4TH AMENDMENT, BATSON, AND GRIEVANCE ARBITRATION

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The Court of Appeals recently issued two opinions in criminal cases addressing important issues. The first involves a search and seizure arising out of a suspicionless automobile stop. The second turns on strict adherence to *Batson* procedures to preserve for appellate review challenges to an opponents' exercise of peremptory strikes, a cautionary tale for those who particiapte in jury trials. This month we address those decisions, as well as one in which the Court once again strongly supports arbitration, even where (as here) it could result in a determination that a public employer must provide a pension benefit it has had no legal authority to provide.

Suspicionless Stops – A Quandry

In *People v. Jackson*, the Court for the third time in three years dealt with the thorny issue under the Fourth Amendment of a suspicionless police stop of a motor vehicle. Relying upon the United States Supreme Court's opinion in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), which it deemed controlling, the Court in an opinion by Judge Howard A. Levine unanimously affirmed the order of the Appellate Division, First Department vacating the judgment of conviction and dismissing the indictment.

At the cornerstone of the conclusions in *Jackson* and *City of Indianapolis* that the seizures were unlawful, was the fact that the suspicionless stops had as their primary purpose to serve the governmental interest in general crime control, rather than "some measure of individualized suspicion" of wrongdoing. While that simple proposition seems clear when applied to cases in which the stop is carried out by police outside of a specific law enforcement plan and therefore without any neutral limitation upon the exercise of their discretion as to whom to stop, it seems less clear when read against prior United States Supreme Court cases that have sustained stops and permitted use of the seizure evidence.

Jackson and the Court's two prior suspicionless search opinions neatly show the parameters of the issue.

In *Matter of Muhammad F.*, 94 N.Y. 2d 136 (1999), a NYC Police Department program involved random, suspicionless stops of taxi and livery vehicles in specific neighborhoods by plainclothes officers roving in unmarked cars and making stops at their discretion, in order to

combat robberies of drivers. Following the Supreme Court's seminal decision in *Brown v. Texas*, 443 U.S. 47 (1979), the Court of Appeals found the seizure unlawful in the absence of a plan that imposed neutral limitations on the discretion of the officers making the stops.

The Court's later opinion in *People v. Abad*, 98 N.Y. 2d 12 (2002), involved a specific program (Taxi/Livery Robbery Inspection Program) in which car owners displayed on their vehicles a decal authorizing the stopping and visual inspection of the vehicles by the police at any time, to provide driver safety. Under the program, cars displaying the decal were briefly stopped and inspected. There the Court sustained the search and seizure, finding the three-part test of *Brown* had been met: the gravity of the public interest in preventing crimes against livery cabs; the seizure advanced the public interest; and the program reduced the intrusiveness of the stops. Clearly, the pre-consent to the seizure played a role in the result.

Then came *Jackson*. It arose out of a suspicionless nighttime stop at a roadblock stopping all vehicles at 133rd Street and 12th Avenue in Manhattan. When a car in which Jackson was a passenger was stopped, a police officer saw in the car a plastic bag with white powder, later identified as cocaine. Jackson was indicted for criminal possession. After his suppression motion based upon the unlawful stop and seizure of the cocaine was denied, he pled guilty and, as a second felony offender, was sentenced to six years to life. The Appellate Division reversed, vacating the judgment of conviction and dismissing the indictment on the grounds that the seizure was unlawful. The Court granted the prosecution's motion for leave to appeal.

Applying *City of Indianapolis* (which had not been decided at the time of Jackson's plea), the Court affirmed. The record suggests that the police attempted to establish at the suppression hearing compliance with the criteria set up by the Supreme Court in *Brown*, but fell well short of achieving it. For example, the stop was not supported by a plan, but rather the roadblock had been in operation for only an hour and a half and was dismantled within minutes after Jackson's arrest. Also, the roadblock had been set up for what was clearly general crime control in that area of Manhattan such as shootings, homicides, assaults on and robbery of cab drivers, carjackings and the sale of drugs. *City of Indianapolis*, once decided, left no room to sustain the search in *Jackson*.

And yet, *City of Indianapolis* shows a past willingness in the Supreme Court to sustain searches that could only be defended as pragmatic. For example, in a comprehensive majority opinion, Justice Sandra Day O'Connor discussed two cases in which that court had upheld suspicionless searches. In *U.S. v. Martinez–Fuerte*, 428 U.S. 543 (1976), the Court sustained stops at two permanent immigration checkpoints less than 100 miles from the Mexican border because of the "formidable law enforcement problems" posed by illegal immigration from Mexico, the difficulty of effectively preventing illegal immigration at the Mexican border and the modest intrusion involved in the stops. Could not these same criteria be applied to efforts to deal with the trafficking and sale of narcotics in Manhattan or other specific criminal activity that law enforcement sought to deal with pursuant to a minimally intrusive plan?

