W00A

047

FILED
SID J. WHITE
SEP 12 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,602

KEVIN NELMS,

Petitioner.

vs.

STATE OF FLORIDA,

Respondent.

****

****

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Bureau Chief, Senior
Assistant Attorney General

DON M. ROGERS
Assistant Attorney General
Florida Bar No. 656445
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGES**

FLORIDA STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Kevin Nelms was the defendant in the trial court and is the Petitioner before this Court, therefore, he will be referred to herein as "Petitioner". The State of Florida was the prosecution in the trial court and is the Respondent before this Court, and therefore, will be referred to as the "Respondent" or "State", herein.

The following symbols will be used:

"R"	Record on Appeal.
"AP"	Appendix to Respondent's Answer Brief

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts found on pages two and three of Petitioner's initial brief subject to the following additions.

1) After being convicted of first degree murder Petitioner filed a direct appeal in the Fourth District Court of Appeal. In his initial brief on direct appeal four issues were raised:

> POINT I
>
> THE TRIAL COURT ERRED BY RELYING ON INCOMPETENT EVIDENCE IN DENYING APPELLANT'S MOTION TO SUPPRESS
>
> POINT II
>
> THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS TO THE POLICE
>
> POINT III
>
> THE TRIAL COURT ERRED BY LETTING THE PROSECUTOR MAKE MR. HANSEN'S PAIN AND SUFFERING A FEATURE OF THE CASE
>
> POINT IV
>
> THE TRIAL COURT ERRED BY NOT DISMISSING THE INDICTMENT

A copy of the brief is found in the appendix (AP-1). No reply brief was filed.

2) The Fourth District Court of Appeal per curiam affirmed Petitioner's conviction on December 18, 1985. Mandate issued on January 3, 1986. See Nelms v. State, 480 So.2d 1320 (Fla. 4th DCA 1986) (Table).

3) Petitioner first raised the Spencer issue in his second amendment to a motion for post conviction relief. The second amendment was filed in the trial court on October 25, 1989 (R 472).

SUMMARY OF THE ARGUMENT

Petitioner did not raise the Spencer issue on direct appeal. The only jury issue raised on direct appeal addressed the makeup of the grand jury. The makeup of the petit jury or the manner in which the petit jury pool was drawn was not addressed on direct appeal. Pursuant to Moreland v. State, Spencer cannot be applied retroactively to Petitioner who first raised the Spencer issue in a Fla. R. Crim. P. 3.850 motion years after his direct appeal becomes final.

ARGUMENT

THE HOLDING OF SPENCER V. STATE, 545 SO.2D 1352 (FLA. 1989) SHOULD NOT BE APPLIED RETROACTIVELY TO PETITIONER AS THE ISSUE WAS NOT RAISED ON DIRECT APPEAL

The sole issue in the present case is whether the decision in Spencer v. State, 545 So.2d 1352 (Fla. 1989) should be retroactively applied to Petitioner. Respondent strongly believes Spencer should not be retroactively applied in Petitioner's case.

In Moreland v. State, 16 FLW S481 (Fla. July 11, 1991), this Court stated: "we hold Spencer should be applied retroactively to Moreland and to persons like him who challenged the Palm Beach County Jury districts at trial and raised that issue on appeal." At bar, Petitioner did not challenge the jury districts at trial and did not raise the issue on direct appeal. Therefore, based on this court's holding in Moreland that the claim is not fundamental, Spencer should not be applied retroactively to Petitioner.

A review of what actually occurred during Petitioner's trial and direct appeal is in order. Prior to trial, Petitioner's trial counsel filed a seven paragraph motion titled "Challenge to Grand Jury Panel and Motion to Dismiss Indictment." (R 152) At trial, Petitioner's attorney referred to the pretrial motion "to excuse the entire grand jury" Petitioner's attorney also stated: "I noticed that in our entire panel of 50 persons there are only two black people." (R 491-492)

On direct appeal, Petitioner raised the following issue as Point IV of the initial brief: "The trial court erred by not dismissing the indictment." (AP 1 p. 26-27) This was the sole issue on direct appeal in which jury composition was mentioned. Petitioner argued only that the trial court erred in dismissing the indictment because . . . "the grand jury panel was improperly summoned from a different geographical area than the petit jury. . ."[1] Petitioner did not argue on direct appeal that the trial court erred in drawing the jury pool, from which the petit jury was chosen, from the eastern district of Palm Beach County. Indeed, on direct appeal Petitioner did not argue that he was prejudiced due to the way in which his petit jury was chosen. Petitioner did not argue that the jury district system in Palm Beach County was unconstitutional. This is a key distinction between the case at bar and other cases upon which Petitioner relies.

In Spencer v. State, 545 So.2d 1352 (Fla. 1989) Spencer, on direct appeal, challenged the Palm Beach County jury selection process on the following three grounds: (1) that the division distorts the population mix, resulting in a failure to

---

[1] A close reading of point IV of Petitioner's initial brief on direct appeal (AP 1) shows that no challenge is made to the use of a petit jury chosen from a jury pool drawn only from the eastern district. The challenge is to the makeup of the grand jury and whether this was grounds to dismiss the indictment.

