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IN THE SUPREME COURT OF FLORIDA

KONSTANTXNOS X. FOTOPOULOS,  
Appellant,  
vs .  
STATE OF FLORIDA,  
Appellee.

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CASE NO. 77,016

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant relies on the Preliminary Statement in his Initial Brief.

STATEMENT OF THE CASE AND FACTS

The Appellant will rely upon his Statement of the Case and Facts as set forth in his Initial Brief.

SUMMARY OF THE ARGUMENT

The Appellant will rely upon his summary of the Argument as set forth in his Initial Brief.

POINT I

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO USE  
PEREMPTORY CHALLENGES TO EXCLUDE BLACK PROSPECTIVE  
JURORS.

The State correctly notes that a trial court is vested with broad discretion in determining whether peremptory challenges are racially intended. Reed v. State, 560 So.2d 203 (Fla. 1990). However, when a court misconstrues the applicable law, as was done sub judice, there has not been a valid exercise of discretion. As set forth in the Appellant's Initial Brief, and interestingly not addressed nor rebutted by the State in her Answer Brief, the trial court erroneously believed that as a white, Greek defendant, the Appellant lacked standing to make a "Neil objection." (R. 229). This, of course, is not the law. Bryant v. State, 565 So.2d 1298 (Fla. 1990); Kibbler v. State, 546 So.2d 710, 712 (Fla. 1989). Because of this legal misinterpretation, the trial court did not make a "conscientious evaluation" of the Appellant's timely "Neil" objections. This failure alone requires the granting of a new trial, Barwick v. State, 547 So.2d 612 (Fla. 1989).

The State has also overlooked the fact that it "volunteered" reasons for

striking prospective jurors Bostic and Gordon. (R. 229-230, 434-435).<sup>1</sup> The volunteered reasons are now subject to review on the merits. See, e.g., Reed v. State, supra, at 206; see, also: Smith v. State, 562 So.2d 787, 788-89 (Fla. 1st DCA 1990); Knight v. State, 559 So.2d 327 (Fla. 1st DCA) appeal pending, # 76084 (Fla. May 29, 1990). The State's reasons are invalid.

The State's argument that they had accepted two (2) black jurors prior to Mrs. Bostic is without merit as it does not isolate them from a "Neil" challenge. The issue is whether any juror has been discriminatorily excused, independent of the other. State v. Slappy, 522 So.2d 18, 21 (Fla.), cert.den., 487 U.S. 1219, 108 S.Ct. 2873 (1988); Tillman v. State, 522 So.2d 14 (Fla. 1988).<sup>2</sup>

The State's attempts to distinguish Mrs. Bostic's juvenile son's involvement with the law and the State Attorney's office from other white jurors who also had family members involved with the law and the State Attorney's office are distinctions without substantive differences. The fact is that the State readily accepted white jurors who had family or friends who had been arrented, and prosecuted. See, Initial Brief, pg. 21. However, as to two (2) black prospective jurors, Mrs. Bostic and Mrs. Gordon, this circumstance suddenly became very important. At no time during jury selection did Mrs. Bostic indicate that she could not be fair and impartial. If the State was truly concerned about Mrs. Bostic's ability to be fair and impartial in light of her "on the record"<sup>3</sup> disclosures about her son, then the State should have questioned her. Instead, the State did not bother to ask one question of Mrs. Bostic about her son's case(s). (R. 133-162). This absence of questioning renders the State's

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<sup>1</sup>In reference to Bostic, the State sua sponte volunteered its reasons. (R. 230). As to Mrs. Gordon, the trial court asked the State, in an abundance of caution, to state its reasons. (R. 434-435).

<sup>2</sup>As noted in Appellant's Initial Brief, the two (2) black jurors accepted by the State were Mr. Harris, Florida Department of Corrections' guard, (R. 95-96), and Mr. Johnson, who initially espoused his opinion that the death penalty must automatically be imposed upon a first degree murder conviction. (R. 85-87).

