6-23 O/A 10-7-87

IN THE SUPREME COURT OF FLORIDA

DAVID WAYNE KIBLER,

Petitioner,

vs.

STATE OF FLORIDA.

Respondent.

CASE NO. 70,067

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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PETITIONER'S BRIEF ON THE MERITS

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 questionaires 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[redacted]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, Petitioner 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 purposefull 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. 492, 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 Court accepted jurisdiction on May 4, 1987. This brief follows.

SUMMARY OF ARGUMENT

In Point I herein Petitioner argues that the decision in State v. Neil, 457 So.2d 481 (Fla. 1984) should apply regardless of the race of the defendant. If black people are systematically excluded from a jury the Florida constitution is violated no matter what the race of the defendant. The effect of this constitutional violation cannot be measured or proven by a defendant of any race, therefore a failure to show prejudice cannot be a valid reason to deny standing to a white defendant.

The Fifth District Court held that the record in this case would not support reversal even if Petitioner had standing to raise the Neil issue. In Point II Petitioner respectfully disagrees. The trial court asked that the prosecution give reasons for its exclusion of the only black jurors, then under Neil the burden of proof shifted to the state. But after the reasons were given the Court made no factual finding on the issue of the intent to discriminate. Furthermore the reasons themselves were totally inadequate. If a prosecutor can avoid the intent of Neil merely by stating he preferred other jurors over the black jurors, then Neil will be meaningless.

Petitioner urges this Court to reverse the decision of the Fifth District Court of Appeal and order the case remanded for a new trial.

ARGUMENT

POINT I

THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT A WHITE DEFENDANT CANNOT CHALLENGE THE STATE'S USE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACKS, ON THE BASIS OF VIOLATION OF THE RIGHT UNDER ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION TO AN IMPARTIAL JURY.

In Petitioner's case the Fifth District Court of Appeal held that a white defendant had no standing to challenge a prosecutor's deliberate use of peremptory challenges to exclude black people from the jury trying his case. Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987). The Court wrote that the question had been settled - as far as the federal constitution was concerned - in Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Although this Court's decision in State v. Neil, 457 So.2d 481 (1984) was specifically based on the State constitution, the Fifth District Court majority reasoned that had Batson been available at the time Neil was decided, "it would have served as the basis for disposition of Neil's petition for certiorari review."

Judge Orfinger, wrote in a concurring opinion that he would not have reached the standing question and was not confident that this Court would "embrace the more restricted test of Batson v. Kentucky." He pointed out that in Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985) the Court noted that the question of whether a defendant may protest that an

identifiable group other than his own has been systematically excluded from the petit jury had been answered in the affirmative in Peters v. Kiff, 407 U.S. 493, 92 S.Ct 2163, 33 L.Ed.2d 83 (1972).

Petitioner asserts that the United States Supreme Court decisions are clearly conflicting therefore Florida law on the standing issue is better left based on the state constitution as it was originally in Neil. And of course Petitioner believes the better position is that a defendant of any race has the same constitutional right to a jury chosen free from peremptory challenges based solely on race.

The Respondent will no doubt agree with the Fifth District Court that the definitive federal precedent is Batson v. Kentucky, supra. Indeed Batson does state that in order to make a prima facie case of purposeful discrimination in jury selection, "The defendant must initially show that he is a member of a racial group capable of being singled out for differential treatment." Id. 106 S.Ct. at 1722. However, the Court's statement on the standing issue is clearly dicta because James Batson is black and complained of exclusion of black people from the jury in his case. There was no need to decide the issue and the Court gave no explanation for the position it took.

In 1972 the U.S. Supreme Court was directly faced with this same standing issue in a jury discrimination case. Unlike Batson the Court in Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) faced a claim by a petitioner who was not black that blacks were excluded from his jury. After finding that the jury selection system was in fact discriminat-

ory the Court addressed the standing question:

> It is a separate question, however, whether petitioner is entitled to the relief he seeks on the basis of that constitutional violation. Respondent argues that even if the grand and petit jury were unconstitutionally selected, petitioner is not entitled to relief on that account because he has not shown how he was harmed by the error. It is argued that a Negro defendant's right to challenge the exclusion of Negroes from jury service rests on the presumption that a jury so constituted will be prejudiced against him; that no such presumption is available to a white defendant; and consequently that a white defendant must introduce affirmative evidence of actual harm in order to establish a basis for relief.
>
> That argument takes too narrow a view of the kinds of harm that flow from discrimination in jury selection. The exclusion of Negroes from jury service, like the arbitrary exclusion of any other well-defined class of citizens, offends a number of related constitutional values.
>
> * * *
>
> Moreover, the Court has also recognized that the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community. In Williams v. Florida, 399 U.S. 78, 26 L.Ed.2d 446, 90 S.Ct. 1893 (1970), we sought to delineate some of the essential features of the jury that is guaranteed, in certain circumstances, by the Sixth Amendment. We conclude that it comprehends, inter alia, "a fair possibility for obtaining a representative cross-section of the community." 399 U.S. at 100, 26 L.Ed.2d at 460. Thus if the Sixth Amendment were applicable here, and petitioner were challenging a post-Duncan petit jury, he would clearly have standing to challenge the systematic exclusion of any identifiable group from jury service.