Petitioner did not challenge the constitutionality of the manner in which Palm Beach County was divided into two jury districts either at trial or on direct appeal.

be able do draw prospective jurors from a fair representative cross-section of the county; (2) the manner in which it is determined that a defendant will be tried in the eastern or western district is a denial of equal protection; and (3) the authorizing statute for jury districts, section 40.015, is unconstitutional under article I, sections 16 and 22; article III, section 11(a)(5) and (a)(6); and article V, section 1, of the Florida Constitution. 545 So.2d at 1354.

In Amos v. State, 545 So.2d 1352 (Fla. 1989), Amos (Spencer's codefendant), on direct appeal "timely challenged as unconstitutional the jury district system utilized in Palm Beach County to select his jury." Id.

In Craig v. State, 16 FLW S480 (Fla. July 3, 1991), Craig, on direct appeal, claimed the trial court erred in denying his motion to draw the jury pool from all of Palm Beach County.

In Moreland v. State, 16 FLW S481 (Fla. July 3, 1991), "Moreland...made the same sixth amendment challenge to the county's jury districts that Spencer had made." Id. On direct appeal "Moreland raised the constitutionality of the jury districts." Id.

However, unlike the above cases, the present case is before this Court as an appeal from the denial of a motion filed pursuant to Florida Rule of Criminal Procedure §3.850. In his initial brief Petitioner silently acknowledges that the Spencer issue was not raised on direct appeal.

The above analysis clearly shows that Spencer and its progeny are all predicated on at least three facts: 1) that the defendant challenges, prior to trial, the manner in which Palm Beach County is divided into jury districts; 2) that the defendant is tried by a jury chosen from a jury pool selected solely from the eastern district and; 3) that same issue "on which Spencer received relief" must be raised in the trial court and on direct appeal. See Moreland, 16 FLW at S481.

At bar, on direct appeal, Petitioner only challenged the jury pool from which his grand jury was chosen. No challenge to the jury pool from which the petit jury was chosen was made on direct appeal.(AP-1) Clearly, petitioner did not raise the same issues as Spencer either in the trial court or on direct appeal. Therefore, petitioner is not entitled to relief. Moreland, 16 FLW S480 n.3.

In Moreland, this Court applied the retroactivity test found in Witt v. State, 387 So.2d 922 (Fla. 1980), and concluded "that a major constitutional change of the law, which can be raised for the first time in a post conviction motion did not occur here." 16 FLW at 481. This court reversed Moreland primarily on the idea of "fundamental fairness" because "if Moreland had been sentenced to death, he would have appealed to this Court, . . . and would have obtained the same result as Spencer. . ." Id. Such notions of fundamental fairness do not dictate retroactive application of Spencer to Petitioner. As noted earlier Appellant did not raise the Spencer issue on direct

appeal. Assuming, arguendo, that Petitioner was entitled to a direct appeal to the Florida Supreme Court upon his conviction, this Court would not have granted relief because the Spencer issue would not have been presented in his initial brief. This fact clearly points out that notions of fundamental fairness, as applied in Moreland, should not apply to Petitioner.

Petitioner's appellate counsel cannot be held to be ineffective for failing to raise the Spencer issue on direct appeal. Petitioner was convicted on March 8, 1985. Petitioner's initial brief on direct appeal was filed in the Fourth District Court of Appeal on September 10, 1985. The Fourth District Court of Appeal per curiam affirmed Petitioner's conviction on December 18, 1985 with mandate following on January 3, 1986. Nelms v. State, 480 So.2d 1320 (Fla. 4th DCA 1986). This Court issued Spencer on June 15, 1989, three and one half years after mandate issued in Petitioner's direct appeal. This Court has previously held that claims of ineffective assistance of counsel that place a duty upon defense lawyers to anticipate changes in the law are without merit. Stevens v. State, 552 So.2d 1082, 1085 (Fla. 1989); Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982). The same principle is equally applicable to appellate attorneys. "Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points." Atkins v. Dugger, 541 So.2d 1165, 1167 (Fla. 1989).

Contrary to Petitioner's assertion, Mitchell v. State, 567 So.2d 1037 (Fla. 4th DCA 1990), does not support Petitioner's ineffectiveness argument. While Mitchell was pending before the District Court, this Court issued Spencer. Mitchell's appellate counsel did not bring Spencer to the attention of the Fourth District Court of Appeals, through the filing a notice of supplemental authority. Additionally, during the pendency of Mitchell's appeal the Fourth District reversed Mitchell's codefendant's conviction due to Spencer. See Walker v. State, 546 So.2d 802 (Fla. 4th DCA 1989). The Fourth District in Mitchell did not find appellate counsel ineffective but reversed due to "the interests of justice." 567 So.2d at 1038. Obviously, the facts of the present case are dramatically different from those found in Mitchell as Petitioner's direct appeal was finalized three and one half years prior to Spencer, and Petitioner was tried alone.

