IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,046

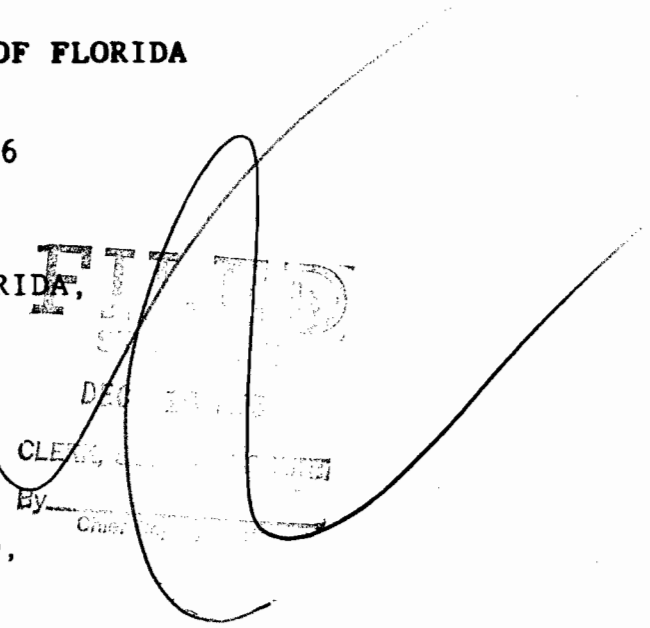
THE STATE OF FLORIDA,

Petitioner,

vs.

JOSE CASTILLO,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

* *

REPLY BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, Jose Castillo, was the defendant in the Circuit Court and the Appellant in the Third District Court of Appeal. Petitioner, THE STATE OF FLORIDA, was the prosecution in the Circuit Court and the Appellee in the Third District. In this brief, the parties will be referred to as they appear before this court.

The symbol "R" will be used, in this brief, to refer to the Record-on-Appeal and the symbol "T" will identify the transcript of trial court proceedings. The appendix to the original brief of petitioner on the merits will be referred to as "App." and by the exhibit letter assigned and the appendix to this brief will be referred to as "R. App." All emphasis is supplied unless otherwise indicated.

QUESTIONS PRESENTED

I

WHETHER THE DECISION IN STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) IS NOT TO BE APPLIED RETROACTIVELY TO ALL CASES PENDING ON DIRECT APPEAL AT THE TIME THE DECISION BECAME FINAL?

II

WHETHER A MOTION FOR MISTRIAL MADE DUE TO ALLEGEDLY DISCRIMINATORY USE OF PEREMPTORY CHALLENGES, AFTER THE JURY IS SWORN, IS NOT A TIMELY OBJECTION PURSUANT TO STATE V. NEIL, 457 SO.2D 481 (FLA. 1984)?

III

WHETHER ASKING A DEFENSE WITNESS, DEFENDANT'S MOTHER-IN-LAW, IF SHE WENT TO THE VICTIM'S HOUSE TO OFFER HIM MONEY NOT TO TESTIFY, WAS, IF ERROR, NOT REVERSIBLE WHERE SHE ADMITTED GOING TO THE VICTIM'S HOUSE AFTER HER SON-IN-LAW HAD BEEN ARRESTED?

SUMMARY OF THE ARGUMENT

I

State v. Neil, 457 So.2d 481 (Fla. 1984) should not be applied retroactively to this case since both the court and prosecution relied on the state of the law at the time as not requiring the State to justify its use of challenges and because case law strongly indicates that the kind of change concerned should not be retroactively applied.

II

Pursuant to present law concerning the timeliness of objections to the use of challenges and to the jury panel, a motion for mistrial made after the jury is sworn is not a timely objection under State v. Neil, 457 So.2d 481 (Fla. 1984).

III

Asking a witness, the defendant's mother-in-law, who admits going to the victim's house, if she went there to offer him money not to testify is not reversible error where she was a minor witness as to a collateral matter whose credibility was already severly impeached. No other alleged prosecutorial misconduct was properly preserved.

