Circuit Court for Baltimore City
Case No. 116110012

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3439

September Term, 2018

DANIEL T. MILLS

v.

STATE OF MARYLAND

Meredith,*
Arthur,
Gould,

JJ.

Opinion by Meredith, J.

Filed: December 30, 2020

*Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of this Court, and after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

In *Mills v. State*, 239 Md. App. 258, 282 (2018), we concluded that the Circuit Court for Baltimore City had erred in its handling of a "*Batson* challenge" raised during jury selection at the trial of Daniel T. Mills, appellant. *See Batson v. Kentucky*, 476 U.S. 79 (1986). We noted that, although Mills pointed out that the State had exercised peremptory strikes to remove four African-American venirepersons, the trial court ruled that Mills had not made a prima facie showing of racial discrimination because the trial judge had conducted a statistical analysis of the jurors. 239 Md. App. at 270. As a consequence, the trial court denied the *Batson* challenge without asking the State to provide race-neutral explanations for the strikes. We held this was an error, and ordered a limited remand for reconstruction of the *Batson* hearing to consider whether the State had race-neutral reasons for the four challenged strikes. *Id*. at 273-74. But, because the trial judge retired from the bench soon after our opinion was filed, the trial judge was not available to hear the case on remand. The new judge assigned to consider the remand accepted the reasons provided by the State and affirmed the previously-entered judgments of conviction. This appeal followed.

QUESTIONS PRESENTED

In this appeal, we are asked to consider the following questions, which we have reordered as follows:

> 1. Whether the judge who conducted the remand proceeding should have disqualified himself based on his prior participation in this case as an Assistant Attorney General in the Criminal Appeals Division of the Office of the Attorney General and his failure to seek and obtain the agreement of the defendant and counsel to waive his disqualification.

> 2. Whether the *Batson* hearing on remand could be reconstructed fairly where the judge who presided over the defendant's trial was unavailable to conduct the remand and where defense counsel did not have access to his copy of the juror list.
>
> 3. Whether the trial court erred in finding that there was no race discrimination in jury selection under *Batson v. Kentucky*, 476 U.S. 79 (1986), based on a proffered justification by the prosecutor that was factually untrue.

For the reasons we will explain herein, we answer "yes" to the first question. Therefore, we will vacate the judgments of the circuit court and remand the case for a new trial. As a result of our conclusion, we do not reach Mills's other questions.

FACTUAL AND PROCEDURAL BACKGROUND

On April 25, 2017, Mills appeared for trial on charges of possession of cocaine and possession with intent to distribute cocaine (as well as possession of a firearm). In our previous opinion, we described the background for the *Batson* issue as follows:

> . . . [T]he parties commenced making additional strikes [of jurors] from the box. The State struck Juror 2132, a married, 61-year-old African-American female whose highest attained education level was indicated, "HS OR GED – NA" and whose occupation (as well as that of her spouse) was likewise indicated, "NA." In total (including Juror 2132), the State had made four peremptory strikes against African-American venirepersons. The others stricken by the State included Juror 2119, a single, 64-year-old male with a high school education; Juror 2155, a single, 60-year-old female with a high school education; and Juror 2164, a single, 39-year-old female with a high school education.
>
> At that point, the defense raised its . . . *Batson* challenge. In response, the State acknowledged, "I'll concede based on the pattern." The following colloquy then took place:
>
> THE COURT: Okay. But the pattern is still consistent. And –

[DEFENSE COUNSEL]: **The pattern of strikes is all African/Americans.**

THE COURT: **But the strikes left us with one, two, three, four whites, though I was expecting 3.3. And as far as males, one, two, three, four, five, when I was expecting 4.5.**[1]

Nothing the State has done has changed the -- the basic appearance of the way the jury would have looked had we just thrushed [sic] the crowd and said "Everyone run up and take a seat." So I'm going to deny the motion, as a prima facie case has not been established yet.

