FLORIDA SUPREME COURT

Case No. 62,098

FREDDIE C. JONES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT

Criminal Division

Case No. 81-23460(A)

SUPPLEMENTAL BRIEF OF APPELLANT

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INTRODUCTION

This brief is filed on behalf of appellant, Freddie C. Jones, in reply to the Supplemental Brief of Appellee filed by the State of Florida. All references to the transcript of proceedings at the trial beginning on March 29, 1982 will be abbrievated with the letter T.

ARGUMENT

I.

THE RULE OF STATE V. NEIL SHOULD BE APPLIED TO THE PRESENT CASE

The state has overlooked the case of Andrews v. State, __So.2d__, 9 F.L.W. 432 (Fla. 1984). In Andrews, this court applied the rule of State v. Neil, __So.2d__, 9 F.L.W. 423 (Fla. 1984), to a case pending on appeal before this court at the time the Neil decision was rendered.

The general law in Florida on this point was announced in Lowe v. Price, 437 So.2d 142 (Fla. 1984), the court there saying:

> Decisional law and rules in effect at the time an appeal is decided govern the case even if there has been a change since time of trial.

Lowe, supra at 144. Lowe was a criminal case involving whether a defendant should be discharged because time had run under the speedy trial rule.

The Florida Supreme Court has traditionally applied new rules of criminal law to cases pending on appeal when the new rule was announced. For examples of this practice see Spurlock v. State, 420 So.2d 875,877 (Fla. 1982); State v. Rickard, 420 So.2d 303, 306-307 (Fla. 1982); and Hoberman v. State, 400 So.2d 758 (Fla. 1981).

The decision in State v. Neil, supra, rests in part on the cases of People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978) and Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 cert. denied, 444 U.S. 881 (1979). People v. Wheeler, supra, held at footnote 31 that the rule of the case would apply to "any defendant now or hereafter under sentence of death." In Commonwealth v. Clark, 378 Mass. 392, 393 N.E.2d 296,305, n. 17 (1979), the court held that the Soares rule would apply to cases pending on direct appeal at the time of the Soares decision.

The standards of United States v. Bowen, 500 F.2d 960 (9th Cir. 1974) and State v. Carpentieri, 82 N.J. 546, 414 A.2d 966 (1980), that are argued by the state, were rejected by the United States Supreme Court in United States v. Johnson, 457 U.S. 537 (1982). Both Bowen and Carpentieri involved improper searches. The Johnson court announced at page 562:

> We therefore hold that, subject to the exceptions stated below, a decision of this Court construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.

By final the court means that the judgment of conviction was rendered, the availability of appeal exhausted and either the the time for a petition for certiorari had elapsed or the petition had been denied. Johnson, supra at 542, n. 8. A case pending on direct review is one that is not yet final. Johnson, supra at 555-556.

The two (2) U.S. Supreme Court cases that deal with improper jury selection or function and application of a new rule to cases

on appeal are Witherspoon v. Illinois, 391 U.S. 510 (1968), and Brown v. Louisiana, 447 U.S. 323 (1980). The Witherspoon opinion says at footnote twenty-two (22):

> But we think it clear, Logan notwithstanding, that the jury-selection standards employed here necessarily undermined "the very integrity of the . . . process" that decided the petitioner's fate, see Linkletter v. Walker, 381 U.S. 618,639, and we have concluded that neither the reliance of law enforcement officials, cf. Tehan v. Shott, 382 U.S. 406,417: Johnson v. New Jersey, 384 U.S. 719,731, nor the impact of a retroactive holding on the administration of justice, cf. Stovall v. Denno, 388 U.S. 293,300, warrants a decision against the fully retroactive application of the holding we announce today.

The Brown court explains why a rule concerning the proper performance of the function of the jury should be applied retroactively as follows:

> It is difficult to envision a constitutional rule that more fundamentally implicates "the fairness of the trial - the very integrity of the fact-finding process." Linkletter v, Walker, 381 U.S., at 639. "The basic purpose of a trial is the determination of truth," Tehan v. United States ex rel. Shott, 382 U.S. 406,416 (1966), and it is the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases. Any practice that threatens the jury's ability properly to perform that function poses a similar threat to the truth-determining process itself. The rule in Burch was directed toward elimination of just such a practice. Its purpose, therefore, clearly requires retroactive application. (footnote omitted).

Brown, supra at 334.

Even before the ruling in United States v. Johnson, supra, the U.S. Supreme Court had consistently held that where the purpose of a new constitutional doctrine was to overcome a problem that concerned the truth finding function (as opposed to a rule that merely excluded evidence) that rule would be applied

to cases pending on appeal. Hankerson v. North Carolina, 432 U.S. 233,243 (1977); United States v. Peltier, 422 U.S. 531,535 (1975); and Robinson v. Neil, 409 U.S. 505,508-509 (1973). The composition of a jury and determination of who can be excluded does concern and affect the truth finding function of a trial. Taylor v. Louisiana, 419 U.S. 522,530 (1975). Thus, under the standard of Hankerson, Peltier and Robinson, the rule of State v. Neil, supra, should be applied to cases pending on appeal.

