THE SUPREME COURT OF FLORIDA

CASE NO. 77,624

STATE OF FLORIDA,

Petitioner,

vs.

TIMOTHY LEE FOX

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JOAN FOWLER
Bureau Chief
Senior Assistant
Attorney General

MELYNDA L. MELEAR
Assistant Attorney General
Florida Bar No. 765570
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (407) 837-5062

Counsel for Petitioner

FILED
SID J. WHITE
JUL 25 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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OTHER AUTHORITIES:

PRELIMINARY STATEMENT

Petitioner was the Appellee before the District Court of Appeal, Fourth District, and the Prosecution in the trial court, Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida. Respondent was the Appellant and the Defendant, respectively, in the court's below.

In the brief, the parties will be referred to as they appear before this Honorable Court, except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R" Record on Appeal

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On April 25, 1989, Respondent was charged by information with robbery (R. 313). During jury selection the prosecutor exercised a peremptory challenge to strike a black juror (R. 135). Appellant objected on the basis of State v. Neil, 457 So.2d 481 (Fla. 1984) (R. 135). The trial court asked the prosecutor to give reasons for striking the black juror (R. 135). The prosecutor responded that the juror indicated that he previously sat on a jury in a trial where there was a hung jury, and that he could not make a decision in that case (R. 135). The trial court noted

> THE COURT: Mr. Roig also was on a jury that wasn't able to reach a verdict but he was struck for cause. And you did ask everybody who had jury duty as to their service. It wasn't just a situation where you were isolating Mr. Williams and picking out him and not asking it of other people.

It then determined:

> THE COURT: That's not a fact that I have to look at, but whether or not you asked him the same amount of questions that you did other jurors and you did. I think Williams would be a good juror but I don't think you can find your reasons are anything but neutral and so at this point I'll have to overrule the objection. Okay. But that's without prejudice before we pick the jury, if Mr. Halpern is asking me to revisit that. We're up to jurors one, five, six, seven, 17 and 19.

The trial court expressly offered an opportunity to motion the court for a mistrial at the close of the State's closing argument on the grounds that the State's argument was prejudicial (R. 262). The court proceeded to explain to Respondent that if

his counsel motioned the court for a mistrial and the motion was granted, the case would be reset for trial in a few weeks (R. 262). Respondent declined to avail himself of the opportunity to motion the court for mistrial. Thus, the trial court in denying Respondent's motion for new trial, found that Respondent waived his rights to assert error arising from the jury selection (R. 330).

Respondent was found guilty of robbery as charged (R. 315-316). On September 1, 1989, Respondent was sentenced to twenty-two (22) years in prison (R. 323). On September 1, 1989, Respondent timely filed his notice of appeal (R. 324).

By opinion filed January 23, 1991, reported at Fox v. State, 573 So.2d 962, (Fla. 4th DCA 1991), attached as Exhibit A, the Court of Appeal found that while the trial court employed the proper procedure for determining a Slappy/Neil violation, the state had failed to show a "racially neutral" reason for excusing juror Williams which was supported by the record. The court found that the State was incorrect in its assertion that Mr. Williams had previously served on a hung jury. The court also noted that, "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."

Petitioner filed a Motion for Rehearing on February 6, 1991, but same was denied by Order dated February 27, 1991. Notice to Invoke the Discretionary Jurisdiction of this Honorable Court was filed March 15, 1991, pursuant to Fla.R.App.P. 9.120(d). On June 25, 1991, this Court granted discretionary jurisdiction. This timely brief on the merits follows.

SUMMARY OF ARGUMENT

The District Court of Appeal Erred in failing to find that Respondent waived his argument that the Prosecutor's reason for its peremptory challenge lacked record support. In Floyd v. State, 569 So.2d 1225, 1230 (Fla. 1990), this Court held that a defendant waives his right to claim that a prosecutor's reasonable and racially neutral explanation for a peremptory challenge is unsupported by the record, when he fails to object to it on that basis at trial.

ARGUMENT

THE DISTRICT COURT OF APPEAL ERRED IN FAILING TO FIND THAT RESPONDENT WAIVED HIS ARGUMENT THAT THE PROSECUTOR'S REASON FOR ITS PEREMPTORY CHALLENGE LACKED RECORD SUPPORT.

The Fourth District in the instant case held:

> 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, 540 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 "racially neutral" reason for excusing juror Williams that was supported by the testimony in the record. Accordingly, we are compelled to reverse and remand for a jury trial.

Fox, 573 So.2d at 963.

Petitioner respectfully submits that the District Court's decision was improper since Respondent waived his argument below that the prosecutor's reason for its peremptory challenge lacked record support. At trial court must evaluate the credibility of a prosecutor's explanation for a peremptory challenge in light of the circumstances of a case as reflected in the record. State v. Slappy, 522 So.2d 18, 22 (Fla. 1988). Generally, such a task

requires the trial court to examine the record to see if it supports the prosecutor's reason. See, Tillman v. State, 522 So.2d 14, 17 (Fla. 1988). If the trial court errs in that duty, it is the defendant's responsibility to direct the trial court's attention to the error. As this court pointed out in State v. Neil, 457 So.2d 481, 487 , n.9 (Fla. 1984):

> As stated in Castor v. State, 365 So.2d 701, 703 (Fla. 1987):
>
> > The requirement of a contemporaneous objection is based on a practical necessity of basic fairness in the operations of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of proceedings.

