -
21 the Appellate Division applied the wrong standard of review
22 and said the prosecutor failed at step two because they did
23 not supply the reasons for not striking similarly situated
24 jurors, and the court overturned that and then reached step
25 three. And because there was no dis - - - disparate

1 treatment argument raised below, it was impossible on
2 appeal to tell whether at trial, this - - - these jurors
3 were excluded because of pretext or not. That was not a
4 preservation decision in *People v. Payne*; this court
5 specifically described it as Allen representing an
6 articulation problem, meaning the reasons weren't
7 articulated, so the record wasn't developed enough for the
8 defendant to meet his burden on the merits.

9 And then in *Snyder v. Louisiana*, United States
10 Supreme Court case from 2008, the United States Supreme
11 Court considered a - - - a disparate treatment argument on
12 appeal that was not raised by the - - - the litigator
13 below, and it - - - based in large - - - in large part, his
14 decision was based on this dis - - - disparate treatment,
15 and that's because there were other facts in the record
16 that allowed the court to differentiate why this disparate
17 treatment might have been pretextual. And here, that
18 brings us back to K.S. - - - I'm sorry - - - K.S. - - - the
19 - - - the person for whom the court speculated that there
20 was a bad vibe. And here, you know, the - - - to the
21 extent that this might be perceived as a disparate
22 treatment argument, it's because there were multiple people
23 who had similar jury service. And the prosecutor, you
24 know, maybe struck - - - struck one, didn't strike some
25 others. But here we have some explanation for why there

1 was disparate treatment on jury service, which was the
2 court's speculation that there was some sort of bad vibe
3 about this one particular juror. And that explanation
4 itself is highly evocative of the exact rationales that the
5 Supreme Court cited in Batson and cited in its most recent
6 case, Flowers v. Mississippi. The assumption that a black
7 juror is favorable to black defendants is exactly - - -

8 JUDGE RIVERA: So - - - so - - - so - - I'm
9 sorry. So then your argument now is that even if the
10 prosecutor had said yes, Judge, that's my reason, right?
11 That it would still not be sufficient. It's pure pretext
12 whether the prosecutor had articulated it or not.

13 MR. SAWYER: So I think there are two problems.

14 JUDGE RIVERA: First problem is whether or not
15 the judge is the one providing the information versus the
16 prosecution, right?

17 MR. SAWYER: Well, so there are two responses to
18 that.

19 JUDGE RIVERA: Yeah.

20 MR. SAWYER: So first of all, I think it becomes
21 a bigger - - - a closer question. The judge would have to
22 look at the record, see what - - - see what else is there.
23 And second of all, I think - - - it would be unpreserved
24 here - - - but I think there would be a - - - a procedural
25 Batson claim where by offering this reason first, the court

1 deviated from the proper Batson procedure and - - - and I
2 want to say Miller-El v. Dretke, the Supreme Court laid out
3 perfectly that it's not enough for a trial court or an
4 appellate court to invent a reason for exercising a
5 pretextual strike. It must rise and fall on the
6 prosecutor, and if a court jumps in first the prosecutor -
7 - - or I guess, the party exercising the peremptory strike,
8 it applies to defense counsel as well. And - - -

9 JUDGE GARCIA: Also puts us in a somewhat awkward
10 position of having to determine whether the court's reason
11 is pretextual.

12 MR. SAWYER: That's - - - that's - - - that's
13 true, too. But as I was saying - - -

14 JUDGE RIVERA: The motivation behind - - - the
15 animus behind this case law, of course, is to purge our
16 criminal justice system of these kinds of bases for
17 striking people from the jury, so the fact that Judge
18 Garcia is already suggesting - - - that a judge themselves
19 may be suggesting something that is inappropriate, right?

20 MR. SAWYER: Yes. The judge - - -

21 JUDGE RIVERA: I mean it's very difficult. I
22 mean, if the lawyer can't do it, why can the judge? But my
23 point - - - put that aside - - - was that your position is
24 regardless of - - - of whether or not the judge had said
25 it, but if the prosecutor had said yes, that's correct;

1 that is my reason. Your position is pretext, full stop.

