IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS-

CASE NO. 64,618

LARRY WILLIAMS,

RESPONDENT.

PETITIONER'S BRIEF ON THE MERITS

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CASES

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PETITIONER'S BRIEF ON THE MERITS

Petitioner was appellee in the lower tribunal and the prosecution in the trial court. Respondent was the appellant and the defendant in the trial court. The parties will be referred to either as the petitioner and/or the State and respondent and/or defendant.

The State when referring to the original record on appeal will use the following abbrievations followed by the appropriate page number:

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STATEMENT OF THE CASE AND FACTS

The defendant was charged with battery on a law enforcement officer in violation of Section 784.07, Fla.Stat. (R 1). He was also charged with another offense within the information which is not involved herein since that charge was dismissed prior to trial (TT 40).

The charge and ultimate conviction was predicated upon the testimony of Sgt. A. A. Chastain and Officer Brian O'Neil, Correctional officers at the Union Correctional Institution, (TT 13,20) that on May 3, 1982 at about 12:45 a.m. (TT 14) while the defendant was being escorted by Chastain into an office to discuss the propriety of his taking four putty knives to his cell the defendant turned around and started swinging at Chastain, hitting him in the face, neck and chest (TT 16,22). The physical assault and battery was, of course, against the will of Sgt. Chastain (TT 17). According to defendant and another inmate who testified on his behalf, Chastain jumped the defendant and the latter never struck Chastain (TT 37-38,46,48). The jury obviously rejected the defense testimony and returned a verdict of guilty as charged (TT 86).

During selection of the jury two prospective jurors, to-wit: Ernest Addison and Olin McCann were excused (TV 23,33) peremptorily by the defense because the trial judge denied challenges for cause (TV 39). The record does not show what the grounds asserted were because the objections were interposed in unrecorded side-bar

conferences (TV 23,33), however, after the jury was sworn (TV 38) trial counsel placed on the record the following:

> MR. DeLUCA: Your Honor, with reference to the case, State of Florida versus Larry Williams, as to jury selection, Juror No. 29, Ernest Addison and No. 82, Olin McCann, we move the Court for challenge of cause since both those presons, Mr. Addison being a correctional officer and within the Department of Corrections at U.C.I. and Officer McCann being a correctional officer within the Department of Corrections at R.M.C., both of those persons stated on the record that they believed they could be impartial and would be impartial.
>
> However, we move the Court to challenge them for cause.
>
> Not only is the defendant entitled to a jury free of bias or partiality, but he is entitled to a jury that is free of suspicion of bias or partiality.
>
> The Court then denied our motions for cause. Ultimately we exhausted our six rule challenges, moved to back-strike Alfred Harvey, who is a maintenance and construction coordinator or counselor at R.M.C. The Court denied it.
>
> Since we had used all our challenges we then moved the Court to allow us an additional challenge within the inherent authority of the Court, which at that time you denied.
>
> At this time we again would move to strike the complete jury panel now that the jury is sworn in that we feel the law in the State of Florida is we are entitled to a jury free of suspicion and bias and free of any suspicion of its impartiality.
>
> I would state further that that is the basis of the statute excluding deputy sheriffs, sheriffs and municipal police officers. And the old case law which explains the reasoning behind that is that they are so intricately involved with the system that even if they themselves are not biased or partial that they are not free of the suspicion of that.
>
> I would suggest that with the situation regarding R.M.C. and U.C.I. the same is true as with deputy sheriffs, there is so much intricate involvement within the system that you cannot overcome that suspicion.
>
> MR. TOBIN: Your Honor, I would like to place two matters on the record as to that, if I may.

THE COURT: Go ahead.

MR. TOBIN: To clarify something that may go up on appeal, the defendant is being tried only on one count of the Information. It was a two count Information. One count was dismissed.

I state that for the record because the rules specifically provide where there is only one count the Judge shall allow six. If there are multiple counts, more may be allowed, as the rule speaks, in the interest of justice.

However, that part of the rule would be inapplicable. And just to clarify any record that may go on appeal, I just wanted that on the record.

In addition to that, although the Court has ruled, I would just like to reiterate for the record the Supreme Court of Florida has addressed the issue of correctional officers being unable to serve and has ruled that that is not the case and not in the same light as a police officer or as a deputy sheriff as Mr. DeLuca has analogized to.

Those are the only two matters I have.

THE COURT: The motion for challenge for cause in both juror's situations was timely made by the defense at side-bar.

The defense has correctly related that a number seven challenge peremptorily was sought to be made but because of the exhaustion of the previous six peremptory challenges it was not granted.

The motion for additional challenge was also denied.

(TV 38-41).