* * *

> If it were possible to say with confidence that the risk of bias resulting from the arbitrary action involved here is confined to cases involving Negro defendants, then perhaps the right to challenge the tribunal on that ground could be similarly confined. The case of the white defendant might then be thought to present a species of harmless error.
>
> But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases. First, if we assume that the exclusion of Negroes affects the fairness of the jury only with respect to issues presenting a clear opportunity for the operation of race prejudice, that assumption does not provide a workable guide for decision in particular cases. For the opportunity to appeal to race prejudice is latent in a vast range of issues, cutting across the entire fabric of our society.
>
> Moreover, we are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented. Id. 407 U.S. at 498-500, 33 L.Ed.2d at 91-92 (footnotes omitted)

The Supreme Court recognized that any defendant, whatever his or her race would not be able to prove prejudice based on exclusion of blacks from the jury:

> It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case. Consequently it is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainty. See Speiser v. Randall, 357 U.S. 513, 525-526, 2 L.Ed.2d 1460, 1472, 78 S.Ct. 1332 (1958); In re Winship, 397 U.S. 358, 370-373, 25 L.Ed.2d 368, 378-381, 90 S.Ct. 1068 (1970) (Harlan, J., concurring). In light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few.
>
> Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. This certainly is true in this case, where the claim is that Negroes were systematically excluded from jury service. Id. 407 U.S. at 504, 33 L.Ed.2d at 94-95 (footnotes omitted)

Three years later the Supreme Court faced a similar standing question in Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). A male defendant argued that women were systematically excluded from the venire and that he would therefore be deprived of his federal constitutional right to a fair trial by a jury of a representative segment of the community. Justice White wrote the following for seven members of the Court:

> The State first insisted that Taylor, a male, has no standing to object to the exclusion of women from his jury. But Taylor's claim is that he was constitutionally entitled to a jury drawn from a venire constituting a fair cross section of the community and that the jury that tried him was not such a jury by reason of the exclusion of women. Taylor was not a member of the excluded class; but there is no rule that claims such as Taylor presents may be made only by those defendants who are members of the group excluded from jury service. In Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163 (1972), the defendant, a white man, challenged his conviction on the ground that Negroes had been systematically excluded from jury service. Six Members of the Court agreed that petitioner was entitled to present the issue and concluded that he had been deprived of his federal rights. Taylor, in the case before us, was similarly entitled to tender and have adjudicated the claim that the exclusion of women from the jury service deprived him of the kind of factfinder to which he was constitutionally entitled. Id. 419 U.S. at 526, 42 L.Ed.2d at 695-696.

Batson v. Kentucky, supra, appears to contradict Peters and Taylor on the question of standing. There is no reason stated in Batson for the contradiction, indeed no reasoning at all is given for the pronouncement on standing. Petitioner respectfully contends that the better position is stated in Peters and Taylor, therefore the dicta in Batson should not be followed.

In State v. Neil, supra, this Court cited three state court decisions that had dealt with the issue of peremptory challenges and race. One of those decisions, People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S.2d 739 (1981) did not decide the standing question presented here. The two others did and both allow a defendant of any race to raise the issue. In People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748, 764 (1978) the Court cited Peters v. Kiff, supra, and Taylor v. Louisiana, supra, as

resolving the standing question. Similarly in Commonwealth v. Soares, 387 N.Ed.2d 499, 517 (Mass. 1979) the Court specifically held that common group membership of the defendant and those jurors excluded was not a prerequisite to assertion of the right defined.

Petitioner suggest that this Court can and should avoid the confusion created by the conflicting federal cases by deciding this case on state consitutional grounds as was done in State v. Neil, supra. Our constitution guarantees for all the right to an impartial jury. Art. 1, Section 16 Fla. Const. In Neil this Court held that based on this right a party could not exercise peremptory challenges solely to exclude black people from a jury. As both People v. Wheeler, supra and Commonwealth v. Soares, supra point out, the race of the defendant may be a factor in the determination of whether a party has in fact used its peremptory challenges in an intentionally discriminatory way. This is however no reason to say that if a white defendant makes such a showing he should be denied relief. If a defendant can meet the requirements of Neil he has shown that peremptory challenges have been exercised solely on the basis of race, and he has shown by his objection that he believes he may be prejudiced by such discrimination. He should be entitled to relief whatever his race.

