D.A. 12/4/91

047

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 77,692

DORIS ELIZABETH BROOKS,
etc., et al.,

Petitioners,

-vs-

MASOUD MAZAHERITEHRANI,

Respondent.
_____/

REPLY BRIEF OF PETITIONERS ON THE MERITS

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CITATIONS OF AUTHORITY

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

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.

Defendant contends that if this Court accepts Petitioners' argument it will "seriously restrict, if not remove the peremptory challenge from the jurisprudence of this State" (Respondent's Brief p.4). That statement is unpersuasive. This Court has already determined in STATE v. NEIL, 457 So.2d 481 (Fla. 1984), and its progeny that exclusion of potential jurors on the basis of race through the use of peremptory challenges violates Article I, §16 of the Florida Constitution.[1] That restriction on the use of peremptory challenges cannot reasonably be challenged, and the case sub judice only addresses the appropriate remedy for such conduct. The denial of a peremptory challenge, which has been determined to have been utilized solely

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[1]/Defendant suggests in its brief that STATE v. NEIL, supra, is undermined by the Supreme Court's decision in HOLLAND v. ILLINOIS, 493 U.S. ____, 110 S.Ct. 803, 107 L.Ed.2d 905 (1990). In HOLLAND, the Court held that the Sixth Amendment to the United States Constitution was not violated when the state utilized the peremptory challenges to eliminate potential jurors on the basis of race. However, the United States Supreme Court's interpretation of a federal Constitutional provision does not in any way bind this Court in its interpretation of the Florida Constitution. Moreover, the Court in HOLLAND noted that such use of peremptory challenges was still prohibited by the Fourteenth Amendment of the federal Constitution.

on the base of race, does not remove or restrict the appropriate use of peremptory challenges in this State.

The Defendant has failed to present one valid reason why the remedy of denying the peremptory challenge cannot be a proper judicial response to racially discriminatory use of peremptory challenges. Defendant states that in footnote 13 of GRAY v. MISSISSIPPI, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987), the Court indicated that dismissing the venire and starting "afresh" is the acceptable method. That statement is inaccurate. In fact, GRAY v. MISSISSIPPI did not even involve racial discrimination in the use of peremptory challenges.

In GRAY, a criminal case, the state challenged for cause eight venire members who expressed some doubt about the utilization of the death penalty. After the trial court denied those challenges, the prosecutor used peremptory challenges to remove those panel members. Later, a venire member was equivocal regarding her beliefs about capital punishment, but subsequently stated she could reach a guilty verdict and vote to impose the death penalty. However, the trial judge excused that potential juror for cause on motion of the prosecutor, after acknowledging that it had required the prosecutor to use peremptory challenges against the eight venire members whose opposition to the death penalty was unequivocal. After the defendant was convicted, he challenged that excusal for cause and the Mississippi Supreme Court affirmed, stating that there was no prejudice because the error simply corrected the mistake of the trial judge in refusing

to uphold the state's challenges for cause as to dismissal of the prior venire members.

The United States Supreme Court reversed the conviction, and stated in footnote 13:

> We do not suggest that, if the trial judge believed that he had applied an erroneous standard during voir dire, there was no way to correct the error. The Mississippi Supreme Court said that a trial court "should be afforded the opportunity to correct any errors at trial by way of a motion for a new trial." 472 So.2d, at 423. In the situation presented by the case, the equivalent action would have been to dismiss the venire sua sponte and start afresh.... [Emphasis in original.]

Obviously, that statement cannot be characterized as addressing the issue in the case sub judice. That case did not involve the improper utilization of peremptory challenges, but rather a trial court's erroneous denial of challenges for cause which resulted in the exhaustion of the state's peremptory challenges. The court did not state what was the appropriate remedy in a situation such as in the case sub judice, but simply noted a remedy the trial court could have utilized to remedy its error in denying the state's challenges for cause. The court's only discussion of the procedural aspects of this issue is in BATSON v. KENTUCKY, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), where it declined to dictate a particular remedy.

The only argument against the remedy of denying the peremptory challenges is a due process contention that does not survive scrutiny. Defendant contends that:

> Requiring a litigant to go to trial with a jury composed of persons he validly considers as unsuitable is a violation of the constitutional protection of not being deprived of one's property without due process of law.

