

IN THE SUPREME COURT OF FLORIDA

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FEB 26 1987
CLERK, SUPREME COURT
By _____
Deputy Clerk

DAVID WAYNE KIBLER,)
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 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 70,067 Deputy Clerk

AMENDED PETITIONER'S BRIEF
ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CASE NO. 70,067

PETITIONER'S BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

On November 25, 1985, Petitioner was charged by information with one count of burglary of a dwelling with a battery therein and four counts of sexual battery. (R461-462) All the charges arose out of a single incident that occurred at the apartment of the alleged victim, [REDACTED] The case was tried by jury before the Honorable Michael F. Cycmanick, Circuit Judge. (R1-439)

Jury selection took place on April 21, 1986. When the time came for peremptory challenges the judge excused the court reporter stating, "This doesn't need to be on the record. We'll quote whatever disputes there are at the end." (R97)

Following peremptory challenges, the following exchange was recorded:

THE COURT: Let's go on the record.

MS. FORRESTER [defense counsel]: Okay. Judge, I would note for the record that the State has challenged all the black people on the jury. And I'd like to specifically request the Court inquire as to reasons given for excluding the blacks on the jury starting with --

THE COURT: let the record reflect that the State, the record should reflect the State exercised three of its preemptory (sic) challenges and those three of, all prospective jurors of the -- that were black, W [REDACTED] W [REDACTED] was one.

MR. BOGLE [prosecutor]: T [REDACTED] D [REDACTED] and H [REDACTED] J [REDACTED]

And short of held, of being held in contempt I refuse to respond to the Defendant's accusations when the Defendant is white.

MS. FORRESTER: It doesn't matter if the defendant's white. It's across-the-board exclusion of all the blacks on the panel. And I think for that reason the State needs to articulate reasons.

THE COURT: I'm going to request that you give some reason or give the reasons, if you would, recognizing the Defendant in this case is white, just in the event the State versus Neal, N-E-A-L, is expanded to --

MR. BOGLE: I didn't have a good feeling -- Ms. D [REDACTED] was not intelligent enough, I don't believe. She's a housekeeper. She wasn't able to answer my questions.

THE COURT: W [REDACTED]

MR. BOGLE: Let the record reflect he served on a DUI jury and convicted a man in front of Judge Formet three and a half years ago. I had no objection to him. In this case I preferred other jurors.

THE COURT: J [REDACTED]

MR. BOGLE: In this particular case I have no objection to Mr. J [REDACTED] other than I got to T [REDACTED] C [REDACTED] and E [REDACTED] C [REDACTED], I like them better.

THE COURT: Can you represent to the court there was no motivation to discriminate?

MR. BOGLE: It was not to discriminate against any particular race. I took everything into account known to me from the questionnaires they filled out and answers they gave me without any belief I was doing it for racial reasons. I do not believe I was.

MS. FORRESTER: I'd like to point out just in response to that, in response to that I'd like to point out, in response to the answer given, in Ms. D██████'s case she was a housewife.

MR. BOGLE: Housekeeper for the Comfort Inn.

MS. FORRESTER: Keeper. I'm sorry. I misunderstood. I though (sic) he said housewife. I was going to point out there are other housewives on the jury.

I would like to make my objection, Your Honor. I don't think those grounds are sufficient. It requires articulable reasons, and not because the prosecutor doesn't feel that these are suitable.

MR. BOGLE: We can start tomorrow morning at 10:00 o'clock with a whole new panel. That's a, the remedy. I refuse to participate in this. Neal requires a prosecutor -- I don't see how the prosecutor can be partial with a white defendant. (R98-100)

Judge Cycmanick did not comment further on the objection, and the trial proceeded.

Following deliberations the jury found Petitioner guilty as charged on all counts. (R428-429) He was sentenced to concurrent terms of life in prison on each sexual battery count, and to a consecutive ten years for burglary. (R548-556) The recommended sentence under the guidelines was life in prison. (R546)

Timely Notice of Appeal was filed, Petition was adjudged insolvent and the Office of the Public Defender was appointed for the purpose of appeal. (R556,558)

Before the Fifth District Court of Appeal, Petitioner argued he was entitled to a new trial based on this Court's decision in State v. Neil, 457 So.2d 481 (Fla. 1984). Petitioner contended that the state's use of peremptory challenges to

exclude all blacks from the jury in his case was not adequately explained by the prosecutor's assertion that he preferred other jurors.

The District Court affirmed Petitioner's conviction in its opinion in Kibler v. State, 12 FLW 274 (Fla. 5th DCA January 15, 1987). The Court held that Kibler did not have standing to raise the exclusion of blacks from his jury because he is white. The District Court noted that subsequent to the Neil decision the United States Supreme Court held that in order to establish a prima facie case of purposeful discrimination in selection of a jury panel, the defendant, "initially must show that he is a member of a racial group capable of being singled out for differential treatment." Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The District Court decided that, "Had Batson been available to the Florida Supreme Court in September, 1984, it is reasonably apparent that it would have served as the basis for disposition of Neil's petition for certiorari review."

The District Court further held that even if he had standing to raise the Neil issue, "the facts in this record would not support reversal." The Court held that the evidence "shows sufficient reasons based on the jurors themselves for their exclusion."

