O.A. 12/4/91

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 77,692

DORIS ELIZABETH BROOKS,
etc., et al.,

Petitioners,

-vs-

MASOUD MAZAHERITEHRANI,

Respondent.
_____/

BRIEF OF PETITIONERS ON THE MERITS

Moses Baker, Jr., Esq. of
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
P.O. Drawer 3626
West Palm Beach, FL 33402
and
Philip M. Burlington, Esq. of
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(407) 686-8010
Attorneys for Petitioners

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CITATIONS OF AUTHORITY

STATUTES

PREFACE

This case is before the Court on a Petition for Review of the Fourth District's decision reversing the Judgment entered in accordance with the jury verdict, and remanding for a new trial. The Petitioners were the Plaintiffs in the trial court, and the Respondent was the Defendant. For ease of reference, the parties will be referred to by their proper names or as they appeared in the trial court. The following designation will be used:

(R) - Record-on-Appeal

STATEMENT OF THE CASE AND FACTS

Plaintiffs' Complaint for negligence alleged that the Defendant negligently operated and maintained his motor vehicle, causing it to strike a motor scooter operated by Plaintiff's minor daughter, Sharhonda Moore (R103-04). As a result of Defendant's negligence, Sharhonda Moore suffered permanent injuries. The Plaintiffs incurred medical expenses in caring and treating Sharhonda Moore, which expenses resulted from Defendant's negligence (R104). Defendant filed an Answer and raised affirmative defenses (R105-07). The Plaintiffs and their trial attorney are black (R96). Both parties requested a jury trial.

At the end of the voir dire of the jury, counsel for the Plaintiffs objected to Defendant's exercise of his three peremptory challenges to excuse the only black persons who appeared in the prospective jury panel (R71-72). The trial court heard the explanations proffered by Defendant's counsel for excusing the three black potential jurors, before finding that those challenges had been made "on a racial basis" (R73-74). After discussing whether such action may have been an accepted practice in the past, the trial court stated (R75):

> I don't know how we are going to work this out, but it seems to be apparent that you are just taking the black people off. We got a black lawyer and black client, and I'm going to rule that you did it on a racial basis.

Plaintiffs' counsel asked the trial court to disallow Defendant's peremptory challenges to the three black potential jurors and to permit them to sit on the jury or, in the alternative, bring up a new jury panel (R75-77). However,

Plaintiffs' counsel argued that without disallowing such racially motivated peremptory challenges, the Plaintiffs would have no adequate remedy (R76). The trial court granted the Plaintiffs' request and denied Defendant's peremptory challenges to the three black potential jurors (R79-80). The trial court declined to impanel a new jury, stating (R101), "That's really not a remedy."

The trial court did permit the Defendant to strike other potential jurors without losing the right to object to the earlier ruling on the black potential jurors (R81). The Defendant exercised a peremptory challenge to strike another potential juror (R82). The jury was sworn and later returned a verdict of $37,500 for the Plaintiffs (R84). The trial court entered a Final Judgment based on the jury verdict in favor of the Plaintiffs (R108).

The Defendant moved for a new trial, asserting that the greater weight of the evidence did not support the jury verdict; the jury findings were against the manifest weight of the evidence; and that the trial court erred in striking the Defendant's peremptory challenges and allowing the three challenged jurors to sit on the jury and decide the case (R109-10). The trial court denied the Motion for New Trial (R111).

The Defendant filed an appeal to the District Court of Appeal of the State of Florida, Fourth District (R112). The Defendant's statement of judicial acts to be reviewed raised on appeal only those trial court rulings made during the jury selection process (R120). The only transcript from the trial

that was included in the record related to the selection of the jury (R1-102).

In his brief before the Fourth District, the Defendant did not challenge the trial court's finding that the peremptory challenges were exercised in a discriminatory manner, nor that the verdict of the jury was against the manifest weight of the evidence. The only error alleged was that the trial court failed to strike the entire jury pool and to recommence jury selection, citing STATE v. NEIL, 457 So.2d 481 (Fla. 1984).

In response, the Plaintiffs argued that STATE v. NEIL did not mandate striking the entire jury pool as the only remedy for racial discrimination in the selection of juries, and that the harmless error doctrine precluded reversal since there was no allegation that the jury as impaneled was biased or that the verdict was erroneous.