After the adjudication of guilt and the imposition of sentence the defendant lodged an appeal with the District Court of Appeal, First District (R 26), wherein it was urged that the trial judge erred in denying the challenges for cause because Addison and McCann were "law enforcement officers" under Section 40.013(2) and notwithstanding that both prospective

jurors, under oath, stated that they could render a fair and impartial verdict, a "suspicion of prejudice or bias against a defendant arises when a correctional officer serves on a jury trying a defendant inmate for battery on a correctional officer" (App's Brief, at p. 8, Appendix A herein), attempting to distinguish this Court's decision in Morgan v. State, 415 So.2d 6 (Fla.1982). Appellate counsel argued that the constitutional right to an impartial jury is not fulfilled ". . . when an inmate of the department of corrections charged with battery of a law enforcement officer cannot be assured that the jurors who will be called to consider his case will be free of suspicion of bias or prejudice against him by reason of their status as correctional officers. . ." (App's Br. at P. 9) even though no constitutional claim was ever raised or argued in the trial court.

The District Court of Appeal, First District, in a 2-1 decision, with Judge Mills writing a strong dissent, reversed the judgment and sentence because ". . . the circumstances of the present case raise both an appearance and a substantial probability of inherent juror bias in a trial for an alleged offense against a person in the course of employment involving unusual personal risks identical to those shared by the challenged jurors. . ." (Opinion at p. 2) citing Irby v. State, 436 So.2d 1047 (Fla.1st DCA 1983), rev.den., ___ So.2d ___ (Fla.1984), Case No. 64,435.

A timely motion for rehearing was filed and denied and the State filed a petition for discretionary review in this Court. Said petition for review was granted June 7, 1984.

ISSUE

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S CHALLENGES FOR CAUSE AND THE DECISION OF THE LOWER TRIBUNAL HOLDING ERR WAS COMMITTED PREDICATED UPON IMPLIED OR INHERENT JUROR BIAS IS CONTRARY TO ESTABLISH PRINCIPLES OF LAW.

ARGUMENT

Petitioner respectfully submits that the majority opinion holding an appearance or probability of inherent juror bias requires the excusal for cause of prospective jurors is foreign to sound principles of established law which should be rejected by this Court and that the decision should be quashed with directions that the judgment and sentence imposed be affirmed.

The State agrees that an individual is entitled to a trial by a fair and impartial jury. Indeed, that right is secured by both the State and Federal Constitutions. That is why certain persons are disqualified to serve as jurors, Sec. 40.013(2), Fla.Stat.; litigants are given the opportunity to establish prospective jurors are biased, Sec. 913.03, Fla.Stat.; and why litigants are provided a limited number of peremptory challenges to use as they see fit. Swain v. Alabama, 380 U.S. 202 (1965); Dobbert v. State, 409 So.2d 1053 (Fla.1982). Actually, this defendant could not demonstrate a denial of an impartial jury because neither Addison or McCann served on the jury that convicted him, Rollins v. State, 148 So.2d 274 (Fla.

1963); Young v. State, 96 So. 381 (Fla.1923) and therefore the appellate attorney's reference to a denial of an impartial jury was, and is, nothing but rhetoric.

Judge Zehmer seemed impressed with the fact that the defendant was ". . . required to go to trial with a jury panel including a maintenance and correction supervisor in a related prison institution in Union County after unsuccessfully challenging that juror for cause. . . ." Aside from the fact that there is no evidence that he moved to excuse juror Harvey for cause, there was nothing to indicate this juror was an unqualified or biased juror! Indeed, Juror Harvey stated he didn't know the defendant or the witnesses (TV 10,12) would and could accord the defendant his presumption of innocence (TV 11,16) and his status or experience as an employee with the Department of Corrections would not cause him to lean one way or the other because a correctional officer was the victim (TV 16-17). The majority never concluded this juror possessed inherent bias or should have been excused for cause. It should be observed that Juror Harvey was one of the first veniremen called (TV 8) and could have been peremptorily excused on several occasions but was not. Petitioner does not mean to suggest that the defense had to utilize one of its peremptory challenges to excuse him; that is a matter to be determined by counsel for the defendant. Petitioner does submit, however, that Judge Zehmer's characterization that the defendant was "required" to have this juror serve on the jury is totally unsupported

by the record. A court can not dictate how an attorney exercises his peremptory challenges. Swain and Dobbert, supra.