Petitioner suggests that this Court should consider the ruling in Spencer to be fundamental. Petitioner argues it represents an application of established constitutional principle that a defendant is entitled to be tried by a jury drawn from a fair cross section venire. However in Moreland, this court found that a major constitutional change of law did not occur in Spencer. 16 FLW at S481. The issue in Spencer did not involve the right of a defendant to a jury selected from a fair cross-section of the community but rather the implementation of Section 40.015, Florida Statute (1987) through Palm Beach County's

Administrative Order No. 1.006-1/80, "In Re: Glades Jury District-Eastern Jury District. This Court in Spencer states that procedural fairness is not accomplished by a strict division of the county into east/west jury districts, thereby, excluding a portion of the black population of Palm Beach County from service in the Eastern district. However, procedural fairness is met when a jury district contains the same population mix of blacks as does the county as a whole. Thus, Spencer does not change the law, but rather interprets statutory provisions providing a guideline for creating such jury districts where none previously existed.

Although this Court found in Spencer "an unconstitutional systematic exclusion of a significant portion of the black population from the jury pool for the West Palm Beach district", a difference of 1.1 percent between the eastern district's 6.4% black voters as opposed to the 7.5% of black voters in the whole county does not constitute fundamental constitutional error as contemplated by the United States federal case law which addressed laws patently excluding blacks from jury duty or other recognizable groups from jury duty. Spencer at 1354.

The U.S. Supreme Court has never held that the Sixth Amendment is violated when a larger jury district is divided into smaller jury districts where the smaller jury districts do not reflect the exact same percentage makeup of blacks (or women, Hispanics, elderly, etc.) as the large jury district or where the

urban/rural population mix has not racially discriminate. A defendant is not entitled to a perfect cross section of the community, but to a "fair" cross section. Some deviation is inevitable. Assessing the fairness of a group's representation requires a comparison between the percentage of the "distinctive group" on the qualified jury wheel and the percentage of the group among the population eligible for jury service in the division. The Eleventh Circuit has consistently held that a prima facia case of under representation has not been made where the absolute disparity between these percentages does not exceed ten (10%) percent. U.S. v. Rodriguez, 776 F.2d 1509, 1577 (11th Cir. 1985); U.S. v. Maskeny, 609 F.2d 183, 190 (11th Cir. 1980). Consequently, the disparity of 1.19% between the proportion of blacks eligible for jury service in the whole county (7.5%) versus the eastern jury district (6.49%) is not constitutionally significant to warrant retroactivity. See Moreland, 16 FLW at 481.

Petitioner also suggests he should be "granted relief to satisfy equal protection requirements." This Court has already rejected this argument in Moreland where it noted that the Spencer issue must have been raised on direct appeal in order to be retroactively applied via 3.850 motion. 16 FLW S481 n.3. This argument taken to its logical end would require relief for virtually every criminal defendant tried in Palm Beach County during a ten year period! Such a ruling would have a devastating effect on the administration of the criminal justice system in the county.

The effect of retroactive application upon the administration of justice is so great that this Court has rarely found that a change in decisional law requires retroactive application. State v. Glenn, 558 So.2d 4, 6 (Fla. 1990). Sub judice, the State justifiably relied upon the special districting process authorized by Section 40.015, Florida Statutes, as implemented in the Fifteenth Judicial Circuit by Administrative Order No. 1.006-1/80, entitled "In re: Glades Jury District--Eastern Jury District". The purpose was a properly motivated effort to reduce substantial travel time for jurors, and to alleviate unnecessary expense to the state treasury. Any resulting discrimination was unintentional. Spencer, at 1354. Numerous trials were held in the Eastern District of Palm Beach County over a ten year period in reliance upon the aforementioned statute and administrative order.

Many final convictions would, therefore, be subject to being vacated if the decision in Spencer is applied retroactively to individuals such as Petitioner. Resulting trials will necessarily be hampered by the obvious problems of lost evidence, faulty memory and missing witnesses. These factors must also be weighted heavily against any retroactive application. The decision in Spencer should not be applied retroactively to any fully adjudicated case where the conviction has become final and the issue was not raised on direct appeal. This Court, as did the Fourth District Court of Appeal, should decide in favor of the strong policy interest of decisional finality. Granting

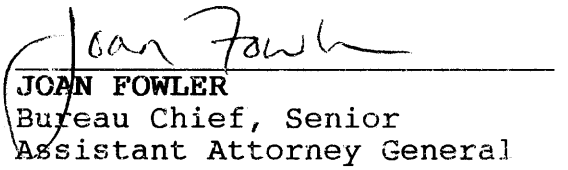
collateral relief to Nelms and others similarly situated would have a strong negative impact upon the administration of justice in Palm Beach County.

CONCLUSION

The Fourth District Court of Appeal did not err by refusing to give retroactive application to the Florida Supreme Court's decision in Spencer v. State to Petitioner. Respondent would request that this Court affirm the Fourth District Court's ruling.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



JOAN FOWLER
Bureau Chief, Senior
Assistant Attorney General

DON M. ROGERS
Assistant Attorney General
Florida Bar No. 656445
111 Georgia Avenue, Suite 204
West Palm Beach, FL 33140
(407) 837-5062

Counsel for Appellee