IN THE SUPREME COURT OF FLORIDA

ROOSEVELT BOWDEN, :

Appellant, :

vs. : Case No. 74,438

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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ISSUE I

APPELLANT WAS DEPRIVED OF HIS RIGHTS UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS WHEN THE STATE PEREMPTORILY EXCUSED THE SOLE BLACK PROSPECTIVE JUROR WITHOUT PROVIDING A VALID RACIALLY-NEUTRAL EXPLANATION FOR THE EXCUSAL.

Appellee asserts that Appellant failed to allege or demonstrate that there was a strong likelihood that the juror in question here, Almeith Brazell, was peremptorily excused by the State on account of her race. This matter has been conclusively put to rest by this Court's recent decision in Reynolds v. State, 16 F.L.W. S159 (Fla. Jan. 31, 1991). In Reynolds the Court held a strong likelihood of racially-discriminatory use of the peremptory challenge is demonstrated where the prosecutor exercises the peremptory to remove all members of the minority. "The fact that only one member of the minority was available for jury service is irrelevant." 16 F.L.W. at S160. Thus, when the prosecutor below peremptorily excused Ms. Brazell, who was undisputedly the only black person on the jury panel, and Appellant's counsel called the situation to the trial court's attention, the need for an inquiry pursuant to State v. Neil, 457 So.2d 481 (Fla. 1984) and it progeny was triggered.

To the extent Appellee may be suggesting that defense counsel somehow did not use the correct words in order to preserve this issue for appellate review, it is difficult to see what more

he could have or should have done. Counsel mentioned the Neil case by name [although it is misspelled in the record as "Neal" (R884)], and asked the trial court to inquire of the State its reasons for challenging the only black person on the panel. (R884) This is very similar to what defense counsel did in Bryant v. State, 565 So.2d 1298 (Fla. 1990), in which this Court reversed and remanded due to the lack of a Neil inquiry. See also Adams v. State, 559 So.2d 1293 (Fla. 3d DCA 1990), which is cited at page 5 of Appellee's brief.

At page 7 of its brief, Appellee claims that the prosecutor below "volunteered" reasons for excusing Ms. Brazell. This is inaccurate. The trial court called upon the prosecutor to "make an announcement as to what the basis would be" for exercising the peremptory because "it would be safer, for the purposes of the record." (R884-885)

Also on page 7, Appellee states that after excusing Ms. Brazell, the prosecutor excused seven women. Although the exact number is not particularly significant, Appellant can count only six women whom the prosecutor excused after Ms. Brazell: Ms. Hensley, Ms. Priestly, Ms. Marvin, Ms. Vinson, Ms. Donnelly, and Ms. Bare. (R886,902-904,912,925)

With regard to the validity of the reasons asserted by the prosecutor for removing Ms. Brazell, Appellee seeks to legitimize the prosecutor's contention that there were "too many women up there" by rationalizing that it was not unreasonable for the State to attempt to get a jury that was balanced with men and women.

(Brief of the Appellee, p. 7) However, as Appellant noted in his initial brief at page 37, when the prosecutor removed Ms. Brazell there were nine white women remaining on the jury panel who could have been excused instead. In Kibler v. State, 546 So.2d 710 (Fla. 1989) this Court indicated that while eliminating one juror in order to reach another might be a legitimate basis for exercising a peremptory challenge, it is incumbent upon the prosecutor to come forth with nonracial reasons for challenging a black juror rather than a white one in an attempt to get to another juror. Here, there was no reason why the prosecutor could not have excused one of the nine white female jurors, rather than the only black juror, if he was attempting to reach a male to sit on the jury.

Another reason the prosecutor gave for excusing Ms. Brazell was that she said a relative or family member had been accused of a crime. (R885) There is nothing in the record to support this statement, but Appellee asserts at page 8 of its brief that "it is apparent that the prosecutor discerned this information from the questionnaire provided by the juror." Obviously, this Court cannot evaluate a prosecutor's explanations pursuant to Neil on the basis of speculation about what may or may not be contained in a jury questionnaire that is not part of the appellate record. How do we know that the questionnaires of some of the white jurors who were not challenged did not reveal that they had relatives who were accused of crimes, but the prosecutor chose not to challenge them on this basis because they were white?