<sup>3</sup>As noted in the Initial Brief, it appears that the State used extra off the record information in connection with Mrs. Bostic. This raises a basic issue of fairness. See Initial Brief, pg. 22, citing Thompson v. state, 565 So.2d 1311, 1313-1314 (Fla. 1990).

explanation "immediate suspect," and does not meet the State's burden in proving the reason offered was not a pretext hiding discriminatory intent. See, Slappy, 522 So.2d at 23. Additionally, the State's "feeling" that Mrs. Bostic may want to please the State is plainly spurious and insufficient. Foster v. State, 557 So.2d 634 (Fla. 3d DCA 1990).

Lastly, the state has failed to take into account this Court's admonition in State v. Slappy, supra, 522 So.2d at 21-22, that the spirit and intent of Neil is "not to be obscured" in procedural rules governing the shifting burdens of proof. Instead, parties are to be given broad leeway, and any doubt as to whether a party objecting to the use of peremptory challenges based on race has met his initial burden should be resolved in that party's favor. Id.

#### **POINT II**

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S  
REPEATED MOTIONS TO SEVER COUNT ONE FROM THE REMAINING  
COUNTS

The Appellee's entire argument on this point is based on the assertion that the Ramsey murder was part of the overall plan to murder Lisa Fotopoulos. According to the Appellee,

"The evidence clearly demonstrates that at the time the Ramsey murder occurred it was (Mr. Fotopoulos') intent to use this to further his plans for Lisa's demise."  
(Appellee's Brief, page 21).

There is no record cite to support the Appellee's assertion on this point. More importantly, there is not a scintilla of evidence in the record to support this argument. Rather, each and every witness who testified for the State on this point testified that Ramsey was killed solely because he **was** blackmailing Fotopoulos, and further, the alleged plans to kill Lisa Fotopoulos was not mentioned or discussed until after the Ramsey murder.

Where there is no evidence in the record to support the Appellee's basic premise that the **two** murders were connected, the Appellee's position is without merit.



### POINT III

#### THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO IMPEACH THE APPELLANT ON THE BASIS OF PRIOR MISCONDUCT

The Appellee responds to this argument by asserting that there were no improper questions; Mr. Fotopoulos simply gave the "wrong" answer.

This argument by the Appellee is an insult to this Court. While many areas of the law may be subject to interpretation, the law surrounding impeachment by prior convictions should be settled beyond any dispute. Specifically, F.S. § 90.610 and a multitude of cases restricts the inquiry to two questions: whether the witness has been convicted of a crime, and if so, how many times? If the witness answers truthfully, all questions must stop. (see cases cited in Appellant's Brief, pages 38-39)

This Rule is so firmly entrenched; so well known to even the newest prosecutor; so indelibly etched in every prosecutor's manual that no one could seriously suggest that some other rule prevails.

until now.

The Appellee suggests that the questions propounded by the prosecutor in the present case after Mr. Fotopoulos had accurately disclosed the existence and number of prior conviction were proper in every respect. In the words of the Appellee, "When the prosecutor asked Fotopoulos if that was all he had to say, he could have just said yes..." (Appellee's Brief, page 25)

Under the Appellee's theory we do not need an evidence code or trial judges to rule on the admissibility of evidence; we just need smarter witnesses.

The Appellee next suggests that defense counsel was attempting to "direct his client's answering of cross examination questions". (Appellee's Brief, page 25). It should be absolutely clear to any observer that defense counsel was trying to limit the prosecutor's attempt to propound questions designed specifically to elicit inadmissible and improper responses from Mr. Fotopoulos. Indeed, the statement by defense counsel was addressed to the Court, not Mr. Fotopoulos. "That's all he has to say, Your Honor, if I may". (R. 2359-60).

While one may possibly excuse the indiscretion of the prosecutor, the response by the trial judge was inexplicable. The judge, in response to defense

counsel's efforts to limit the inquiry, admonished defense counsel, in effect, to sit down and be quiet.

The Appellee also attempts to justify the introduction of the facts underlying the counterfeiting convictions as responsive to Mr. Fotopoulos' testimony concerning his financial affairs. This argument is also without merit.

