IN THE SUPREME COURT OF FLORIDA

CASE NO. 75-1530

70,321

THE STATE OF FLORIDA,

Petitioner,

vs.

CHARLES SLAPPY,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, THE STATE OF FLORIDA, was the appellee in the court below and the prosecution in the trial court. Respondent, CHARLES SLAPPY, was the appellant below and the defendant in the trial court. The Appendix to the Petitioner's Brief on Jurisdiction will be referred to by the symbol "App." and by the exhibit letter assigned. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The defendant was charged with, and convicted of carrying a concealed firearm.

The State exercised seven peremptory challenges in this case (one against an alternate), four of which were exercised against black persons, leaving one black person on the jury (R.2, SR., T.97). The challenge of Mrs. Lumpkin, one of the black people excused, was not an issue in this appeal because the appellant admitted that the State demonstrated that she was not excused on the basis of race (Appellant's Brief, 8). She believed she had previously been a juror in a case in which the defense counsel was one of the lawyers (T.61-63) and did not believe she could judge the case as if she had never served on a jury before (T.63).

Mrs. Ellen Williams, the first black person challenged by the State, was a teacher's aide from South Miami whose husband used to carry a gun for work, as a guard, (T.11-12, 92).

Frank Williams was a teacher's assistant whose ex-wife was a teacher. (T.12).

Mrs. Oppie Jordon, a disabled widow (T.16), when asked, "Would you have any problem abandoning the presumption of innocence if I proved to you that the defendant committed the crime?" answered, "Do it make a difference whether you been in criminal court before?" (T.35). When she was asked, "Do you think you could be a fair juror in this case?", by the defense, her answer was "If I could understand it better. I haven't heard anything now to really know because I never been in this kind of court before." (T.79-81).

The defense objected after the challenge of Mrs. Williams, which was overruled (T.92). It objected to the challenge of Mr. Williams, which was overruled (T.93-94), and it objected to the challenge of Mrs. Jordon, which was not ruled upon (T.94). The challenge of Mrs. Lumpkin, although not objected to, resulted in the court asking the reasons for the challenge of each of the black veniremen concerned (although without making any specific finding that there was a substantial likelihood that challenges were being utilized on the basis of race, alone). This resulted in the following exchange:

State, why are you excusing Ms. Lumpkin?

MR. RANCK: She said she thinks she knew Mr. Tarkoff from previously in her response. Whether or not she did or not did not -- I don't want someone on a defense--

THE COURT: Why did you excuse Ms. Jordon?

MR. RANCK: She didn't seem to be too secure about sitting on a jury. She asked questions, I think, twice, whether or not she needs to know anything about the law or criminal justice system. Her health doesn't seem to be very good. I just didn't want someone like that on the jury.

THE COURT: How about Mr. Williams?

MR. RANCK: Both Mr. Williams and Mrs. Williams I excused because they're both teachers, assistant teachers, and both of them at elementary schools. That to me indicates a degree of liberalism that I prefer not have on a jury.

THE COURT: Liberalism?

MR. RANCK: Yeah, maybe more sympathetic to people who go astray than people who don't have to deal with kids in a classroom. Always getting into trouble.

MR. TARKOFF: Of course. They accepted Mr. Farrar, who is also a teacher, and I excused him.

MR. RANCK: He was also in the army.

THE COURT: You never heard of liberals in the army?

MR. RANCK: I think you are less likely to find help in the military than elementary school.

> THE COURT: Anyhow, I made the inquiry. Let's see. What do we have? We have Sanchez, we have Sylves, we have Bibby, Aguinaga, DeAlmeida. That's one, two, three, four, five. I need one more gentleman to make six. (T.95-96).

Shortly thereafter, defense counsel moved for Judge Kogan to dismiss the panel, as follows:

> MR. TARKOFF: First I would move the Court to strike the entire panel for which the state has exercised its challenges in order to--
>
> THE COURT: I will deny the motion. There is one black juror, Mr. Bibby, who remains on the jury panel. The Court is also satisfied that based upon the explanations given by Mr. Ranck, that these reasons why he excused the other four black jurors fall within a degree of reasonableness as far as exercising a peremptory challenge for reasons other than race. (T.97).

It should be noted that Mr. Kenneth Farrar, a white school teacher whose "non-challenge" is used as an example of disparate treatment by the court (opinion, 9), was a childless senior high school teacher (T.13, 54), who had been an infantry soldier (T.54), and who was secretary of the Democratic Club of Greater Miami. (T.55). He was peremptorily challenged by the defense (R.2, T.93), at a time when the State had remaining challenges.