Respondent's sentences were proper since he was charged with committing the crimes with a firearm and was convicted as charged. Further, the trial court correctly found that the murder and the attempted murder constituted two (2) separate incidents.

ARGUMENT

I

THE DECISION IN STATE V. NEIL, 457 SO.2D 481 (FLA. 1984) IS NOT TO BE APPLIED RETROACTIVELY TO ALL CASES PENDING ON DIRECT APPEAL AT THE TIME THE DECISION BECAME FINAL.

This court succinctly set forth, in State v. Neil, 457 So.2d 481 (Fla. 1984), the reasons that its decision should not retroactively be applied to cases in which jury voir dire predated the Neil decision. Respondent has chosen to ignore these reasons, arguing that the retroactive application of Neil by three (3) district courts of appeal mandates that the change involved must be applied to all "pipeline" cases. (Respondent's Brief, 23). Respondent is incorrect.

First, it should be pointed out to Respondent that the district courts of appeal do not issue mandates to this court, but vice versa; a basic rule of appellate law which respondent has overlooked.

As this court stated, ". . . . 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 . . . ." State v. Neil, 457 So.2d 481, 488 (Fla. 1984). The Fifth District properly pointed out that this reasoning is as applicable to "pipeline" cases as to cases in which the appeals had been completed prior to the Neil decision. Wright v. State, 471 So.2d 1295 (Fla. 5th DCA 1985). In

fact, this reasoning is particularly applicable to this case since both the trial court and the prosecutor heavily relied on the state of the law at the time of trial for the proposition that the state was not required to explain the reasons for its peremptory challenges (T. 176-177). In fact, the Assistant State Attorney's failure to explain his peremptory challenges (T. 177), at a time when he had already won on the issue (T. 176), has become a major feature of the respondent's argument. (Respondent's Brief, 24, 32). Since there were numerous perfectly proper reasons for the use of the challenges (R.App., 11-12) which could have been argued, the applicability of the record problem to this case shows the precise difficulty that concerned this court in Neil.

Further, respondent has chosen to totally ignore this court's reliance on People v. Thompson, 79 A.D. 2d 87, 435 N.Y.D. 2d 739 (1981) and its reliance on People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978) and Daniel v. Louisiana, 420 U.S. 31 (1975) in formulating a workable rule regarding retroactive effect. The only response to the rule set forth in People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal.Rptr. 890 (1978) that limits its applicability to cases in which jury voir dire was conducted after the decision became final, companion cases and death cases is that it is too confusing (Respondent's Brief, 22). It is respectfully submitted that Florida courts are as capable of fairly applying such a rule as California courts. Determining which cases are companion cases, death cases and cases in which

voir dire was conducted after the decision in Neil became final hardly appears to be so difficult that it would create a "pandora's box" of problems as argued by the respondent. (Respondent's Brief, 22).

Thus, it is clear that the retroactivity rule of Wheeler, which precludes the change in law from being applied to cases such as this one is fair, workable, and the most just rule which can be applied under the circumstances.

The only other significant argument is made by respondent on this issue based upon a complete misstatement of the facts. Respondent has spent five (5) pages of his brief arguing that an alleged admission by the prosecutor that he was excluding black persons from the jury mandates reversal under the United States Constitution the Sixth Amendment and Swain v. Alabama, 380 U.S. 202 (1965). (Respondent's Brief, 30-34). The only problem with this argument is that the prosecutor never made any such admission. The allegation is based upon the following statement by the Assistant State Attorney, set forth on page 32 of Respondent's Brief:

> MR. SCOLA: I did not set out to excuse blacks from the prospective panel. In fact, I wanted some blacks on it. It wasn't until they started to systematically exclude the Latins on the panel that I decided that there were other options which would be more preferable to the State.
>
> (T 176).