In a concurring opinion, Chief Judge Orfinger expressed his view that the case should not have been decided as the issue of standing. He wrote that "the trial court correctly held that the disputed challenges did not occur solely on the basis of race." He further stated, "I am not as confident as the majority that the court would have embraced the more

restricted test of Batson v. Kentucky, [supra], had Batson been decided." Judge Orfinger noted that in Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985) the Third District Court held that a white defendant did have standing to raise this issue citing Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1979).

On February 13, 1987 Petitioner filed Notice to Invoke Discretionary Jurisdiction in this cause. This brief follows.

SUMMARY OF ARGUMENT

The decision in Petitioner's case is in express and direct conflict with Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985). Castillo applied this Court's holding in State v. Neil, 457 So.2d 481 (Fla. 1984) in the case of a defendant who was not black. The District Court held Neil inapplicable to petitioner because he is white.

The decision also conflicts with Slappy v. State, 12 FLW 433 (Fla. 3d DCA February 3, 1987) because the District Court did not require the prosecutor to articulate specific reasons for his actions, but instead looked at the record of jury selection to find reasons never mentioned by the prosecutor at trial.

ARGUMENT

POINT I

THE DECISION OF THE DISTRICT COURT OF
APPEAL IS EXPRESSLY AND DIRECTLY IN
CONFLICT WITH CASTILLO V. STATE, 466
So.2d 7 (Fla. 3d DCA 1985).

In State v. Neil, 457 So.2d 481 (Fla. 1984) this Court ruled that, under proper circumstances, a criminal defendant could call into question the state's use of peremptory challenges to exclude black people from the petit jury hearing his case. In Petitioner's case the District Court ruled that a white defendant could not raise the Neil issue. This decision is in direct conflict with Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985). A footnote in Castillo makes clear that the Court was applying Neil to a non-black defendant:

A sub-issue under this point is whether a defendant may protest that an identifiable group other than his own is being systematically excluded. The question was answered affirmatively by the United States Supreme Court in Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 33 L.Ed.2d 83 (1972), which held that a criminal defendant, whatever his race, has standing to challenge the arbitrary exclusion of members of any race from service on a grand or petit jury.

Castillo, at pg. 8

The portion of Castillo dealing with Neil was subsequently quashed by this Court. State v. Castillo, 486 So.2d 565 (Fla. 1986). However this Court's decision did not address the race of the defendant question, therefore the Third District's position is still clear precedent and the conflict still remains to be resolved. Since Neil was based on the Florida Constitution, the conflict can only be resolved by this Court.

POINT II

THE DECISION OF THE DISTRICT COURT OF
APPEAL IS EXPRESSLY AND DIRECTLY IN
CONFLICT WITH SLAPPY V. STATE, 12 FLW
433 (Fla. 3d DCA February 3, 1987).

In Slappy v. State, 12 FLW 433 (Fla. 3d DCA February 3, 1987) the District Court wrote that it was deciding "one of the first cases since Neil was decided ... to focus on the trial judge's responsibility with respect to reasons given by a prosecutor who had been ordered to rebut the presumption that peremptory challenges are being exercised to exclude prospective jurors solely on the basis of ethnicity." The court reviewed several California cases and came to the following conclusions:

In summary the California cases give meaning to the requirements of Neil v. State and Batson v. Kentucky. After a presumption arises that a party has used its peremptory challenges to exclude prospective jurors on the basis of race, the offending party must articulate "legitimate reasons" which are "clear and reasonably specific" and which are "related to the particular case to be tried." The following will weigh heavily against the legitimacy of any race-neutral explanation: 1) an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically; 2) no examination or only a perfunctory examination of the challenged juror; 3) disparate examination of the challenged juror, i.e., questioning challenged venireperson so as to evoke a certain response without asking the same question of other panel members; 4) the reason given for the challenge is unrelated to the facts of the case; and (5) disparate treatment where there is no difference between responses given to the same question by challenged and unchallenged venirepersons.

Slappy at pg. 435.

The Slappy case requires articulation of legitimate reasons for use of peremptory challenges. In Petitioner's case, the prosecutor gave no reason for two of his three decisions

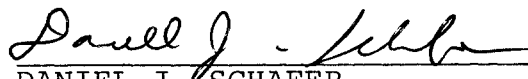
to strike black venirepersons, stating only that he liked other jurors better. The Fifth District Court's decision to affirm despite the lack of articulated reasons for the prosecutor's actions probably conflicts with Neil itself, and definitely conflicts with Slappy, supra. Slappy holds that a trial judge must take a critical look at reasons offered by a party for peremptory challenges. In Petitioner's case, the Fifth District Court accepted a total lack of justification from the prosecutor and was apparently willing to search the record for reasons not offered by the state. Thus the two cases are in direct conflict.

CONCLUSION

Based on the arguments and authorities cited here, Petitioner respectfully requests that this Honorable Court accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Ave., Daytona Beach, FL 32014 via his basket at the Fifth District Court of Appeal and mailed to: Mr. David W. Kibler, Inmate No. C 072491, P. O. Box 1500, Cross City, FL 32620 on this 25th day of February, 1987.



DANIEL J. SCHAFER
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