The Fourth District reversed the judgment, stating:

> During the course of jury selection appellant sought to exercise peremptory challenges to exclude three black jurors. Finding that the attempted excusals were racially motivated, the trial court disallowed the challenges. We reverse. The proper remedy under STATE v. NEIL, 457 So.2d 481 (Fla. 1984), was to dismiss the jury pool and "start voir dire over with a new pool." Id. at 487. See also CARTER v. STATE, 550 So.2d 1130 (Fla. 3d DCA), rev. denied, 553 So.2d 1164 (1989).

The court did not address the issue of harmless error.

The Plaintiffs moved for a rehearing or, alternatively, to certify the question whether STATE v. NEIL, supra, mandates only

one remedy. That motion was denied. The Plaintiffs then filed a Petition for Review in this Court, and this Court accepted jurisdiction.

POINTS ON APPEAL

POINT I

DISMISSAL OF THE JURY POOL AND RECOMMENCING OF VOIR DIRE WITH A NEW JURY POOL SHOULD NOT BE THE ONLY REMEDY FOR RACIAL DISCRIMINATION IN THE USE OF PEREMPTORY CHALLENGES.

POINT II

THE JUDGMENT SHOULD BE AFFIRMED BASED ON THE HARMLESS ERROR DOCTRINE AS CODIFIED IN FLA. STAT. §59.041.

SUMMARY OF ARGUMENT

The Fourth District erred in reversing the Final Judgment entered in accordance with the jury verdict solely on the basis that the trial court had disallowed Defendant's peremptory challenges which it determined had been exercised in a discriminatory manner. The remedy of discharging the jury and selecting a new jury should not be required in all cases involving discrimination in the exercise of peremptory challenges. It is time consuming and expensive for all involved, and does not protect the right of the potential jurors to participate in the judicial system. The remedy of simply disallowing the peremptory challenges does protect the right of the potential jurors and is a much more efficient means of correcting the wrong. Thus, this Court should hold that the trial court was within its discretion in denying the peremptory challenges after determining that they had been exercised in a discriminatory manner.

Alternatively, this Court should conclude that the Final Judgment of the Circuit Court should have been affirmed by the Fourth District on the basis of the harmless error doctrine. The only error alleged on appeal by the Defendant involved the trial court's refusal to strike the jury panel and have a new selection of a jury. No argument was ever made that the jury as constituted was prejudiced or biased in any manner, nor was the jury's verdict challenged in any manner. Therefore, under Fla. Stat. §59.041, there was no allegation that a manifest justice occurred and, therefore, affirmance was mandated.

For these reasons, this Court should quash the decision of the Fourth District, and remand for affirmance of the Final Judgment in accordance with the jury verdict.

ARGUMENT

POINT I

DISMISSAL OF THE JURY POOL AND RECOMMENCING OF VOIR DIRE WITH A NEW JURY POOL SHOULD NOT BE THE ONLY REMEDY FOR RACIAL DISCRIMINATION IN THE USE OF PEREMPTORY CHALLENGES.

The Fourth District determined that the trial court erred in denying the peremptory challenges that were discriminatorily utilized, and ruled that the only remedy authorized under STATE v. NEIL, supra, was to strike the jury pool and begin an entirely new jury selection. Such a cumbersome process should not be the only remedy for such discrimination, as it fails to protect the rights of potential jurors to participate in the judicial process, and does not alleviate the perception that the court is participating in the discrimination. It is respectfully submitted that this Court's decision in STATE v. NEIL, supra, was not intended to limit the trial court's discretion to fashion a remedy when discrimination is demonstrated. This Court should rule that the trial court had the discretion to simply disallow the use of the peremptory challenges that were utilized in a discriminatory manner, and thereby prevent the discrimination and ensure the juror's right to participate in the judicial process.