2 MR. SAWYER: My position is on this record, this
3 would be pretext in large part because the reason itself -
4 - - the substance of the reason - - - is evocative of the
5 very reasons that the Supreme Court of the United States
6 and - - -

7 JUDGE RIVERA: And if it wasn't pretext, but the
8 - - - the judge had mentioned it, that's then the problem.
9 That it's the judge, not the prosecutor, correct?

10 MR. SAWYER: Right. If the - - - if the party
11 exercising the peremptory strike knows in advance what the
12 judge is going to find creditable, then it eliminates the
13 whole purpose of the Batson burden shifting framework - - -

14 JUDGE RIVERA: It's like a win-win argument.
15 Thank you.

16 MR. SAWYER: Sorry, I didn't catch that.

17 JUDGE RIVERA: Seems like a win-win argument that
18 you're making there.

19 MR. SAWYER: All right. All right. Thank you,
20 Your Honor.

21 JUDGE RIVERA: If you're persuasive.

22 MS. FENN: Good afternoon. Danielle Fenn for the
23 Office of Melinda Katz. May it please the court. Here,
24 the Appellate Division correctly ruled the defendant failed
25 to sustain his burden of demonstrating a Batson violation.

1 Initially, some of defendant's current specific claims are
2 unpreserved for this court's review. Regarding M.G., the
3 defendant never claimed below that the prosecutor's reason
4 that she raised her hand in response to a question about
5 needing scientific evidence was factually inaccurate.
6 Moreover, regarding the second juror, K.S., defendant never
7 claimed below that that strike was pretextual because the
8 prosecutor didn't strike other jurors who are - - - other
9 panelists who had prior jury service. Moreover, in this
10 case, the ADA did not - - -

11 JUDGE RIVERA: How can we - - - how can we uphold
12 the judge's action here? The judge - - - the judge cannot
13 provide the prosecutor's basis for a challenge.

14 MS. FENN: But in this case, regarding the second
15 juror, K.S., the court jumped the gun and provided these
16 reasons. But then by not saying anything - - - by not
17 contradicting that or not adding anything - - - the
18 prosecutor apparently adopted that reason as his own - - -

19 JUDGE RIVERA: Why is that apparent? Why is that
20 apparent?

21 JUDGE SINGAS: That's not really an argument we
22 should rely on.

23 JUDGE RIVERA: Yes. How can that be?

24 MS. FENN: It's apparent because the prosecutor -
25 - - the prosecutor disputed it. He could have said

1 actually, Judge, no, that's not my reason - - -

2 JUDGE RIVERA: Isn't the point - - -

3 JUDGE SINGAS: So silence now is adoption? Is
4 that your argument?

5 MS. FENN: Yes, it is a - - -

6 JUDGE CANNATARO: Counsel, if the judge
7 articulates the persuasive reason for - - - for holding in
8 favor of - - - of the strike, are you saying that it's
9 counsel - - - the prosecution would actually gain, say,
10 credit? You'd contradict the judge on that?

11 MS. FENN: If it was something that the
12 prosecutor didn't believe was the actual reason, the
13 prosecutor could say that. It could say, Judge - - - or in
14 addition, it could be, Judge, that actually isn't my
15 reason. Or additionally, I believe that I - - - I made the
16 strike for this additional reason. But that didn't happen
17 here.

18 CHIEF JUDGE WILSON: But what is the - - what is
19 the reason that we ask the prosecutor to identify the
20 reasons? Why - - - why do we do that?

21 MS. FENN: That's up to the peo - - - the - - -
22 whoever the responding party is.

23 CHIEF JUDGE WILSON: Sure. But in this case, the
24 prosecutor.

25 MS. FENN: Has the bur - - - and the prosecutor -

1 - -

2 CHIEF JUDGE WILSON: Why do we ask that in a
3 broader sense?

4 MS. FENN: To provide race-neutral reasons - - -

5 CHIEF JUDGE WILSON: Well - - -

6 MS. FENN: - - - to a - - -

7 CHIEF JUDGE WILSON: Well - - -

8 MS. FENN: - - - racially neutral reason for the
9 strike.

10 CHIEF JUDGE WILSON: Well, to provide an
11 explanation of what the prosecutor's reasons are, right?

12 MS. FENN: Yes.

13 CHIEF JUDGE WILSON: And the reason we ask that
14 is we are trying to determine whether the prosecutor in
15 this case, right, is acting with racial animus.

