OA 11-3-87

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,331

STATE OF FLORIDA,

Petitioner,

vs.

CHARLES SLAPPY,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

REPLY BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, **CHARLES SLAPPY**, was the defendant in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit and the Appellant in the Third District Court of Appeal. Petitioner, **THE STATE OF FLORIDA**, was the prosecution in the trial court and the Appellee in the district court. The parties, in this brief, 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 before the Third District and this court, the symbol "SR" will identify the Supplemental Record and the symbol "T" will designate the transcript of lower-court proceedings. The terms "Appellant's Brief" and "Appellee's Brief" will refer to the initial briefs filed by the respective parties in the Third District Court of Appeal and the term "Respondent's Brief" will designate the Brief of the Respondent on the Merits before this court. The appendix to Petitioner's Brief on the Merits will be referred to as "App." and by the exhibit letter assigned. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE FACTS

The petitioner readopts, realleges and incorporates by reference the Statement of the Facts set forth in its

original brief on the merits as though fully set forth herein. Additionally, in response to the Statement of the Facts set forth by the respondent, petitioner would note the following additional facts.

Although, as respondent has pointed out, Mrs. Lumpkin was not challenged during two preliminary rounds of challenges (Respondent's Brief, 4-5), the Respondent has admitted that the State sufficiently proved that she was not excused solely on the basis of race (Appellant's Brief, 8). This is understandable where Mrs. Lumpkin believed she knew defense counsel from a prior case in which she was a juror and did not believe that she could judge the case as if she had never served on a jury before (T. 61-63).

Additionally, although Mr. Wenceslau De Almeida didn't think carrying a concealed firearm was ". . . too much of a crime . . . " (T. 28), as pointed out on page 6 of Respondent's Brief, there are a number of other items that Respondent failed to mention. He had <u>at one time</u> (in contrast to respondent's assertion on page 6 of his brief) belonged to a gun club and to the NRA (T. 25-26). He had also spent four (4) years in the Air Force as a radioman and a gunner and was discharged as a Staff Sergeant (T. 83). He was a retired City of Miami Fireman (T. 83) and he would have no problem convicting the defendant if the judge instructed him that carrying a concealed firearm is a crime (T. 27-28).

By comparision, Mr. Jerry Bibby, a black juror who served (R. 2, SR.), didn't really think that carrying a concealed firearm should be a crime, at all, but if the judge instructed him that it was a crime and it was proven that the defendant committed it, he would be able to find the defendant guilty (T. 29-30), as he did (R. 19).

Petitioner reserves the right to present additional facts in the argument portion of this brief, as relevant.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT ERRED IN CONDUCTING A DE NOVO REVIEW OF THE TRIAL COURT, RESULTING IN REVERSAL OF THE TRIAL COURT'S RULING THAT THE STATE HAD NOT SYSTEMATICALLY EXCLUDED PERSONS FROM THE JURY DUE SOLELY TO THEIR RACE?

SUMMARY OF THE ARGUMENT

The respondent has not even attempted to refute the allegations that the district court conducted a de novo review of the trial court based on assumptions which are not only unsupported, but are contradicted by the record.

Further, respondent's argument that any reason which could cover up a racially motivated challenge must be invalid precludes any reason from ever being held valid, discourages trial judges from conducting inquiries about reasons, and reserves all credibility choices to the district courts instead of the trial judges.

The respondent and the distict court have, in essence, proposed an unworkable standard for reviewing trial courts consisting of a laundry list of reasons for reversal and paying no deference, whatsoever, to trial court determinations.

Reversal is required.

ARGUMENT

THE DISTRICT COURT ERRED IN CONDUCTING A DE NOVO REVIEW OF THE TRIAL COURT, RESULTING IN REVERSAL OF THE TRIAL COURT'S RULING THAT THE STATE HAD NOT SYSTEMATICALLY EXCLUDED PERSONS FROM THE JURY DUE SOLELY TO THEIR RACE.

The respondent had failed to even attempt to refute the central allegations of the petitioner, that the district court conducted a de novo review of the trial court based on the unsupported assumption that ". . . the trial court apparently considered itself bound to accept all of the prosecutor's explanations at face value . . . ." (App., Exh. A, 10). An assumption which is not only unsupported, but which is contradicted by the record.