How or why an individual white defendant might perceive or actually suffer harm from the unfair exclusion of blacks from his jury should not be the issue, for as is pointed out in Peters v. Kiff actual harm is impossible to prove. One theory of prejudice is noted in People v. Wheeler, 583 P.2d at 761, not 17:

> Blacks may, in fact, be more inclined to acquit than whites. The tendency might stem from many factors, including sympathy for the economic or social circumstances of the defendant, a feeling that criminal sanctions are frequently too harshly applied, or simply an understandable suspicion of the operations of government. Whites may also be more inclined to convict, particularly of crimes against a white victim. But these tendencies do not stem from individual biases related to the peculiar facts or the particular partiy at trial, but from differing attitudes toward the administration of justice and the nature of criminal offenses. The representation on juries of these differences in juror attitudes is precisely what the representative cross-section standard elaborated in Taylor [v. Louisiana, supra] is designed to foster." (Note, Limiting the Peremptory Challenge: Representation of Groups on Petit Juries (1977) 86 Yale L.J. 1715, 1733, fn. 77.)

There is no legitimate policy goal served by limiting the application of the Neil decision to black defendants. All persons including the Petitioner are entitled to be tried by a fair and impartial jury.

POINT II

THE DISTRICT COURT OF APPEAL ERRED IN FINDING THAT THE RECORD IN PETITIONER'S CASE SUPPORTS A FINDING THAT THE PROSECUTION DID NOT EXERCISE PEREMPTORY CHALLENGES SOLELY ON THE BASIS OF RACE.

In State v. Neil, 457 So.2d 481 (Fla. 1984), this Court established the following procedure when a party wishes to challenge the discriminating use of peremptory challenges:

> The initial presumption is that peremptories will be exercised in a nondiscriminatory manner. A party concerned about the other sides' use of peremptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race. If a party accomplishes this, then the trial court must decide if there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race. If the court finds no such likelihood, no inquiry may be made of the person exercising the questioned peremptories. On the other hand, if the court decides that such a likelihood has been shown to exist, the burden shifts to the complained-about party to show that that the questioned challenges were not exercised solely because of the prospective jurors' race. The reasons given in response to the court's inquiry need not be equivalent to those for a challenge for cause. If the party shows that the challenges were based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race, then the inquiry should end and jury selection should continue. On the other hand, if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool. (footnotes omitted.)

In Petitioner's case the state used peremptory challenges to strike the only three black potential jurors. When Petitioner objected the prosecution didn't feel he should have to respond because the defendant was white. It appears that the Court accepted the state's argument, but asked for some explanation of the reasons behind the exclusion of all black jurors in case Neil was "expanded" to apply to all defendants. The prosecutor said he believed one of the three blacks was "not intelligent enough." As for the two others he stated only that he liked other jurors better. The Court never made a ruling on the issue apparently treating the prosecutor's reasons as a proffer to preserve the record. (R98-100)

The Fifth District Court ruled that under the Neil test the burden of proof shifted to the prosecution when the Court requested reasons for the peremptory challenges. But on the merits, the District Court said only:

> The trial court found, and the record shows, that the challenges did not occur solely on the basis of race, and the trial court was correct in denying the motion to dismiss the jury pool. Kibler v. State, supra at 77.

First Petitioner must respectfully point out that the trial judge did not make the factual finding the District Court states he made. The judge made no comment at all on the prosecutor's challenges or the reasons he gave for them. It is apparent that the reason the Court did not properly follow the Neil procedure was that it was believed the Petitioner could not raise the issue because he was white. Petitioner realizes that a trial judge's finding of no intent to discriminate

would be entitled to great weight because he has the benefit of observing the jury selection process. In this case we have no such finding because the Court and the prosecution did not take the objection of a white defendant seriously. This Court must therefore reverse Petitioner's conviction.

If this Court believes it should analyze the reasons for challenges offered by the state attorney, (despite the fact that the trial court did not do so) those reasons should be found insufficient.

The reasons given for excluding T[redacted] D[redacted] are sufficient. Petitioner does not question the prosecutor's view of Ms. D[redacted]s intelligence because it is a valid non-racial reason for exercise of a peremptory challenge. However his reasons for excusing Mr. W[redacted] and Mr. J[redacted] must be held insufficient. If a prosecutor (or defense attorney) can avoid the intent of the Neil decision by stating he has no objection to jurors but merely prefers other jurors, then the decision would become totally meaningless. Likewise a barebones statement that there is no intent to discriminate cannot be enough. The Neil court stated the reasons for exercise of challenges should be shown to be "based on the particular case on trial, the parties or witnesses, or characteristics of the challenged persons other than race." No such showing was made here.

The purpose of Neil is to protect against the systematic exclusion of jurors because of their race." Hale v. State, 480 So.2d 115 (Fla. 2d DCA 1985). Protection against discrimination will be real only if non-reasons for peremptory challenges such as those given in this case are rejected.

Petitioner's convictions should be reversed and his case remanded for a new trial.

CONCLUSION

BASED on the arguments and authorities cited herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the Fifth District Court of Appeal in this cause and order that the case be remanded for a new trial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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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 # C072491, P. O. Box 221, Raiford, FL 32083 on this 29th day of May, 1987.

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER