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appeal 087

SUPREME COURT OF FLORIDA

KEVIN NELMS,
Petitioner

Vs. CASE NO. 77,602

STATE OF FLORIDA,
Respondent

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Circuit Court in and for Palm Beach County, Florida, the Petitioner for post-conviction relief and the Appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and the Appellee. The parties will be referred to as Petitioner and State throughout this Brief.

The symbol "R" followed by a number will refer to the record on appeal.

STATEMENT OF THE CASE AND FACTS

Petitioner was indicted for murder in the first degree (R35-36), found guilty by jury, adjudged guilty (R319) and sentenced to life without possibility of parole for 25 years (R320). The Fourth District affirmed his conviction on direct appeal (R341-342, 480 So.2d 1320).

His Motion to Vacate (R344-381) was amended (R420-459) and amended again. He ultimately alleged that Petitioner was denied a countywide jury, thus systematically excluding a significant concentration of the black population of Palm Beach County, and denying him a true cross-section of the county (R472-478, 482-491).

The cause came on for hearing on May 10, 1990 (R1). Attorney James Eisenberg testified that he was appointed to represent Petitioner as the result of a Public Defender conflict (R5-6). He filed Exhibit One, a challenge to the grand jury panel and motion to dismiss which said in part:

> "Four. The petit jury panel before the Court has been selected only from the eastern jury district and not from the Glades jury district."

The Court refused to allow him to elaborate on the language used in the motion (R8-11).

Eisenberg read verbatim from the State's response to that motion, which relied on the validity of Administrative Order 1.006-1/80 creating separate jury districts for eastern and western Palm Beach County (R13, 174). He testified that paragraph 4 of his motion addressed that jury district (R13). He recalled complaining during jury selection that blacks were underrepresented on the jury venire (R14-16), 490-491). He conceded he did not ask to be transferred to the Glades District (R19). When he said he wasn't sure what he did file without

looking, the prosecutor assured him he had not asked for a countywide jury. He accepted her assurance based on her review of the file (R19). However, his challenge to the grand jury panel included a prayer in the alternative for a new panel drawn from the same area as the grand jury (R152).

By order filed April 4, 1990 (R493-500), the Judge denied Petitioner's Motion to Vacate. By Notice of Appeal (R501) filed May 1, Petitioner sought review of that Order.

On appeal, the District Court affirmed (573 So.2d 109), referring only to its decision in State v. Moreland, 564 So.2d 1164 (Fla. 4DCA). Rehearing was denied February 14, 1991.

By notice filed March 13, 1991, Petitioner sought discretionary review of that decision. By Order of July 9, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

Petitioner was tried in the Eastern District of Palm Beach County, despite his challenge to the different area for the petit jury compared to the grand jury. His pretrial motion expressly prayed for a new jury which would have been countywide.

He was denied post conviction relief because the Judge below did not believe the decision invalidating the jury districts applies retroactively. This Court has now ruled that it does, so Petitioner is entitled to the benefit of the ruling.

What Petitioner did below is sufficient to preserve the issue, but he should be granted relief even if it were not. This is so in part because this Court did not create new constitutional law, but simply applied established standards in a different setting.

It is also so in part because any procedural default on the part of Petitioner's attorneys would necessarily be ineffective assistance.

Petitioner would also suggest that the right to a fair cross-section on the venire is so fundamental that its denial can be raised initially by post-conviction motion.

Finally, so many have received relief, by one avenue or another that equal protection requires relief. Fundamental fairness requires no less.

POINT INVOLVED

FUNDAMENTAL FAIRNESS REQUIRES THAT PETITIONER RECEIVE A NEW TRIAL BECAUSE HIS REQUEST FOR A COUNTYWIDE JURY WAS DENIED

ARGUMENT

FUNDAMENTAL FAIRNESS REQUIRES THAT PETITIONER RECEIVE A NEW TRIAL BECAUSE HIS REQUEST FOR A COUNTYWIDE JURY WAS DENIED

In Spencer v. State, 545 So.2d 1352 (Fla. 1989), this Court held Palm Beach County's jury district plan unconstitutional because it systematically excluded a significant portion of the black population from the West Palm Beach jury pool. This appeal concerns its application to a postconviction motion for relief.