Justice O'Connor also discussed *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990). There the Court sustained a Michigan sobriety checkpoint program where suspicionless stops were made of motorists to determine intoxication. The Court justified the result based upon "the imperative of highway safety" and "the magnitude of State's interest in getting drunk drivers off the road." Again, is the eradication of trafficking and sale of drugs any less an imperative? Based upon *City of Indianapolis*, in which the City conceded that the checkpoints were being operated "to interdict unlawful drugs in Indianapolis," the Supreme Court believes so. Why is such a seizure to advance the government's general interest in crime control any lesser so than catching illegal aliens or drunk drivers?

Finally, the Supreme Court has also suggested that it would sustain stops to check drivers' licenses and vehicle registration in the interest of "roadway safety." *Delaware v. Prouse*, 440 U.S. 648 (1979).

The question, it seems, is where should law enforcement be permitted to go to effect lawful stops and seizures when specific crime is rampant. An answer may lie in a footnote to Justice O'Connor's opinion that poses the hypothetical—and then declines to answer it—of whether constitutional scrutiny can be achieved by making the principal or primary purpose of the checkpoint to catch unlicensed drivers and drunks and the "secondary purpose of interdicting narcotics."

Preserving *Batson* Challenges

"[T]he exclusion of jurors on the basis of race continues to plague the judicial system, and courts must be vigilant in eradicating this problem," the Court of Appeals stated in unanimously deciding the combined appeals of *People v. Terick James* and *People v. Anthony Jones.* The opinion by Judge George Bundy Smith continued, however: "Nevertheless . . . ." Both convictions were upheld due to failure to preserve jury selection challenges made under *Batson v. Kentucky*.[i]

In *James*, the Court of Appeals cited a prior decision in explaining that there are three steps to making a successful *Batson* challenge: (1) a prima facie showing that a party is using peremptory strikes "to remove a cognizable racial group;" (2) the nonmoving party must provide a race-neutral reason for each strike challenged in the first step; and (3) the moving party must assert that the reason offered is pretextual, which "permits the trial court to resolve factual disputes, and whether the [nonmoving party] intended to discriminate is a question of fact." The court *then* determines if the reasons given are pretextual."[ii]

But the *James* decision appears to have added a fourth step to the process when the moving party claims the other party has engaged in a pattern of discrimination: "When . . . the court accepts the race neutral reasons given, the moving party must make a specific objection to the exclusion of any juror still claimed to have been the object of discrimination. It is incumbent upon the moving party to be clear about any person still claimed to be improperly challenged."

During the trials of the appellants, after defense counsel made prima facie cases (step 1), the respective prosecutors offered race-neutral reasons for their exercise of peremptory challenges against black members of the jury pool (step 2). The trial courts then found that the strikes had been based upon race-neutral reasons (step 3). The defendants' lawyers did not thereafter argue that the reasons given by the prosecutors were pretextual, or otherwise object to jury selection. This failure to reassert their challenges to the prosecutors' strikes on the grounds that the reasons offered were pretextual, after the trial court had accepted the race-neutral reasons offered as nonpretextual, the Court held, left the *Batson* objections unpreserved for review.

The Court also found that the defense lawyers had failed to preserve their *Batson* challenges by neglecting to identify precisely each juror whose exclusion by the government was being challenged. *James* makes it clear that if a party raises a challenge following a series of strikes of persons within a group, unless the party states that it is challenging all prior strikes in the pattern as well, the challenge may be construed to apply only to the venire person most recently stricken. The strictness of these preservation standards is illustrated by the facts of the two cases.

In *James*, the prosecutor struck five black women, the fifth of whom was Ms. Bemejam. Defense counsel objected under *Batson*, pointed out the pattern of strikes and argued, "now [the prosecutor has struck] Ms. Bemejam and I am asking him to give a reason why he is kicking her off." The prosecutor proceeded to explain his strike of Ms. Bemejam and two of his prior strikes of black female venire persons. The Appellate Division, First Department interpreted the above-quoted argument as a challenge to the exclusion of Ms. Bemejam only, the explanation of which the trial court had found to be nonpretextual. It held that any objections to the striking of the other four black women had not been preserved for review.

Justice Peter Tom dissented. His opinion maintained that it is obvious from the record that counsel was objecting to each of the strikes that formed a part of the challenged pattern, and that the prosecutor had offered reasons for only two of the four women other than Ms. Bemejam, which should have resulted in a finding that the government had failed to overcome the prima facie case of race-based jury selection with respect to the other two women. But the Court of Appeals affirmed the First Department and agreed with its ruling that a challenge to each person forming the alleged discriminatory pattern had not been preserved.