Appellee argues that Appellant did not properly preserve the matter of the prosecutor's explanation being unsupported by the record because defense counsel below did not specifically challenge the prosecutor's representation, and relies upon Floyd v. State, 569 So.2d 1225 (Fla. 1990) to support its argument. However, Floyd was not decided until September 13, 1990, long after Appellant's trial was over, and established a new procedural requirement in order to preserve a challenge under Neil that the prosecutor's asserted reason for removing a minority juror does not enjoy record support. Court decisions prior to Floyd place the full burden upon the trial court to conduct an adequate Neil inquiry once the defendant made a prima facie showing of discriminatory exercise of peremptories. For example, in Tillman v. State, 522 So.2d 14 (Fla. 1988) this Court observed:

> In State v. Slappy, 522 So.2d 18 (Fla. 1988), and Blackshear v. State, 521 So.2d 1083 (Fla. 1988), this Court further defined the procedure to be utilized when a challenge of racial discrimination in the use of peremptory strikes is made. We held that "any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor." Slappy, at 22. Moreover, the trial judge must "evaluate both the credibility of the person offering the explanation as well as the credibility of the asserted reasons." Id. In other words, "a judge cannot merely accept the reasons proffered at face value." Id. In essence, the proffered reasons must be not only neutral and reasonable, but they must be supported by the record. It is incumbent upon the trial judge to determine whether the proffered reasons, if they are neutral and reasonable, are indeed supported by the record. [Footnote omitted. Emphasis supplied.]

522 So.2d at 16-17. In State v. Slappy, 522 So.2d 18 (Fla 1988), as here, defense counsel offered no comments after the prosecutor gave his reasons for peremptorily excusing black jurors. The district court of appeal "essentially determined that the state's explanation was not supported by the record," and this Court refused to disturb the district court's finding. 522 So.2d at 24. In Knowles v. State, 543 So.2d 1258, 1259 (Fla. 4th DCA 1989) on rehearing the court reversed and remanded, noting as follows:

> The trial court did not evaluate the explanation [given by the prosecutor for peremptorily excusing the sole black juror from the panel] or determine that it was supported by the record, as the trial court must. [Footnote omitted. Emphasis supplied.]

In Knowles defense counsel did not challenge the prosecutor's explanation as being unsupported by the record. Finally, in Timmons v. State, 548 So.2d 255 (Fla.2d DCA 1989), review denied, 557 So.2d 35 (Fla. 1990) the court agreed with the Fourth District Court of Appeal's interpretation of the trial court's responsibilities under Neil:

> . . . [H]ere, as determined by the Fourth District in Knowles, the absence of an evaluation by the trial court of any explanation by the state and the absence of a determination by the trial court that such an explanation was supported by the record require that we reverse and remand for a new trial. [Emphasis supplied.]

548 So.2d at 256. Defense counsel should not be faulted for failing to anticipate a requirement that was not foreshadowed by legal precedent, and the holding in Floyd should not be used to thwart Appellant's legitimate issue.

The court below failed in his duty to evaluate the validity of the prosecutor's stated reasons for excusing Ms. Brazell. He went through the motions of requiring the State to give reasons, because it was "safer, for the purposes of the record," but apparently erroneously believed he did not have to rule upon the reasons until and unless some further pattern of racial discrimination in the State's exercise of its peremptories emerged. This was reversible error. In addition to the cases cited in Appellant's initial brief, see Smith v. State, 16 F.L.W. D151 (Fla. 3d DCA Jan 8, 1991).

ISSUE II

THE COURT BELOW ERRED IN FAILING TO CONDUCT ADEQUATE INQUIRY INTO APPELLANT'S DISSATISFACTION WITH HIS COURT-APPOINTED COUNSEL AND IMPROPERLY DENIED APPELLANT'S RIGHT TO REPRESENT HIMSELF.