In STATE v. NEIL, supra, this Court ruled that Article I, §16 of the Florida Constitution mandated that potential jurors could not be eliminated through the use of peremptory challenges exercised solely on the basis of their race. That holding has been extended to civil actions under the authority of Article I,

§22 of the Florida Constitution, CITY OF MIAMI v. CORNETT, 463 So.2d 399 (Fla. 3d DCA 1985); JOHNSON v. FLORIDA FARM BUREAU CASUALTY INSURANCE CO., 542 So.2d 367 (Fla. 4th DCA 1988).[1]

In STATE v. NEIL, supra, the State used its peremptory challenges in a criminal action to remove three black potential jurors. The defendant, a black, objected to each challenge as being racially motivated. The remedy sought by the defendant was to have the court strike the entire jury pool (457 So.2d at 482). That relief was denied, and the defendant was convicted. The conviction was affirmed by the Third District, NEIL v. STATE, 433 So.2d 51 (Fla. 3d DCA 1983). However, the Third District certified a question of great public importance, i.e., whether a party could compel the State to explain the basis for its exercise of its peremptory challenges.

This Court reversed, holding that upon a proper objection, the trial court had authority to require a party to explain its use of peremptory challenges when they appeared to be utilized in a discriminatory manner. In the event the trial court determined

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[1]/In CITY OF MIAMI v. CORNETT, supra, the Third District noted that Article I, §16 of the Florida Constitution guaranteed a criminal defendant the right to a trial by "an impartial jury," whereas Article I, §22, which preserved the right to jury trials in civil actions, did not specifically incorporate the term "impartial." However, the court concluded that the term "impartial" must be implied in §22 because, "anything less than an impartial jury is the functional equivalent of no jury at all," 463 So.2d at 402. The Fourth District adopted the Third District's reasoning, JOHNSON v. FLORIDA FARM BUREAU, supra, 542 So.2d at 369.

that the peremptory challenges were being utilized in a discriminatory fashion, the court should dismiss that jury pool and start voir dire over with a new pool (457 So.2d at 487). This Court noted that the right to peremptory challenges is not of constitutional dimension; and that its primary purpose was to aid and assist in the selection of an impartial jury (457 So.2d at 486).

Some District Courts have construed STATE v. NEIL as rigidly limiting the trial courts' discretion to one remedy when the peremptory challenges are discriminatorily utilized: i.e., the dismissal of the jury pool and the commencement of an entirely new jury selection procedure, see e.g., CARTER v. STATE, 550 So.2d 1130 (Fla. 3d DCA 1989). Such adherence has not been without comment. In CARTER v. STATE, supra, 550 So.2d at 1131, fn. 1 (Fla. 3d DCA 1989), the court stated:

> We believe that a trial court should have the discretion to cure a discriminatory challenge by means other than dismissal of the entire panel. However, this court and the trial courts are bound by the clear language of [STATE v.] NEIL, [(supra)] absent directions otherwise from the Florida Supreme Court.

While STATE v. NEIL only mentions one remedy, it is respectfully submitted that it should not be applied so as to preclude other remedies when they can be efficiently administered. In STATE v. NEIL, the remedy requested by the defendant was to strike the jury panel and to recommence jury selection. This Court accepted the defendant's argument and

approved the remedy requested. The opinion does not, however, prohibit other remedies. Practical considerations and fundamental fairness dictate that there be alternative judicial responses to such discriminatory conduct.

The remedy mentioned in STATE v. NEIL is ineffective to protect the potential jurors' right to be free from discrimination. In BATSON v. KENTUCKY, 106 S.Ct. 1712 (1986), the United States Supreme Court held that under the equal protection clause of the Fourteenth Amendment, a black criminal defendant could challenge the state's utilization of peremptory challenges to eliminate potential black jurors in a discriminatory manner. In doing so, the Court noted that the issue involved implicates the rights of more than just the parties to the lawsuit (106 S.Ct. at 1717-18):

> Racial discrimination in selection of jurors harms not only the accused whose life or liberty they are summoned to try....As long ago as STRAUDER [v. WEST VIRGINIA], 100 U.S. 303 (1879),...the Court recognized that by denying a person's participation in jury service on account of his race, the state unconstitutionally discriminated against the excluded juror. [Citations omitted.]
>
> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. [Citations omitted.] Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing [black citizens] that equal justice which the law aims to secure to all others. [Citations omitted.]

In FLUDD v. DYKES, 863 F.2d 822 (11th Cir. 1989), the Eleventh Circuit concluded that the holding and reasoning of BATSON applies with equal force to civil actions. In so ruling, the Court noted that when potential jurors are excluded from jury service because of their race, the "discriminatory actor" is the court (863 F.2d at 828).

