IN THE SUPREME COURT OF THE STATE OF FLORIDA

J. B. PARKER,

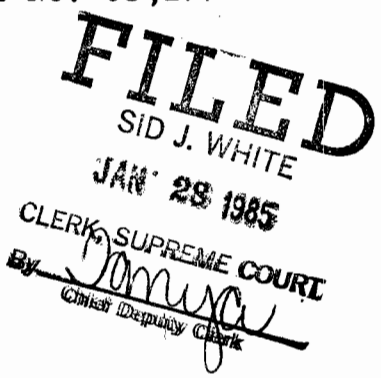
Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 63,177



SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

JIM SMITH
Attorney General
Tallahassee, Florida

RICHARD G. BARTMON
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Appellee

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PRELIMINARY STATEMENT

Appellee adopts its Preliminary Statement, as set forth in its original Answer Brief, and further states as follows:

This Supplemental Brief is being filed pursuant to this Court's Order of January 9, 1985, ordering the filing of supplemental briefs in this cause.

Oral argument was heard by this Court, after submission of the original briefs of the parties, on May 8, 1984.

STATEMENT OF THE CASE AND FACTS

Appellee relies on its Statement of the Case, and Statement of the Facts, as set forth in its Answer Brief, and additionally accepts Appellant's present Statement to its limited extent, but would make the following additions and clarifications:

The State responded to defense counsel's allegations, by stating that it had peremptorily challenged venireperson Williams, for reasons other than race. (R, 454-455). Additionally, the prosecution indicated that the State Attorney had never advised that peremptory challenges be sought on the basis of race; that there were many other reasons, including the demeanor of venirepersons, the way they answered questions on voir dire, and their attitudes, as expressed in such answers, that led the State to seek excusal of certain jurors; and that race "had nothing to do" with the State's exercise of peremptorty challenges of four black jurors in this case. (R, 456-457). The trial court then proceeded to excuse juror Williams. (R 457).

SUMMARY OF ARGUMENT

The decision of this Court in State v. Neil, 457 S.2d 481 (Fla. 1984), is inapplicable to the case herein, since this Court expressly stated, in Neil, that said decision was not to apply retroactively.

Further, the prosecution's statement, on the Record, expressly indicating that the State's exercise of peremptory challenges, during voir dire, were not based upon race, mandates affirmance of Appellant's conviction and sentence, since the procedure and result herein is in accord with the test in Neil.

POINT ON APPEAL

I. WHETHER SINCE RECORD DEMONSTRATED NO EXCLUSION OF JURORS, ON PEREMPTORY CHALLENGES, EXCLUSIVELY DUE TO RACE, TRIAL COURT APPROPRIATELY DISMISSED SAID POTENTIAL JURORS ON STATE'S PEREMPTORY CHALLENGES?

ARGUMENT

I. SINCE RECORD DEMONSTRATED NO EXCLUSION OF JURORS, ON PEREMPTORY CHALLENGES, EXCLUSIVELY DUE TO RACE, TRIAL COURT APPROPRIATELY DISMISSED SAID POTENTIAL JURORS ON STATE'S PEREMPTORY CHALLENGES.

Appellant has maintained that the posture of this case is exactly that reviewed by this Court in State v. Neil, 457 S.2d 481 (Fla. 1984), and compels the same result of remand for further inquiry, as to the reasons for the State's exercise of peremptory challenges. This position lacks procedural and substantive merit.

Appellant has selectively ignored the express language of the Neil decision, which makes Neil inapplicable to the present case. As succinctly stated by this Court (and quoted in Appellant's brief at 6-7), the Neil decision is not to have retroactive effect upon trial voir dires, conducted prior to Neil. Neil at 488. Additionally, this Court expressly declared that said decision does not represent the necessary "change in the law", to warrant retroactive effect:

> 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, [citations omitted]
> ....

Neil, at 488 (e.a.). Since the word "or" is used in this phrase, the plain meaning of the language therein expressed an intent to apply the non-retroactive nature of the case to direct

appeals, as well as collateral proceedings. Id. Since the voir dire being challenged occurred in January, 1983, (some twenty months before Neil was issued), Appellant may not claim the benefits of Neil, by retroactive application.

Assuming arguendo this Court reaches the merits of this point, the Record herein is eminently distinctive, from the one examined by this Court in Neil. As Appellant correctly points out, this Court's reversal and remand in Neil was due to the inability to be able to clearly state, from the record in Neil, whether the trial court therein would have found, under Neil, the requisite likelihood of peremptory exclusions solely by race. Neil, at 487. The Record herein can not be said to suffer from such a defect.

When Appellant challenged the exclusion of venire-persons Williams, the trial court observed that she had been "hesitant", in expressing her feelings on capital punishment. (R, 444). Furthermore, the prosecution explained its reasons for the peremptory challenge of Johnson, based on her expressed need to care for an invalid, and the hardship that being a juror would cause to this obligation; her responses on capital punishment, which were unfavorably regarded by the State, and the perception that, although she claimed to understand everything, she appeared "undecided" on this question. (R, 454-455). The state attorney further expressed his position, with regard to the exercise of peremptory challenges, as follows:

> (MR. STONE [Prosecutor]: I have never at any time ever mentioned to anybody, to excuse any juror for any reason, whether race, creed or color when we are trying a case. They are many have separate reasons. We excuse jurors for the way they answer, peremptorally, the way they answer questions, their attitude, their demeanor, many, many, things and unfortunately in this case as we said, we have excused nine now. Four of which were black and five were white. And we had just cause for everyone of them. Race had nothing to do with it.)

(R, 456-457)(e.a.).

Therefore, it is clear that when Appellant suggested that the State was utilizing peremptory challenges to exclude jurors base on race, the prosecution demonstrated that the challenges were not race-related, and were instead related to the nature of the case, and other characteristics of those challenged. (R, 454-457). It was thus appropriate for the trial court, in its discretion, to determine no further inquiry was necessary, under the dictates of Neil. Neil, at 486-487, 487, n. 10. Thus, although obviously unaware of the requirements this Court would subsequently impose, in Neil, the effect of the state attorney's explanations and the trial court's resulting exclusion of jurors, was full compliance and application of the test in Neil. Id. It is therefore not necessary to reverse or remand this case, so as to accomplish a result already accomplished herein, at the time of voir dire.

Because the circumstances presented by this Record substantially differ from those in Neil, in a manner contem-

plated by, and in accordance with, the result in Neil, Appellant's claim on the merits is unavailing, thus mandating that the conviction and sentence be affirmed.

CONCLUSION

WHEREFORE, Appellee respectfully requests that this Court AFFIRM the Judgment of Conviction and Sentence, based on the arguments herein and in Appellee's original brief.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

Richard G. Bartmon

RICHARD G. BARTMON
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Answer Brief of Appellee has been furnised by United States mail to ROBERT G. UDELL, ESQUIRE, 310 Denver Avenue, Stuart, Florida 33494 this 25th day of January, 1985.

Richard G. Bartmon
Of Counsel