

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIAPOLIS SMITH,

Defendant-Appellant.

UNPUBLISHED

May 7, 1999

No. 172558

Kent Circuit Court

LC No. 92-060735-FC

AFTER REMAND

Before: Hoekstra, P.J., and Markey and J.C. Kingsley*, JJ.

HOEKSTRA, P.J. (concurring in part and dissenting in part).

I concur in parts II and III of the majority's opinion; however, I would hold in part I that defendant has not satisfied the third prong of the test set forth in *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

I agree that defendant satisfied the first prong of the *Duren* test because African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes. Moreover, I agree that defendant satisfied the second prong of the *Duren* test because the evidence produced upon remand revealed that the number of African-Americans in the venires from which juries are selected was not fair and reasonable in relation to the census numbers indicating the number of African-Americans who are living in the community. However, my examination of the evidence produced upon remand causes me to diverge from the majority's conclusion that defendant also satisfied the third prong of *Duren*, which is that the underrepresentation of African-Americans is due to systemic exclusion of the group in the jury-selection process.

In my view, the lower court did not clearly err in finding that the underrepresentation was not due to systemic exclusion of the group in the jury-selection process. Specifically, the evidence produced on remand revealed that when the court changed its process for the 1993-94 jury year from first selecting names of jurors to serve in district court to first selecting names of jurors to serve in circuit court, the underrepresentation of African Americans only slightly decreased. The statistician testified that the underrepresentation for both jury years was "very consistent." Thus, in the year after defendant's jury was chosen, no statistically significant change occurred when the system stopped

“draining” the largest concentration of African-Americans from the master jury list by first selecting district court jurors.

Moreover, the evidence produced at the hearing below did not demonstrate that the underrepresentation lingering after reversal of that portion of the selection process was due to systemic exclusion of African-Americans in the jury-selection process. Rather, the evidence proffered in this regard was the testimony of Kurt Metzger, who attributed the underrepresentation to factors *outside* the jury selection process. Kurt Metzger expressly opined at the evidentiary hearing below that the reasons African-Americans do not respond to census inquiries are likely the same as those for not responding to a jury questionnaire. These reasons included Metzger’s general assertion that a higher percentage of African-Americans than Caucasians willingly express distrust for the government and judiciary as well as several more specific economic factors that were disproportionately higher in the African-American community.

Of course, I do not reject the proposition that systemic exclusion may exist, only that defendant has not made the requisite showing on the record produced in this case. We cannot conclude that the underrepresentation was due to systemic exclusion such as that described in *People v Hubbard (After Remand)*, 217 Mich App 459; 552 NW2d 493 (1996), simply because the jury-selection systems once contained similarities. In *Hubbard, supra* at 480, this Court could conclude that “[t]he evidence produced on remand reveals that the jury allocation process employed by Kalamazoo county before July 1992—and not random selection—caused the underrepresentation.” The record in this case does not support the same conclusion.

Accordingly, I would find that the trial court did not clearly err in making its findings of fact on the record below nor did the trial court abuse its discretion in denying defendant’s motion for a new trial.

/s/ Joel P. Hoekstra