[DEFENSE COUNSEL]: Judge, can I just briefly be heard, that I -- **I don't think that necessarily the panel jury is the standard. It's whether the State is striking individual jurors because of their race.**

THE COURT: No. You see, if -- if 75 percent of the people who came in were black females, I would expect that 75 percent of the people who were stricken would be black females. That's why **I do a statistical analysis on how I'm expecting the jury to look and see whether or not actions taken by the parties is taking that out of balance.**

That I believe is part of what I'm required to do for the initial prima facie showing. It's not just a question of how many strikes you used against a particular group.

No matter how that would seem, it depends on how things are. Because, let's face it, most of the people who came into the room when we called for and ended up getting 57 people, most of the people were black females.

[1] The trial judge had previously explained to counsel that it was his practice to perform a "statistical analysis" of the venire panel, and his "initial scan indicated that the males constituted 37 percent, which means we ought to have about 4.5 men in the jury, and that the whites accounted for 27 percent, which means that we should have about 3.3 whites on the jury if they just -- the normal shuffle just filled up the jury box." 239 Md. App. at 269.

(Emphasis added [in our previous opinion].)

With that, the court denied Mills's *Batson* challenge.

Id. at 270 (footnote omitted).

We held that the trial court erred in determining that Mills failed to make a prima facie showing of racial discrimination to raise a challenge under *Batson*. *Id*. at 271. We explained: "The Supreme Court has expressly rejected a statistical test at the first step of the *Batson* analysis, observing that the 'Constitution forbids striking even a single prospective juror for a discriminatory purpose[.]' *Snyder v. Louisiana*, *supra*, 552 U.S. [472,] 478, 128 S.Ct. 1203 [(2008)] (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994))." *Id*. (footnote omitted). "[H]ad the circuit court applied the proper test—whether the opponent of the strikes had shown 'that the totality of the relevant facts gives rise to an inference of discriminatory purpose,' *Batson*, 476 U.S. at 94, 106 S.Ct. 1712—it would have been compelled to conclude that Mills had satisfied his initial burden." *Id*.

We further observed, 239 Md. App. at 272, that "the appropriate remedy" for the trial court's error was described as follows by the Court of Appeals in *Ray-Simmons v. State*, 446 Md. 429, 447 (2016):

> **[U]nless it is impossible to reconstruct the circumstances surrounding the peremptory challenges, due perhaps to the passage of time or the unavailability of the trial judge**, the proper remedy where the trial court does not satisfy *Batson's* requirements is a new *Batson* hearing in which the trial court must satisfy the three-step process mandated by that case and its progeny.

(Emphasis added.)

Because we were unaware of the imminent retirement of the trial judge, we were "not persuaded that it would be 'impossible to reconstruct the circumstances surrounding' the aborted *Batson* hearing," 239 Md. App. at 273 (quoting *Ray-Simmons*, 446 Md. at 447), and we concluded that a limited remand was "'worth the effort.'" *Id.* (quoting *Chew v. State*, 317 Md. 233, 239 (1989)).

We provided the following instructions for the proceedings to take place upon the limited remand:

> The procedure to be followed is that outlined in *Edmonds* [*v. State*], *supra,* 372 Md. 314, 812 A.2d 1034 [(2002)]—the circuit court must allow the prosecution an opportunity to set forth "race-neutral reasons" for its peremptory strikes, and it must then decide whether those reasons are bona fide or "pretextual." *Id.* at 341, 812 A.2d 1034. If the court finds that Mills "has met his burden of proving purposeful discrimination," it "shall order a new trial," but if it finds otherwise, then the judgments shall be affirmed. *Id.* at 341-42, 812 A.2d 1034.
>
> *See also Stanley*, 313 Md. at 77-80, 542 A.2d 1267.

Id. at 274.