The court in CLARK v. CITY OF BRIDGEPORT, 645 F.Supp. 890 (D.Conn. 1986), came to a similar conclusion and reemphasized the effect of such discrimination on the judicial system as a whole (645 F.Supp. at 894):

> In order for the peremptory [challenge] to serve its just and proper end, "justice must satisfy the appearance of justice." [Citations omitted.] The arbitrary right of the peremptory is not absolute and cannot be allowed to facilitate the apparent unjust end of the Assistant City Attorney in these three cases...
>
> The guarantee that the state will not utilize discriminatory criteria in the selection of jurors is one to be enjoyed by a criminal defendant and prospective juror alike. The protection also applies to the entire system of justice which, once scathed by the discrimination present at bar, finds its integrity in public trust undermined. [Citation omitted.]

See also, PEOPLE v. KERN, 554 N.E.2d 1235, 1242-43 (N.Y. 1990).

This Court recognized this aspect of the problem in STATE v. SLAPPY, 522 So.2d 18, 20 (Fla. 1988):

> [T]he appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being - to insure equality of treatment and evenhanded justice. Moreover, by giving official sanction to irrational prejudice, courtroom bias only enflames bigotry in the society at large.

When the full implications of the discriminatory utilization of peremptory challenges are considered, it is apparent that limiting the trial court's remedy to the impanelling of a new jury is not appropriate. That response still results in the exclusion of the impartial jurors and denies their right to participate in the judicial system. As a matter of logic, it is not unfair or unreasonable to deny the peremptory challenge that is improperly exercised, since as a prerequisite to that remedy it must be shown that the party sought to exclude the juror solely on the basis of race. What harm can come to an offending party as a result of such a remedy? Allowing the trial court to deny a peremptory challenge enforces the opposing party's right to have a jury selected in a non-discriminatory fashion, and protects the right of the juror to participate.

To require the impanelling of a new jury every time there is a discriminatory use of the challenges simply gives the violating party another bite of the apple. Sometimes, the laws of chance will enable the discriminating party to achieve its goal, i.e., a jury with a particular racial makeup. Requiring the selection of a new jury also causes an unjustifiable expense of time, money and effort. Judicial economy supports a holding that an inefficient remedy should not be mandated where a more effective response is available. In some circumstances, selecting a new jury may be appropriate and necessary. But in a case such as the one sub judice, the effect would be to penalize everyone for the discriminatory conduct of one party.

The trial court's action in simply denying the use of the peremptory challenges to exclude the black jurors in this case is not without precedent. The utilization of that remedy by the trial court has been approved in other cases, UNITED STATES v. DeGROSS, 913 F.2d 1417, 1425 (9th Cir. 1990); COMMONWEALTH v. DiMATTEO, 427 N.E.2d 754 (Mass.App. 1981), rev. den., 440 N.E.2d 1173 (Mass. 1982); COMMONWEALTH v. LEGENDRE, 518 N.E.2d 872 (Mass.App. 1988). Additionally, the denial of the exercise of the discriminatory peremptory challenge was specifically stated to be the appropriate procedure in STATE v. LEVINSON, 795 P.2d 845, 850 (Hawaii 1990). The court in that case noted that when the peremptory challenge is disallowed, the party attempting to exercise it should be permitted an additional challenge.

The rationale for striking the entire jury pool and recommencing jury selection was explained in PEOPLE v. WHEELER, 583 P.2d 748, 765 (Cal. 1979). The court in that case noted that when a trial court determines that peremptory challenges have been used in a discriminatory manner, the trial court must dismiss the jurors already selected. The court then stated (583 P.2d at 765):

> So too it must quash any remaining venire, since the complaining party is entitled to a random draw from an entire venire - not one that has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges.

See also RILEY v. STATE, 496 A.2d 997, 1013 (Del.App. 1985). The rationale for that remedy, however, fails to consider the rights

of the potential jurors to participate in the trial, and also does not address the perception of the trial court as participating in the act of discrimination. Certainly, that remedy is appropriate in some situations, but its justification does not support it being the only permissible remedy.