Recent decisions have clarified some of the parameters of Spencer. We now know that the Fourth District was in error in refusing to apply Spencer retroactively. State v. Moreland, 564 So.2d 1164 (Fla. 4DCA 1990), on which the Court relied in rejecting Petitioner's postconviction relief appeal, has now been reversed by this Court to ensure fundamental fairness and uniformity in individual adjudications, Moreland v. State, Case No. 76,752, Opinion filed July 11, 1991, 16 FLW S481.

Fundamental fairness also requires relief for Petitioner. He filed a pleading which specifically prayed in the alternative for a jury drawn in the same manner as the grand jury (R152). That would have been a countywide jury under the Administrative Order establishing the jury districts (R151-152).

Thus, the trial Judge was simply in error in finding (R497) no such request was made. He was correct in finding there had been no request for a transfer to the Glades District, but that was not required to preserve the issue. Craig v. State, Case No. 73,251, Opinion of this Court filed July 3, 1991, 16 FLW S480. Craig also holds that failure to submit supporting statistics or to renew

the request at trial is not fatal to its preservation. Appellant did better than Craig, because he complained again at trial of the underrepresentation of blacks on the jury panel and referred to his pretrial motion (R423-424).

Judge Mounts also concluded that because there was no request for a countywide jury, it was not litigated on appeal. However, he found that denial of the pretrial "Challenge to Grand Jury Panel and Motion to Dismiss Indictment" was raised on direct appeal (R497). Because, contrary to Judge Mounts' conclusion, that "Challenge" did request a countywide jury, it would appear that Petitioner did all that was required to preserve this issue. Like Moreland, he should receive a new trial as relief for the unconstitutional jury district system he was tried under.

There is an alternate reason why Petitioner feels he must receive a new trial. It focuses on the nature of the Spencer ruling, rather than what Petitioner did to preserve the issue.

In Moreland v. State, supra, this Court declared that:

> "Spencer, however, did not create new law or make a major constitutional change of law. Rather, at the first opportunity it applied existing sixth amendment law to a new situation."

(16 FLW S481)

It thus acknowledged prior decisions foreshadowing Spencer. Cases like Taylor v. Louisiana, 419 U.S. 422, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972), Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942) and Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1180) require a representative venire as a component of the right of jury trial under the Sixth and Fourteenth Amendments.

In Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court recognized the fair cross-section requirement as an essential feature of the Sixth Amendment guarantee of jury trial. This Sixth Amendment guarantee was imposed, by means of the Fourteenth Amendment, on the states in Taylor v. Louisiana, 95 S.Ct. at 697, (1975). "We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment." As early as 1953, the Supreme Court had stated:

> "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.

Brown v. Allen, 344 U.S. 443, 474; 73 S.Ct. 397, 416; 97 L.Ed. 469 (1953).

Because Spencer is but an application of established constitutional principles, it must be available in collateral proceedings like this one, Yates v. Aiken, 484 U.S. 211 at 216, 98 L.Ed.2d 546 (1988). Peters v. Kiff, supra, was also a habeas corpus proceeding.

The underlying theory is that the Court is applying law which was already in existence when the conviction occurred. Yates ordered relief in a case where there was no objection to the faulty instruction on burden of proof at trial and the issue was not raised on appeal. See Yates v. Aiken, 349 S.E. 2d 84 at 85 (S.C. 1986).

