IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,331

THE STATE OF FLORIDA,

Petitioner,

v.

CHARLES SLAPPY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT IN OPPOSITION TO JURISDICTION

Respectfully submitted,

FLYNN and TARKOFF
1414 Coral Way
Miami, Florida 33145
Tel: (305) 858-1414

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INTRODUCTION

The Respondent, CHARLES SLAPPY, was the Defendant in the trial court and the Appeallant in the court below. The Petitioner, THE STATE OF FLORIDA, was the Appellee in the court below and the Prosecution in the trial court.

The Appendix, filed by the Petitioner, with its brief on jurisdiction, will be referred by the symbol "App." and by the exhibit letter assigned by the Petitioner.

All emphasis is supplied, unless otherwise indicated.

STATEMENT OF THE CASE

The Respondent, a Black man, was found guilty by a jury of the crime of carrying a concealed firearm, in the Circuit Court of Dade County. (App. Ex.A, Pg. 1)

That finding of guilt was reversed by the Third District Court of Appeals in Case No. 85-1530, and the cause has been remanded for a new trial. (App. Ex.A, Pgs. 1-11).

These proceedings follow.

STATEMENT OF FACTS

The Respondent would object to the Statement of Facts contained in the Petitioner's Brief on Jurisdiction insofar as it contains facts and information not found within the confines of the majority opinion, as the record itself may not be the basis for conflict jurisdiction. Reaves v. State, 485 So.2d 829 (Fla. 1986).

During the jury selection in the trial court, the State exercised four of its six peremptory challenges against Blacks.

(App. Ex.A, Pg.2)

One of those was Mrs. Rhonda Lumpkin, a dispatch clerk for the telephone company. Mrs. Lumpkin indicated that previously she sat as a juror in a criminal case and believed that defense counsel for Mr. Slappy may have been one of the lawyers involved in that case. The Defendant did not claim that the exclusion of Mrs. Lumpkin was racially motivated. (App. Ex. A, Pg.2.)

Another Black juror excused by the State was Mrs. Oppie Jordan, a disabled widow. The only questions directed to her specifically during voir dire were whether she had ever served as a juror in a criminal case, whether she could be a fair juror in this case, and whether she understood the principles of "presumption of innocence" and "proof beyond a reasonable doubt." She responded that previously she had served as a juror in a civil case and that she could be a fair juror with a better understanding of the case. (App. Ex. A, Pg.2.)

A third Black juror excused by the State was Mary Ellen Williams. Questioning by the court and defense counsel disclosed that she was an elementary school teachers aid married to a security guard, and that she was afraid of guns. She responded that nevertheless she could be a fair juror, even though the case involved a firearm. (App. Ex. A., Pg.2.)

The fourth Black juror excused by the State was Frank Williams, who, coincidentially, also was a teachers assistant in an elementary school. In response to questions by the court and defense counsel, Mr. Williams answered that he was once selected as a juror in a civil case and understood the difference in the burden of proof in civil and criminal cases. (App. Ex. A, Pgs. 2-3.)

After the State had excused the fourth Black juror, the court obviously satisfied that a prima facie showing was made that the State was excluding jurors based on race, ordered the prosecutor to explain his reasons for the peremptory challenges. That exchange between the court and counsel was as follows:

> THE COURT: Allright. At this particular juncture Ms. Lumpkin is the fourth Black juror excused by the State.
> State, why you are excusing Ms. Lumpkin?
>
> ASSISTANT STATE ATTORNEY: She said she thinks she knew [the defense counsel] 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. Jordan?
>
> ASSISTANT STATE ATTORNEY: She din't seem to be 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 don't want someone like that on the jury.
>
> THE COURT: How about Mr. Williams?
>
> ASSISTANT STATE ATTORNEY: Both Mr. Williams and Mrs. Williams I excused because they are both teachers, assistant teachers, and both of them at elementary schools. That to me indicates a degree of liberalism that I prefer not to have on a jury.
>
> THE COURT: Liberalism?
>
> ASSISTANT STATE ATTORNEY: Yeah, maybe more sympathic to people who go astray than people who don't have to deal with kids in a classroom. Always getting into trouble.
>
> DEFENSE COUNSEL: Of course. They accepted Mr. Farrar, who is also a teacher, and I excused him.
>
> ASSISTANT STATE ATTORNEY: He was also in the Army.
>
> THE COURT: You never heard of liberals in the Army?

ASSISTANT STATE ATTORNEY: I think they are less likely to find help in the military than elementary school.