The Post-Appeal *Batson* Hearing on Remand

Our opinion was filed on November 5, 2018. A hearing on remand was scheduled for December 6, 2018, and was initially assigned to the same trial judge who had presided over Mills's trial in 2017. On December 6, Mills's trial counsel and the prosecutor appeared, but, when the trial judge took the bench, he told counsel that the hearing would have to be rescheduled because Mills had not been transported to the courthouse, and the hearing could not proceed without him. The judge also advised

counsel that he was retiring in January 2019, and he would not be able to hear this case on remand because he was not planning to sit as a senior judge after his retirement. The transcript reflects:

> THE COURT: So, we're going to have to postpone this and it would have to be more than ten working days from now, and it could be anytime you want, and then I will, I guess, have to send this to the judge in charge of Criminal to have them assign somebody to do the hearing. So, when do you want to come back?
>
> [DEFENSE COUNSEL]: How about January 15, 16, 17?
>
> * * *
>
> THE COURT: January 17th. What time, 1:45 or 9:30?
>
> [DEFENSE COUNSEL]: I'll defer to the Court.
>
> THE COURT: I won't be here.
>
> [THE PROSECUTOR]: You're not going to come back?
>
> THE COURT: No, sir. I will not be able to come back that day. I cannot come back. I am leaving on the 12th, and although I'll be on vacation thereafter, I'm not making plans to come back. But on the 17th, I will be someplace else.

The parties returned on January 29, 2019, to attempt to reconstruct the balance of the *Batson* hearing. While the parties waited for Mills to be brought to the courtroom from lockup, the new judge assigned to hear the remand greeted counsel, and then made the following statement:

> THE COURT: Just in the interest of full disclosure, Mills went to the [A]ttorney [G]eneral's [C]riminal [A]ppeals [D]ivision while I was there. I did not work on the case.
>
> [THE PROSECUTOR]: Right.

> THE COURT: I dimly remember [Assistant Attorney General] Gary O'Connor mentioning the case as sort of, what am I going to do with this one. So that's --
>
> [DEFENSE COUNSEL]: Did you tell him what to do is my next question, I guess?
>
> THE COURT: -- about the extent.
> I told him the best he could possibly hope for was a limited remand, so --
>
> [THE PROSECUTOR]: Very good, Your Honor.
>
> THE CLERK: Do you want to call this case for the record?
>
> [THE PROSECUTOR]: Yes. Calling State of Maryland versus Daniel Mills, case number 116110012. [Counsel] on behalf of the State.
>
> [DEFENSE COUNSEL]: [Counsel] for Mr. Mills who I understand is in the lockup downstairs.
>
> THE COURT: Okay. Yes. We'll wait for him to get up here.

While the parties continued to wait for Mills to be brought to the courtroom, defense counsel tried to locate in the court's file his copy of the jury venire list, which contained his notes regarding the prospective jurors. Counsel were soon made aware that the clerk's office said that their personal copies of the jury lists had been transmitted to the Court of Special Appeals, but had not yet been returned to the circuit court. The prosecutor pointed out, however, that the trial judge's personal copy of jury venire list was not part of the record on appeal that had been sent to Annapolis, but was present in the circuit court file, though under seal.

After Mills arrived in the courtroom, the judge did not repeat what he had disclosed to defense counsel and the prosecutor regarding his conversation with his

colleague who was handling Mills's appeal for the Attorney General's Criminal Appeals Division. Nor did the judge offer defense counsel and Mills an opportunity to discuss in private the implications of the judge's former association with the Criminal Appeals Division.

But defense counsel raised a "preliminary argument" regarding the feasibility of the reconstructing the circumstances surrounding the contested peremptory challenges at Mills's trial. Defense counsel argued that the participation of the trial judge who presided over Mills's trial in 2017 was necessary for a "proper recreation of the *Batson* event." The prosecutor disagreed, arguing that any circuit court judge could rule on the issue of whether the State's reasons were race-neutral or not. The judge ultimately rejected defense counsel's preliminary argument.

