IN THE SUPREME COURT OF FLORIDA

GERALD DOBLY McCLOUD,

Petitioner

v. CASE NO. 71,899

STATE OF FLORIDA,

Respondent.

_____/

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

The petitioner was the appellant below and the defendant in the trial court. The parties will be referred to as they appear before this Court. A one volume record on appeal containing the pleadings in Case Nos. 85-4591-CF and 85-4592-CF will be referred to by use of the symbol "R" followed by the appropriate page number in parenthesis. The transcripts of the lower court proceedings will be referred to by use of the symbol "T" followed by the appropriate page number in parenthesis.

STATEMENT OF THE CASE AND FACTS

The respondent adopts the statement of the case and facts as set forth in the district court's opinion filed December 9, 1987. The appellant's statement of the case and facts as set forth in his initial brief on appeal in the First District Court of Appeal is also acceptable to the respondent.

SUMMARY OF ARGUMENT

The state's peremptory challenges of prospective black jurors were based upon racially neutral reasons. The factual findngs by the District Court and the trial court were correct and both courts correctly applied the law to those facts.

ARGUMENT

ISSUE

THE TRIAL COURT WAS CORRECT IN DENYING PETITONER'S MOTIONS FOR MISTRIAL SINCE THE STATE BASED ITS PEREMPTORY CHALLENGES IN CASE NO. 85-4591-CF AND CASE NO. 85-4592-CF UPON RACIALLY NEUTRAL GROUNDS.

The petitioner contends that the District Court incorrectly held that the trial court was correct when it denied a motion for mistrial based upon an allegation that the prosecutor had improperly used peremptory challenges to exclude black jurors.

In Neil v. State, 457 So.2d 481 (Fla. 1984) this Court enunciated the test that courts must use when confronted with an allegedly racially discriminatory use of peremptory challenges. The court stated:

> A party concerned about the other side's 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 liklihood 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.

State v. Neil, surpa, at 486. (Footnote omitted)

Thus, we learned from Neil that before requiring the offending party to demonstrate that the questioned challenges were not exercised solely because of a prospective jurors race, the offended party must: (1) make a timely objection; (2) demonstrate on the record that the challenged persons are members of a distinct racial group; and (3) demonstrate a strong likelihood that the prospective jurors are challenged solely on the basis of their race. Parker v. State, 476 So.2d 134, 138 (Fla. 1985); Cotton v. State, 468 So.2d 1047 (Fla. 4th DCA 1985); Finklea v. State, 471 So.2d 608 (Fla. 1st DCA 1985). The trial court and the District Court of Appeal made the correct finding that although a showing was made that the prospective jurors belong to a distinct racial group the petitioner had failed to demonstrate a "strong" likelihood that the prospective jurors were challenged solely on the basis of race. In the trial court the petitioner relied solely upon the number of black jurors excluded to establish that the peremptories were exercised on racial grounds. The trial court made no specific findng that a systematic pattern of exclusion existed. Moreover, the District Court of Appeal correctly followed language in the Neil decision which stated that the exclusion of a number of blacks by itself was insufficient to trigger an inquiry into a party's use of peremptories.

In Slappy v. State, 13 F.L.W. 184 (Fla., March 11, 1988) this Court recognized that the issue was not whether several

black jurors had been excluded because of their race, but whether any juror had been so excluded. In the case below, the petitioner did not present any evidence to the trial court to suggest that even one black juror had been excluded because of race. Rather, he relied upon the number of challenges exercised by the state to establish his complaint. Had the petitioner presented evidence of even one exclusion because of race, the burden to demonstrate racially neutral reasons would have shifted to the state. Slappy, supra. This burden was not met and thus no error occurred.

Assuming arguendo, the petitioner had met his burden, an examination of the record in both trials establishes that the state's reasons were racially neutral, reasonable and not a pretext. The trial court which, was in the best position to evaluate the reasons in light of the voir dire examination, the facts of the case and the demeanor of the prospective jurors, made the finding that the prosecution had "stated sufficient reason" for its challenges.

In Case No. 85-4592-CF, the state challenged eight jurors: R[redacted] G[redacted]

The state stated no reason for striking her.

H[redacted] L[redacted]

Mr. L[redacted] testified that he was employed as a landscaper

and had lived in the area for 22 years. He was divorced and had two children. (T 74, 109) The state challenged Mr. L[redacted] because he had a prior conviction for loitering. (Tr. 142) The respondent submits that it is common practice to exclude a juror with a prior record since, from a prosecution's standpoint, he may be overly sympathetic to the defendant.

G[redacted] B[redacted]

The record indicates that Ms. B[redacted] testified that she was a minister. (R 128) She also related that she had retired after 24 years of service with Royal Janitorial Service. Her testimony indicated that she had five children. (T 77-78, 113) The state challenged Ms. B[redacted] for cause on the grounds that her religious beliefs could interfere with her ability to reach a verdict. The State excused her on a peremptory challenge after the court denied challenge for cause. (T 141) The exclusion of a person with strong religious convictions against judging others is sometimes advantageous to the prosecution. This peremptory challenge was clearly based upon a race neutral reason.

