

FILED

SID J. WHITE

IN THE SUPREME COURT OF FLORIDA

JAN 21 1985

CLERK, SUPREME COURT

By *Danya*
Chief Deputy Clerk

J. B. PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal Case No. 69, 177

Trial Case No. 82-354-CF
(Lake County Case No.
82-912-CF-A-01)

APPELLANT'S SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

Appellant was the defendant and appellee was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Martin County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol (R.) will be used to refer to the Record on Appeal.

STATEMENT OF THE CASE AND THE FACTS

Appellant relies on the Statement of the Case and the Facts set forth in his initial brief and would respectfully add the following:

The following statements and arguments reflect the record at various times when the State challenged members of the venire:

(R. 335)

THE COURT: All right. Mrs. Brinson, you may step down, please. Mrs. Judson, you may step down, please. Mrs. Fieldings, you may step down, please.

WHEREUPON A CONFERENCE WAS HELD AT THE BENCH.

(Mr. Makemson: I want something I want to put on the record. Mrs. Fielding was the second black witness.)

(THE COURT: Not witness, juror.)

(MR. MAKEMSON: That has been peremptory challenged by the State. I would object that the State is systematically excluding the blacks from this jury panel by use of peremptory challenges, systematically excluding them. That's my Motion.)

(THE COURT: I see no systematic exclusion besides I don't know if there is a law that says that he couldn't systematically excuse them, if he wanted to.)

(MR. STONE: I don't need to state the reason.)

WHEREUPON, THE CONFERENCE AT THE BENCH ENDED.

* * * * *

(R. 443-444)

(MR. MAKEMSON: For the record, I believe that Mr. Stone has now excused the third black juror. I would say or suggest that this is a systematic exclusion of blacks from the jury. And I would ask for a mistrial based upon the fact that he has systematically excluded the blacks and I ask for a whole new jury panel to be brought in.)

(MR. STONE: I haven't excluded anybody. I have used my peremptory challenges. We don't have to give a reason for it. Just like I could say, he systematically excluded all of the men on there.)

(MR. MAKEMSON : I want the record to reflect that every black juror that has been called has been excused by the State, peremptory challenged by the State.)

(MR. STONE: I think the record shows that.)

(MR. MAKEMSON: But it doesn't show on the panel right now.)

(THE COURT: There is in the jury box. It looks like a half a dozen others sitting in the audience.)

(MR. MAKEMSON: I just want to make my position clear. This is a systematic exclusion of blacks.)

(THE COURT: All right.. The Court, of course, since the last such Motion has observed interrogation of Miss Johnson at this time and the Court noticed a hesitancy, a very definite hesitancy in answering questions about capital punishment.)

(MR. MAKEMSON: She may have hesitated but she qualified and said that she could follow the law. Mr. Stone didn't ask a whole lot of questions about that.)

(THE COURT: A long time ago when I tried cases, I never cared that they answered, I was questioning how they answered. That's what scares off people.)

(MR. MAKEMSON: Hesitancy means she is thinking, trying to give an honest answer, is an interpretation.)

WHEREUPON, CONFERENCE ENDED AT THE BENCH.

THE COURT: Miss Johnson, you may step down,

* * * * *

(R. 454 -456)

(MR. MAKEMSON: Your Honor, this is the fourth time that a black juror has been called to the panel and this is the fourth time that a black juror has been excused by the State. The only black jurors that have been called have been excused by the State, I believe. It's now a systematically exclusion of every black juror. There has been several called in this case and I object and I ask that the

whole panel be stricken and a whole new jury panel be called.)

(THE COURT: Are you going to waive speed trial?)

(MR. MAKEMSON: I am being forced into making this decision.)

(THE COURT: Did you waive it? Obviously, if you don't waive speedy trial, the time will continue to run, so, you are forcing me -)

(MR. MAKEMSON: I don't want to waive anything. The trial doesn't have to be completed. The trial can start.)

(THE COURT: But then if we have a mistrial, then that trial is over.)

(MR. MAKEMSON: Then you start another one.)

(THE COURT: Go ahead.)