More specifically, this Court's recent decision, Floyd v. State, 569 So.2d 1225, 1230 (Fla. 1990), this Court held that since defense counsel failed to object to the prosecutor's explanation for striking a black juror, the Neil issue was not properly preserved for review. Although noting in Floyd that it is the State's obligation to advance a facially race-neutral reason supported by the record, this Court found that it was opposing counsel's obligation to contest the factual existence of the reason. Id. As this Court explained, "When the State asserts a fact as existing in the record, the trial court cannot be faulted for assuming it is so when defense counsel is silent and the assertion remains unchallenged." Id. Thus, this Court held that "once the State has proffered a facially race-neutral reason, a defendant must place the court on notice that he or she contests the factual existence of the reason." Id. The rationale of this requirement was explained thus:

> Here, the error was easily correctable. Had defense counsel disputed the State's statement, the court would have been compelled to ascertain from the record if the State's assertion was true. Had the court determined that there was no factual basis for the challenge, the State's explanation no longer could have been considered a race-neutral explanation, and Juror Edmonds could not have been peremptorily excused.

Accordingly, this Court concluded that the Neil issue had been waived by defense counsel's failure to object to the prosecutor's explanation.

Similarly, in the instant case, Respondent failed to challenge the State's asserted facially race neutral reason for striking juror Williams. This failure to request a read back of the pertinent testimony or otherwise object was expressly noted in the Fourth District's opinion. As in Floyd, had Respondent done so, the trial court could have quickly ascertained from the record whether Williams had actually served on a hung jury and denied the State's peremptory challenge if the court found that Williams did not. Id. Thus, the Respondent failed to satisfy his burden of placing the court on notice that he contested the factual existence of the State's asserted reason. Id.

In the absence of such a challenge by Respondent, the trial court was clearly under no obligation to verify the existence of factual support for the Petitioner's facially race neutral reason for the strike. Id. Accordingly, pursuant to Floyd, because Respondent failed to object to the Prosecutor's reason for the strike, the Neil issue was not properly preserved for review. Id. See also, Valle v. State, 16 FLW S.303, 304 (Fla. May 2, 1991)

(defendant did not preserve for review his claim that the trial court failed to make a proper Neil/Slappy inquiry, since he only objected to the State's reason for its peremptory challenge on the ground that it was used to create a jury in favor of the death penalty).

Furthermore, as the trial court correctly found in denying Appellant's motion for new trial, the asserted Neil/Slappy issue was waived by Appellant's failure to avail himself of the opportunity to motion the court for a mistrial during closing arguments. See, Phillips v. United States, 401 F.Supp.594, 597 (E.D. Mo. 1975) (fact that defendant declined court's offer of a mistrial on unrelated issue during course of trial waived issue of alleged error arising from Defendant's absence from courtroom during peremptory challenge stage of jury selection. "Although the mistrial proceedings had nothing to do with the selection of the jury, it did give [defendant] the opportunity to obtain a new jury, if in fact, he felt any prejudice emanating from the existing jury."); Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974) (where trial judge extends counsel an opportunity to cure any error and counsel fails to take advantage of such opportunity, such error, if any, was invited and does not warrant reversal); Palmer v. State, 572 So.2d 1012 (Fla. 4th DCA 1991) (where defendants failed to avail himself of the trial court's offer to strike the entire jury panel, he waived any complaints to defects in the voir dire process).

PAGE(S) MISSING

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, Petitioner respectfully requests that this Honorable Court REVERSE the Fourth District Court of Appeal's decision and AFFIRM Respondent's conviction and sentence.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MELYNDA L. MELEAR
Assistant Attorney General
Florida Bar No. 765570
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(407) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Petitioner's Brief on the Merits" has been furnished, by courier, to: JEFFREY L. ANDERSON, Assistant Public Defender, Counsel for Defendant, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this ____ day of July, 1991.

Of Counsel

MLM/ka

EXHIBIT A

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).

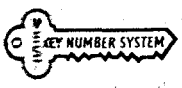
Sams, Beckham, Spiegel, Alger & Criscione, Cooper, Wolfe & Bolotin and Sharon Wolfe and Linda G. Katsin, Miami, for appellants.

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 Kloiz*, 394 So.2d 509 (Fla. 5th DCA 1981); *Cizer v. Shawver*, 177 So.2d 691 (Fla. 1st DCA 1965); see also *Scutieri v. Estate of Reitz*, 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 establishe
State was incorrect in asserting that
had previously served on hung jury.

Reversed and remanded.

1. Jury ⇐33(5.1)

State's proffered "racially neutra
planation for exercise of peremptory
lenge must be supported by record
defense alleges that exercise of perem
challenges was racially motivated.

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

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jury duty and served on hung jury an
State did not want juror which coul
make decision, but record establishe
State was incorrect in asserting that
had previously served on hung jury.

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

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

PER CURIAM.

Timothy Lee Fox appeals his con
for the offense of armed robbery, an
tence of twenty-two years in prison
alleges error in the voir dire proce
based on his trial counsel's objectio
the state's exercise of peremptory
lenges were racially motivated, in vio
of *State v. Slappy*, 522 So.2d 18
cert. denied, 487 U.S. 1219, 108 S.Ct.
101 L.Ed.2d 909 (1988), and *State v.*
457 So.2d 481 (Fla.1984).

Upon the state's announcement
intention to strike prospective juro
Williams, appellant's trial counsel ra
timely objection. He established th
appellant was black, and that there
only two prospective black jurors ou
panel of thirty. He made specific

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 Petitioner's Brief on the Merits" has been furnished, by courier, to JEFFREY L. ANDERSON, Assistant Public Defender, Counsel for Appellant, The Governmental Center, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 19th day of July, 1991.

Of Counsel

MLM/ka