In Jackson v. State, 16 F.L.W. D140 (Fla. 1st DCA Dec. 26, 1990) the defendant questioned the competency of court-appointed counsel. The trial court conducted an inquiry and concluded there was no basis for his complaints. The defendant was informed that if he dismissed court-appointed counsel, the State would not be required to appoint a substitute. The district court of appeal determined, however, that the court erred in not also telling the defendant that he had the option of self-representation.

At page 10 of its brief Appellee claims that at the hearing on defense counsel's motion to withdraw, Appellant "was offered the opportunity to represent himself and declined same."

This is inaccurate. At the hearing of November 18, 1988 the court asked Appellant, "Well, do you feel like you can handle your trial all by yourself, Mr. Bowden?" (R693) Appellant then said he was attempting to hire a "street lawyer." (R693-695) This constituted the entire exchange concerning Appellant's desire to represent himself. From this brief discussion it can hardly be said that the court gave Appellant an opportunity to represent himself and that he declined. Surely, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) requires a much more probing inquiry into a defendant's desire to conduct his own defense than what occurred below.

Appellee's statement at page 12 of its brief that Appellant did not challenge the competency of his attorneys is incorrect. For example, Appellant complained that his counsel only wanted to prepare for a penalty phase (R692), and, after he was convicted, Appellant asserted that not one of the witnesses he wanted to put on the stand to prove his innocence had been called. (R1561-1562) These are certainly matters pertaining to competency of counsel.

Appellee also faults Appellant for the alleged untimeliness of Appellant's request prior to sentencing for another counselor to be appointed to represent him. (Brief of the Appellee, p. 14) Appellee fails to recognize, however, that Appellant had repeatedly expressed dissatisfaction with the manner in which his defense was being conducted. His pre-sentencing request for a

different attorney was hardly the first time he had raised the issue.

Finally, in Johnston v. State, 497 So.2d 863 (Fla. 1986), which is cited page 44 of Appellant's initial brief and page 11 of Appellee's brief, this Court stated: "A trial court is obligated to examine the reasons given by a defendant to support his motion to discharge counsel and the grounds behind counsel's motion to withdraw. [Citation omitted.]" 497 So.2d at 867. This the court below failed to do in the instant case.

ISSUE III

THE TRIAL COURT ERRED BY CURTAILING APPELLANT'S RIGHT TO TESTIFY IN HIS OWN DEFENSE.

At pages 17 through 18 of its brief, Appellee quotes Appellant's penalty phase testimony and argues that this testimony "was not even remotely connected to the critical issues in the instant case." Appellant's testimony included a plea for his life. (R1475) Clearly, this was relevant to the "critical issue" of whether the jury would recommend life or death for him.

Furthermore, Appellee's entire discussion of Appellant's testimony at penalty phase is irrelevant. Appellee fails adequately to explain what this testimony has to do with the trial court's failure to honor Appellant's request to say something to the jury at guilt phase. In a trial for an offense exposing Appellant to the ultimate sanction society can being to bear, he should have been permitted to speak his piece fully at both phases of his trial.

ISSUE IV

THE COURT BELOW ERRED IN REFUSING TO GRANT A MISTRIAL OR GIVE A CURATIVE INSTRUCTION TO THE JURY WHEN STATE WITNESS RITA LITTLEFIELD GAVE IRRELEVANT, HIGHLY PREJUDICIAL TESTIMONY.

Appellee apparently concedes that the testimony in question was not relevant for any purpose. However, Appellee argues that any prejudicial effect of Rita Littlefield's testimony was dissipated by a so-called "curative instruction" the court gave. After Juror Karangelen said he did not hear the answer Littlefield gave to the prosecutor's question (which answer is the subject of this issue), the trial court merely said he sustained an objection and "[w]e can't speculate on that." (R1007) The court did not instruct the other jurors who must have heard Littlefield's response to disregard it. Thus, the court's remark to Karangelen hardly constituted the type of curative instruction defense counsel had in mind when he requested one.

