IN THE SUPREME COURT
OF FLORIDA

CASE NO. 66,799
1st DISTRICT COURT OF APPEAL
CASE NO.: AW-248

HARRY LAMAR TEDDER,

Petitioner,

vs.
VIDEO ELECTRONICS, INC., et al.

Respondents.

INITIAL BRIEF OF PETITIONER

HARRY LAMAR TEDDER

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STATEMENT OF THE CASE

On October 16, 1982, HARRY LAMAR TEDDAR, VIDEO ELECTRONICS, INC., PORTER M. MOORE and REX MOORE signed an employment contract which provided that Harry Teddar would work as general manager of Video Electronics for a two-year period. On August 20, 1982, Harry Tedder was terminated. Mr. Tedder subsequently filed suit in the Circuit Court, Fourth Judicial Circuit for breach of contract.

A jury trial was held during September, 1983. The defendant objected during the trial to the Court's rule regarding backstriking in the jury selection process. The objection was considered and overruled. After a three day trial the jury returned a verdict for the Plaintiff, Harry Tedder. Judgment was entered in the amount of $74,497.50.

The defendant, Rex H. Moore, died after the trial but before the Notice of Appeal. The Estate of Rex H. Moore and the other defendants pursued their Appeal on three issues, including the issue on appeal herein related to the jury selection process. The First District Court of Appeal upheld the trial court on the two other points on appeal but reversed and remanded the case based solely on the jury selection issue.

That issue was certified to this Court by the First District Court of Appeal to be of great public importance.

Harry Tedder is now the Petitioner to the Florida Supreme Court. Simultaneous with his Notice To Invoke Discretionary Jurisdiction of this Court, Mr. Tedder filed a Motion To Stay Mandate Pending Review with the First District Court of Appeal. That stay was granted.

STATEMENT OF THE FACTS

The rules related to jury selection were carefully set forth by the trial judge at the pretrial conference (unrecorded). Each side was allowed six peremptory challenges. One strike was allowed for the alternate. One round of backstriking would be allowed and the jury members seated after the first round of backstriking would be sworn

The Court followed its trial rules precisely. The Defendants exercised their right to backstrike at the fourth side-bar conference when they excused Juror Number 223, Ms. Townsend (T 53). Following the backstriking by the Defendants the Court swore the four jurors who were seated (T 55). At that time both Plaintiff and Defendants had exercised five peremptory challenges and each had one remaining challenge. Two further jurors were called. At the fifth side-bar conference the Defendants attempted to backstrike a juror who had already been sworn (T 61). The court did not allow the strike (T 62). The Plaintiff exercised his final peremptory challenge. The fifth juror was sworn (T 63). The final regular juror was called. The Defendants did not strike the sixth juror (T 66). An alternate juror was called (T 67). Neither side challenged the alternate (T 73). The final two jurors were sworn (T 74).

THE CERTIFIED ISSUE

IN THE ABSENCE OF SUBSTANTIAL REASONS ARISING FROM EXCEPTIONAL CIRCUMSTANCES SHOWN TO EXIST IN THE PARTICULAR CASE, IS IT AN ABUSE OF DISCRETION FOR A TRIAL COURT TO EMPLOY A JURY SELECTION PROCEDURE IN WHICH SOME BUT NOT ALL PROSPECTIVE JURORS ARE SWORN FOR THE PURPOSE OF PROHIBITING THE EXERCISE OF PREMPTORY CHALLENGES TO BACKSTRIKE SUCH JURORS?

I. DUAL PRINCIPLES OF LAW

This case involves two principles of law that have deep roots in Florida Jurisprudence. The first principle is the right to challenge a juror until he is sworn. The second principle, equally venerable, is the right of the judge to control the time and manner in which the jurors are sworn. As stated in Grant v. State, 429 So.2d 758 (Fla. 4th DCA 1983), Florida courts have consistently held for more than one hundred years that a prospective juror may be challenged at any time before the juror is sworn. See, e.g. Jones v. State, 332 So.2d 615 (Fla. 1976); Knee v. State, 294 So.2d 411 (Fla. 4th DCA 1974); Walden v. State, 319 So.2d 51 (Fla. 1st DCA 1975); Shelby v. State, 301 So.2d 461 (Fla. 1st DCA 1974).

However, after a juror or jurors are sworn, the defendant no longer has a right to challenge. In Mathis v. State, 45 Fla. 46, 34 So. 287 (1903), the trial judge swore seven jurors before the completion of

the jury panel and thereafter swore each newly chosen juror individually. Upon review, this Court said:

> We are of the opinion that, while it may be the better practice to postpone the swearing in chief of jurors until the full panel is obtained, so as to allow the longest possible time for peremptory challenges . . . in the absence of a statutory provision, the rule is that the time and manner of swearing jurors in chief, after they have been examined on voir dire, and an opportunity given for challenge, are within the sound judicial discretion of the Court. (Id., 34 So. at 291).