First, the evidence of counterfeiting comes within the purview of F.S. § 90.404(2), evidence of other misconduct. The Appellee is apparently unconcerned that the prosecution totally ignored the notice requirement of F.S. § 90.404(2)(b)(1).

second, the testimony as to Mr. Fotopoulos' financial affairs concerned the amount of his assets, not the source. whatever marginal relevance the source of the income may have had was clearly outweighed by the undue prejudice resulting from the testimony.

Lastly, this issue was addressed by counsel and the Court at length during the trial. (R. 1503-29). During the discussion defense counsel raised the counterfeiting activity in relation to Mr. Fotopoulos' financial affairs. (R. 1514, 1518-9). Thereafter, defense counsel and the prosecutor entered into a stipulation which was published to the jury. (R. 1530) The consideration for Mr. Fotopoulos to enter the stipulation was the prosecutor's assurance that no testimony concerning counterfeit currency would come in. (R. 1515-6).

The discussion also addressed the issue of hand grenades, (R. 1503), the AK-94 Rifle (R. 1513), ammunition magazines and other weapons (R. 1511). In exchange for concessions by defense counsel contained in the stipulation, the prosecution agreed that no evidence of the hand grenades and other items would be introduced by the state during the trial. (R. 1515-6)

After receiving these concessions from defense counsel, the prosecutor utterly and blatantly ignored the stipulation by introducing the certified copies of the convictions for counterfeiting activity; testimony about the weapons; and photographs of the hand grenades.

Finally, the Appellee applies the same logic to the questions by the prosecutor concerning the conversations between Mr. Fotopoulos and his attorney.

This logic is based on the premise that there are no improper questions, only improper answers. Thus, the Appellee states, "[Q]uestions do not violate any privilege; the privilege simply provides a legal basis for not answering those questions." (Appellee's Brief, page 29).

What the Appellee misses is that when a question is propounded by the prosecution seeking information from Mr. Fotopoulos concerning conversations with his attorney, and the trial court overrules an objection, Mr. Fotopoulos is compelled to provide the information.

#### POINT IV

The Appellant will rely upon his argument as set forth in his Initial Brief.

#### POINT V

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A "RICHARDSON BEARING" AFTER BEING ADVISED OF A DISCOVERY VIOLATION.

The Appellee's first response to the "Richardson" claim is that the matter was not properly preserved where defense counsel failed to "object".

In making this argument the Appellee overlooks this Court's language from Richardson v. State, 246 So.2d 771 (Pla. 1971) as well as a wealth of other authority. In Richardson, supra at 775, this Court cited to Ramirez v. State, 241 So.2d 744 (Fla. 4th D.C.A. 1970) and stated:

"We think that the District Court Appeal for the Fourth District has succinctly stated the burden that the Rule places both upon the prosecuting attorney and upon the trial court in the following quoted extract from its opinion in Ramirez v. State, supra :

'The point is that if, during the course of the proceedings, it is brought to the attention of the trial court that the state has failed to comply with the Rule 1.220(e) CrPR the Court's discretion can be properly exercised *only after the court has made an adequate inquiry into all of the surrounding circumstances.*' (246 So.2d. at 775) (original italics, emphasis added)"

This Court in Richardson then continued,

"Examination of the facts before the trial court bearing upon the issue of the State's noncompliance with the Rule disclosed that the petitioner complained, and now complains, about the State's use at trial of the (disputed evidence). (246 So.2d at 775)"

In the present case defense counsel at the very first instance at the statement by Mr. Fotopoulos was mentioned, stated,

"I do not have a copy of that, Your Honor. That was never provided." (R. 2373).

In the language of Richardson, defense counsel's statements both "brought to the attention of the Court" the fact that the statement was not provided and constituted a "complaint" ("That was never provided").

As if this were not enough, a colloquy between counsel for the parties then ensued concerning the reasons why the statement was never provided by the State.

