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FILED
SID J. WHITE
AUG 8 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

TIMOTHY LEE FOX,

Respondent.

CASE NO. 77,624

RESPONDENT'S ANSWER BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
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Florida Bar Number 374407

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PRELIMINARY STATEMENT

Respondent was the Appellant in the court below and the defendant in the trial court. Petitioner was the Appellee in the Court below and the prosecution in the trial court. In this brief, the parties will be referred to as they appear before this Honorable Court of Appeal. A copy of the district court opinion is attached as Appendix I.

The following symbol will be used:

"R" Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Fact with the addition of the following clarification.

The trial court did not offer Respondent a mistrial either during jury selection or at any other time. However, after closing argument, the trial court inquired of Respondent as to whether he was satisfied with his counsel's decision not to object or move for a mistrial due to the prosecutor's closing argument, and that if his counsel had earlier made a motion the judge would have considered whether an improper argument had been made (R262-263).

SUMMARY OF THE ARGUMENT

The prosecutor's reason for challenging the black juror -- that the juror had previously served on a hung jury and was therefore indecisive -- was facially invalid. There is no nexus between being on a hung jury and being indecisive. In fact, being on a hung jury shows that one is decisive in his or her belief despite possible pressure from other jurors. It was error to overrule Respondent's objection.

In addition, there were a number of indications showing that the reason for excluding the black juror was a pretext.

A separate reason for prohibiting the state's challenge was that a factual predicate did not exist to support the state's claim that the juror served on a hung jury. It is presumed that the trial court was aware of the voir dire in his required presence. See State v. Singletary, 549 So.2d 996 (Fla. 1989). Unlike Floyd v. State, 569 So.2d 1225, 1229 (Fla. 1990) where the trial court informed defense counsel that he was unaware of the challenged juror's answers, in the present case there was no evidence rebutting the presumption that the trial court was aware of what occurred during voir dire. Thus, unlike in Floyd, supra, the present issue cannot be deemed to be waived.

In addition, due to the effect of discrimination on the judicial system and on those not represented by counsel, it is the trial court's duty to ascertain if there is record support for the reasons for excluding the juror.

Finally, the present issue was not waived in the court below.

ARGUMENT

IT WAS REVERSIBLE ERROR TO PERMIT THE PROSECUTOR TO UTILIZE A PEREMPTORY CHALLENGE ON A BLACK JUROR WHERE THE PROSECUTOR FAILED TO GIVE A LEGITIMATE RACIALLY NEUTRAL REASON FOR UTILIZING THE CHALLENGE.

Petitioner raises the issue as to the trial court's duty in this case to ascertain whether the prosector's reason is factually supported by the record. Respondent will momentarily address this issue. However, first a threshold matter of determining whether the prosecutor's reason is facially legitimate must be addressed. In other words, even if the reason for excluding the juror is supported by fact, the reason will not be valid if it is not legitimately related to the case.

During jury selection the prosecutor exercised a peremptory challenge to strike a black juror -- Sampson Williams (R135). Respondent objected on the basis of State v. Neil, 457 So.2d 481 (Fla. 1984). The trial court asked the prosecutor to give reasons for striking the black juror (R135). The prosecutor indicated that the black juror had previously been on a hung jury and that he didn't want a juror sitting who could not make a decision (R135). The trial court noted that he believed Mr. Williams would make a good juror, but permitted the peremptory challenge (R136).

A. Reason is not facially legitimate.

It is well-settled that the reason for excluding the juror must be facially race neutral and facially legitimate. See State v. Slappy, 522 So.2d 18, 22 (Fla. 1988) (there must be a "clear and reasonably specific" explanation of "legitimate reasons" for exercising the challenges); Thompson v. State, 548 So.2d 198, 200

(Fla. 1989) (burden to show that reasons are 1) neutral and reasonable and 2) not a pretext); Tillman v. State, 522 So.2d 14, 16 (Fla. 1988); Roundtree v. State, 546 So.2d 1042 (Fla.1989). For example, if a black juror was excused for the reason that he or she was over 40 years old on the premise and that jurors over 40 years of age are indecisive, the reason would be facially race neutral. However, the reason would not be legitimate. Reasons for peremptory challenges cannot be accepted at face value. Roundtree v. State, 546 So.2d 1042, 1044 (Fla. 1989); Tillman v.State, 522 So.2d 14,16 (Fla. 1988); State v. Slappy, 522 So.2d 18, 22 (Fla. 1988). The reasons must be evaluated.[1] Id. The failure to critically evaluate the reason in such a manner would amount to an abuse of discretion in the evaluation proces. Thus, an excusal of a juror because people over 40 are indecisive would be invalidated because there is no valid correlation between age and decisiveness. Such a reason would be facially invalid.