Similarly, in *Jones* defense counsel raised a *Batson* objection after several strikes of blacks. He pointed to the pattern and argued, "[a]t this point I think it's the prosecutor's burden to show that this isn't race based." Counsel did not specifically state that he was challenging the first strike of a black woman from a prior round of selection, Ms. Tuckedt. Here as well, the prosecutor sought to justify not only the most recent strike, but other strikes, including of Ms. Tuckedt. The defendant argued on appeal that the government had not presented sufficient reason to overcome a prima facie case of a race-based strike of Ms. Tuckedt. The Court of Appeals agreed with the First Department that only the challenge to the last strike before the *Batson* objection was preserved for review (and that strike had been supported by a race-neutral

reason). Because the defendant had failed to articulate a separate *Batson* claim arising from the preemptory used against Ms. Tuckedt, any challenge to her exclusion was not preserved.

In sum, any lawyer making a *Batson* objection must be certain to (a) state when he or she challenges the other party's explanation as pretextual – even if the trial court has already ruled it was not pretextual – and, (b) if raising an objection based upon a pattern of strikes, state that the challenge is made as to each strike forming the pattern and identify each potential juror in that pattern by name.

PBA Grievance Arbitration

The Court held that grievances against two municipalities by Police Benevolent Associations (PBAs) were arbitrable pursuant to collective bargaining agreements (CBAs), in *Matter of the Arbitration Between City of Johnstown and Johnstown PBA*.

Johnstown and Schenectady had entered into CBAs at a time when a certain retirement benefit could by law be extended only to "Tier 1" police and fire employees. Under the benefit, pensions are calculated on the basis of the retiree's average monthly salary for the 12-month period immediately preceding retirement. The New York legislature subsequently amended the Retirement and Social Security Law to permit the extention of the 12-month calculation benefit to "Tier II" employees *if* a municipality chose to do so, which neither Johnstown's Schenectady's nor legislatures did. The statutory amendment also provided that a Tier II employees' entitlement to such benefit was *not* subject to compulsory interest arbitration.

When the cities did not provide the 12-month calculation benefit to Tier II employees, both PBAs demanded arbitrations under the general arbitration clauses of their respective CBAs, and both cities filed Article 75 petitions to stay the arbitrations against them. Stays were entered, then dissolved by the Appellate Division, Third Department in decisions affirmed by the Court of Appeals.

The majority opinion, by Judge Albert M. Rosenblatt, applied a two-part test for determining whether the disputes were arbitrable, arising from its prior *Liverpool* and *Watertown* decisions.[iii] A court should first determine whether there is any "statutory, constitutional or public policy" prohibition against arbitration of the dispute (the "may they abritrate" prong) and, if so, determine whether the parties agreed to arbitrate such disputes (the "did they agree to arbitrate" prong).

The cities argued that it would have been illegal for them to have provided the benefit at the time of the CBAs. The Court ruled, however, that the issue was not whether the benefits could legally be provided, but whether a claim to such benefits could legally be arbitrated. Because the PBAs were asserting that the Tier II employees' right to the disputed pension benefit arose under the CBAs, they could demand arbitration under those agreements' arbitration provisions.

On the second prong the cities maintained that, when entering into the CBAs they did not intend to arbitrate Tier II employees' right to the benefit because those employees could not have been given the benefit at the time. This argument, the Court stated, confused the merits of the PBAs' grievances with the parties' intention to arbitrate the grievances. Because there was no exception in the CBAs to arbitration of retirement benefits, the parties had agreed to resolve this dispute through arbitration.

Judge Victoria A. Graffeo dissented in an opinion agreeing with the majority's articulation, but not application, of the relevant test. On the "may they arbitrate" prong, the dissent pointed to two statutory provisions that, it contended, bar arbitration of the instant disputes. Not only did the statutory amendment that made the provision of a 12-month calculation benefit available prohibit compulsory interest arbitration over the benefit, but Civil Service Law §201(4), a provision of the Taylor Law, excludes the provision of benefits under a public retirement system from the definition of "terms and conditions" of employment subject to collective bargaining. The purposes of the two provisions, respectively, are to "preclude employee bargaining representatives from obtaining this benefit unless the local legislative bodies authorize the Cities to offer it," and "due to the unique needs of administering a statewide retirement system," to restrict public employers from negotiating and granting retirements benefits in a CBA.

On the "did they agree" prong, Judge Graffeo argued that majority's focus upon whether there was a " reasonable relationship" between the subject matters of the disputes and of the CBAs ignored the right of a municipality to first determine whether it could afford to extend the benefit. "Because there is no legal authority for an arbitrator to extend such retirement benefits in the absence of municipal authorization," the dissent would have reversed the decisions below and stayed arbitration.

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[i] 476 U.S. 79 (1986). The Supreme Court has held that it is a violation of the Equal Protection Clause for a party to "exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's gender, ethnic origin, or race." *U.S. v. Martinez-Salazar,* 528 U.S. 304, 315 (2000), *citing*, inter alia, *Batson*.

[ii] Quoting *People v. Allen*, 86 N.Y. 2d 101, 110 (1995) (emphasis added).

[iii] See Matter of Acting Supt. of Schools of Liverpool Cent. School District, 42 N.Y.2d 509 (1977) and Matter of Board of Educ. of Watertown City School Dist., 93 N.Y.2d 132 (1999).