In Moreland, this Court rejected the idea that any infringement on the right to jury trial would constitute fundamental error, and disapproved that statement in Nova v. State, 439 So.2d 255 (Fla. 3DCA 1983). However, this Court should not reject the idea that a fair cross-section is fundamental. In the recent Holland v. Illinois, 493 U.S. ____, 107 L.Ed.2d 905, 106 S.Ct. 1785 (1990), the Court reiterated the Sixth Amendment need for a fair cross-section venire, saying:

> "It has long been established that the racial groups cannot be excluded from venire from which the jury is selected. That constitutional principle was first set forth ... under the Equal Protection Clause. Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880).
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> ...
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> Our relatively recent cases, beginning with Taylor v. Louisiana, hold that a fair-cross-section venire is imposed by the Sixth Amendment, which provides in pertinent part: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime was committed...' The fair-cross-section venire requirement is obviously not explicit in this text, but is derived from the traditional understanding of how an 'impartial' jury is assembled. That traditional understanding includes a representative venire, so that the jury will be, as we have said, 'drawn from a fair cross section of the community.' Taylor, 419 U.S. at 527, 42 L.Ed.2d 690, 95 S.Ct. 692 (emphasis added).
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> ...
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> The Sixth Amendment requirement of a fair cross section of the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does). Without that requirement, the State could draw up jury lists in such a manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition. The State would have, in effect, unlimited peremptory challenges to compose the jury pool in its favor. The fair-cross-section venire requirement assures, in other words, that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis." (emphasis added).

Holland, 107 L.Ed.2d at 918-19.

See also Bass v. State, 368 so.2d 447 at 449 (Fla. 1DCA 1979).

Petitioner concludes that he should receive a new trial under Spencer even if his attorney had not preserved the issue. In fact, his right to relief might be even clearer.

If Petitioner had not challenged this issue at trial and were denied relief on that basis, it would be obvious that his attorney was ineffective. There may be cases where the defense would rather not have more blacks on the venire, but this is not one of them. Petitioner is black (R185). His attorney wanted more blacks and complained at trial that he was not getting them.

Reasonably competent counsel had to know he would improve his chances of getting black jurors on his venire if the Glades District were included. The disparity from Eastern District to Western District was too great for him not to know.

Moreover, the cases requiring a representative venire were all there to be observed. Judge Cohen did not need this Court to draw him a map. His decision in State v. Alix Joseph, Case No. 87-619, Cir.Ct. Fifteenth Circuit was cited by this Court in Spencer v. State, supra, 545 So.2d at 1355. Even before Spencer, failure to challenge the jury districts would have been poor legal judgment in the circumstances.

In footnote 3 of Moreland, supra, this Court held Moreland would have been entitled to no relief if his attorney had not raised the issue on appeal. Petitioner would urge this Court to reconsider this dicta. If counsel preserved the issue at trial and was rebuffed, failure to raise the issue on any appeal requesting reversal of the conviction must per se be ineffective assistance.

Consider that counsel is seeking at least a new trial. Spencer establishes a 100 per cent chance of success by raising the issue. There can be no possible tactical reason not to do so. Therefore, if a dispositive point, fully preserved at trial, is omitted, appellate counsel has been quite derelict.

The Fourth District missed the need for fairness in individual adjudications which guided this Court in Moreland, supra, but it recognized ineffective assistance with regard to the issue. In Mitchell v. State, 567 So.2d 1037 (Fla. 4DCA 1990), it granted relief by habeas corpus to a defendant whose attorney did not raise the issue, even after Spencer came out. Mitchell's codefendant received a new trial in Walker v. State, 546 So.2d 802 (Fla. 4DCA 1989).

If appellate counsel had let Petitioner down in this case, he should still have relief.

Petitioner must also be granted relief to satisfy equal protection requirements. He has been denied the representative cross-section so many others were granted. If the offense occurred in Belle Glade, he could have chosen trial in either District, but he was given no such option here. If he'd come before Judge Cohen, his request for a countywide jury would have been granted. If his case went straight to this Court, he would have won the direct appeal. If his codefendant had won, the Fourth District would have granted postconviction relief.

Perhaps equal protection is just another way of saying fundamental fairness, but Petitioner should not end up treated differently than Spencer, Amos, Craig, Moreland, Walker, Mitchell, Alix Joseph and all the others.

CONCLUSION

Because Petitioner did preserve the issue, because a fair cross-section venire is fundamental, because Spencer is but an extension of existing decisions and because so many have already received relief, fundamental fairness requires a new trial for Petitioner with a countywide jury.