Supreme Court of Florida

ORIGINAL

No. 77,624

STATE OF FLORIDA, Petitioner,

vs.

TIMOTHY LEE FOX, Respondent.

[October 10, 1991]

BARKETT, J.

We review Fox v. State, 573 So.2d 962 (Fla. 4th DCA 1991), based on asserted conflict with Floyd v. State, 569 So.2d 1225 (Fla. 1990), cert. denied, 111 S.Ct. 2912 (1991).*

* We have jurisdiction pursuant to article V, section 3(b)(3), Florida Constitution.

Fox was charged by information with robbery. During jury selection, the prosecutor exercised a peremptory challenge to strike a black juror. Fox made a timely objection to the challenge on the basis of State v. Neil, 457 So.2d 481 (Fla. 1984), clarified, State v. Castillo, 486 So.2d 565 (Fla. 1986), stating that the prospective juror, Mr. Williams, was one of only two prospective black jurors out of a panel of thirty. The trial court asked the prosecutor to give reasons for striking the black juror, and the prosecutor replied, "Because the testimony I believe was he was on jury duty and there was a hung jury, and he couldn't make a decision. I don't want a juror that can't make a decision." The judge overruled the defense's objection, finding the prosecutor's explanation was race-neutral. Fox did not contest the adequacy of the explanation or its record support. The jury ultimately chosen found Fox guilty of the robbery charge. On appeal, the district court reversed Fox's conviction, stating:

> [T]he 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.

573 So.2d at 963.

In Floyd v. State, 569 So.2d at 1229-30, this Court held:

> It is the state's obligation to advance a facially race-neutral reason that is supported

> in the record. If the explanation is challenged by opposing counsel, the trial court must review the record to establish record support for the reason advanced. However, 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. 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. . . . Because defense counsel failed to object to the prosecutor's explanation, the Neil issue was not properly preserved for review.

In the instant case, defense counsel did not contest the State's factual assertion. The district court thus erred in reversing Fox's conviction as the issue had not been preserved for appellate review.

Accordingly, we quash the opinion below and remand for proceedings consistent with this opinion.

It is so ordered.

SHAW, C.J. and OVERTON, McDONALD, GRIMES, KOGAN and HARDING, JJ., concur.

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

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions

Fourth District - Case No. 89-2377

(Broward County)

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for Petitioner

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