Next, the judge unsealed the trial judge's personal copy of the jury venire list, and the prosecutor began to explain his reasons for exercising the peremptory strikes to remove the four African-American jurors who had not responded to any questions on voir dire. Beginning with Juror 2119 (who was listed as a "64-year-old African-American man with a high school or GED education"), the prosecutor explained:

> [THE PROSECUTOR]: **Your Honor, State's primary basis for that strike was the potential juror's failure to list occupation.**
>
> THE COURT: Okay.
>
> Let's take them one at a time. So counsel. I don't see in here anybody with -- without an occupation who was not struck up through the list we're talking about.

> Do you agree everybody was either struck for cause or **it looks like at least three of the four** --
>
> [THE PROSECUTOR]: **I can tell Your Honor now that --**
>
> THE COURT: -- were --
>
> [THE PROSECUTOR]: **-- that was the basis for four strikes.**
>
> THE COURT: **For all four strikes?**
>
> [THE PROSECUTOR]: **With [sic] the occupation.**
>
> THE COURT: And I don't see anybody with no occupation listed who made it on this jury. Is that --
>
> THE CLERK: They don't have the list, the jury list because it is still at [the] [C]ourt of [S]pecial [A]ppeals.
>
> THE COURT: Okay.
>
> THE CLERK: And it haven't came [sic] back yet.

(Emphasis added.)

Defense counsel argued to the judge that the proffered rationale did not hold up because, according to defense counsel, the State initially permitted Juror 2132 to be seated as a juror, but thereafter struck that juror "from the box." The prosecutor provided further explanatory comments about striking these four African-American jurors (*i.e.*, Jurors 2132, 2119, 2155, and 2164):

> [THE PROSECUTOR]: Well, I don't think I ever said I only – as a rule, I strike people without jobs.
>
> **And I say, in this particular situation, it wasn't merely that I thought they didn't have jobs. I think it was more that they failed to list jobs, which I see as a failure to follow instructions.**

> And I don't want a juror who is not going to be following instructions and paying attention specifically the instruction to -- to, you know, judge just based on the facts and render a decision based entirely on the facts and the understanding of reasonable doubt which is a completely complicated issue.
>
> So I want jurors who can actually pay attention and follow instructions. And when I see a juror sheet, and I see spaces filled out or not filled out that is a red flag for me.

(Emphasis added.)

Ruling from the bench, the judge explained that, if the prosecutor had provided "subjective reasons"—such as, "I don't like the way that person looked[,] I don't like the way that person was dressed"—the judge believed he "would have had no choice, under those circumstances, . . . [but to] set this matter back for new trial." But the judge concluded that the failure to list an occupation was a factor he could assess objectively:

> [THE COURT]: But, you know, what **I find** is remarkable consistency here, **that no juror that didn't list an occupation was seated. That is the sort of objective and consistent thing that is very easy for the Court to assess. It is clearly race-neutral and not** -- and not a -- **not pretextual under these circumstances.**
>
> So I appreciate your argument. But I find that these were legitimate jury strikes not on the basis of race or gender. And so the Batson challenge is again denied.

(Emphasis added.)

This timely appeal followed.

DISCUSSION

WHETHER THE JUDGE WHO CONDUCTED THE REMAND PROCEEDING SHOULD HAVE DISQUALIFIED HIMSELF

As noted above, before this remand hearing began, the new judge assigned to conduct the limited remand hearing informed defense counsel and the prosecutor (at a time when Mills was not in the courtroom) that he had been an Assistant Attorney General in the Criminal Appeals Division of the Maryland Office of the Attorney General when Mills's direct appeal reached that Division. The judge also disclosed the fact that, during the period when he was still employed in the Criminal Appeals Division, he had a conversation about Mills's appeal with the Assistant Attorney General representing the State in Mills's direct appeal, wherein the attorney asked the future judge "what am I going to do with this one," and the judge had told his colleague that "the best he could possibly hope for was a limited remand."

Parties' Contentions

Mills contends on appeal that the remand judge failed to comply with the Maryland Code of Judicial Conduct relative to disqualification from hearing a case in which the judge's impartiality might reasonably be questioned. *See* Maryland Rule 18-102.11.