Likewise, at bar the prosecutor's reasons for excluding the black juror, because a juror on a hung jury cannot make decisions, is facially invalid because there is no nexus between being on a hung jury and being indecisive. Being on a hung jury shows that the group of 12 jurors have strong individual opinions that cannot be compromised into a unanimous verdict. It does not show

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[1] This evaluation as to the facial validity of the reasons is distinct from the other evaluations performed by the trial court. It does not involve the evaluation of the credibility of witnesses or evidence. Rather, the evaluation consists of analyzing the reason on its face.

indecision by the individual jurors. In fact, being on a hung jury can demonstrates a decisiveness. Being on a hung jury shows that a juror is decisive and unswerving in his or her belief - despite possible pressure from other jurors.[2] Thus, exclusion on the premise that the individual is indecisive because he or she served on a hung jury is not facially legitimate. It was error to permit the challenge of the black juror based on this facially invalid reason.

B. Reason is pretextual.

Besides the facial invalidity of the reason, it should be noted that there are a number of indications that the reason was merely a pretext. A number of other potential jurors had previously served on juries.[3] However, the prosecutor did not ask Corwith, Kimsey, Roig, Houser or Isreal if decisions had been reached by the prior juries they had served on (R32-58). If the prosecutor was truly concerned about hung juries, rather than using it a pretext, he would have asked these individuals whether their juries had reached a decision.[4] Also,the prosecutor never asked

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[2] On the other hand, one can be on the majority vote of the hung jury and still unswerving in his or her belief.

[3] These are Raimandi (R 18), Corwith (R19), Kimsey (R20), Williams (R22), Roig (R24), Houser (R25), Isreal (R28-29).

[4] While some of the jurors eventually answered these questions when questioned by the defense, the fact that the prosector totally ignored this subject when asking about prior service shows his true lack of concern about hung juries.

the two jurors who had served on hung juries (R90,97-98), why their juries had failed to reach a decision. If the prosecutor was truly concerned about this type of juror not being able to make decisions, he would have ascertained if the particular juror was able, or unable, to reach an individual decision. Finally, the prosecutor did not attempt to discover whether the challenged black juror, Mr. Williams, had been indecisive in any manner in his prior jury service. The prosecutor's failure to question the jurors, and Mr. Williams, as to their decisiveness as individuals shows that the reason was pretextual.

C. Present issue is distinguishable from Floyd v. State.

As demonstrated earlier, the objection to the challenge of the black juror should have been sustained even if there had been record support that Mr. Williams had served on a hung jury. However, the fact that there is no factual predicate for the reason is a separate argument for holding the challenge to be pretextual. In this case there was absolutely nothing indicating that Mr. Williams would be anything other than a fair and impartial juror. In fact, the trial judge specifically noted that he believed Mr. Williams would make a good juror (R136). It can't be disputed that if the prosecutor's reason for challenging Mr. Williams was based on something that never occurred, the peremptory challenge should not be permitted. However, as Petitioner correctly points out, Respondent never informed the trial court that there was no factual predicate showing that Mr. Williams had served on a hung jury. Consequently, Petitioner

claims that under Floyd v. State, 569 So.2d 1225 (Fla. 1990) the trial court cannot be blamed for assuming that Mr. Williams had been on a hung jury. However, the instant situation is distinguishable from Floyd, supra.

The situations being analyzed are where the trial court is present during voir dire asking questions, listening to questions, and listening to the juror's answers. Thus, there is a presumption that the trial court knows a juror's answers and knows whether the prosecutor is correct in his factual predicate premising the reason for the challenge.[5] In Floyd this presumption was not applicable where the trial court specifically stated during the inquiry into the challenge that it "did not recall" the juror's answer. 569 So.2d at 1229. At this point defense counsel was on notice that the trial court was unaware the prosecutor's representation of the juror's answer was untrue. Since the presumption of awareness was no longer alive, the defense attorney had a duty "to place the court on notice" of the