Indeed, the cases continue to hold that the time and manner of swearing the jury rest in the sound discretion of the trial judge. See Buchanan v. State, 95 Fla. 301, 116 So. 275 (Fla. 1928); King v. State, 125 Fla. 316, 169 So. 747 (Fla. 1936); Bocanegra v. State, 303 So.2d 429 (Fla. 2d. DCA 1974); cert dismissed, 308 So. 2d 111 (Fla. 1975).

This Court has never held that the discretionary authority of the trial judge as to when to swear a juror after vior dire by the parties was limited by a party's right to exercise peremptory challenges. This Court has always found these dual principles to be equal and harmonious in the overall scheme of justice. There have been no statutory provisions enacted or Rules of Civil Procedure promulgated which have altered the rule of law announced by this Court in Mathis.

II. SHORT PROGRESSION OF CASES

The Fourth District Court of Appeal began the short progression of cases which have led to this case on appeal when it stated in Denham v. State, 321 So.2d 1082 (Fla. 4th DCA 1982), "Backstriking or backchallenging should not be prohibited by a trial court." That statement was purely dicta and the convictions of defendants were still affirmed.

In 1983 the Fourth District Court of Appeal cited Denham in Grant v. State, 429 So.2d 758 (Fla. 4th DCA 1983) and concluded as follows:

> Appellee has failed to cite and we have found no case which endorses the procedure exercised by the trial judge sub judice. However, neither have we found a case which reverses a trial judge's exercise of discretion in the time and manner of swearing the jurors. Thus, we are not prepared to call the judge's procedure a per se abuse of discretion which would mandate reversal without a showing of prejudice. Nonetheless, we disapprove of the procedure utilized by the trial judge in this case, for it served no purpose at all except to prevent the parties from accepting the jury as a panel. Grant at 760. (emphasis added)

The Court did uphold the conviction of defendant Grant because the appellant failed to demonstrate that he was prevented from peremptorily challenging a

previously accepted juror because of the trial court's no "backstrike" procedure.

In 1985 the Fourth District Court of Appeal cited its own Grant v. State, as sole authority to find the procedure of restricting backstriking was an abuse of discretion. King v. State, 10 FLW. 155 (4th DCA 1985). In his written dissent, however, Judge Glickstein strongly reminded the court that in every case in which a trial judge is reversed, there must be a reason founded in the Federal or State Constitution, a State statue, or a rule of Court or procedure. After an analysis of all such authority, Judge Glickstein concluded that "those on the appellate bench who decry the procedure used here should suggest that the Florida Supreme Court remedy the problem in its next promulgation of Florida Rules of Procedure and should not attempt unconstitutional usurpation of that court's rule-making authority." King at 156

In the instant case the Appellate Court recognizes the right of the trial court to control the time of swearing jurors but seeks to limit that discretion by raising the "recognized better practice" to the level of a Rule of Civil Procedure. In Mathis v. State, supra, this court found no inherent abuse of discretion by the trial court even though a "better practice" was

noted. Nor was an abuse of discretion found in King v. State, 169 So. 747 (Fla. 1936). As stated earlier, there have been no applicable changes in statutory law or Rules of Procedure since those decisions which could justify the lower appellate court's departure from the precedent of this Court. If the "better practice" was mandatory in Florida, this Court would have so held in Mathis and King. It did not so hold, however, and the discretionary authority of the trial court was clearly upheld in both cases.

III. A NEW FLORIDA RULE OF CIVIL PROCEDURE?

The cases which make up the short progression of cases from Denham v. State, supra, to the instant case are all criminal cases subject to the following Florida Rule of Criminal Procedure:

> "Rule 3.310. Time for Challenge
>
> The State or defendant may challenge an individual prospective juror before the juror is sworn to try the cause; except that the court may, for good cause, permit it to be made after the juror is sworn, but before any evidence is presented."

There is no comparable Florida Rule of Civil Procedure. In the instant case the defendants' challenge was peremptory and not for cause. There is no rule of Civil Procedure or Criminal Procedure which directs the

trial judge to wait until all peremptory challenges are exhausted to swear a juror. A procedure which requires the court to set forth the reasons for its discretion in that regard is a totally new burden on the trial judge which is unprecedented.

The First District Court of Appeal is clearly usurping the authority of this Court to promulgate Rules of Procedure by its decision that "we conclude that whenever a trial court exercises its discretion to do so [eliminates backstriking] and so departs from the better practice, the record should reflect substantial reasons therefore arising from exceptional circumstances in the particular case." Decision on Appeal, page 9.