The State contends that Mills's argument that the judge's history with the case required further action under Rule 18-102.11 "grossly exaggerates" the judge's past involvement in Mills's case. The State asserts that the judge's "de minimis role in Mills's appeal did not trigger the disqualification procedure outlined in Rule 18-102.11."

The State also characterizes the judge's response to his then-fellow Assistant Attorney General as an "off-the-cuff" opinion that was expressed when the colleague was "wondering aloud" what he should do with Mills's case, and did not rise to the level of participating personally and substantially as an attorney in the matter.

Standard of Review

Interpretation of the Maryland Rules is a question of law we consider *de novo* on appeal. *Hartford Fire Insurance Company v. Estate of Sanders*, 232 Md. App. 24, 39 (2017) ("When a pure question of law comes before either this Court or the Court of Appeals, the standard of review is *de novo* . . . ."). When construing the Maryland Rules, "'we apply principles of interpretation similar to those used to construe a statute.'" *Rawlings v. Rawlings*, 362 Md. 535, 555 n.19 (quoting *Holmes v. State*, 350 Md. 412, 422 (1998)).

Analysis

In Maryland, the professional standards applicable to judges are found in the Maryland Code of Judicial Conduct, Rule 18-100.1, *et seq*. (the "MCJC").[2]

The Court of Appeals has long recognized: "It is, of course, important that the judicial process not only be fair, *but that it appear to be fair*." *Boyd v. State*, 321 Md. 69,

[2] The MCJC is "based in large part on the 2007 Model Code of Judicial Conduct proposed by the American Bar Association (ABA Model Code)," although there are some differences with respect to certain provisions, the style, and organization. Maryland Rule 18-100.1(a). "Most of the differences are necessary for consistency with the Maryland Constitution, Maryland statutes, and other Maryland Rules." Maryland Rule 18-100.1(a).

85-56 (1990) (emphasis added). *See also Smith v. State*, 64 Md. App. 625, 635 (quoting *Scott v. State*, 289 Md. 647, 655 (1981)) ("The law requires the trial of a defendant not only to be fair but to give every appearance of being fair.").

Rule 18-102.11(a)(1)-(5) informs judges of particular situations in which the judge is disqualified because "the judge's impartiality might reasonably be questioned." Under Rule 18-102.11(c), a judge may sometimes avoid recusal by disclosing the reason that the judge believes potentially disqualifies the judge from hearing or deciding the matter. If the judge has disclosed the potential basis for disqualification, Rule 18-102.11(c) requires that the judge also provide litigants an opportunity to consider waiving the judge's disqualification under prescribed circumstances. Since August 1, 2017, Rule 18-102.11 has provided in pertinent part:

> **RULE 18-102.11. DISQUALIFICATION (ABA RULE 2.11)**
>
> **(a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including the following circumstances**:
>
> * * *
>
> (5) **The judge:**
>
> (A) served as an attorney in the matter in controversy, or **was associated with an attorney who participated substantially as an attorney in the matter during such association;**
>
> (B) served in governmental employment, and in such capacity participated personally and substantially as an attorney or public office concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy; . . . .

* * *

(c) A judge subject to disqualification under this Rule, other than for bias or prejudice under subsection (a)(1) of this Rule, **may disclose on the record the basis of the judge's disqualification and may ask the parties and their attorneys to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and attorneys agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.**

(Emphasis added.)

The official comment to Rule 18-102.11 provides further guidance:

COMMENT

[1] **Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of subsections (a)(1) through (5) apply. In this Rule, "disqualification" has the same meaning as "recusal."**

[2] **A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.**

* * *

[4] A judge should disclose on the record information that the judge believes the parties or their attorneys might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[5] This procedure gives the parties an opportunity to waive the recusal if the judge agrees. The judge may comment on possible waiver but must ensure that consideration of the question of waiver is made independently of the judge. A party may act through an attorney if the attorney represents on the record that the party has been consulted and consents. As a practical matter, a judge may request that all parties and their attorneys sign a waiver agreement.

(Emphasis added.)