Respondent ignores these allegations by making the argument, as it did successfully in the district court, that any reason which might obscure racial discrimination must be held invalid (Respondent's Brief, 15). While such an argument sounds pursuasive, it ignores the practical fact that any reason, no matter how facially valid, could be a cover-up for racial prejudice. Thus, as respondent has pointed out, challenging liberals could never be upheld because the challenging party might be simply substituting the word "liberal" for "black" (Respondent's Brief, 15). Under respondent's analysis no reason could ever be valid

because it might be obscuring racial prejudice. This clearly discourages trial judges from conducting any inquiry, at all, for fear of reversal.

Thus, the third district and the respondent agree that, no matter how ill a juror appears, that juror may not be peremptorily challenged unless the challenging party risks alienating the jury by asking personal questions concerning health (App., Exh. A, 4; Respondent's Brief, 19). Appearance, therefore, is added to political orientation and occupation as an impermissible reason for exercising challenges because it might cover up a racially-motivated reason.

The practical solution to this problem is, as it has always been, that credibility choices belong to the trial judge. This is the solution advocated in Batson v. Kentucky, 90 L.Ed.2d 69, 89, f.21 (1986), in Commonwealth v. Soares, 387 N.E.2d 499, 517 (Mass. 1979) and in numerous additional cases. It is also the solution that the district court ignored in this case, choosing to substitute its own credibility determinations for those of Judge Kogan, despite being unable to see the lawyers or the jurors whose credibility it was determining.

However, instead of the traditional standards for reviewing trial court judges' decisions in jury challenges,

the standards of abuse of discretion and manifest error (neither of which is mentioned either by the district court or respondent), the district court advocates a de novo review of reasons given for challenges to determine if they are "legitimate", "clear and reasonably specific", "related to the particular case to be tried" and setting forth five (5) factors to be weighed heavily against any trial judge's finding that reasons are valid and none in support of the trial court (App., Exh. A. 9). Under this standard, no deference is paid to the decisions of trial courts and the impressive reasons set forth by the district court mean anything they wish, without any necessity of finding an abuse of discretion or manifest error or meeting the standards required by these tests. Ross v. State, 474 So.2d 1170 (Fla. 1985); State v. Williams, 465 So.2d 1229, 1231 (Fla. 1985); Christopher v. State, 407 So.2d 198 (Fla. 1981); cert. denied, 456 U.S. 910, 72 L.Ed.2d 169 (1982); Skipper v. State, 400 So.2d 797 (Fla. 1st DCA 1981); rvs'd on other grounds, 420 So.2d 877 (Fla. 1982); cert. denied, 105 S.Ct. 3540 (1985).

It's respectfully submitted that this court did not intend State v. Neil, 457 So.2d 481 (Fla. 1984) to preclude peremptory challenges based upon occupation, physical appearance, political orientation or other "group affiliations", as assumed by both the district court and respondent. If the suspect area is limited to race, as

indicated in the Neil opinion, then the analysis of the district court is unsupportable, providing no basis for reviewing trial courts, but simply a list of justifications for reversing them.

Given that policy, the traditional standards of abuse of discretion and manifest error, together with the proposed test of race-neutral reasons which are reasonable and made in good faith, are sufficient to insure that "sham" reasons will be precluded. Judge Kogan's analysis met the required tests. The opinion of the third district does not.

Therefore, it is respectfully submitted that de novo reveiws of trial court determinations that the reasons given for challenges are valid should be discouraged, credibility determinations should be left to the trial court, and the district court must, therefore, be reversed.

CONCLUSION

Based upon the foregoing arguments and authorities, the Petitioner's respectfully submits that this court should reverse the decision of the Third District Court of Appeals and remand the case for affirmance of the trial court's decicion.

Respectfully submitted,

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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 **MICHAEL H. TARKOFF, ESQ.** Flynn and Tarkoff, 1414 Coral Way, Miami, Florida 33304 on this 11 th day of September, 1986.

CHARLES M. FAHLBUSCH
Assistant Attorney General

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