(MR. MIDEELIS: Number one, I thought she indicated that it would be a hardship for the person that she was caring for. He was an invalid, if she served on the jury. Number two, I determined that she did not like capital punishment, that she was not -- did not qualify as a cause challenge but it would enable us to exercise peremptory challenge based upon her feelings regarding capital punishment and number three, the third reason after she indicated she understood everything. She, obviously, was undecided according to her answers, even though he was questioning her. So, conditioned upon that, I recommended to Mr. Stone, that we exercise our peremptory challenge and for that reason and for no other.)

(MR. MAKEMSON: As far as the invalid, she testified, she was asked if she thought she would be better off and she said, "No." She dismissed that, she had the opportunity to say, yes, but she said, "No." The second thing about the capital -- her answer, I wrote it down, she said she didn't like it. When Mr. Midelis asked her if she could vote for the death penalty, she said, "Yes, I think I could." They have not challenged her for cause so I still say it's a systematic exclusion of a black juror.)

(THE COURT: For the record, Mrs. Williams asked me to be let off when we started excluding jurors because she was fully employed. I did not let her off even though she had four children.)

(MR. STONE: We recommend she be excused on that request then and we not be charged with a challenge.)

(THE COURT: I just wanted to point out on the record that I am the one that kept her here.)

(MR. STONE: Then I move the Court excuse her for the underage children like we did for the schoolteacher.)

(THE COURT: Not unless he consents to it. You have made your choice about this.)

(MR. MAKEMSON: Are you going to let him exercise his challenge?)

(THE COURT: Yes, it doesn't matter what they excuse them for.)

(MR. MAKEMSON: I just want to make the record clear. It's being done over my objection. I'm just making the record.)

ARGUMENT

THE TRIAL COURT ERRED IN OVERRULLING APPELLANT'S
OBJECTION THAT THE STATE SYSTEMATICALLY EXCLUDED
BLACKS FROM THE JURY BY USING PEREMPTORY CHALLENGES
WHERE IT FAILED TO INQUIRE INTO THE STATE'S MOTIVES
FOR SUCH CHALLENGES

The record shows that defense counsel objected that the state was using its peremptory challenges to exclude blacks from the jury. (R. 335, 443-444, 454-456) The trial court refused to make the prosecutor explain his actions, and the prosecutor offered no explanation until defense counsel requested that the whole panel be stricken. (R. 335, 444, 455)

In State v. Neil, 457 So.2d 481 (Fla. 1984), defense counsel objected at trial that the state was using peremptory challenges to exclude blacks from the jury systematically. The trial court ruled that the state did not have to explain its actions. The case eventually reached the Florida Supreme Court, which held that the trial court had erred by failing to inquire into the state's motives. The court also set forth the procedure for such an inquiry, and then wrote:

Turning to the instant case, we find that Neil should be given a new trial before a new jury. His counsel objected to the state's excusal of black prospective jurors. The court allowed additional peremptories after argument, but acceded to the state's reliance on Swain. 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.

Although we hold that Neil should receive a new trial, we do not hold that the instant decision is retroactive. The difficulty of trying to second-guess records that do not meet the standards set out herein as well as the extensive reliance on the previous standards make retroactive application a virtual impossibility. Even if retroactive application were possible, however, we do not find our decision to be such a change in the law as to warrant retroactivity or to warrant relief in collateral

proceedings as set out in Witt v. State, 387 So.2d 922
(Fla.), cert.denied, 449 U.S. 1067 (1980)

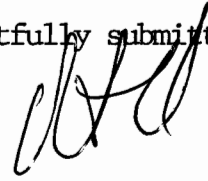
457 So.2d at 487-488
(footnote omitted)

The facts of this case are indistinguishable from those in Neil. Appellant preserved the jury challenge issue for appeal. Accordingly, he is entitled to the same relief as that afforded in Neil, namely reversal of his conviction and sentence and the remand of this cause to the trial court for a new trial.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, appellant respectfully requests this Honorable Court to reverse the Judgment and Sentence of the trial court or remand this cause to the Lower Tribunal with instructions to make a determination as to whether the State of Florida acted improperly in excluding prospective jurors on the basis of race.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished to LYDIA M. VALENTI, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, this 18th day of January, 1985.



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