16 MS. FENN: That's correct.

17 CHIEF JUDGE WILSON: Is that right?

18 MS. FENN: Yes.

19 CHIEF JUDGE WILSON: So how does letting the
20 judge answer that question get us into the mind of the
21 prosecutor?

22 MS. FENN: The fact that the judge gave this
23 reason about prior jury service - -

24 CHIEF JUDGE WILSON: And the prosecutor never
25 gave any reason.

1 MS. FENN: That's correct. And this question - -
2 - this issue about demeanor, that it was something in her
3 demeanor that made the court and the prosecutor both
4 believe that she had been on a jury that had voted to
5 acquit - - - by not saying anything, by not either directly
6 contradicting that and saying that's not the reason or
7 adding to that, the prosecutor adopted that reason as his
8 own.

9 JUDGE TROUTMAN: So you're saying that step two
10 for a prosecutor to state a reason is gone? They don't
11 have to. As long as the judge takes care of it, it's fine.

12 MS. FENN: No. At step two, the prosecutor
13 should give - - - the - - - the prosecutor is supposed to
14 give the reason, and this specific - - -

15 JUDGE TROUTMAN: Here - - - you're saying you can
16 just - - - if the judge is gracious enough to give the
17 prosecutor a reason, the prosecutor can then just adopt it,
18 and then step two is satisfied. And then the judge is to
19 assess the judge's own rationale. For - - -

20 MS. FENN: And in this specific case, the judge
21 perhaps jumped the gun in providing these reasons and in
22 terms of more general - - -

23 JUDGE RIVERA: Well, I'm not really clear about
24 what you mean by that - - - jumped the gun. What - - -
25 that makes it seem like the judge just needed to wait and

1 then provide reasons.

2 MS. FENN: No.

3 JUDGE RIVERA: I don't think that's what you
4 mean.

5 MS. FENN: No, Your Honor.

6 JUDGE RIVERA: I also actually think you don't
7 mean adopted, because adopted seems to mean oh, I'm
8 persuaded by that reason. That sounds good as opposed to
9 confirming, right? I think you mean that the silence
10 confirms that that is the prosecutor's reason.

11 MS. FENN: Yes - - -

12 JUDGE RIVERA: Okay.

13 MS. FENN: - - - it confirms his reason. It's
14 not that the judge talked him into the reason or that the
15 judge was - - -

16 JUDGE TROUTMAN: So are you just saying now that
17 the judge is able to discern what's in the mind of the
18 prosecutor and then satisfy step two as a result?

19 MS. FENN: In this specific case, it seemed like
20 there was something in this panelist's demeanor that was
21 evident in the courtroom - - -

22 JUDGE TROUTMAN: A bad vibe?

23 MS. FENN: It seemed like it was something that
24 she said, because the court did say the People weren't
25 happy with the way that she said it.

1 JUDGE TROUTMAN: Did the court say a bad vibe?
 2 Is that an objective basis that we should be making
 3 decisions or we are - - - put - - - then put in a position
 4 to be able to review it? The judge is doing it. A bad
 5 vibe. You're saying somehow because there were some sort
 6 of feelings that that was sufficient - - - that just jumped
 7 off the page. So of course, that was the prosecutor's
 8 reason. Is that essentially what you're saying?

9 MS. FENN: In terms of the term bad vibe - - -
 10 the court said a few things -- - but in terms of bad vibe,
 11 that implies some demeanor-based reason. And the court did
 12 say - - -

13 JUDGE TROUTMAN: But don't you admit that it
 14 would - - - at least - - - if the prosecutor, him or
 15 herself, says it, it would then put us in the proper
 16 sequential order of review rather than the judge inserting
 17 what the judge thinks the prosecutor is - - - is basing a
 18 concern off of?