As noted in Comment [2], quoted above, the judge's obligation to recuse (if applicable at all) "applies regardless of whether a motion to disqualify is filed." And this Court has held that a party's failure to move for recusal in the circuit court does not preclude us from exercising our discretion to review the issue on appeal. *Scott v. State*, 110 Md. App. 464, 486-87 (1996) (a judge's failure to recuse is one of the "limited category of issues . . . which an appellate court ordinarily will address even though they were not raised by a party"); *Smith v. State*, 64 Md. App. 625, 631-34 (1985). Accordingly, even though Mills did not specifically move for recusal, we exercise our discretion to review the contention Mills raises on appeal that the judge assigned to conduct the limited remand had an obligation to recuse himself from the remand hearing unless he obtained the parties' waiver.

As previously mentioned, Rule 18-102.11(a)(5)(A) identifies, as one of the circumstances that disqualifies a judge, the circumstance that "[t]he judge . . . **was associated with an attorney who participated substantially as an attorney in the matter during such association.**" It appears to us that, in this case, the assigned judge was "associated with an attorney" who "participated substantially as an attorney in the matter during such association," *i.e.*, at a time when both the future judge and the Assistant Attorney General handling the appeal were both attorneys working in the Criminal Appeals Division. And we were told at oral argument that there were approximately 18 attorneys in that Division.

Although the State focuses on the limited extent of participation *by the judge* regarding Mills's direct appeal, Rule 18-102.11(a)(5)(A) does not require that *the judge's* participation in the litigation be "substantial." All that is required is that the judge have been "**associated with** an attorney who participated substantially as an attorney in the matter during such association." (Emphasis added.) There appears to be no dispute that the judge and the attorney assigned to handle Mills's direct appeal were, at that time, associated with each other as colleagues in the Criminal Appeals Division. Accordingly, we conclude that the disqualification provision of Rule 18-102.11(a)(5)(A) was applicable.

And, although it might have been possible for the judge to proceed with the remand hearing if all parties had knowingly waived the appearance of partiality pursuant to the procedures set forth in Rule 18-102.11(c), that did not happen here. The disclosure of the association was never repeated after Mills arrived in the courtroom, and the judge never provided an opportunity for the "the parties and attorneys [to] agree, without participation by the judge or court personnel, that the judge should not be disqualified." *Id.*

In cases in which the trial judge has not properly handled a *Batson* challenge to a party's exercise of peremptory strikes, we have held (as we did on direct appeal in Mills's case) that an appropriate remedy is to order a limited remand to give the trial court an opportunity to "reconstruct the circumstances surrounding the peremptory challenges . . . [and] satisfy the three-step process mandated by [*Batson*] and its progeny." *Edmonds v.*

State, 372 Md. 314, 339-40 (2002). *See Mills*, 239 Md. App. at 272-73. But, when the circumstances surrounding the peremptory challenges are "impossible to reconstruct . . . due perhaps to the passage of time or the unavailability of the trial judge," the appropriate remedy for the trial court's failure to initially satisfy the requirements of *Batson* is to remand the case for a new trial. *Ray-Simmons*, 446 Md. at 447. *See also Spencer v. State*, 450 Md. 530, 564-65 (2016). We conclude that yet another limited remand of this case for the circuit court to try again to reconstruct the *Batson* hearing before another new judge is not the appropriate remedy in the instant case for two reasons: the passage of time and the unavailability of the trial judge who conducted jury selection. *See Ray-Simmons*, 446 Md. at 447; *Edmonds*, 372 Md. at 339-40.

We agree with the State's observation that "nothing in *Edmonds* or *Ray-Simmons* suggests that the new *Batson* hearing must be conducted by the same judge who presided over the trial." But we note that the Court of Appeals in *Edmonds*, 372 Md. at 339-40, clearly indicated that "the unavailability of the trial judge" or "the passage of time" can render the reconstruction of the circumstances surrounding the peremptory challenges impossible. And, at this point, both of those factors are present.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED; CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY MAYOR AND CITY COUNCIL OF BALTIMORE.