The analysis set forth in Stovall v. Denno, 388 U.S. 293 (1967), may or may not be applicable to the case at bar. Compare United States v. Johnson, supra, which strongly implies that it is not with Solem v. Stumes, __U.S.__, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984), which implies that it might. The Stovall analysis addresses three (3) factors in determining whether a case will be applied retroactively: (a) the purpose to be served by the new standard, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. Stovall, supra at 297. Factor (a) is of foremost importance. Desist v. United States, 394 U.S. 244,249 (1969). Factors (b) and (c) are relied on only where factor (a) does not clearly favor retroactively or prospectively. Desist, supra at 250.

In examining factor (a), we look to see if the new rule was fashioned to correct flaws in the factfinding process at trial. Stovall, supra at 298. Where the new rule is fashioned to overcome such a problem, then it is to be applied retroactively regardless of the other two (2) factors. Williams v. United States,

401 U.S. 646,653 (1971). Since the rule of Neil v. State, supra, was intended to correct a flaw in the factfinding process, it should be applied to cases pending on appeal.

In examining factor (b), it has been nowhere asserted by the state that it used its peremptory challenges to exclude black people from juries in a good faith reliance on Swain v. Alabama, 380 U.S. 202 (1969). In this regard, "good faith" and exclusion of jurors because of their race would appear to be mutually exclusive concepts. Analysis under this factor also includes a determination of whether the ruling in Neil was foreshadowed in other prior cases. Stovall v. Denno, supra at 299. As explained in the Neil opinion, its ruling was foreshadowed by Taylor v. Louisiana, 419 U.S. 512 (1975); People v. Wheeler, supra; Commonwealth v. Soares, supra; People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 739 (2d Dist. 1981); and McCray v. Abrams, 576 F.Supp. 1244 (E.D.N.Y. 1983). The ruling was also foreshadowed by Duncan v. Louisiana, 391 U.S. 145 (1968); Carter v. Greene County, 396 U.S. 320 (1969); and Peters v. Kiff, 407 U.S. 493 (1972). When taken together these three (3) cases hold that there is a Sixth Amendment due process right to a jury taken from a fair cross-section of the commmunity that is different from the equal protection right described in Swain v. Alabama, supra, and that this Sixth Amendment right includes the idea that black persons cannot not be excluded from jury service because of their race.

Appellant is unaware of the statistics that would be needed to properly analyze factor (c). In making this analysis appellant asks the court to look only at those cases 1) where the issue of racially based use of peremptory challenges was preserved at the

trial level and 2) that were pending on appeal when the decision in State v. Neil, supra, was announced.

This case raises a logical anomaly. Freddie Jones raised at his trial the very same objections to jury selection as did Jack Neil. Jones presented the very same issue on appeal to this court. In fact, Jones presented the issue to this court before Neil did. The state now argues that because Neil's case was decided first, Neil should be accorded a trial by a fairly chosen jury, but Jones should not. There is something in this argument that is arbitrary and unfair - a denial of due process of law - and that results in unequal treatment without a rational basis - a denial of the equal protection of the laws. This type of illogic should not be followed.

II.

RACIALLY BASED USE OF PEREMPTORY CHALLENGES PREVENTED THE DEFENDANT FROM BEING TRIED BY A JURY THAT REPRESENTED A FAIR CROSS-SECTION OF THE COMMUNITY

In the portion part of their brief dealing with this issue the state reargues issue IV of the initial briefs in this case. Appellant hereby adopts and incorporates herein those portions of his initial brief that addressed this point.

The state argues that because one of the jurors was black, the appellant cannot argue that peremptory challenges were used to excuse blacks from the jury. In Commonwealth v. Soares, supra, one of the jurors was black, and the identical argument was raised and then rejected by the court:

> One need not eliminate 100% of minority jurors to achieve an impermissible purpose. If the minority's representation is reduced to "impotence," as, for example, by the challenge of a disproportionate number of group members, and the failure to challenge only a minority member who can reasonably be relied on as "safe," the majority identified biases are likely to meet little resistance, and the representative cross-section requirement is not fulfilled. See Kuhn, Jury Discrimination, supra at 287 n. 213.

The state asserts that the appellant could not have met the standard set forth in Neil. The appellant started at an attempt to make the showing, but before counsel for appellant had even finished his first sentence the court cut him off and told him that he had not met the standard of Swain v. Alabama, supra. The colloquy was as follows:

> MR. GOLD: Your Honor, it is clear, it is a clear pattern in this case on the part of the State - -
> THE COURT: The law is that it has to be a systematic exclusion, case by case, and not juror, in a specific case. Under the United States Supreme Court, it is very clear that it has to be a systematic case be case exclusion. There is no evidence of that in this case whatsoever.

(T584).