The Appellee's reliance on Lucus v. state, 376 So.2d 1149 (Fla. 1979) and Delmarco v. State, 406 So.2d 1169 (Fla. 1st D.C.A. 1981) is misplaced. In Lucus defense counsel informed the court that a rebuttal witness had not been listed. The court responded that rebuttal witnesses need not be disclosed to which defense counsel stated, "Very well, Your Honor" (376 So.2d at 1151).

Had the trial court in the present case advised defense counsel that he was not entitled to prior statements by the accused, or made any ruling on the matter, and defense counsel given a similar response as occurred in Lucus, the present case would be in a different posture.

However, in contrast to Lucus, defense counsel in the present case brought the matter to the attention of the court; complained to the court; and argued his position before the court, all of which, it is respectfully submitted the trial court: ignored.

Delmarco cited by the Appellee, in fact supports the position of Mr. Fotopoulos. In Delmarco the Court stated,

"If a trial judge becomes aware that the State has breached the discovery provisions of the Florida Rules of criminal Procedure, he must conduct an inquiry into the circumstances surrounding the breach, he

must ascertain the degree of prejudice due to the offense, and he must determine the appropriate sanction." (406 So.2d at 1170)(emphasis added)

clearly, in the present case the statements by defense counsel were sufficient to make the trial judge aware that the state had breached the discovery provisions of Florida Rules of criminal Procedure.

The Appellee next argues that the State was under no obligation to provide or even advise counsel for Mr. Fotopoulos that the State was in possession of the transcript.

"Contrary to Fotopoulos' assertion, the Rule does not require the prosecuting attorney to disclose all information within his possession and control. The State is not required to prepare the defense's case..." (Appellee's Brief, page 35).

The issue before this Court is not whether the prosecuting attorney is compelled to disclose all information or to prepare the defendant's case. Rather, the issue is whether the state is required to advise the accused of statements by the accused in the possession of the prosecutor. The answer to this issue is clearly and unequivocally resolved by Fla.R.Crim.P. 3.220(a)(1)(iii).

It should be obvious that this Rule contains no exception for court reported statements or testimony by the accused. Rather, the Rule applies to all statements by the accused within the state's possession or control.

Finally, the Appellee argues that defense counsel should have been aware that a hearing was held and counsel could have obtained a transcript of the hearing. (Appellee's Brief, page 35)

while counsel may have been aware that a hearing was held, there is nothing in the Order to indicate that Mr. Fotopoulos testified at the hearing. More importantly, there is nothing contained in the State's response to the Demand for Discovery to indicate that Mr. Fotopoulos testified at the hearing or that the State was in possession of the transcript of the testimony. (R. 2622-23) Nor did the State list the transcript as a "tangible paper or object which the prosecuting attorney intends to use in the hearing or trial...." Fla.R.Crim.P.

3.220(a)(1)(xi). Nor did the State list the clerk of the court, the presumptive custodian of the original transcript, assuming it was filed, among the one hundred and seventy-five witnesses contained on the State's "Witness List" (See, Supp. Record ). In short, the response by the State gave every indication that no such statement existed. In spite of this, defense counsel should have divined that the statement existed and gone to some undisclosed location and obtained a copy of the statement from some undisclosed individual.

Clearly, the specific purpose of the Florida's Criminal Discovery Rules is to put an end to the type of sleuthing expected of the defense counsel by the Appellee in the present case.

POINTS VI-XVI

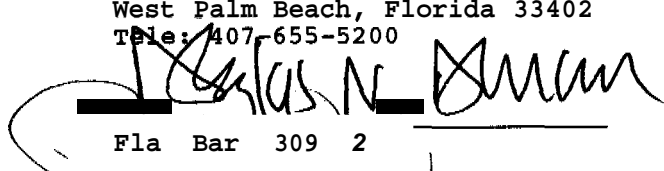
The Appellant will rely upon his arguments as set forth in his Initial Brief.

CONCLUSION

Based upon the arguments and authorities cited herein, as well as in the Initial Brief, Mr. Fotopoulos respectfully requests this Court to reverse his convictions and sentences, and remand for a new trial and any other appropriate relief this Court deems fit.

Respectfully submitted,

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