Despite the fact that respondent refers to this statement no less than six (6) times in its brief as an admission that the

that the State was excluding blacks (Respondent's Brief, 23, 29, 30, 31, 32), it was, as can be seen, nothing of the sort. Respondent tries to make it into an admission through its rather tortured "analysis" on page 32 of his brief. This "analysis" succeeds only in formulating a rather strained inference. The respondent has chosen to ignore the rule of law requiring all reasonable inferences and deductions to be derived from them to be interpreted in the manner most favorable to sustaining the trial court's ruling. Schlanger v. State, 397 So.2d 1028 (Fla. 3d DCA 1981); Pet. for rev. denied, 407 So.2d 1105 (Fla. 1981). Since the trial court denied the defense motion for mistrial on grounds of systematic exclusion of black persons from the jury (T. 177), all interences are to be interpreted in the light most favorable to the State, not the defense. Since the comment involved could as easily be interpreted as referring to excluding gun owners or persons with prior knowledge of the case (R.App., 11-12), the "admission" relied upon by respondent is non-existent and the entire argument based upon it must fail.

The most just and workable rule in applying the Neil decision is obviously the one set forth herein, which requires that it not be applied to cases in which voir dire took place before Neil became final (except in companion or death cases). Since this analysis is peculiarly applicable to this case, in which the trial judge and the prosecutor specifically relied on the state of the law at the time, the district court incorrectly applied the Neil standards to this case.

II

A MOTION FOR MISTRIAL MADE DUE TO THE ALLEGEDLY DISCRIMINATORY USE OF PEREMPTORY CHALLENGES, AFTER THE JURY IS SWORN, IS NOT A TIMELY OBJECTION PURSUANT TO STATE V. NEIL, 457 SO.2D 481 (FLA. 1981).

The respondent continually maintains that he never accepted the jury (Respondent's Brief, 25, 28), while admitting that he allowed the jury to be sworn without objection (Respondent's Brief, 23). It is respectfully submitted that allowing the jury to be sworn without objection is accepting the jury. This is especially true when page 170 of the transcript reveals the following:

> THE COURT: All right, so Carrie Davis, does the State accept?
>
> MR. SCOLA; Judge, State accepts Carrie Davis as an alternate.
>
> THE COURT: Fine. Defense?
>
> MR. O'DONNELL: Yes, Judge.
>
> THE COURT: Okay, then, gentlemen, I believe that we have a jury.
>
> MR. O'DONNELL: Thank you, Judge.
>
> (T. 170)

It is respectfully submitted that thanking the court for its announcement that a jury has been selected and permitting the jury to be sworn without objection precludes the respondent from arguing that he never accepted the jury (T. 170-172).

The record makes it clear that the defense deliberately waited until the jury had been sworn (without objection) (T. 172), and excused for the night (T. 175) and then made

a motion for mistrial phrased in such a manner that the intentional conduct of the Assistant State Attorney was the grounds for the mistrial (T. 175). A motion for mistrial that they later said they didn't want (T. 444). Thus, the defense deliberately placed the trial judge in the dilemma of either denying the motion for mistrial or placing the court in a position where the defense could allege that a retrial was barrred by double-jeopardy, although respondent has chosen to dismiss this as a ". . . . silly argument. . . " (Respondent's Brief, 23, note 4), they have conveniently overlooked their own deliberate attempt to set up an argument that, since the mistrial was the result of prosecutorial overreaching, retrial of the respondent would be barred, despite the motion for mistrial by the defense. See, Bell v. State, 413 So.2d 1292 (Fla. 5th DCA 1982). Thus, the respondent's allegation that a defense motion for mistrial waives any jeopardy claim (Respondent's Brief, 23) is obviously false, since the defense deliberately phrased their motion so they could make a non-waiver argument, invalid though it may have been. See, State v. Dixon, 10 F.L.W. 2553 (Fla. 2d DCA November 13, 1985).

The respondent's question of how can systematic exclusion of blacks be objected to before the State has exercised all its challenges (Respondent's Brief, 27-28) has an easy answer. By objecting to the exclusion of black jurors before they were excused the way Jack Neil did. This was done in every case in which this court has upheld

objections due to systematic exclusion of black persons, but was not done in this case. Thus, the cases which held that, if a defendant objects to a prospective juror being excused, he must make his objection before the juror is excused could be fairly applied to the Neil situation. Brown v. State, 381 So.2d 690 (Fla. 1980); Paramour v. State, 229 So.2d 855 (Fla. 1969); Ellis v. State, 6 So.768 (Fla. 1869).