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[5] Obviously, unless the trial court is not present, or affirmatively indicates that he has not heard certain testimony, it is to be presumed that it has heard the testimony. This presumption is consistent with this Court's requirement stated in State v. Singletary, 549 So.2d 996, 999 (Fla. 1989) that the trial court's presence at voir dire is mandatory to uphold its ultimate "responsibility to see that the constitutional mandate is followed." The "selection of a jury to try a case is a work which devolves upon the court." Singletary, supra at 998. The trial court is presumed to listen to all parts voir dire and his attendance and attention are especially important to assure that "selection of jurors is free from racial prejudice." See Singletary, supra at 999. The trial court must carefully listen to voir dire to protect not only the parties, but also the jurors from that which might not be objectionable to the parties. Id. (Justice Barkett specially concurring).

misstatement.

Unlike the situation in Floyd, the presumption of the trial court's awareness was alive in the present case. Unlike in Floyd the trial court did not represent that he was unaware of Mr. Williams' answers. In fact, from the questioning the trial court remembered the facts well enough to conclude that Mr. Williams would make a "good juror" (R136). Thus, unlike in Floyd, there is a presumption that the trial court was aware and the improper exclusion of the black juror cannot be ignored on the basis of Floyd. Here, it was the trial court's error in the evaluation process which permitted the improper challenge.[6] This error cannot be ignored.

D. Trial courts have duty to prevent racially discriminatory challenges.

In addition, because of the nature of discriminatory striking of black jurors, the ultimate burden must rest upon the trial judge to prevent racial discrimination. The harm of discriminatory challenges extends beyond the defendant, they also harm the excluded black juror and touch the entire community. Batson v.Kentucky, 476 U.S. 87, 106 S.Ct. 1712, 1718 (1986). The discrimination undermines public confidence in the fairness of our

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[6] For example, the trial court merely analyzed whether Mr. Williams had been asked the same number of questions as other jurors (R136). Unfortunately, the important aspect in this case was the nature, rather than number, of the questions asked by prosecutor. The prosecutor was not asking jurors whether their prior juries were hung or if they were indecisive. This shows a lack of concern by the prosecutor and shows his reason was pretextual. Moreover, as initially noted, the whole premise for his reason was facially invalid.

judicial system. Id; Slappy supra. Thus, to uphold confidence in the judicial system, the trial court has a "duty to examine them [the reasons] to determine if they are supported by the record." Tillman v. State, 522 So.2d 14, 17 (Fla. 1988). Because of the ease of utilizing peremptory challenges in a discrimination manner, the trial court's duty extends to analyzing the reason for the challenge to insure it is valid.

Discrimination, which harms black jurors and undermines confidence in the judicial system, cannot be permitted to thrive due to procedural rules on the parties. See Skippy, supra at 21-22. (spirit and intent of Neil was not to create procedural obstacles to protect discrimination); Batson, supra (rejects burdens imposed in Swain which effectively aided in masking discrimination). The trial court must ascertain record support for the challenges even without request to do so, to protect not only the parties, but also to protect the interest of those who are not represented by counsel -- the excluded black juror and the entire community. To overlook the improper exclusion of a black juror, cannot but breed disrespect for the law and its administration in the eyes of the public. The trial court erred in this case.

Finally, Petitioner claims that Respondent waived any issues on appeal by declining the trial court's offer of a mistrial. Such a claim is without merit. First, in the instant case the trial did not offer Respondent a mistrial to cure the Slappy error or any other error. Rather, the trial court inquired of Respondent as to

whether he was satisfied with his counsel's decision not to object or move for a mistrial[7] and that if his counsel had earlier made a motion the judge would have considered whether an improper argument had been made (R262-263).[8] Thus, Respondent had not been offered a new jury as Petitioner claims.

Furthermore, there is no Florida caselaw to support the claim that failure to request, or accept, a mistrial on one issue waives all other issues.[9] Logically, such a waiver must be explicit and cannot merely be implied There is no reason to believe that an attorney would be concentrating on what occurred during jury selection during the closing argument at trial. Jury selection is simply not on his or her mind and it cannot logically be said that the jury selection issues are being waived when the attorney does not have those issues in mind. Furthermore, even an acceptance of mistrial for one error will not cure the denial of a motion for

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[7] There are no comments in the record that would be so objectionable or incurable as to require a mistrial. Such a motion could not have been made in good faith by counsel.

[8] In making the inquiry, the trial court told Appellant that an objection and motion could have been argued and that if would have been considered. However, the trial court did not offer a mistrial thus giving Appellant a new jury if he wanted one.