19 MS. FENN: In this specific instance - - -
 20 generally, it is a burden shifting regime or a burden - - -

21 JUDGE GARCIA: But Counsel, put it in another way
 22 - - -

23 MS. FENN: - - - but here - - -

24 JUDGE GARCIA: - - - to go back to what Chief
 25 Judge's point was earlier, the purpose of the process and



1 the sequencing is because we want to know if the prosecutor
2 - - -

3 MS. FENN: Um-hum.

4 JUDGE GARCIA: - - - has a valid reason. So it
5 seems to defeat that purpose for a judge - - - perhaps to
6 come up with a good reason, the judge may have - - - not
7 liked to seat that juror, and then provide that and assume
8 - - - I'm not saying this is the case - - - but assume
9 there is a prosecutor or a defense lawyer who really wants
10 to strike that juror for an inappropriate reason and does
11 not have a race-neutral reason. In fact, it's a bad
12 peremptory. Now has this lifeline, and they can just say
13 sure, yeah, that's - - - that's right. Why suggest a
14 reason to a party that will get them out of having to
15 justify the strike?

16 MS. FENN: I don't think in this case - - - it
17 seemed - - -

18 JUDGE GARCIA: Why is this case different than
19 any case? I mean, we don't know what happened here. We
20 don't know on this record what the prosecutor would have
21 said.

22 MS. FENN: The fact that - - - but the fact that
23 the prosecutor didn't say anything - - - didn't add or
24 contradict to what the court said. He did confirm it, that
25 those were his reasons.



1 JUDGE SINGAS: No, he didn't.

2 MS. FENN: And it seems like - - -

3 JUDGE SINGAS: There was no confirmation.

4 JUDGE CANNATARO: He confirmed it?

5 JUDGE SINGAS: I mean, we're talking about a
6 burden that the People have, right? And if it was the
7 other way around, if we were talking about a burden that
8 the defense had, and if a judge had filled in the blank, I
9 think you would be arguing the defense didn't meet their
10 burden. I mean, you're in a - - - you're in a sort of
11 untenable position, but I don't see how you can say a
12 burden has been fulfilled when the People stood mute.

13 MS. FENN: It's - - - it's the fact that the
14 prosecutor didn't add or dispute the reasons.

15 JUDGE TROUTMAN: Okay. So - - - so are you
16 saying because the prosecutor didn't add or anything that
17 there is some sort of adoption? Are you saying going
18 forward, the rules should be that as long as a reason is
19 put on the record at step two, albeit by the judge, that
20 that's okay? And - - - and you want us to clearly say
21 going forward, prosecutors don't have to do it. The judge
22 can satisfy it for them.

23 MS. FENN: In - - - in this case, and in Batson
24 generally, there is this burden shifting of the - - - of
25 the People or the nonmovant providing reasons and then the

1 determination of pretext. In this specific case, the court
2 provided those reasons and the prosecutor either adopted,
3 did not challenge them, confirm - - -

4 JUDGE TROUTMAN: But again, yes or no, going
5 forward is step two satisfied as long as the trial judge
6 sets forth a reason and the prosecutor acquiesces, and then
7 by that acquiescence, adopts it; it's okay?

8 MS. FENN: I wouldn't say it's okay. It's - - -
9 Batson - - -

10 JUDGE TROUTMAN: It's satisfied. Step two is
11 satisfied if the sequence happens that way; that is
12 essentially what you are saying.

13 MS. FENN: Yes. In this - - - in this specific
14 case with this, where it seems like it was apparent to the
15 parties that this demean - - - that there was something in
16 this particular juror's demeanor and the way that she said
17 it, because the court even says - - -

18 JUDGE RIVERA: I think the point is, it doesn't
19 matter if it's apparent to the judge. What matters is that
20 the prosecutor has got to articulate their reason. And you
21 can't just not say anything and have a person who's
22 supposed to be the neutral, right - - - the neutral person
23 in the courtroom start articulating reasons in support of a
24 peremptory.