In effect, the proposed rule would require the trial judge to show "good cause" for swearing jurors individually after vior dire and opportunity for challenge. Such a dramatic change would surely require all of the study, debate, and safeguards inherent in the ordinary rule making process. The court itself calls its declaration a "rule":

> Adherence to this rule will, we believe, infuse considerable uniformity and consistency in the jury selection process, insure that the better practice is generally followed, and preserve the trial court's discretion to depart from this procedure when exceptional conditions so require. (Decision on Appeal, page 9).

This even sounds like a recommendation to a Rules Committee and would certainly be more appropriately considered as such. In the instant case, however, the trial court, in Jacksonville, Florida, properly relied on the established precedent of this Court. The trial court exercised its discretion on a subject clearly left to his discretion. Unlike the new "rule" offered by the Appellate Court, there was no rule in effect requiring the trial judge to set forth the reasons for his action. There is, on the contrary, a presumption favoring the trial court's wide latitude in regulating the conduct of the trial proceedings. See 3 Fla. Jur 2d: Appellate Review, Section 313, 328.

IV. COMMON LAW AND FEDERAL LAW

The United States Supreme Court dealt with the issue of backstriking as early as 1894 in the case of St. Clair v. United States, 154 U.S. 134, 148, 14 S.Ct. 1002, 1008, 38 L. Ed. 936 (1894). In that case the Court held as follows:

> By rule 63 of the court below, it is provided that "in all criminal trials the designation, impaneling, and challenging of jurors shall conform to the laws of the state existing at the time, except as otherwise provided by acts of congress or the rules of this court; but a juror shall

be challenged, or accepted and sworn, in the case as soon as his examinatin is completed, and before the examination of another juror.

This rule was enforced at the trial of this case. After the first juror was examined as to his qualifications, the court announced that he must be sworn to try the case, unless challenged by one party or the other; the accused claiming the right to examine all the jurors as to their qualifications before being required to exercise his privilege of peremptory challenge as to any of them.

This general subject was carefully considered in Lewis v. U.S., 146 U.S. 379, 13 Sup. Ct. 136, and in Pointer v. U.S., 151 U.S. 407, 410, 411, 14 Sup. Ct. 410. Referring to section 800 of the Revised Statutes, and the act of June 30, 1879, c. 52 (21 Stat. 43, 44), we said in the latter case: "There is nothing in these provisions sustaining the objection made to the mode in which the trial jury was formed. In respect to the qualifications and exemptions of jurors to serve in the courts of the United States, the state laws are controlling. But congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall, by general standing rule, or by special order in a particular case, adopt the state practice in that regard. U.S. v. Shackleford, 18 How. 488; U.S. v. Richardson, 28 Fed. 61, 69." "In the absence of such rule or order," it was further said, "the mode of designating and impaneling jurors for the trial of cases in the Courts of the United States is within the control of those courts, subject only to the restrictions congress has prescribed, and also to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries for the trial of offenses. * * * In some juridictions the mode pursued in the challenging of jurors is for the

> accused and the government to make their peremptory challenges as each juror, previously ascertained to be qualified, and not subject to be challenged for cause is presented for challenge or acceptance. But it is not essential that this mode should be adopted." Referring to certain observations of Chief Justice Tindal in Reg. v. Frost, 9 Car. & P. 129, 137, it was further said: "At most, in connection with the report of the case, they tend to show that the practice in England, as in some of the states, was to have the question of peremptory challenge as to each juror sworn on his voir dire, and found to be free from legal objection, determined, as to him, before another juror is examined as to his qualifications. But there is no suggestion by any of the judges in Frost's Case that that mode was the only mode that could be pursued without embarrassing the accused in the exercise of his right of challenge. The authority of the circuit courts of the United States to deal with the subject of impaneling juries in criminal cases was recognized in Lewis v. U.S., subject to the condition that such rules must be adopted to secure all the rights of the accused. 146 U.S. 378" 13 Sup. Ct. 136.
>
> Adhering to what was said in Pointer's Case,--that any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of his right to peremptory challenge must be condemned,--we hold that the rule adopted by the court below is not inconsistent with any settled principle of criminal law, nor does it interfere with the selection of impartial juries. St. Clair v. U.S., id at 1007.

In 1965 the Seventh Circuit U.S. Court of Appeal reviewed the very issue before this Court. In U.S. v. Mackey, 345 F.2d 499, 502 (7th Cir. 1965) the Federal Court cited St. Clair v. United States, supra, as authority for its decision to uphold the "no backstrike"

rule of the trial court. The Court concluded as follows:

> "We conclude defendant has not been denied any statutory or constitutional right and hold the district court did not abuse its discretion in the rule it invoked for the use of peremptory challenges. Mackey at 503 (emphasis added)

After a review of a similiar local rule in Kentucky, the Sixth U.S. Circuit Court of Appeals came to the same conclusion in United States v. Anderson, 562 F.2d 394 (6th Cir. 1977).

