IN THE SUPREME COURT OF FLORIDA

CASE NO. 62,098

FREDDIE C. JONES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

* *

SUPPLEMENTAL BRIEF OF APPELLEE

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INTRODUCTION

The appellant was the defendant in the court below. The appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appeared in the trial court. The symbol "R" will be used to designate the record on appeal. The symbol "T" will be used to designate the trial transcript. All emphasis has been supplied unless the contrary is indicated.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The jury pool consisted of sixty-two prospective jurors (R.1607-1616), fifty-two whites and ten blacks. (T.851). Of the ten blacks, three were excused for cause on the issue of capital punishment, one was selected to sit on the jury, and the remaining six, Calvin Mapp, Jr., Angela Capers, Celeste Owens, Ron Sneed, Lonnie Branch and James Bunyon were excused by peremptory challenge by the State. (R.851).

On voir dire, it was ascertained that Calvin Mapp, Jr., was the son of Dade County Court Judge, Criminal Division, Calvin Mapp, Sr. (T.298). Mr. Mapp was questioned extensively by the State as to his relationship with his father, whether they ever spoke about cases, or if the spoke about his view of the legal system. (T.374).

Angela Capers informed the State that she did not have philosphical or moral objections to capital punishment. (T.518). However, she told defense counsel that she was against the death penalty, and depending on the circumstance of the case, it might affect her judgment as to guilt or innocence. (T.574). The trial court advised both parties that when he was a prosecutor, he had prosecuted the Capers brother and was concerned that Miss Capers was related to them. (T.569).

Celeste Owens, worked for the Social Services Department of Dade County, Human Resources Department. She was center director for a neighborhood center and work with juveniles. (T.319, 621). She advised that she had contact with youngsters who got into trouble with the law and helped them through the experience. (T.621-622). Further, she advised that she had two children, 18 and 19 years old. (T.319).

Ron Sneed advised that at one time, he had taken criminology courses. (T.707).

Lonnie Branch stated that he was an active Baptist. (T.709). When asked by both the State and the Defense if he was for the death penalty, he answered evasively by stating that he was not against it. (T.674, 710).

James Bunyon's son was charged with the crime of breaking and entering. (T.313). He advised that his son was a juvenile when charged and that he was tried as an adult. He indicated that many charges were filed against his sone, but it was resolved satisfactorily before trial. (T.534). He also stated he was a witness to a shooting, gave a deposition but no charges were ever filed. (T.535).

SUPPLEMENTAL POINTS INVOVLED ON APPEAL

I

WHETHER THE RECORD CLEARLY EVIDENCES THAT THE STATE'S USE OF ITS PEREMPTORY CHALLENGES WERE NOT USED IN A DISCRIMINATORY MANNER TO SYSTEMATICALLY EXCLUDE BLACKS.

II

WHETHER THE HOLDING IN STATE V. NEIL, No. 63,899 (FLA. SEPT. 27, 1984) IS APPLICABLE TO PIPELINE CASES (THOSE PENDING ON APPEAL PRIOR TO THE NEIL DECISION).

ARGUMENT

I

THE RECORD CLEARLY EVIDENCES THAT THE STATE'S USE OF ITS PEREMPTORY CHALLENGES WERE NOT USED IN A DISCRIMINATORY MANNER TO SYSTEMATICALLY EXCLUDE BLACKS.

In State v. Neil, No. 63,899 (Fla. Sept. 27, 1984), this Court rejected the Swain test, and instead implemented the following test to determine if peremptory challenges are being used in a discriminatory fashion:

> ...The initial presumption is that peremptories wil be exercised in a nondiscriminatory manner. A party concerned about the other side's use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the

> court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool.

In footnote 10, this Court stated:

> We agree with Thompson that the exclusion of a number of blacks by itself is insufficient to trigger an inquiry into a party's use of peremptories. It may well be that the challenges were properly exercised but that that fact would not be apparent to someone not in attendance at the trial. The propriety of the challenge, however, might be readily apparent to the judge presiding over the voir dire. We emphasize that the trial court's decision as to whether or not an inquiry is needed is largely a matter of discretion.

In the case sub judice, the record clearly shows that the challenged peremptories were properly exercised based upon the answers elicited during voir dire as related to the facts of the case.

It is clear that Calvin Mapp, Jr. was stricken from the

jury because he was the son of an active misdemeanor Dade County Court Judge. (T.292). The State's extensive questioning of his relationship with his father, shows that the State would have struck him regardless of his race. (T.374).