25 MS. FENN: Yes, Your Honor. In this case, it's -

1 - - it's not that. In any case, the judge has to provide.
2 That's not - - -

3 JUDGE RIVERA: Let me ask you this. Have you all
4 - - - have you in your practice, have you seen this before?
5 I mean, I - - - I - - - I couldn't find a case where I'd
6 ever seen this before.

7 MS. FENN: No, I have never seen this specific
8 factual - - - of this scenario.

9 CHIEF JUDGE WILSON: You keep answering about in
10 this case - - -

11 MS. FENN: The court - - -

12 CHIEF JUDGE WILSON: - - - but the problem I
13 have, I think, is really a much broader one. And imagine
14 it this way. My sixth grader goes in for a social studies
15 test; I'd like to know that she knows the answer to the
16 questions, but instead of answering - - - filling the
17 answers, the principal comes in and says, here's what the
18 answers are and my sixth grader leaves. I have no
19 confidence that she knows anything about the contents of
20 that test, but that's what I'm trying to find out.

21 JUDGE GARCIA: In fairness, I think it would be
22 these are the answers I think you would give.

23 CHIEF JUDGE WILSON: Yeah.

24 MS. FENN: I think in this case, the fact - - - I
25 think there's a few things. The fact - - -

1 CHIEF JUDGE WILSON: But this is every case,
2 right? It's back to Judge Troutman's question. This is -
3 - - you're effectively asking for a rule that - - - and
4 look, we could save a lot of time in trials. We could get
5 more cases through the system if we just let the judge
6 decide these without asking the prosecutor.

7 MS. FENN: No, I don't think that it's - - - it's
8 a matter - - - in terms of Batson, it's the - - - the par -
9 - - the proponent and then the responding party. It's not
10 ever the judge giving reasons or that the judge is giving
11 the answers to one party or the other party. But in this
12 specific case, it seemed apparent to both the court and the
13 prosecutor that they both believed that this particular
14 panelist is something - - -

15 JUDGE GARCIA: Counsel, you keep saying that they
16 - - -

17 MS. FENN: - - - in the way that she said - - -

18 JUDGE GARCIA: - - - both believed - - - and
19 obviously, that's the problem I think we're having here. I
20 mean, the - - - the burden Batson seems very reasonable in
21 terms of showing that the strike isn't - - - isn't racially
22 motivated and it isn't pretextual. And we asked the
23 prosecutor to do that. And is it really that great of a
24 burden, even in this case? And I'm saying it would be
25 enough. But if the prosecutor just said yes, that was my

1 reason, is that asking too much here?

2 MS. FENN: I don't think it's asking too much. I
3 think when the court said that it's - - - that something in
4 her demeanor that the way that she said it, that's what the
5 court said. It made the ADA nervous that if she had voted
6 to acquit, the ADA would be nervous and that would be a
7 legitimate reason. It's that the ADA, by not adding
8 something - - - it's not that no one has to provide - - -
9 as the nonmoving party, no one has to provide reasons - - -

10 JUDGE CANNATARO: Counsel, at the risk of saying
11 something I think you've heard four or five times, the
12 purpose of the Batson process is to ferret out this kind of
13 invidious discrimination bias that - - - that can sometimes
14 take place. Are you saying that it's possi - - - and the
15 mechanism by which that is done is to extract answers from
16 the person who's been accused of - - - of using bias so
17 that they can be evaluated? It's not really like what the
18 reason is, it's to look behind it and - - - and try to
19 understand what the real motivations are. I - - - I don't
20 understand how you can argue that that can be done if
21 you're not getting the words from the person who's been
22 accused of engaging in this bias.

23 MS. FENN: In this specific case, I - - - I do
24 understand this. The burden at step two is to provide
25 reasons.

1 JUDGE CANNATARO: But it's - - -

2 MS. FENN: But if the reason was - - -

3 JUDGE CANNATARO: - - - it's not really - - -
4 it's. Yes, that's - - - that's what you have to give the
5 reasons, but the purpose of giving the reasons is to give
6 the court the ability to evaluate the genuineness and
7 credibility of those reasons, as opposed to some other
8 pretextual - - - nonpretextual purpose.

