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SID J. WHITE
AUG 28 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

THE SUPREME COURT OF FLORIDA

CASE NO. 77,624

STATE OF FLORIDA,

Petitioner,

vs.

TIMOTHY LEE FOX,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

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PETITIONER'S REPLY BRIEF ON THE MERITS

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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

The State relies on the Statement of the Case and Facts as given in Petitioner's Initial Brief on the Merits, with the following additions:

During voir dire, Juror Williams, responding to Appellant's question, stated that he had served on a jury at least four times. One of those times concerned the theft of a sweater, and another concerned drugs (R. 86). He explained the facts of the drug case and indicated that he did not believe that an actual drug sale had transpired (R. 87). Questioning about prior jury service was also directed by Appellant to Mr. Corwith, (R. 68) Mr. Kimsey (R. 76), Mr. Roig, (R. 90), Mr. Hauser,[1] (R. 97) and Mr. Israel, (R. 111).

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[1] Mr. Roig and Mr. Hauser testified to having served on hung juries.

SUMMARY OF ARGUMENT

The prosecutor provided a sufficient racially neutral reason for challenging Juror Williams. 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.

In his Answer Brief, Respondent claims that the State's reason for challenging Juror Williams, that he had previously served on a hung jury and was indecisive, was facially invalid. In reply, the State asserts that the prosecutor's reason for challenging Juror Williams was "a clear and reasonably specific racially neutral explanation," in accordance with State v. Slappy, 522 So.2d 18 (Fla. 1988), and that Respondent's contention is circular.

During jury selection, Appellant objected to the State's strike of Juror Williams and demanded an inquiry (R. 135). The court ruled that no systematic exclusion of blacks had occurred but still requested a reason from the prosecutor (R. 135). The prosecutor replied that Mr. Williams had served on a hung jury and could not make a decision (R. 135). He said that he did not want an indecisive juror (R. 135). The court commented that Mr. Roig was also on a hung jury but was struck for cause (R. 136). The prosecutor stated that Mr. Hauser had been likewise struck for cause (R. 136). All jurors who had previously served on jury duty were questioned about their service (R. 136). The court determined the reason for the exercise of the peremptory challenge to be neutral and overruled Appellant's objection (R. 136).

Both the prosecutor and the court recollected that Juror Williams had said that he was on a hung jury and that he could not reach a decision, when in fact he had said that he had previously sat on a jury and that he felt the defendant was not guilty. Based on its recollection, the court determined that the State had provided a sufficient reason for challenging Juror Williams. It stated, "... I don't think you can find your reasons are anything but neutral ..." (R. 136). See Reynolds v. State, 576 So.2d 1300, 1301 (Fla. 1991) (a trial court's determination on the State's reasons for peremptory challenges is to be given great deference on appeal); Reed v. State, 560 So.2d 203, 206 (Fla.), cert. denied, ____ U.S. ____, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990)("We must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene an who themselves get a "feel" for what is going on in the jury selection process").

Respondent contends that the State's reason for challenging Juror Williams was invalid because it did not establish that Juror Williams was an indecisive person. His argument is circular. Respondent is really claiming that the record does not support the State's assertion, accepted by the trial court, that Juror Williams was indecisive. In actuality, that was the very claim which the Fourth District addressed on appeal, and which is the subject of the State's Initial Brief.

As stressed in that brief, the District Court of Appeal erred in failing to find that Respondent waived his argument that the prosecutor's reason for his peremptory challenge was not

supported by the record. In Floyd v. State, 569 So.2d 1225, 1230 (Fla. 1990), 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." Contrary to Respondent's analysis, this Court did not restrict its holding in Floyd to a situation where a trial court explicitly notes that it cannot recall the juror's answers during voir dire.

A trial court is always required to examine a prosecutor's reasons for challenging a juror to determine whether they are supported by the record. See Tillman v. State, 522 So.2d 14, 17 (Fla. 1988). It is not discharged of that duty merely by stating that it cannot remember what a juror said on the record, as Respondent implies. Indeed, by knowing that it cannot remember a juror's statements, a trial court is aware that it should take necessary measures to ascertain the facts in the record, so as to uphold its duty under Tillman. This Court nonetheless found that the defendant in Floyd was required to point out the facts in the record to the trial court in order to preserve for appeal his argument that the State's reason for challenging the juror lacked record support, even though the trial court admitted it did not recall the juror's answers.

Here, the trial court believed its memory of Juror Williams' statements was accurate. Since two other jurors who had been asked about their prior jury experience responded that they had been on hung juries, it was not unreasonable for it to have thought that Juror Williams stated he had served on a hung

jury and could not make a decision. For that reason, Respondent should have placed the court on notice of Juror Williams' answers to his questions. Having not done so, Respondent waived his argument on appeal, and the Fourth District Court of Appeal erred in failing to have so held. Floyd.

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been furnished by courier to: **JEFFREY L. ANDERSON**, Assistant Public Defender, Counsel for Defendant, The Governmental Center, 301 N. Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 13th day of August, 1991.

Of Counsel

MM/ka