> "We conclude that the District Court did not abuse its discretion in limiting the manner in which peremptory challenges could be exercised. See St. Clair v. United States, 154 U.S. at 147-48, 14 S.Ct. 1002 See also United States v. Mackey, 345 F.2d 499 (7th Cir. 1965); Philbrook v. United States, 117 F.2d 632 (8th Cir. 1941) (emphasis added)

There are no cases in federal courts which support the position of the Respondants. If the right to backstrike were so essential to a fair trial, it would seem that the federal courts would have found it so. They have not. If it were an abuse of discretion to give a party only one chance to strike a juror after voir dire, it would seem that the federal courts would have so found. They have not. The decisions of our U.S. Federal Courts are in complete harmony with the venerable case law of this Court. Both have traditinally upheld the discretion of the trial court on this issue.

The practice of swearing jurors at the end of each round of challenges is time honored and part of the common law practice of law.

> The common-law practice however, was to present each juror as he was called, to examine, pass, or challenge him, and to swear him before the next juror was presented; in other words, the jurors were impaneled one by one [McDonald v. State, 172 Ind. 393, 88 N.E. 673; State v. Hartley, 22 Nev 342, 40 P 372] This common-law practice is sometimes still followed, particularly in capital cases, and also to a considerable extent in cases involving imprisonment for life or for a long term of years, and the United States Supreme Court has found nothing objectionable in a rule of a lower court adopting such a practice. [St. Clair v. United States, 154 U.S. 134, 38 L.Ed. 936, 14 S. Ct. 1002] 47 Am Jur 2d, Jury Section 193, p. 784. See also 47 Am Jur 2d, Jury Section 340, p. 909.

Florida Statute 2.01 adopted the common-law of England:

> The common and statute laws of England which are of general and not a local nature with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

Since the practice which prohibited backstriking was part of the common law, it has effectively been statutorily adopted in Florida as an accepted method of jury selection. As indicated in St. Clair, supra, it

was codified into a Rule of the U.S. District Court [No. 63] by 1894. In the 1977 case of U.S. v. Anderson, supra, it was embodied in a local rule of a Federal District Court. Although not codified, it is the practice in the Federal District Courts in Jacksonville, Florida today!

The question is, does the practice of preventing backstriking infringe upon a right related to the use of peremptory challenges. The U.S. Supreme Court, the U.S.Appellate and District Courts, and the common law practice all concur with the prior holdings of this court that the use of such a practice is not prejudicial to a right of a party to use his peremptory challenges.

V. JUSTICE IN THIS CASE

The lower Appellate Court herein has remanded the case for a new trial. The issue related to backstriking was the only error found in the previous jury trial. Two other points raised by Video Electronics, et al were resolved in favor of Mr. Tedder.

Immediately after the decision of the District Court of Appeal, Mr. Tedder filed a Motion to Stay the Issuance of a Mandate. That Motion was granted. The bond which was posted by the Video Electronics, et al

remains intact. As indicated in the Motion to Stay, if the bond is released the substantial judgment awarded to Mr.Tedder would be forever uncollectable due to the death of Rex Moore and the dramatic decline in the video game industry. A remand would reverse the ultimate outcome of the litigation whether or not a new trial was had and won by Mr. Tedder.

The issue of backstriking should be an issue debated and dealt with in a Rules Committee and not in a decision of the Court in a specific case. The trial court herein abided by the rules in effect at the time of the trial and the precedent of this Court. If the rule is to be changed it should not be at the expense of Mr. Tedder. There is no evidence to suggest that the jury was unqualified to hear the case or that the defendants at the trial had no opportunity to use their peremptory challenges on each juror. There is no evidence or argument by the defendants that they did not understand the Court's procedure. The parties hereto have had a fair trial without error. Justice in this case requires a reversal of the remand ordered by the District Court and an affirmation of the judgment for Harry Lamar Tedder.

CONCLUSION

The trial court in this cause employed a method of jury selection that dates back to the common-law of England. The procedure which limits or eliminates backstriking has been reviewed and approved by the United States Supreme Court. Modern Federal Courts continue to employ the procedure and no federal cases have found its use to be an abuse of discretion where the parties knew of and understood the rule.

This Court has consistantly upheld the discretion of the trial court on this issue even though it has noted a "better practice". The "better practice" has never been incorporated into any statute or Rule of Civil Procedure in Florida. The short progression of cases from the Fourth District Court of Appeal which precede this case are unsupported by controlling precedent, statue, or adopted rule of procedure. There is nothing in the record to suggest that any of the jurors who heard the case were unqualified or that their decision was in error. The defendants (Respondents herein) had an opportunity for vior dire examination and an opportunity to exercise peremptory challenges.

The remand of the First District Court of Appeals in this case should be reversed and the judgment of the trial court affirmed.