In summary, the Fourth District's rigid interpretation of STATE v. NEIL is erroneous, as this Court's decision did not prohibit the utilization of other remedies. Requiring that the only judicial response to the discriminatory use of peremptory challenges is to dismiss the entire jury pool does not remedy the violation of the potential jurors' right to participate in the judicial process. It is also an unduly cumbersome, time consuming, and expensive procedure. The trial court should have the discretion to determine the appropriate procedure and, where appropriate, to utilize the most efficient remedy, i.e., the denial of the peremptory challenge(s). For these reasons, this Court should hold that the Fourth District's decision is erroneous, and that the trial court acted within its discretion in simply denying the peremptory challenges which were discriminatorily utilized by the Defendant. Therefore, the Fourth District's decision should be quashed, and the cause remanded for affirmance of the Final Judgment in accordance with the jury verdict.

POINT II

THE JUDGMENT SHOULD BE AFFIRMED BASED ON THE HARMLESS ERROR DOCTRINE AS CODIFIED IN FLA. STAT. §59.041.

Fla. Stat. §59.041 provides that no judgment should be set aside or reversed, or a new trial granted, unless it shall appear that the error complained of has resulted in a miscarriage of justice. In the case sub judice, the Defendant did not include in the record to the Fourth District (or to this Court), a transcript of the proceedings other than that relating to the selection of the jury. No argument was raised on appeal that the verdict returned by the jury was against the manifest weight of the evidence or otherwise improperly based. In fact, the Defendant never even made the argument that the jury as constituted was prejudiced against his client or in any manner partial. Under these circumstances, the harmless error doctrine mandates that the Final Judgment of the trial court be affirmed.

The Defendant's sole issue on appeal to the Fourth District was that the trial court erred in not dismissing the entire jury pool and reselecting a jury after it determined that the Defendant had utilized its peremptory challenges in a discriminatory manner. Clearly, such a technical argument does not demonstrate a "miscarriage of justice" as required under Fla. Stat. §59.041. The Defendant did not challenge in any manner the fairness of the proceedings or the result.

It has been held that a new trial is not justified in response to a challenge to the jury's qualifications, without a showing of bias or prejudice and resulting injury, FLORIDA POWER

CORP. v. SMITH, 202 So.2d 873, 878 (Fla. 2d DCA 1967). Speculation regarding jury prejudice is insufficient to satisfy that requirement, STATE v. McGOUGH, 536 So.2d 1187 (Fla. 2d DCA 1989). Any error in denying a jury challenge will be considered harmless unless it "infects the ultimate fairness of the trial so that the litigant is thereby deprived of a jury of his or her peers..." LONGSHORE v. FRONRATH CHEVROLET, INC., 527 So.2d 922, 923 (Fla. 4th DCA 1988). The Defendant made no such challenge in this case, and the Fourth District found no such harm.

Additionally, it should be noted that this Court stated in STATE v. NEIL, supra, that the use of peremptory challenges is not of constitutional dimension (457 So.2d at 486). This Court also stated that "no one is entitled to a jury of any particular composition," (457 So.2d at 487). Therefore, the Defendant cannot claim that the trial court's ruling infringed his constitutional rights, nor denied him the particular jury that he requested.

For these reasons, the harmless error doctrine should be applied to mandate affirmance of the Judgment of the Circuit Court. The Defendant has never argued that the jury's verdict resulted in a miscarriage of justice, or was in any way erroneous. The only argument raised involved the composition of the jury, which was never alleged to be prejudiced against the Defendant. Reversal based solely on a technical challenge to the procedure utilized by the trial court is not justified. Therefore, the decision of the Fourth District should be quashed, and the Final Judgment of the Circuit Court affirmed.

CONCLUSION

For the reasons stated above, the decision of the Fourth District should be quashed, and the cause remanded for affirmance of the Final Judgment in accordance with the jury's verdict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished to WILLIAM E. HOEY, ESQ., 204 River Plaza, 900 S. U.S. Hwy. #1, Jupiter, FL 33477; and RICHARD H.W. MALOY, ESQ., 605 Ocean Dr., Ste. 4M, Key Biscayne, FL 33149, by mail, this 5th day of August, 1991.

Moses Baker, Jr., Esq. of
SEARCY DENNEY SCAROLA
BARNHART & SHIPLEY, P.A.
P.O. Drawer 3626
West Palm Beach, FL 33402
and
Philip M. Burlington, Esq. of
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(407) 686-8010
Attorneys for Petitioners

By: _____
PHILIP M. BURLINGTON
Florida Bar No: 285862

B/BROOKS.BRF/GG