9 MS. FENN: Yes, Your Honor. And in this specific
10 case where the fact that the ADA didn't challenge what the
11 judge said and didn't add to anything the judge said, and
12 said there's additional reasons, really points to the fact
13 that those were the ADA's reasons. And in this case, there
14 must have been something in her demeanor - - -

15 JUDGE PRITZKER: Counsel even if they were - - -

16 MS. FENN: I'm sorry?

17 JUDGE PRITZKER: Let's assume you're right. It
18 may be in his head. The problem is it's subjective
19 inquiry. There has to be a subject and the subject is the
20 DA, it's not the judge, right? I mean, you'd agree with
21 that, wouldn't you?

22 MS. FENN: Yes.

23 JUDGE PRITZKER: So how could you make - - - how
24 can you determine the subjective mindset unless you're a
25 mind reader?

1 MS. FENN: In terms of the - - - the reasons - -
2 - this reason about prior jury service and the belief that
3 there was an acquittal - - - the fact that the judge said
4 it and not the ADA, doesn't mean the judge can't then
5 determine whether that reason is pretextual, because it
6 must have been something in her demeanor, because the
7 defense attorney also doesn't say anything about her
8 demeanor. It says we don't know what the - - - the verdict
9 is. And it was apparent to the court, apparently as - - -
10 apparent to the ADA was something, like the judge said, in
11 the way that she said it, apparently the tone of her voice,
12 it might have been her facial expression, that indicated
13 that she had voted for an acquittal in a prior instance of
14 jury service, and that would be a race-neutral reason. My
15 light is on. If there are no further questions, I'll rely
16 on my belief.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. SAWYER: Your Honors, as several of you noted
19 in - - - in that last argument, step two squarely places
20 the burden on the pro - - - or on the party exercising the
21 peremptory strike to come forward with a race-neutral
22 reason, an adoption of a standard that would allow a
23 prosecutor to remain silent at step two would be a radical
24 deviation from the Batson protocol. It would make it
25 impossible to evaluate claims at step three, and make it

1 impossible to evaluate claims on appeal.

2 I just want to address one - - - one thing my
3 colleague said here. She said that it was - - - that both
4 parties believed that there was this bad vibe, and I want
5 to make clear that the record shows that the defense
6 counsel contested this and said that that was not borne
7 out. That that was - - - that he didn't get that vibe,
8 that he didn't understand why this juror had been struck,
9 given her history with the NYPD. I also want to note that
10 sometimes - - -

11 JUDGE RIVERA: The same question - - - have you
12 ever seen this before?

13 MR. SAWYER: No, Your Honor.

14 JUDGE RIVERA: Okay. Thank you.

15 MR. SAWYER: So I want to point out that
16 sometimes one of the reasons that the Batson protocol is
17 difficult is because sometimes reasons can show up as true
18 that are, in fact, pretext. And it's really - - - it's - -
19 - Batson is a difficult process because you're evaluating
20 whether somebody who's in front of a court constantly is
21 telling the truth or not. And this - - - this - - - these
22 are repeat players in the court system. And it's - - -
23 that - - - for that reason, it's really important to
24 actually get these reasons on the record rather than the
25 judge relying on his or her own intuition and then

1 evaluating the judge's own guess as to what the reason is.
2 So I - - - I just want to conclude with - - - I
3 want to note that the - - - the People right now are asking
4 to impose a kind of new Batson rule with respect to K.S.
5 As former Chief Judge DiFiore and the Judicial Task Force
6 report last year recognized, protecting the rights of
7 jurors and defendants from discrimination requires
8 strengthening Batson, not weakening it. At a moment in
9 history when other states, including our neighbors New
10 Jersey and Connecticut, have - - - are taking steps to
11 enable trial courts to better protect against invidious
12 discrimination and appellate courts to better evaluate when
13 trial courts deviate from that requirement. This - - -
14 this court should decline the invitation to move our state
15 in the opposite direction. Thank you.

16 CHIEF JUDGE WILSON: Thank you.

17 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sophia Long, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of New York v. Dwane Estwick, No. 56 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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