However, the rule set forth in Overstreet v. Sandler, 186 So. 247 (Fla. 1938), that only requires objections to the jury to be raised before trial, does appear to be more just, as it more easily applies to a systematic exclusion error. See, Leach v. State, 132 So.2d 329 (Fla. 1961); Peek v. State, 413 So.2d 1225 (Fla. 3d DCA 1982); Pet. for rev. denied, 424 So. 2d 763 (Fla. 1982).

Further, the test proposed by respondent, that an objection is timely if made at any time that remedial action can be taken (Respondent's Brief, 23) is clearly unworkable. First, the "remedial action" of a new trial could be ordered at any time, including years later. Thus, the proposed test provides no limits, at all.

Also, the test, as set forth in Neil states that, if discriminatory use of challenges is found, ". . . . then the court should dismiss that jury pool and start voir dire over with a new pool." State v. Neil, 457 So.2d 481, 487 (Fla. 1984). Implicit in this statement is the assumption that the

required "timely objection" must be made prior to the swearing of the jury, since the outlined remedy becomes impossible once the jury has been sworn. Instead, the court (as this one was) would be faced with the requirements of declaring a mistrial, opening up the possibility of a double-jeopardy claim, and beginning a new trial.

Respondent's argument that the State waived the timeliness issue by not objecting to the defense objection (Respondent's Brief, 29) is invalid on its face. While the State would not stoop to calling an argument of counsel "silly" (despite Respondent's contrary position on page 23 of his brief), arguing that not objecting to an objection which was made on grounds that were non-existent, at the time, waives any requirement that the original objection must have been made in a timely manner, is as close to meeting such a description as has been encountered by the undersigned. If the objection wasn't timely, then the issue wasn't preserved and no convoluted pseudo-analysis can change that.

Here, where it is clear that the defense deliberately waited until the jury was sworn before voicing any objection, whatsoever, to the panel, in an attempt to gain a tactical advantage, this court should hold that the objection was untimely and that the point which resulted in the reversal was not properly preserved.

III

ASKING A DEFENSE WITNESS, DEFENDANT'S MOTHER-IN-LAW, IF SHE WENT TO THE VICTIM' HOUSE TO OFFER HIM MONEY, WAS, IF ERROR, NOT REVERSIBLE WHERE SHE HAD ADMITTED GOING TO THE VICTIM'S HOUSE AFTER HER SON-IN-LAW HAD BEEN ARRESTED.

The respondent, once again, has used his technique of distorting the facts and then trying to convince this court that the distortion constituted proper grounds for reversal. The respondent has stated at least five (5) times that the prosecutor's questions imputed the crime of bribery to the respondent (Respondent's Brief, 34, 35, 36, 38, 39, 40). The actual question objected to is set forth both on page 27 of Petitioner's Brief and page 35 of Respondent's Brief. It was directed to the respondent's mother-in-law, a defense witness, and was; "And you went there to offer him money so that he would not testify against your son-in-law?" (T. 517). It could hardly be clearer that, not only is the offer not imputed to the respondent, but there isn't even the slightest implication that the respondent even knew about it. The respondent's allegations that the prosecutor claimed that he, in conjunction with his mother-in-law, attempted to bribe a witness (Respondent's Brief, 35, 38); that the crime of bribery was imputed to respondent and his mother-in-law (Respondent's Brief, 34); that the prosecutor communicated a false impression to the jury about the respondent (Respondent's Brief, 36) has no support, either in the objected to question or anywhere else in the record. (T. 517, 518). It should also be noted that, when the prosecutor asked Mrs. Chamizo, "Okay, and you offered

him money not to testify against your son-in-law? (T. 517), that no objection was made. It was only when a follow-up question was necessary due to the witness' attempt to evade answering (T. 517), that any objection was interposed (T. 517-518). Any implications of misconduct were clearly limited solely to the mother-in-law, a witness whose credibility had already been completely destroyed. Respondent never even argues that this witness had any credibility left to prejudice, an understandable position considering that she changed her position on whether the respondent had a mustache at the time of the crime twice while on the stand (T. 518-522) and couldn't even describe the hair color of the respondent, who was sitting in front of her at the time, saying, "Well, it is the same as he has had. How can I say as to whether it is white, or red, or green?" (T. 523-524).