Interestingly, juror Seiberling was also an employee at Union Correctional Institute and her former husband was a vocational instructor with the Department (TV 30,31) and no complaint was made that she was inherently biased by either counsel or the majority below. Is it suggested that a psychology secretary of the Department is not biased but a maintenance supervisor is. On what objective basis do we determine a particular person is inherently or presumptively biased? Could the prosecutor in this case have excused juror Seiberling for cause simply on the grounds that her employment position was in the area of psychology and her husband was a vocational counselor positions, which imply a liberal or pro-inmate attitude? The State is confident the answer is rather obvious. But are judges Zehmer and Shivers suggesting that a maintenance supervisor is a blue collar construction worker and therefore the law--and--order type and anti-inmate? The foregoing amply demonstrates the shallowness and speculative nature of the inherent bias doctrine which this Court repudiated in Lusk v. State, ___ So.2d ___ (Fla.1984), Case No. 59,146, Opinion filed January 26, 1984.

In Lusk the defendant sought to excuse for cause an employee at Union Correctional Institution, who was a correctional officer, on the basis that he was disqualified under §40.013(2) ". . .since a law enforcement position inherently

creates a disability to serve as a fair and impartial juror. . .". This Court disagreed, reaffirmed Morgan v. State, supra, and determined that the prospective juror was not subject to challenge for cause because of any bias or prejudice.

The rejection of the inherent or implied bias doctrine by this Court in Lusk is consistent with the United States Supreme Court's view on the subject. In Smith v. Phillips, 454 U.S. 209 (1982). The Court, citing to Dennis v. United States, 339 U.S. 162 (1950) said:

> ". . . A holding of implied bias to disqualify jurors because of their relationships with the Government is no longer permissible. . . Preservation of the opportunity to prove actual bias is a quarantee of a defendant's right to an impartial jury. . ."
> 70 L.Ed.2d at 86.

See also: Dobbert v. Florida, 449 U.S. 560 (1981) and Knight v. State, 338 So.2d 201 (Fla.1976) [contritutor and friend of trial prosecutor did not establish bias in law].

By holding prospective jurors Addison and McCann were biased as a matter of law simply because they were correctional officers is in effect a judicial declaration that they--and others in the future--are disqualified, which this Court refused to do in both Morgan and Lusk. Surely it matters not to defendants or their attorneys whether the courts say they are "law enforcement officers" and thus statutorily disqualified under §40.013(2), Florida Statutes or they are inherently biased and must be excused for cause. This Court is acutely aware of

the fact that "a rose by any other name smells the same". This alone establishes that the rationale in Irby and the instant case will not withstand critical analysis.

More importantly, it displaces the trial judge from the process when that is the very reason he is assigned the task of determining whether bias and prejudice exists. After all, he hears and sees the prospective juror and has the unique ability to make an assessment of the individuals candor and the probable certainty of his answers to critical questions presented to him. Hawthorne v. State, 399 So.2d 1088 (Fla. 1st DCA 1981), and Skipper v. State, 400 So.2d 797 (Fla. 1st DCA 1981). This is also why deference to the trial judge's finding of fact is and should be accorded by a reviewing court and why said finding will not be disturbed ". . . unless error is manifest. . ." Singer v. State, 109 So.2d 7,22 (Fla.1959).

Given the holding below there is nothing for a trial judge to assess or evaluate and no questions will have to be asked in future cases. The only thing that will have to be established is that the prospective juror is a correctional officer and the accused is an inmate who allegedly committed a crime while in prison.

The decision in this case stands in stark contrast with what the same court held in Skipper, supra. In that case the defendant contended the trial judge abused his discretion in refusing to excuse a juror for cause who was in training to

become a law enforcement officer and who was at the time a reserve police officer. Even though that juror admitted he might possibly be prejudiced in favor of law enforcement the district court found no error saying:

> ". . . In our view the trial judge, who observed the manner and demeanor of the juror, and heard his statements, could properly have determined that no disqualification of the juror was shown. Section 913.03, Florida Statutes. Appellant has a heavy burden of showing an abuse of discretion. Williams v. State, 386 So.2d 538 (Fla.1980); compare Leon v. State, 396 So.2d 203 (Fla. 3d DCA 1981). . . . 400 So.2d at 798.

In this case neither Addison or McCann said anything which would indicate that they possessed any bias against the defendant. (As to Addison please see TV 18-23 and as to McCann TV 29,32 and 33). In fact, under oath they stated to the contrary. Why could not Judge Green, an experienced trial judge, who observed the manner and demeanor of Addison and McCann and heard their statements, determine that they were free of bias and prejudice? The State submits he could and that Judge Mills was correct in dissent when he opined "the Court substitutes its judgment for that of the trial court which is prohibited" and asked, as does the undersigned, " . . . [w]hat devine insight does the Court possess to determine that the two [prospective] jurors' minds prevented them from acting with impartiality when the [prospective] jurors stated under oath that they would be fair and impartial and the trial court so determined?" Of course, the answer is "none" (Opinion at 5.).

Judge Mills missed the fact that the majority didn't determine the matter as a fact. They presumed it under the inherent bias test repudiated by this Court and the United States Supreme Court.

