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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

TIMOTHY LEE FOX,

Respondent.

CASE NO. 77,624

RESPONDENT'S BRIEF ON JURISDICTION

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Respondent was the Appellant in the Fourth District Court of Appeal and the defendant in the trial court. Petitioner was the Appellee and the prosecution, respectively, in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to Respondent's Appendix, which is a conformed copy of the appellate court's opinion.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts limited as to the issue of jurisdiction, but will refer to any needed clarifications of facts in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

The decision cited by Petitioner in an attempt to invoke the conflict jurisdiction, on the basis of an alleged "direct and express" conflict with the district court, does not conflict with a decision of this Court or with another district court. Thus, discretionary review should be denied.

REASONS FOR DENYING REVIEW

PETITIONER HAS NOT PROPERLY INVOKED THE JURISDICTION OF THIS COURT WHERE THE DECISION OF THE DISTRICT COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL.

Petitioner seeks review pursuant to the "express and direct" conflict provision of Article V, Section 3(b)(3) of the Florida Constitution. The test of jurisdiction under this provision is not whether the Supreme Court necessarily would have arrived at a conclusion different from that reached by the district court, but whether the district court decision on its face so collides with a prior decision of the Supreme Court, or of another district court, on the same point of law as to create an inconsistency or conflict among precedents. Kincaid v. World Insurance Co., 157 So.2d 517 (Fla 1963). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So.2d 885 (Fla. 1962).

In Jenkins v. State, 385 So.2d 1356 (Fla. 1980), this Court noted that the plain language of Article V, Section 3(b)(3), limited review to express conflicts. Express means "to represent in words" or "to give expression to." The issue Petitioner claims conflict on was not represented in words or given expression in the district court's opinion.

As Petitioner correctly points out, Floyd v. State, 569 So.2d 1225 (Fla. 1990), requires the defendant to place the court on notice that he or she contests the factual existence of the state's reason for excluding a black juror. However, Petitioner is

incorrect in alleging that the district court's decision indicates that defense counsel did not contest the factual basis for the reason. The district court's decision does not express that defense counsel failed to contest the factual basis. Petitioner points to the part of the decision explaining that the reason was not supported by the record and that this could have been ascertained by a readback but neither the trial judge nor defense counsel requested a readback. However, the decision does not expressly, or even impliedly, state that defense counsel did not contest the factual predicate.[1] The facts can be contested without asking for a readback. In fact, in Floyd this Court specifically notes that if defense counsel contests the factual statement, the trial court then should ascertain from the record if the state's assertion was true. Floyd does not state that where defense counsel contests the factual predicate that he must also request a readback to preserve the issue. Defense counsel merely has to dispute the fact. Floyd at 1229. The trial court must then ascertain if the fact exists and may do so by a readback (or by another method). Id. The district court's decision does not expressly conflict with Floyd.

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[1] Petitioner's conflict argument is based on the misconception that "This failure to request a readback of the pertinent testimony or otherwise object was expressly noted in the Fourth District's opinion." Petitioner's brief at 5. While the district court's opinion expresses that counsel did not request a readback, it does not state that he failed to contest the factual existence of the state's reason. Requesting a readback is merely one method resolving the accuracy of the contested fact which may, or may not, be employed after the factual predicate has first been challenged. Obviously, the fact can be challenged and the dispute resolved by something other than a readback -- such as one's memory.

Alternatively, the district court noted that "... the state failed to meet its burden of showing a "racially neutral" reason for excusing juror Williams ..." after the state had indicated that its reason for excluding Williams was because he had served on a hung jury which showed that he "couldn't make a decision" (A2). Of course, this Court has required that the reason be legitimate on its face rather than a pretext. State v. Slappy, 522 So.2d 18 (Fla. 1988). Here, the mere fact that a juror is on a hung jury does not demonstrate that the juror is indecisive. Rather, this tends to show that the juror is decisive and unswerving in his or her decision -- despite the pressure applied by other jurors.[2] Thus, the reason, on its face, was not legitimately "racially neutral" and there is no conflict.

For the reasons above, since the district court's decision does not conflict with Floyd, there is no conflict jurisdiction.

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[2] Although not pertinent to the issue of jurisdiction, Respondent would point out that the state's reason was also challenged as a pretext where a number of white jurors, who had previously served on juries, were never asked if their juries were hung. If the reason were legitimate, the black juror would not have been singled out.

CONCLUSION

Because there is no express and direct conflict, this Court should deny the Petition for Discretionary Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MELVINA RACEY FLAHERTY, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 29th day of March, 1991.

Jeffrey L. Anderson

Of Counsel

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1991

TIMOTHY LEE FOX,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 89-2377.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed January 23, 1991

Appeal from the Circuit Court for Broward County; William P. Dimitrouleas, Judge.

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

Robert A. Butterworth, Attorney General, Tallahassee, and Lynn G. Waxman, Assistant Attorney General, 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.

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 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., GLICKSTEIN and POLEN, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MELVINA RACEY FLAHERTY, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 29th day of March, 1991.

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