Compare the situation in this case with asking a defendant/witness, "all right, and isn't it also true, sir, that you intended to commit a sexual battery and you even asked Anetha if she had ever had sex before?", which was held to be harmless in Ross v. State, 10 F.L.W. 2340 (Fla. 1st DCA November 14, 1985). See, O'Callaghan v. State, 429 So.2d 691 (Fla. 1983); Breedlove v. State, 413 So.2d 1 (Fla. 1982); Black v. State, 383 So.2d 295 (Fla. 1st DCA 1980); Pet. for rev. denied, 392 So.2d 1371 (Fla. 1980). The argument that failing to call Mrs. Morales, the person to whom the offer was made, as a state witness, left the defense without a remedy (Respondent's Brief, 41) is unpersuasive, since she could have been subpoenaed by the defense as easily as by the State.

It is respectfully submitted that the question concerned, which inferred no misconduct on the part of the defendant, which concerned a collateral matter, and which was directed to a witness whose credibility was already destroyed, was not reversible error.

The respondent's argument that alleged prosecutorial misconduct at a pretrial hearing supports the reversal is without validity since, despite respondent's contrary allegations (Respondent's Brief, 41), no ruling was even obtained on the defense objection (T. 339, 340), as required by LeRetilley v. Harris, 354 So.2d 1213 (Fla. 4th DCA 1978); cert. denied, 359 So.2d 1216 (Fla. 1978).

Respondent's "lineup required" argument is equally invalid, since there is no right to a lineup. United States v. Poe, 462 F.2d 195 (5th Cir. 1972); cert. denied, 414 U.S. 845 (1973). Further, even if there were such a right under some circumstances, to have required one in this case would have been clearly unjust. The four prosecution witnesses had already picked the defendant's picture out of a photo-lineup under unsuggestive and "excellent" procedures. (T. 373). Further, the defendant wanted the lineup over three and one half years after the crime (R. 1-4A, 117-148), after he had changed his hair color and shaved his mustache (R. 164-165, T. 255, 285, 304, 329, 524). Requiring a lineup in this case would be equivalent to finding that a defendant has a right to deliberately disguise himself for a lineup.

The fact is that there was no substantial likelihood of misidentification of the defendant as the murderer and his motion was properly denied. See, United States v. Brown, 699 F.2d 585 (2d Cir. 1983); United States v. Ravich, 421 F.2d 1196 (2d Cir. 1970); cert. denied, 400 U.S. 834 (1970); State in Interest of W. C., 426 A.2d 50 (N.J. 1981); Bradley v. State, 206 So.2d 657 (Fla. 2d DCA 1968); cert. denied, 393 U.S. 1029 (1969).

The sentencing issues were properly responded to before the Third District (R.App.25-26), although it should be noted that the defense specifically stipulated that the murder victim was killed by a gun shot wound (T. 279-280), while he now maintains that his carrying a firearm in the commission of her murder was never established (Respondent's Brief, 45-47).

CONCLUSION

Based upon the foregoing arguments and authorities, Petitioner respectfully submits that this court should reverse the decision of the Third District Court of Appeals and remand the case for reinstatement of the convictions and sentences imposed by the trial court.

Respectfully submitted,

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Charles M. Fahlbusch

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **REPLY BRIEF OF PETITIONER ON THE MERITS** was furnished by mail to **ROY BLACK, ESQ.**, 100 Chopin Plaza, Suite 1300, Miami, Florida and to **BRADLEY STARK, ESQ.**, 100 Bayview Drive, Miami, Florida, on this 13th day of December, 1985.

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