[9] If such were true, trials and appeals would be a series of unending objections and issues due to the fear that failure to raise one issue would waive all others. It should also be noted that the objectives of requiring non-discriminatory jury challenges focus on the integrity of the judicial system. Waiver of trial rights will not substitute for the integrity of the judicial system.

mistrial on another because the error will likely occur again.[10] Again, in this case Respondent was not offered a motion for mistrial. It cannot be said that the present issue was waived.

It was reversible error to permit the prosecution to utilize a peremptory challenge on a black juror where the prosecutor failed to give a legitimate racially neutral reason for utilizing the challenge.

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[10] For instance, if the prosecutor improperly utilizes peremptory challenges in a racially discriminatory manner, but the objections are sustained, the fact that a motion for mistrial is later granted on an unrelated error will not inform the prosecutor that his actions are impermissible so as to prevent the improper excusal of jurors from reoccurring. Rather, the prosecutor will perceive the earlier denial of mistrial as an approval and will continue his use of challenges in a discriminatory manner.

CONCLUSION

Based on the foregoing, Respondent respectfully requests this Honorable Court to affirm the result of the District Court reversing Respondent's conviction and sentence.

Respectfully Submitted,

RICHARD L. JORANDBY
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(407) 355-2150

Jeffrey Anderson

JEFFREY ANDERSON
Assistant Public Defender
Florida Bar No. 374407
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to MELYNDA L. MELEAR, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, this 7th day of August, 1991.

Jeffrey Anderson

Of Counsel

APPENDIX

5th DCA 1989); § 627.7263, Fla.Stat. (1987).

Affirmed.

Herbert SHESSEL, et al., Appellants,

v.

ESTATE OF Mary Edith CALHOUN, deceased, Appellee.

No. 90-556.

District Court of Appeal of Florida, Third District.

Jan. 22, 1991.

Rehearing Denied Feb. 20, 1991.

Appeal was taken from order of the Circuit Court, Monroe County, J. Jefferson Overby, J., which struck claim against estate because of alleged failure to maintain independent action. The District Court of Appeal, Schwartz, C.J., held that requirement of independent action was satisfied by the pendency of the federal action against the decedent in which her estate was substituted as a party defendant.

Reversed.

Executors and Administrators ⇐245

Pendency of federal action against the decedent, in which her estate was substituted as party defendant and which had gone to judgment and was on appeal, satisfied requirement of an independent action against the estate. West's F.S.A. § 733.705(4).

Sams, Beckham, Spiegel, Alger & Crisione, Cooper, Wolfe & Bolotin and Sharon Wolfe and Linda G. Katsin, Miami, for appellants.

Joseph H. Murphy, Jr., Coral Gables, for appellee.

Before SCHWARTZ, C.J., and BASKIN and COPE, JJ.

SCHWARTZ, Chief Judge.

The order striking the appellants' claim because of an alleged failure to maintain an independent action against the estate as required by section 733.705(4), Florida Statutes (1989) is reversed on the ground that the pendency of a federal action against the decedent—in which her estate was substituted as a party defendant and which indeed had gone to a judgment which is presently on appeal—fully satisfied that requirement. *In re Estate of Brown*, 421 So.2d 752 (Fla. 4th DCA 1982); see *In re Estate of Klotz*, 394 So.2d 509 (Fla. 5th DCA 1981); *Cloer v. Shawver*, 177 So.2d 691 (Fla. 1st DCA 1965); see also *Scutieri v. Estate of Revitz*, 510 So.2d 1003 (Fla. 3d DCA 1987), review denied, 519 So.2d 986 (Fla.1988).

Timothy Lee FOX, Appellant,

v.

STATE of Florida, Appellee.

No. 89-2377.

District Court of Appeal of Florida, Fourth District.

Jan. 23, 1991.

Rehearing Denied Feb. 27, 1991.

Defendant was convicted in the Circuit Court, Broward County, William P. Dimitrouleas, J., of armed robbery, and he appealed. The District Court of Appeal held that State had not met its burden of showing "racially neutral" reason for excusing prospective black juror that was supported by testimony in record, and conviction of black defendant would accordingly be reversed, as State asserted that it was excusing the juror on premise he had been on

prior jury duty, but record establ
State was incorrect in asserting
had previously served on hung
Reversed and remanded.

