OA 12-4-91

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,692

DORIS ELIZABETH BROOKS,

Petitioner,

vs.

MASOUD MAZAHERITEHRANI,

Respondent,

THE STATE OF FLORIDA,

Amicus Curiae.

ON PETITION FOR DICRETIONARY REVIEW

BRIEF OF AMICUS CURIAE ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, DORIS ELIZABETH BROOKS, was the Plaintiff in the trial court and the Appellee in the District Court of Appeal. The Respondent, MASOUD MAZAHERITEHRANI, was the Defendant in the trial court and the Appellant before the district court. The parties, in this brief, will be referred to as they stand before this court. This Amicus Curiae will be referred to as the State. The symbol "R" will be used, in this brief, to refer to the Record on Appeal which was before the district court. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts, insofar as the undersigned has been able to determine, appears generally correct and is accepted by the State, as to the relevant facts contained therein, for purposes of this appeal.

POINT ON APPEAL

WHETHER DISALLOWING RACIALLY MOTIVATED PEREMPTORY CHALLENGES IS A PROPER REMEDY FOR IMPROPER USE OF SUCH CHALLENGES?

SUMMARY OF THE ARGUMENT

Disallowing racially motivated peremptory challenges is a proper remedy when the disallowed challenges were improperly exercised solely due to race. Such a remedy is designed to protect the right of all citizens to participate in the system of justice while, at the same time, protecting the rights of parties to their properly exercised challenges. It also prevents unnecessary waste of judicial resources and provides a simple solution tailored to solve what could otherwise be an insoluble problem.

Additionally, it is a remedy approved by both the federal courts and the majority of state jurisdictions that have considered the issue.

Disallowing improperly exercised peremptory challenges is an appropriate remedy.

ARGUMENT

DISALLOWING RACIALLY MOTIVATED PEREMPTORY CHALLENGES IS A PROPER REMEDY FOR IMPROPER USE OF SUCH CHALLENGES.

Disallowing peremptory challenges which were motivated solely by the jurors' race is remedy so appropriate to the situation that it should be permitted.

First, it is the only remedy which adequately protects a citizen's right to serve on a jury. That there is such a right in this state cannot be doubted, where the Florida Supreme court has stated;

> The need to protect against bias is particularly pressing in the selection of a jury, first, because the parties before the court are entitled to be judged by a fair cross section of the community, and second, because our citizens cannot be precluded improperly from jury service. Indeed, jury duty constitutes the most direct way citizens participate in the application of our laws. (emphasis added).
>
> State v. Slappy, 522 So.2d 18, 22 (Fla. 1988); cert. denied, 108 S.Ct. 2873 (1988).

The United States Supreme Court evidently agrees, where it has noted, in Powers v. Ohio, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), that, ".... a member of the community may not be excluded from jury service on account of his or her race ...." and, ".... An individual juror does not have the right to sit on any

particular petit jury, but he or she does possess the right not to be excluded from one on account of race." Id. at 423-424. Indeed, New York courts, in addressing the issue [remembering that Neil, itself, adopted the test and reasoning of the New York case of People v. Thompson, 79 A.D. 2d 87, 435 N.Y.S.2d 739 (1981)] have noted that jury service is a privilege of citizenship and is a civil right and that improper challenge of jurors by defense counsel on the basis of race deprives them of that right. People v. Davis, 537 N.Y.S.2d 430, (N.Y. Sup.Ct. Bronx Cnty, 1988). Similarly, a federal court, in applying Swain v. Alabama, 380 U.S. 202 (1965), in a case cited with approval in Batson v. Kentucky, 476 U.S. 79 at 99 n. 24 (1986) stated that "... the issue turns primarily on the claim of Blacks to equal participation in the jury process. ..." United States v. Robinson, 421 F.Supp. 467, 471 (Conn. 1976); mandamus gnt'd sub nom, United States v. Newman, 549 F.2d 240 (2d Cir. 1977). See also, Swain v. Alabama, 380 U.S. 202, 203-205 (U.S. 1965). Thus, disallowing an improper peremptory challenge is the only protection of a juror's right to serve. Dismissing the venire, while it may (under appropriate circumstances) protect the parties, leaves a juror's right to serve a right with no practical remedy to enforce it, if the juror is improperly challenged due to race. See, Powers v. Ohio, 111 S.Ct. 1364, 113 L.Ed.2d 411, 427-428 (1991). Disallowing challenges motivated solely by race provides protection of a citizen's right to jury service.