Angela Capers gave conflicting answers as to whether she was for or against the death penalty. Further, she testified that her views on the death penalty could, depending upon the circumstances, affect her judgment on the guilt or innocence portion of the trial. (T.518, 574). Since these answers did not meet the Witherspoon requirements for the striking for cause, the State in order to insure that it would have an impartial jury is a capital case, properly struck Miss Capers.

Likewise, Lonnie Branch was properly struck on the basis of his views concerning the death penalty. Both the State and the Defense asked if he was for capital punishment. Each time his answer was evasive. Instead of saying yes or no, he stated that he was not against it. (T.674-710). This evasiveness, along with the fact that he was active in his religion, was sufficient to raise the specter of partially against the death penalty. Therefore, this strike was also proper.

Celeste Owens stated that in her occupation, she came into contact and helped juveniles who got involved in the legal system. (T.621-622). Since the Defendant herein was 25 years old and his only defense against the imposition of the death was that he never was involved with the law prior to this incident, the State correctly struck her on the assumption tht she too would be against imposing the death penalty on a first time offender.

Ron Sneed advised that he taken criminology courses (T.707). The State's case fingerprint evidence, ballistics identification, and tire tracks comparisons. (T.1101, 1108, 1177). The State's striking of Mr. Sneed is based on the fact tht he could, with his limited and non-expertise knowledge of criminology, have a improperly swayed the rest of the jury by bringing his knowledge into the deliberations. As such, this strike was also proper.

Finally, James Bunyon stated that his son was charged with breaking and entering when he was a juvenile, but was bound over to be tried as an adult. He also stated it was resolved prior to trial. (T.313, 534). The State's striking of Bunyon is supported by the fact that he was involved in the criminal justice system and that since his son was given a second chance, why should not the defendant be given the same second chance. His striking was done based on partiality rather than race.

The State submits that the defendant could not have, at trial, established that the use of the peremptory challenges were based soley because of race. This is even clearer when the fact that one of the petit jurors was black. Therefore, the dismissal of this jury pool would have been inappropriate.

The State further submits that in certain cases, the dismissal of the entire panel for discriminatory use of peremptory challenges is too drastic a remedy. In the instant case, the jury pool consisted of sixty-two people. The defendant is only challenging the striking of six potential jurors on the basis of race. If the trial court wasn't satisfied as to the reasons, for one or two of the State challenges, the State submits the appropriate remedy would be to vacate the challenges and require these individuals to be part of the petit jury. This is the type of alternate remedy the Courts of Massachusetts are formulating in effectuating Commonwealth v. Soares, 377 Mass. 401, 387 N.E.2d 499 cert. denied, 444 U.S. 551 (1979). See Commonwealth v. Reid, 424 N.E.2d 495 (Mass. 1981).

II

THE HOLDING IN STATE V. NEIL, NO. 63,849 (FLA. SEPT. 27, 1984), IS INAPPLICABLE TO PIPELINE CASES (THOSE PENDING AN APPEAL PRIOR TO THE NEIL DECISION).

The case sub judice was pending before this Court prior to the Third District's decision in Neil. Therefore, the State submits that based upon the following analysis, Neil is inapplicable to the case sub judice.

This Court should consider the clear import of Williams v. United States, 401 U.S. 646 (1971) and Michigan v. Payne, 412 U.S. 47 (1973) and reach a conclusion in conformity with the holding of the United States Supreme Court in Bowen v. United States, 422 U.S. 916 (1975) which declined to apply a new constitutional rule of criminal procedure to cases in the pipeline (on direct appeal).

In Bowen, the defendant was stopped by border patrol authorities who discovered contraband in Bowen's vehicle. This led to defendant's conviction on certain drug-related offenses in federal court. Following the affirmance of his convictions by the Ninth Circuit Court of Appeals, defendant petitioned for certiorari to the United States Supreme Court. That petition was still pending when the Court announced its decision in Almeida-Sanchez v. United States,

413 U.S. 266 (1973), which invalidated the use of roving patrols to search motor vehicles with neither a warrant nor probable cause, at points removed from the border and its equivalents. Shortly, thereafter, the court granted Bowen's petition, vacated the judgment below and remanded the matter to the Court of Appeals for further consideration in light of Almeida-Sanchez v. United States.