No authority is presented for this due process argument, other than a general quotation from SCULL v. FLORIDA, 569 So.2d 1251 (Fla. 1990), regarding the general scope of due process. It is clear that Defendant's argument has no merit. If a party validly considers a juror unsuitable, he or she can challenge that juror for cause and, under established law in this State, the juror must be excused if there is any reasonable doubt that that juror would not be impartial, SINGER v. STATE, 109 So.2d 7 (Fla. 1959); LONGSHORE v. FRONRATH CHEVROLET, INC., 527 So.2d 922 (Fla. 4th DCA 1988). The peremptory challenges may be used by a party as it chooses, with the one limitation that they not be utilized in a discriminatory fashion. But peremptory challenges are not of constitutional magnitude; their primary purpose is to assist in the selection of an impartial jury, STATE v. NEIL, supra, 457 So.2d at 486.

Acceptance of Defendant's position would mean that any time a party's peremptory challenges are exhausted and there are other potential jurors he or she believes are unsuitable, there is a due process violation if those jurors are not excluded. In essence, Defendant's position means that due process requires every party to have unlimited peremptory challenges. That is clearly not the law, nor should it be.

On page eight of his brief, Defendant notes BATSON v. KENTUCKY, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and CLARK v. CITY OF BRIDGEPORT, 645 F.Sup. 890 (D.C.Conn. 1986), which note that racial discrimination in the selection of jurors harms not only the parties and the courts, but the excluded jurors as well. Defendant then states that he does not see the relevance of that point to the question whether this Court should modify the remedy for racial discrimination in the use of peremptory challenges. With due respect, the rights of the jurors must be recognized, and this Court has an obligation to protect those rights. The fact that the potential jurors are not represented by counsel, and do not appear as parties, does not mean that they have no rights. The Defendant's contention that the litigants' due process rights are of at least equal value to those of the potential jurors must be considered in light of the weakness of the due process argument that Defendant presents.

Defendant quotes from the trial judge when he ruled that the use of the peremptory challenge was racially motivated, and suggests that the ruling was only based on the fact that it seemed "apparent" that the black jurors were being excluded because the Plaintiff and her counsel were black. It should be noted that the trial court reached this conclusion after hearing defense counsel's explanation for the use of his challenges, which the court obviously found to be insubstantial. Thus, the decision was not based solely on the fact that all three potential black jurors were peremptorily challenged, and the Plaintiff and her attorney were black.

Defendant fails to address the numerous cases from other jurisdictions which authorize the denial of the peremptory challenge as a remedy, except to say that they do not treat the issue "in depth" (Respondent's Brief p.7). While that may be, Defendant has failed to cite any jurisdiction, other than Florida, which limits the trial court's response to dismissing the venire and recommencing jury selection. The Defendant has also not addressed the conservation of judicial resources which would result from permitting the trial judge to deny the peremptory challenge.

In summary, the Defendant has failed to provide any valid justification for requiring a trial court to dismiss the entire venire and recommence the jury selection process any time a peremptory challenge is used in a racially discriminatory manner. The Defendant chooses to ignore the rights of the potential jurors and fails to address the issue of judicial economy. The only rationale for limiting the trial court's discretion is a due process argument which does not survive scrutiny. Therefore, this Court should rule that the trial court has a discretion to either deny the peremptory challenge(s) or, when appropriate, to dismiss the entire venire and recommence the jury selection process.

POINT II

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

The Defendant claims that the harmless error doctrine was not applicable because the United States Supreme Court has held that a denial or impairment of a peremptory challenge in a criminal case is reversible error without a showing of prejudice. Defendant has cited no Florida law regarding civil actions which applies that analysis. More importantly, there is no showing of any denial or impairment of a peremptory challenge since the trial court's finding that the Defendant's exercise of those challenges was racially discriminatory was not challenged in the District Court and, other than a passing comment in his brief before this Court, is not challenged here. Since there has been no challenge to the trial court's finding, clearly the Fourth District's decision was in error for failing to apply the harmless error doctrine.

Defendant argues alternatively that the alleged violation of the due process rights cannot be treated as harmless error. As discussed in Point I, supra, that argument has absolutely no merit. To accept that argument would require granting all parties in any action an unlimited number of peremptory challenges. Since there is no due process violation, that argument cannot operate to avoid the harmless error doctrine.

It should be noted that the Defendant has failed to make any argument justifying a challenge to the jury verdict in this case. Since no argument was presented to the Fourth District that the

jury, as constituted, was in any way partial or prejudiced; and no challenge to the jury verdict was made, the harmless error doctrine should have been applied by the Fourth District. Therefore, the Fourth District's decision should be quashed and the Judgment affirmed.

CONCLUSION

For the reasons above, the decision of the Fourth District should be quashed with directions to enter a Mandate affirming the trial court Judgment.

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 23rd day of September, 1991.

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