A[redacted] B[redacted]

The state excused A[redacted] B[redacted] because she had no children. The fact that she had no children is relevant to her ability to understand why the victim would not resist a sexual attack. Often a victim will not resist an attacker in their home when they fear for the lives of their children. The prosecutor

challenged her because:

> She didn't have any children; the state struck her and one of the victims in this case had children. The state figures that might be a reason to come back not guilty. (Tr. 143)

R[redacted] H[redacted]

Mr. H[redacted] was excluded because of his age and because he was single. Although the exclusion of a juror because of age and marital status has been described as tenuous by one court, it was not determined to be an improper reason for peremptory challenge. Taylor v. State, 11 F.L.W. 849 (Fla. 4th DCA, April 9, 1986).

L[redacted] W[redacted]

The prosecutor challenged Ms. W[redacted] because she testified during voir dire that she did not want to judge anyone. Ms. W[redacted] testified that her home had been burglarized twice and that she felt that her husband committed the offense. She also stated "I just don't want no part of it". She also stated that the experience of having her home burglarized would prejudice her in the case. (Tr 96-97) She stated that it hurt her to be on the jury and made her feel weak inside. She also stated that she did not believe that she could make the right decision. (Tr 97) The trial court denied the prosecutor's challenge for cause so he then excused her because he felt she was not qualified. The

record of Ms. W[redacted]s voir dire totally shows that she either did not want to sit on the jury or felt that she could not sit and pass judgment on another person. (Tr 97-99)

G[redacted] R[redacted]

Ms. R[redacted] also expressed reservations about sitting on the jury since she had been the victim of a crime approximately four years before. (Tr 100, 123-124) The prosecutor's challenge of this prospective juror was also correct and not based upon race. Ms. R[redacted] also indicated that her daughter had been mugged and the case was still pending. (Tr 125-126) In regard to Ms. R[redacted] and Ms. W[redacted] it should be noted that the trial court stated that it was close to excusing those two jurors for cause.

R[redacted] O[redacted]

The state did not give reasons for challenging Mrs. O[redacted]

In case no. 85-4591-CF, petitioner's second case, tried a month after the first, the state challenged the following prospective jurors:

B[redacted] H[redacted] W[redacted]

The prosecutor removed this juror because she was unemployed. From a prosecutorial standpoint, this is clearly a valid reason. Often times a person who has been unemployed is a person who has been down on his luck and perceives the defendant

as a person that is being set up by the same forces of society that have caused him to be unemployed. In the case of Ms. W[redacted], she was a housewife and unemployed. Often times a person who remains at home develops a limited understanding of the world around them because of the lack of intellectual stimulation in their environment.

J[redacted] F[redacted]

Mr. F[redacted] was correctly challenged and removed from the jury because of his employment as an automobile salesman and the tone of his personality which troubled the prosecutor. The prosecutor was justified in removing an individual who may not be attentive to the proceedings or may have a personality that indicates a dislike for the prosecutor. In exercising the challenge the prosecutor stated:

> Your Honor, Mr. F[redacted] - I am not particularly fond of that agency -- he is a car dealer. I don't like individuals on this type of jury that sell cars. Its just the tone of his personality has come through, has offended Mr. Dalaronda and I as it relates to this type of offense. (Tr 675)

The state did not question this prospective juror, however, enough questions were asked by the court to enable the state to observe the individuals demeanor and personality traits.

E[redacted] D[redacted]

Mr. D[redacted] was challenged by the state because of his employment. Mr. D[redacted] had been in the army for three years and worked in criminal investigations. (R 638) The record does indicate however, that the prosecution may have been striking this individual because of his prior employment rather than his current employment. In any event, employment is a valid reason for striking a juror. Because of Mr. D[redacted]'s background, the prosecution may have felt that he would have directed his attention more to the method of the criminal investigation rather than to the evidence presented in the case.

D[redacted] M[redacted]

The prosecutor struck D[redacted] M[redacted] because of being a convicted felon. This was a proper basis for the exclusion of the prospective juror.

Z[redacted] A[redacted]

Mr. A[redacted] was struck from the jury for the same reason as Ms. M[redacted]. Striking an individual because of a criminal record is a valid reason which rebuts any presumptective juror, however, enough questions were asked by the court to enable the state to observe the individuals demeanor and personality traits.

R[redacted] S[redacted]

R[redacted] S[redacted] was struck because of a prior criminal record.