1. Jury ⇐33(5.1)

State's proffered "racially ne
planation for exercise of peremp
lenge must be supported by re
defense alleges that exercise of p
challenges was racially motivate

2. Criminal Law ⇐1166.17
Jury ⇐33(5.1)

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the juror on premise he had bee
jury duty and served on hung ju
State did not want juror which
make decision, but record estab
State was incorrect in asserting
had previously served on hung

Richard L. Jorandby, Public
and Jeffrey L. Anderson, Asst.
fender, West Palm Beach, for

Robert A. Butterworth, Atty.
hassee, and Lynn G. Waxman,
Gen., West Palm Beach, for ap

PER CURIAM.

Timothy Lee Fox appeals his
for the offense of armed robber
tence of twenty-two years in p
alleges error in the voir dire p
based on his trial counsel's obj
the state's exercise of perem
lenges were racially motivated,
of *State v. Slappy*, 522 So.2d
cert. denied, 487 U.S. 1219, 108
101 L.Ed.2d 909 (1988), and *St*
457 So.2d 481 (Fla.1984).

Upon the state's announcem
intention to strike prospective
Williams, appellant's trial couns
timely objection. He establish
appellant was black, and that
only two prospective black juro
panel of thirty. He made spe

prior jury duty, but record established that State was incorrect in asserting that juror had previously served on hung jury.

Reversed and remanded.

1. Jury ⇐33(5.1)

State's proffered "racially neutral" explanation for exercise of peremptory challenge must be supported by record when defense alleges that exercise of peremptory challenges was racially motivated.

2. Criminal Law ⇐1166.17
Jury ⇐33(5.1)

State had not met its burden of showing "racially neutral" reason for excusing prospective black juror that was supported by testimony in record, and conviction of black defendant would accordingly be reversed; State asserted that it was excusing the juror on premise he had been on prior jury duty and served on hung jury and that State did not want juror which could not make decision, but record established that State was incorrect in asserting that juror had previously served on hung jury.

Richard L. Jorandby, Public Defender, and Jeffrey L. Anderson, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Lynn G. Waxman, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

Timothy Lee Fox appeals his conviction for the offense of armed robbery, and sentence of twenty-two years in prison. He alleges error in the voir dire proceedings, based on his trial counsel's objection that the state's exercise of peremptory challenges were racially motivated, in violation of *State v. Slappy*, 522 So.2d 18 (Fla.), *cert. denied*, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988), and *State v. Neil*, 457 So.2d 481 (Fla.1984).

Upon the state's announcement of its intention to strike prospective juror Mr. Williams, appellant's trial counsel raised a timely objection. He established that the appellant was black, and that there were only two prospective black jurors out of a panel of thirty. He made specific reference to *Neil* and requested the court to conduct an appropriate hearing.

In response, the state indicated it was excusing Mr. Williams on the premise that he had been on prior jury duty and it was a hung jury, and therefore it did not want a juror that couldn't make a decision. The court found this to be a racially neutral basis for excusing Mr. Williams, and therefore overruled appellant's *Neil* objection. We reverse.

[1, 2] While the trial court employed the proper procedure for determining whether or not a *Slappy/Neil* violation had occurred, it is necessary that the state's "racially neutral" explanation for exercise of its peremptory challenge be supported by the record. *Hill v. State*, 547 So.2d 175, 177 (Fla. 4th DCA 1989). In the case before us, the record shows that the state was incorrect in its assertion that Mr. Williams had previously served on a hung jury. Regrettably, neither defense counsel nor the trial judge had the voir dire testimony read back to determine if the state's assertion was factually correct. Nonetheless, the state failed to meet its burden of showing a "racially neutral" reason for excusing juror Williams that was supported by his testimony in the record. Accordingly, we are compelled to reverse and remand for a new trial.

HERSEY, C.J., and GLICKSTEIN and POLEN, JJ., concur.

WEST KEY NUMBER SYSTEM

TPI INTERNATIONAL AIRWAYS, Appellant,

v.

Alexander M. ROSENFELD, Appellee.

No. 90–0941.

District Court of Appeal of Florida, Fourth District.

Jan. 23, 1991.

Rehearing Denied March 5, 1991.

Appeal from the Circuit Court for Broward County; Dale Ross, Judge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appendix to Respondent's Answer Brief on the Merits has been furnished, by courier, to MYLANDA L. MELEAR, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, this 7th day of August, 1991.

Jeffrey Anderson
Of Counsel