Second, disallowing an improper challenge prevents unnecessary waste of judicial resources. A New York Court pointed this out in People v. Piermont, 542 N.Y.S.2d 115 (Westchester Cnty.), where it stated

> . . . .Discharging the whole panel would mean that the time of approximately three dozen jury panel members, two lawyers, one court reporter, several court officers and one judge would have been wasted. This is not necessary.
>
> The damage that would otherwise have been done by eliminating all three black jurors can be avoided by disallowing the challenge to #2 and encouraging the defense to reconsider as to #3. Then jury selection can be finished and the trial proper begun.
>
> Id. at 118.

Third, reinstating improperly challenged jurors can provide a simple solution tailored to the problem. As the Fifth Circuit stated in discussing the reasons a timely objection is required, ".... Furthermore, prosecutorial misconduct is easily remedied prior to commencement of trial by simply seating the wrongfully struck venire person. ..." United States v. Forbes, 816 F.2d 1006, 1011 (5th Cir. 1987). Indeed, it permits improper strikes to be targeted and remedied while preserving the rights of both parties to the peremptory challenges which were exercised properly.

Fourth, permitting improperly challenged jurors to be reinstated provides the only practical solution to the otherwise

insoluble problem of a party who continues to exercise challenges on improper grounds. If the only solution were to dismiss the panel, the party striking jurors for improper reasons can just continue to do so in panel after panel until he obtains a panel which contains no members of the race that party wishes to exclude. A party who was improperly striking black persons, for example, could just continue to do so until a panel came up which didn't contain any black people at all. Then, he would have succeeded in obtaining a monochromatic panel without ever having exercised an improper challenge against any person on that panel. Thus, if dismissing the jury pool and beginning voir dire again is the only possible remedy, it can easily lead to an unjust result which defeats the entire purpose of the decision in State v. Neil, 457 So.2d 481 (Fla. 1984). It is respectfully submitted that the Supreme Court could not have intended such a result.

The remedy of disallowing improper challenges is, therefore, reasonable and appropriate.

Additionally, such a remedy is supported by the case law on the subject.

The United States Supreme court certainly appears to consider reinstating improperly challenged jurors a viable remedy, where it states:

> In light of the variety of jury selection practices followed in our state and federal trial courts, we made

> no attempt to implement our holding today. For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, see Booker v. Jabe, 775 F.2d, at 773, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire, see United States v. Robinson, 421 F.Supp. 467, 474 (Conn. 1976), mandamus granted sub nom. United States v. Newman, 549 F.2d 249 (CA2 1977). (emphasis added).
>
> Batson v. Kentucky, 476 U.S. 79, 99, n. 24 (1986).

Indeed, the court cites with approval, United States v. Robinson, 421 F.Supp. 467 (Conn. 1976), a case in which the District Court did precisely that, for a Swain violation (although, at the time, this was considered a improperly, "novel and drastic" remedy requiring mandamus.) See, United States v. Newman, 549 F.2d 240, 250 (2d Cir. 1977). Similarly, the Fifth Circuit has indisputedly indicated that they consider the seating of wrongfully struck venire persons to be a proper remedy. United States v. Forbes, 816 F.2d 1006, 1011 (5th Cir. 1977).

Although the Florida Supreme Court, in State v. Neil, 457 So.2d 481 (Fla. 1984) does state that, ".... if the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury pool and start voir dire over with a new pool, Id. at 487, the use of the term "should" does not appear to preclude other remedies. Although

the court did state, in Carter v. State, 550 So.2d 1130, 1131 (Fla. 3d DCA 1989); rev. denied, 553 So.2d 1164 (Fla. 1989) that it felt that trial court had no choice but to dismiss the entire venire panel, that situation is certainly distinguishable where, in Carter the court was simply deciding if dismissal was a proper remedy, not whether it was the only proper remedy. It is particularly interesting to note that, in the recent case of Perez v. State, No. 90-447 (Fla. 3d DCA Aug. 20, 1991), the district court reversed and remanded for a new trial, not because the trial court ordered a challenged juror seated, but because it did so without having ruled on whether the reasons for exercising the challenge were race-neutral, reasonable and supported by the record.