E[redacted] C[redacted]

Ms. C[redacted] was struck because she was on "welfare and in the job corps". (R 690-691)

A[redacted] D[redacted]

The state challenged Mr. D[redacted] because of a prior criminal record. (Tr 680)

The state submits that the reasons expressed by the state were valid peremptory challenges of prospective jurors. As correctly pointed out by the court below, since Neil was decided, neither this Court nor any Florida district court, has specifically found a reason, given by the prosecutor, unacceptable. Obviously, the reasons for peremptory challenges are as widely diversified as the backgrounds of the attorneys that try cases. Each attorney has his own theory as to what is or is not a good juror in regard to his client's point of view. It is interesting to note that even defense counsel in case no. 85-4591-CF struck several white female jurors. (Tr 148) In case no. 85-4592-CF petitioner's attorney indicated that he had struck jurors based upon their race. He believed that he was permitted to do so. (Tr 676-678) From this Court's language in Neil it would appear that peremptory challenges by either party based soley on race are impermissible. The petitioner may have struck prospective jurors based upon race in an attempt to lead the prosecution into doing so to invite error. Respondent submits

that the State Attorney offered valid, race neutral reasons for the exercise of his peremptory challenges while the petitioner blatantly admitted that he used race to challenge prospective jurors. It seems clear, from Justice Barkett's opinion in Slappy v. State, where she quite resoundingly condemned racial discrimination in a court procedure that the petitioner's practice of excluding jurors is reprehensible and should be resoundingly condemned by this Court. It seems clear, that giving official sanctions to racial prejudice in a courtroom, whether by the state or by a defendant would, as pointed out by Justice Barkett, inflame bigotry in our society at large. Unquestionably, no citizen in this country should be improperly excluded from jury service by either party.

In case no. 85-4592-CF, the state did not provide reasons for the removal of two jurors. The respondent submits that the state was not required to provide reasons for any of the jurors since the trial court ruled that the defendant had not met its burden of demonstrating that there was a strong likelihood that prospective jurors were challenged solely because of race. Morever, there are often times reasons for peremptory challenge which will not appear on the record but are fully known to the prosecutor and to the trial court based upon their observations of the prospective jurors during voir dire. Tillman v. State, 13 F.L.W. 194 (Fla., March 10, 1988) note 1.

The petitioner points out in his brief that both employed and unemployed black males and females were struck by the state that married and single blacks were struck by the state and blacks with and without children were struck by the state and that there was no common thread in the use of the state's peremptory challenges other than race. Nothing in the Neil or Slappy opinions requires the state exercise its peremptory challenges based upon the same reason for each juror.

Furthermore, the petitioner claims that the challenges were not related to the facts of the case and were based upon reasons which equally apply to jurors who were not challenged. As an example, the petitioner points out that Mr. H[redacted] was excused because he was young and single, yet Mr. R[redacted] was kept on the jury although he was also young and single. The problem is that the record doesn't reflect what Mr. R[redacted]'s age was. Moreover, the State Attorney was not requested, nor is he required, to explain why he kept a juror. The petitioner also complains that Mr. L[redacted] was excluded because he had a prior misdemeanor conviction and he was a man, but complains that the state did not object to Mr. R[redacted] or Mr. O[redacted] because of their gender. It is clearly race neutral and reasonable to exclude an individual because of a prior misdemeanor conviction.

The petitioner also compares the exclusion of A[redacted] B[redacted] to the retention of Mr. R[redacted] A[redacted] had no children.

Mr. R[redacted] did. As explained by the prosecutor, a woman without children may not be able to understand why a woman would not resist an attack when her children were in the house.

In case no. 85-4591-CF, four of the prosecutor's peremptory challenges were because the prospective juror had a prior criminal record. (Tr 675-672, 679, 680) The remaining jurors were struck due to: (1) unemployment; (2) employment as a car salesman and his demeanor or tone of personality, (Tr 675), (3) prior criminal investigation employment, (Tr 638, 675), and (4) enrollment in the peace corps. Certainly, these are racially neutral reasons, reasonable and related to the individual cases.

As for the strikes based upon a criminal record, contrary to the petitioner's argument, the court may accept a prosecutor's assertion that a juror has been convicted of a crime without requiring the state to produce a certified copy of the judgment of conviction. A prosecutor is not required to mention the nature, extent or age of the jurors criminal record.

As pointed out by this Court in Slappy the trial judge must evaluate the reasons and the credibility of the person offering those reasons in light of the circumstances of the case. In the instant case, unlike Blackshear, the prosecutor unhesitatingly volunteered his reasons for the exercise of the challenges. Certainly the trial court evaluated the reasons in light of the

prosecutor's candor and readiness to enunciate his reasons.

In summary, respondent contends first, that petitioner failed to carry his burden under the Neil standard and second, that assuming arguendo he met that burden, the prosecution acted appropriately in removing these jurors.

CONCLUSION

Based upon the preceding argument and citations of authority, respondent requests that this Court affirm the petitioner's convictions in case no. 85-4591-CF and 85-4592-CF.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been forwarded by U.S. Mail to Paula S. Sanders, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, on this 15th day of June, 1988.

FOR KURT L. BARCH
ASSISTANT ATTORNEY GENERAL