Thereupon, with a hint of frustration, as if legally obligated to accept the State's explanation, the trial judge concluded his questioning.

THE COURT: Anyhow, I made the inquiry.

(App. Ex.A., Pgs. 2-4).

The Defendant moved to strike the entire jury panel, which motion was denied on the basis that the prosecutor stated reasons for excluding the four Black jurors that were "reasonable." (App. Ex.A, Pg. 4.)

Significantly, the prosecutor never asked Mrs. Jordan any questions regarding her understanding of the proceedings or reflecting on her ability to understand the court's instructions on the law, nor did he inquire about her health, generally, or question whether she suffered from any physical or mental condition which might impair her ability to serve as a juror. Similarly, Mr. Williams and Mrs. Williams, the two "liberal" teachers aids were also asked no questions by the State during voir dire. (App. Ex. A, Pg. 4 and Pg.9.)

ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT'S OPINION HOLDING THAT PURPORTEDLY RACE-NEUTRAL REASONS FOR PEREMPTORY CHALLENGES NEED NOT BE TAKEN AT FACE VALUE, AND UNDER THE FACTS OF THIS CASE WERE INSUFFICIENT TO REBUT THE SUBSTANTIAL LIKELIHOOD THAT SAID CHALLENGES WERE EXERCISED SOLELY ON THE BASIS OF RACE IS EXPRESSLY AND DIRECTLY 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 in no way directly and expressly conflicts with State v. Neil, 457 So.2d 481 (Fla. 1984) and subsequent cases. Rather, the Third District in its opinion gives life to the Supreme Court's opinion in State v. Neil, supra, by holding that the mere fact that a prosecutor can think of a purported reason other than the color of the prospective juror's skin, does not put an end to the inquiry. But rather, the Third District states that it is for the trial court to look beyond the "claimed" racially-neutral reason and determine its validity. Further, the Third District gives guidelines on how the validity of the purported reason should be examined.

Additionally, the Third District, in its opinion, has not ruled contrary to the opinion in Rose v. State, 492 So.2d 1353 (Fla. 5th DCA 1976) by holding that occupational bias can never be the basis to support a challenge. Rather, the Third District merely has held that purported occupational bias cannot be used as a smokescreen to hide challenges on the basis of racial bias. Further, the Fifth District's holding in Rose v. State, supra, is distinquishable from the case at bar.

ARGUMENT

THE DISTRICT COURT'S OPINION HOLDING THAT PURPORTEDLY RACE-NEUTRAL REASONS FOR PEREMPTORY CHALLENGES NEED NOT BE TAKEN AT FACE VALUE, AND UNDER THE FACTS OF THIS CASE WERE INSUFFICIENT TO REBUT THE SUBSTANTIAL LIKELIHOOD THAT SAID CHALLENGES WERE EXERCISED SOLELY ON THE BASIS OF RACE IS NOT EXPRESSLY AND DIRECTLY IN CONFLICT WITH STATE V. NEIL, 457 So.2d 481 (Fla. 1984) AND SUBSEQUENT CASES.

The Petitioner, in its brief, asserts that the decision of the Third District Court of Appeals in this cause is in conflict with certain other decisions.

Their initial contention is that the instant case is in conflict with this Court's opinion in State v. Neil, 457 So.2d 481 (Fla. 1984).

Subsequent to this Court's ruling in State v. Neil, supra, the United States Supreme Court decided Batson v. Kentucky, __ U.S. __ 106, S.Ct. 1712 (1986). In its concurring opinion in that case Justice Marshall noted as follows:

> Any prosecutor can easily assert racially-neutral reasons for striking a juror... If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on non-racial grounds, then the protection erected by the court today may be illusory.

It appears that Justice Marshall was able to foresee the situation in which we currently find ourselves. The Third District has held, by its opinion in this cause, that the prosecutor did not fulfill its burden under State v. Neil, supra, merely because he was able to express a "reasonable" explanation other than race. (App. Ex. A, Pg.3.) Rather, the Third District correctly ruled that it is for the trial court and a reviewing court to analyze the proffered reasons to determine their legitimacy, and in so doing gave examples of factors which will weigh heavily against the legitimacy of any proffered race-neutral explanation. (App. Ex.A, Pg.9.)

To assert that the Third District's opinion in Slappy v. State is in conflict with this Court's holding in State v. Neil,

supra, is unfounded unless it is the Petitioner's contention that Justice Marshall's fears were accurate and the protection of Neil is no more than illusory.