Certainly, the majority of the state jurisdictions which have considered the issue have found that disallowing improper challenges and reinstating improperly challenged jurors is an appropriate remedy.

It is particularly interesting to note that Texas courts hold that disallowing improper challenges may be a proper remedy even where the state statute on the subject says; "If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case" (emphasis added) stating, despite the use of the word "shall," that ".... we conclude that it does not require in all cases that a new array be called, but that the

trial judge has the discretion to apply either remedy. ...." [of the two remedies mentioned in note 24 of Batson]. Sims v. State, 768 S.W.2d 863 (Tex.App. - Texarkana 1989); rev. dismissed, 792 S.W.2d 81 (Tex.Cr.App. 1990); See also, Keeton v. State, 724 S.W.2d 58 (Tex.Cr.App. 1989) (en banc); Henry v. State, 729 S.W.2d 732, 734 (Tex.Cr.App. 1987); Chambers v. State, 750 S.W.2d 264, 266 (Tex.App.-Houston 1988).

It is also particularly interesting to note that disallowing improper challenges is considered an appropriate remedy by the New York courts, where they formulated the procedure for analyzing peremptory challenges in People v. Thompson, 79 A.D.2d 87, 435 N.Y.S.2d 793 (1981) that the Florida Supreme Court adopted in State v. Neil, 457 So.2d 481, 485-487 (Fla. 1984). See, People v. Davis, 537 N.Y.S.2d 430, 443-444 (Sup.Ct. Bronx Cnty, 1988); People v. Piermont, 542 N.Y.S.2d 115, 117 (Westchester Cnty, 1989).

It is also an acceptable remedy in Massachusetts. Commonwealth v. DiMatteo, 427 N.E.2d 754, 757 (App.Ct. Middlesex (1981); rev. denied, 385 Mass. 1101; 440 N.E.2d 1173 (Mass. 1982); Commonwealth v. Reid, 427 N.E.2d 495, 498 (Mass. 1981). It certainly appears to be acceptable to Maryland courts, which stated, "Fashioning an appropriate remedy would appear to fall within the broad discretionary range necessary for the trial judge's effective management of a trial. ...." and "If a single prospective juror has been unconstitutionally challenged it may

be adequate to reinstate the juror on the venire. ...." Chew v. State, 71 Md.App. 681; 6527 A.2d 332, 343-344 (Ct.Spec.App.Md. 1987). Indeed, the State of Alabama, as well, although it notes that dismissal of the jury pool may be an appropriate remedy, also states, ".... This remedy is not exclusive, however. Ex Parte Branch, 526 So.2d 609, 624 (Ala. 1987).

Although there are almost certainly jurisdictions where disallowing improper challenge is not an acceptable remedy, it would certainly appear that the majority of the jurisdictions that have considered the issue, including the United States Supreme Court, believe that it is.

The trial court was correct on this issue.

CONCLUSION

Based upon the foregoing reasons and authorities, it is respectfully submitted that the decision of the district court should be reversed, at least insofar as it holds that disallowing challenges is not a proper remedy under State v. Neil, 457 So.2d 481 (Fla. 1984), and remanded to the district court for further proceeding consistent with that opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE ON THE MERITS was furnished by mail to **MOSES BAKER, JR., ESQ.** of Searcy Denney Scarola Barnhart & Shipley, P.A., P.O. Drawer 3626, West Palm Beach, Florida 33402, **PHILLIP M. BURLINGTON, ESQ.** of Edna L. Caruso, P.A., Suite 4-B, Barristers Bldg., 1615 Forum Place, West Palm Beach, Florida 33401, **WILLIAM E. JOEY, ESQ.**, 204 River Plaza, 900 S. U.S. Hwy. #1, Jupiter, Florida 33477; **RICHARD H.W. MALOY, ESQ.**, 605 Ocean Drive, Suite 4M, Key Biscayne, Florida 33149 and **ROY WASSON, ESQ.**, for Florida Academy of Trial Lawyers, Suite 402, 44 West Flagler Street, Miami, Florida 33130 on this 22nd day of August, 1991.

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