If a party is not given a fair opportunity to meet the standard set forth in Neil, then it is unfair to say that he didn't make the required showing. In order to make the showing you need the opportunity. It is stated in State v. Neil, supra at 425:

> We cannot tell if the test we have set out here had been available, whether or not the trial court would have found that Neil had shown a sufficient likelihood of discrimination in order for the court to inquire as to the state's motives. It may well be that the state did not excuse those prospective jurors solely because of their race. The bottom line, however, is that we simply cannot tell.

The same reasoning is applicable to the case at bar.

The reality remains that there were ten (10) blacks in the jury pool and nine (9) were excused by the state. As in Commonwealth v. Soares, supra, a disproportionate number of blacks were challenged by the state and minority representation on the jury has been reduced to impotence.

The state's arguments concerning the individual jurors don't ring true. Before he became a county court judge, Calvin Mapp, Sr. was an assistant state attorney (T39), who prosecuted criminal cases (T114). When asked: "Did you ever have any conversation with your father regarding his feelings about the judicial system?" (T114), Calvin Mapp, Jr. answered: "No." (T114). Mr. Mapp announced that "I am for capital punishment." (T115). He had twice been the victim of burglary (T116), and when a suspect was apprehended he went to court to testify in the case (T116-117). If anything, we have here a pro-prosecution witness, except for one factor: he is black.

The argument that Angela Capers was excused because the trial judge advised both parties that when he was an assistant state attorney he had prosecuted Capers' brother is a specious one. Capers was asked if she had any brothers and she said "no." (T310). There is nothing in the record that could possibly be conceived as connecting Ms. Capers to the people that the trial judge had once prosecuted. Additionally, the comment by the trial judge concerning his prior prosecution was made at a side bar conference and out of the hearing of the potential jurors (T309).

Angela Capers told the court that she had no philosophical, religious or moral beliefs opposing the death penalty (T124). If she was chosen as a juror she would follow the law as it relates

to the death penalty (T124). She told the assistant state attorney that she had no philosophical or moral observations as to capital punishment (T258) and would have no problem in recommending the death penalty if the aggravation factors are proven (T259). When asked by defense counsel if there were some circumstances where she could give the death penalty she said: "Yes, sir." (T314). She also told defense counsel that the death penalty would not prevent her from finding the defendant guilty if the evidence proves guilt (T314-315). One (1) of the jurors in this case, Ms. Sweet, said that she would have to give it a lot of thought before she could impose the death penalty (T569). This position on the death penalty was more adverse to the state than Capers', but Sweet was not black.

Celeste Owens was the director of a neighborhood center (T291). When asked by the state if she worked with juveniles, Owens said: "I work with all ages, and senior citizens." (T291). This is not the same as saying that she worked with juveniles. When asked by the state if she helped and guided youngsters who got in trouble with the law, she said: "Our social workers do in the office." (T362). The natural inference to be taken from Owens' answer is that she was the center director and not a social worker and that it was the social workers who guided youngsters who got in trouble with the law. Freddie Jones was twenty-five (25) at the time of the crime (R1812). He was not a juvenile. The connection between his age and Celeste Owens being the director of a center for persons of all ages is a rationalization for what really was the basis for her excusal from the jury box. Mrs. Owens had a son in the Army

and a daughter in college studying computer science (T291). Any connection that may have with a twenty-five (25) year old longshoreman is tenuous, at best.

The actual quote from Don Sneed that is cited to by the state is:

> I have to tell you I attended criminology courses, and many of my friends are in law enforcement.

(T447)

Sneed's friends worked for the Metro-Dade Police Department, (T412) the arresting agency in this case. Sneed is in favor of the death penalty (T413) and had been the victim of a burglary (T412). If anything, Mr. Sneed would be a juror who leaned toward the prosecution.

When asked "are you actively a participant in your religion?", Lonnie Branch answered: "I go to some church functions" (T450). The state is grasping for straws if it thinks that there is any connection between going to some church functions at a Baptist church and opposing the death penalty. When asked about the death penalty by both the state and defense, he replied: "I am not against it." (T414,450). This is not ambiguous. Mr Branch was very clear that he would listen to the facts and the court's instructions in deciding on the death penalty (T451). Branch's comments are certainly not as worrisome to a prosecutor as those of Sweet. The difference is that Branch is black and Sweet is not.

This court recognized in its opinion in Neil, supra at 425, that it is difficult to second guess records that were made before the standards set out in the Neil opinion were established. This

is what the state is asking the court to do: second guess what was going on in peoples' minds without the benefit of trial counsel being given the opportunity to explain why the facts of the case do or do not meet the Neil standards. Such a process is based on pure guess work. Guessing should not be the basis for upholding a guilty verdict in a case of first degree murder.

CONCLUSION

Appellant asks that the court remand this case for a new trial as it did in State v. Neil, supra.

CERTIFICATE OF SERVICE

We certify that copy hereof has been furnished by mail this 17th day of November 1984 to Michael J. Neimand, Assistant Attorney General, Department of Legal Affairs, 401 N.W. Second Avenue, Suite 820, Miami, Florida 33128.

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