Appellee also argues harmless error, citing Johnston v. State, 497 So.2d 863 (Fla. 1986). However, in Johnston the propriety of the objectionable testimony was not preserved for appellate review because defense counsel did not request a curative instruction or move for a mistrial. Here, Appellant's attorney immediately objected and moved for a mistrial and a curative instruction. (R1006)

ISSUE V

THE COURT BELOW ERRED IN INSTRUCTING APPELLANT'S JURY AT PENALTY PHASE THAT THEY COULD CONSIDER IN AGGRAVATION THAT THE HOMICIDE WAS COMMITTED DURING A ROBBERY.

Appellant takes exception with Appellee's statement at page 23 of its brief that "the evidence before the jury was that the entire conflict [between Appellant and Charles Littlefield, the deceased] started because of appellant's shortage of funds to pay for room and board." The State's own witness, Rita Littlefield, testified at trial that the argument preceding her husband's demise was about taking advice from Tom Campbell, who was a mutual friend of Appellant and the Littlefields (R1013,1061-1062), not about any "shortage of funds" on Appellant's part.

Appellant's own testimony indicated that he was paying the Littlefields rent of $25.00 and more each week. (R1262,1300) Appellant was paid daily for working construction (R1262,1287-1288), and the record does not support Appellee's conclusion that he was a man of such "limited means" that he found it necessary to kill his close friend for $14.00 and two cheap throwaway lighters.

ISSUE VI

IN FINDING THAT APPELLANT HAD PREVIOUSLY BEEN CONVICTED OF A FELONY INVOLVING VIOLENCE AND SENTENCING APPELLANT TO DEATH, THE COURT BELOW IMPROPERLY CONSIDERED CONVICTIONS AND CIRCUMSTANCES NOT PROVEN BEYOND A REASONABLE DOUBT, AND MAY HAVE CONSIDERED OTHER OFFENSES FOR WHICH APPELLANT WAS NOT CONVICTED.

In Alford v. State, 355 So.2d 108 (Fla. 1977), cited by Appellee at page 24 of its brief, this Court drew a distinction between the trial court "being aware" of certain facts and "considering" them. If the court is merely aware of certain matters which should not enter into his sentencing decision, but he does not in fact consider them, then there is no reversible error. Here, however, the trial court clearly was not only aware of matters contained in the presentence investigation report, but his extensive discussion of the facts of other crimes supposedly committed by Appellant shows that they played a significant part in his decision to sentence Appellant to die in the electric chair.

Appellee states that the holding of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) is that it is not a violation of due process to rely on information that the defendant has had an opportunity to explain or deny. (Brief of the Appellee, p. 24) Appellant would state the holding of Gardner to be that it is a violation of due process when a death sentence is imposed, at least in part, on the basis of information which the person to be sentenced had no opportunity to deny or explain. Interestingly, in Gardner, the record apparently did not reflect the extent to which the sentencing court relied upon the confidential portion of the presentence investigation that was not disclosed to the defense, but only that the trial court had considered the PSI. In the instant case, of course, the court's remarks show his considerable reliance upon elements of the PSI

which did not constitute proof of aggravating circumstances beyond a reasonable doubt.

ISSUE VII

APPELLANT'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE IS APPLIED ARBITRARILY AND CAPRICIOUSLY AND DOES NOT GENUINELY LIMIT THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

Appellee's discussion of this issue contains some factual inaccuracies. For example, Appellee says that the deceased incurred "over 32 separate injuries to the head alone..." (Brief of the Appellee, pp. 26-27) However, the medical examiner, Dr. Wood, testified that there were 32 injuries, not "over 32." (R1206) With regard to Appellee's statement at page 27 of its brief that there were "multiple defense wounds to the victim's arms and hands," Dr. Wood found only a wound to the back of the left arm and a wound to the back of the right lower arm that were clearly defensive wounds. (R1208) The multiple bruises over the hand and right wrist may or may not have been defensive wounds. (R1208)

CONCLUSION

Appellant, Roosevelt Bowden, renews his prayer for the relief requested in his initial brief, and for any and all further relief which this Court may deem appropriate.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 21st day of February, 1991.

Respectfully submitted,

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