(App. Exh. B, 1-4)

ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT'S OPINION, HOLDING THAT THE TRIAL COURT REVERSIBLY ERRED IN RULING THAT THE RACE-NEUTRAL REASONS GIVEN FOR THE PEREMPTORY CHALLENGES OF THREE (3) BLACK JURORS BY THE PROSECUTION WERE SUFFICIENT TO SHOW THAT THE CHALLENGES WERE BASED ON CHARACTERISTICS APART FROM RACE, IS IN CONFLICT WITH STATE v. NEIL, 457 SO.2D 481 (FLA. 1984) AND SUBSEQUENT CASES?

SUMMARY OF THE ARGUMENT

The opinion of the Third District is in direct and express conflict with State v. Neil, 457 So.2d 481 (Fla. 1984) and subsequent cases. It paid no deference to the trial Judge, conducting a de novo review of the reasons given for exercising challenges by drawing a substantial and virtually unsupported inference against the prevailing party, in direct contradiction to cases on that issue.

Further, it held that the State must present evidence of its assumptions concerning perceived occupational bias and that occupation cannot be a basis to support a challenge unless specifically related to the facts of the case, in conflict with Rose v. State, 492 So.2d 1353 (Fla. 5th DCA 1986).

ARGUMENT

THE DISTRICT COURT'S OPINION, HOLDING THAT THE TRIAL COURT REVERSIBLY ERRED IN RULING THAT THE RACE-NEUTRAL REASONS GIVEN FOR THE PEREMPTORY CHALLENGES OF THREE (3) BLACK JURORS BY THE PROSECUTION WERE SUFFICIENT TO SHOW THAT THE CHALLENGES WERE BASED ON CHARACTERISTICS APART FROM RACE, IS IN CONFLICT WITH STATE v. NEIL, 457 SO.2D 481 (FLA. 1984) AND SUBSEQUENT CASES.

This Court, in discussing the reasons given for challenges once an inquiry is made, has stated:

> ....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....
>
> State v. Neil, 457 So.2d 481, 487 (Fla. 1984)

Judge Kogan, the trial court Judge, was satisfied that the reasons given by the prosecution demonstrated that the challenges were exercised on a basis other than race (App.Exh.B,3). Nevertheless, the district court conducted what clearly appears to be a de novo review of the reasons and concludes that the explanations were "...contrived to avoid admitting acts of group discrimination....(App. Exh. A, 10). Its justification for doing this was that, when the trial court said, "Anyhow,

I made the inquiry." it showed that "...the trial court apparently considered itself bound to accept all of the prosecutor's explanations at face value...."(App. Exh. A, 3-4, 10). This assumption is totally without support in the record and is directly contrary to the numerous cases holding that all inferences and presumptions shall be construed in favor of the trial court's finding. See, Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1980).

Further, the district court held that challenging jurors because they were teacher's aides, which indicates liberalism, was invalid because the State presented no evidence that "...liberalism plagues school teachers..." (App. Exh.A, 9-10) (implying that a Neil inquiry must be an evidentiary hearing). This certainly appears to directly and expressly conflict with Rose v. State, 492 So.2d 1353 (Fla. 5th DCA 1986) which held that excusing a juror because she was a teacher and, in the prosecutor's experience "...teachers do not make good jurors...." was held to be sufficient to demonstrate a race-neutral reason for the challenge.

Further, the district court decided to ignore the fact that the trial judge is in an obviously superior position to determine the validity of the reasons given, as pointed out in Thomas v. State, 12 F.L.W.558 (Fla. 4th DCA February 18, 1987)

and Taylor v. State, 491 So.2d 1150 (Fla. 4th DCA 1986). This factor is particularly significant in this case, in which a reason given for challenging Mrs. Jordon was that her health didn't seem to be very good. Both the trial court and the prosecutor could see Mrs. Jordon, but this reason was rejected by the district court as illegitimate because the prosecutor didn't ask her personal questions concerning her health in voire dire. (App. Exh. A,9). Thus, even if a juror was coughing, sneezing, wheezing and appeared to be at death's door, according to the district court, she cannot be challenged peremptorily because of that reason unless the prosecutor asks personal questions about her health (App. Exh. A,9).

CONCLUSION

This Court should grant jurisdiction to resolve the conflicts between the decision in the present case and those in the cases cited above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER ON JURISDICTION was furnished by mail to MICHAEL H. TARKOFF, Flynn and Tarkoff, 1414 Coral Way, Miami, Florida 33145, on this 8th day of April, 1987.

Charles M. Fahlbusch
CHARLES M. FAHLBUSCH
Assistant Attorney General

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