The Petitioner further submits that the Third District's decision is in conflict with the decision of the Fifth District in Rose v. State, 492 So.2d 1354 (Fla. 5th DCA 1986). It is submitted that Rose v. State, supra, is insufficient upon which to base jurisdiction, in that said decision is distinguishable on its facts. See: Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

First of all, in Rose v. State, supra, the trial court never found a likelihood of discrimination such as to justify an inquiry into the State's motives. Rose v. State, supra, at 1354-55. This is contrary to the holding of the Third District in the instant case. (App. Ex.A, Pg. 3.) Additionally, in that case, although the prosecutor in response to the Defendant's objection, stated that teachers do not make good jurors, there was additional inquiry of the juror in question, outside the presence of the other jurors, where it was established that the particular juror was acquainted with various individuals at an establishment known as "The Corner", frequented by the alibi witnesses of the Defendant. Rose v. State, supra, at 1354. It is therefore submitted that Rose v. State is indeed a very different situation in that apparently the juror was challenged for more than just being a teacher (although we do not know what grade); and further, the trial court had never made a finding of a likelihood of discrimination.

The Petitioner also alleges conflict with Taylor v. State, 491 So.2d 1150 (4th DCA 1986). Once again, the case relied upon by the Petitioner is factually distinguishable. First of all, as in Rose v. State, supra, again there never was a finding of a strong likelihood that jurors were being challenged solely because of their race, unlike the case at bar. However, since the prosector saw fit to volunteer reasons as to why he was excluding certain blacks, the Taylor court felt that it was appropriate to examine the answers given. One need only look to the reasons stated in Taylor v. State, supra, to see clearly that they were not the nebulous, illustory reasons given by the prosecutor in this case.

Although the Petitioner makes much of the statement in Taylor v. State, supra, concerning the fact that the trial judge is in an obviously superior position to determine the validity of the reasons given, it is interesting to note the context of that statement by the Fourth District. It arises in a comment concerning the fact that in addition to the very specific reasons which the prosecutor gave concerning the reasons for the various challenges, that he additionally added that as to two of the questioned Blacks, he did not like their background or the way they related to him. The Fourth District noted that these reasons appear rather vague, but that the trial judge that was present would be able to observe these factors himself and determine whether or not they were valid reasons for the challenge. Obviously distinguishable from the case at bar in that this prosecutor chose not to ask questions of the jurors to see how they would relate to him or to disclose their "liberalism."

The last decision which the Petitioner alleges to be in conflict with the Third District's opinion is Thomas v. State, __ So. 2d __, 12 FLW 558 (4th DCA 1987). Once again, the purported conflicting decision is clearly distinguishable from the case at bar. Thomas v. State, supra, deals with the challenge of three jurors. The first of these jurors was named Horne. She was challenged because she had a close relative charged with murder and she had personally attended her relative's trial. Additionally, the state was concerned that Horne had recently been involved in an assault and battery and finally added that, additionally, her demeanor was a factor. Clearly, these were the sort of specific reasons which this Court invisioned when it decided State v. Neil, supra, and are clearly distinguishable from the nebulous reasons given by the prosecutor in the case at bar.

The second juror examined by the court in Thomas v. State, supra, was a man named Fields. The reason Mr. Fields was excused was that he had apparently spoken of an acquaintence with persons who had been arrested and additionally, had demonstrated a "wishy-washy" demeanor, indicating he would not be strong enough to be a good juror.

The third juror, a woman by the name of Jackson, was not allowed to be challenged by the State because the court felt it could not determine why the challenge was exercised because of the State's delay in using the backstrike, although the prosecutor did state that the reason was that she had given an equivocal response when question about whether she might be swayed by sympathy. Once again, the challenges in question were specific and in the words of State v. Neil, "based on grounds that were

related to the characteristics of the prospective juror apart from his race, the particular case on trial, or the parties or witnesses thereto."

The decision sought to be reviewed by the Petitioner is clearly not in conflict with any decision of the Supreme Court of Florida or any other District Court of Appeals.

CONCLUSION

Based upon the cases, argument and policy, it is respectfully submitted that this Court deny Petitioner's request for discretionary review.

Respectfully submitted,

FLYNN and TARKOFF
1414 Coral Way
Miami, Florida 33145
Tel: (305) 858-1414

By Michael H. Tarkoff
MICHAEL H. TARKOFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: CHARLES FAHLBUSCH, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 28th day of April, 1987.

Michael H. Tarkoff
MICHAEL H. TARKOFF