The Court of Appeals considered whether the new rule of law promulgated in that case was properly to be applied to events occurring before its announcement and concluding that the mandate of Almeida-Sanchez would not be applied to invalidate border patrol searches conducted prior to the date of that decision, reaffirmed Bowen's convictions. See United States v. Bowen, 500 F.2d 960 (9th Cir. 1974). Said Court relied upon Williams v. United States, and Michigan v. Payne, supra, as authority for not applying Almeida-Sanchez to the "pipeline" cases--that is cases on appeal, and said:

> The only remaining question is the date upon which Almeida-Sanchez would become applicable to searches at fixed checkpoints. Some would argue that there should be at least a limited retroactivity, requiring us to apply the new rule to those cases involving searches at fixed checkpoints that are now on direct appeal. These are the so-called "pipeline" cases. We reject this approach and hold that Almeida-Sanchez applies only to searches at

fixed checkpoints after June 21, 1973, the date of Almeida-Sanchez decision. The Supreme Court's recent decisions indicate that the pipeline theory does not enjoy majority approval. See Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967,18 L.Ed.2d 1199 (1967). The Court had precisely that issue before it in Williams v. United States, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971), and a majority declined to apply the new rule either to the cases in the pipeline (on direct appeal) or to the cases that were before the Court on collateral attack. Only Justices Brennan and Marshall supported the pipeline theory.

In Michigan v. Payne, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973), the Court again adopted limited prospectively, i.e., only the challenging appellant would benefit from the new rule. In Payne, the Court held that the prophylactic limitations established in North Carolina v. Pearce, 395 U.S. 711, 723-726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), would not be applicable to resentencing proceedings that occurred prior to the date of the Pearce decision, even though Payne's appeal was in the pipeline when Pearch was decided. Justice Marshall, dissenting, concluded that "considerations of fairness rooted in the Constitution [require] that cases in the pipeline when a new constitutional rule is announced must be given the benefit of that rule." 412 U.S. at 60. None of the other justices joined in this part of his dissent and Justice Marshall himself admitted that, other than exceptions not applicable in this case, all "constitutional rules of criminal procedure have been given prospective effect only." 412 U.S. at 62 (footnote omitted). He noted

> that limited retroactivity, as applied in Linkletter [381 U.S. at 622], was an "anomaly." It would be unwise for us to adopt the pipeline theory when the Court has declined to apply it.
>
> 500 F.2d at 979-980.

Bowen applied for certiorari and after granting the writ, the United States Supreme Court citing to Michigan v. Payne and United States v. Peltier, 422 U.S. 531 (1975) another case relied on by the State in its brief, held the Fourth Amendment exclusionary rule would not be served by applying the principles of Almeida-Sanchez, supra, retroactively and AFFIRMED the decision of the Court of Appeals!

For a liking holding as it related to the application of Delaware v. Prouse, 440 U.S. 648 (1979) upon cases pending on appeal when that case was decided see State v. Carpentieri, 414 A.2d 966 (N.J. 1980).

In Neil, this Court relied on Article I, Section 16 of the Florida Constitution, which guarantees the right to an impartial jury, to hold that peremptory challenges are to be exercised in a non-discriminatory manner. Further, this Court held that the Swain test of evaluating peremptory challenge impedes, the Florida's Constitution's right to an impartial jury and therefore from the use of a the Swain

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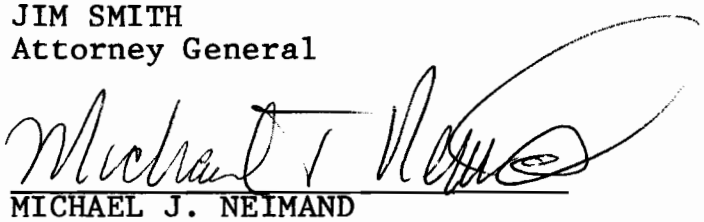
test. Rather, this Court established its own test to determine that the right to be an impartial jury as guaranteed by Article I, Section 16 is preserved. Therefore, the State submits, in accordance with the foregoing analysis, that this clarified constitutional rule of criminal procedure is inapplicable to cases in the pipeline (on direct appeal).

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the judgment and sentence of the lower court should clearly be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief of Appellee was furnished by mail to JOEL V. LUMER AND KATHLEEN PHILLIPS, Attorneys for Appellant, 711 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, on this 5 day of October, 1984.

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