The petitioner feels compelled to discuss another factor which apparently influenced the majority in this case. The court observed in footnote 2 that prospective juror Lobenthal that was excused for cause after stating, "I am a correctional officer. I feel I am personally involved" (TV 5). Opinion at p.3.

What is the significance of this as it relates to Addison and McCann who expressed no such feeling? Is the court concluding that because one individual has a bias all others which have one similar employment characteristic are likewise biased even though the person declares otherwise? Do all judge's think alike because they are judges or do all blacks possess the same attitudes and bias because they are black? Hardly.

All that could be inferred from the statement of Lobenthal and Judge Green's action in response thereto was that prospective jurors are honest and candid to counsel and the court regarding their possible bias and that Judge Green was able to discern that Lobenthal could not be impartial and

acted accordingly by excusing him for cause. Although not mentioned by the lower tribunal two other prospective jurors candidly and forthrightly indicated they could not render a fair verdict and they were excused (TV 23,24).

The undersigned is curious as to why on the basis of a cold record the court below was so willing to accept the statements of veniremen Lobenthal, Alexander and Woodall when they said they could not be fair but was incapable of accepting the sworn statements of Addison and McCann to the contrary? With no disrespect intended it is submitted that what is at work here is two appellate judges without any previous experience as a trial judge who regularly deals with jurors, concluded that if they had been the trial judge they would have excused the individuals for cause and therefore Judge Green's refusal to do so "was an abuse of discretion resulting in manifest error". (Opinion at 2). This is a temptation that appellate courts occasionally succumb to. Witt v. Wainwright, 714 F.2d 1069 (11th Cir.1984) rev. granted, Wainwright v. Witt, ___ L.Ed.2d ___ (1984), 35 Cr.L. 4029. Judge Mills, formerly a trial judge knew better and urged that this was uniquely a matter for the trial judge.

Mention was made of the fact that Addison "knew" the defendant and Sgt. Chastain. Opinion at p. 3, n.1. Not mentioned however was that Addison also unequivocally stated that knowing him would not prevent him from being impartial (TV 19); that he was not on duty when the event took place (TV 21); that he did not talk to any officers about the case; and, had no knowledge about the case. The fact that Addison knew Chastain tells us nothing.

It certainly does not form the basis for removal for cause. McCollum v. State, 74 So.2d 74 (Fla.1954). In McCollum this Court held that a showing of personal or professional contact does not in and of it self disqualify a person from serving as a juror in a criminal prosecution where the professional party is interested or is the injured party. Id. at 79. The petitioner submits that is all that was shown in this case as it relates to venireman Addison.

Moreover, Addison may have actually disliked the man without the defendant even being aware of the fact because the voir dire of him was limited at best. It is common knowledge the fellow workers and collegues frequently do not like each other for a variety of reasons.

In Swain, supra, which we are told held a court can not "force a party to exhaust his peremptory challenges on persons who should be excused for cause," see: Opinion at p. 2 citing to Leon v. State, 396 So.2d 203,205 (Fla. 3d DCA 1981),

the Supreme Court said:

> ". . . While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality. The peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrated. . ."

It is rather apparent from the record that counsel felt or imagined Addison and McCann were partial based upon intuition and he used a peremptory challenge as he was free to do but he did not prove a legally cognizable basis of partiality entitling him to an excusal for cause. It is pure abstract rhetoric or overstatement to suggest that on this record that Judge Green "forced" the defendant "to exhaust his peremptory challenges on persons who should have been excused for cause."

In Leon, which was cited by the majority in this case, but merely noted with comparison in Skipper, supra, the venirewoman, who sat on the jury that convicted the defendant, actually said three times that she didn't know whether she could judge the case solely on the basis of the evidence, 396 So.2d at 204, because she was a victim of a burglary at one time. If such were the facts of this case the cause would not even be before this Court. Indeed, the State has absolutely no quarrel with the Leon decision, except for the last sentence contained therein. The concluding sentence is not supported by Swain, supra, and it is contrary to Rollins and Young, supra. Said cases correctly hold a defendant must show he was prejudiced by the erroneous ruling by demonstrating he was required to

accept an unqualified juror after he exhausted his peremptory challenges. The majority decision is wrong on this score as well because the defendant can point to no juror that sat on the cause which was disqualified or subject to removal for cause after he exercised his peremptory challenges on Addison and McCann.

CONCLUSION

This was a rather simple case with a total record of slightly over 100 pages. It is still a rather simple case but it, as well as has Irby, injected a dangerous concept that casts doubt on the legal integrity of two death cases decided by this Court. The principle of law announced the implied bias doctrine should be repudiated before it gathers judicial moss and creates confusion. The decision should be quashed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Paula S. Saunders, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 27th day of June, 1984.

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