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IN THE SUPREME COURT OF FLORIDA

TONY JEFFERSON,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

CASE NO. 78,507

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

AUTHORITIES CITED

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Indian River County, Florida, and the appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this Court.

The symbol R will denote Record on Appeal.

The symbol SR will denote Supplemental Record.

STATEMENT OF THE CASE

Petitioner was charged by way of an information filed in the 19th Judicial Circuit [Indian River County] with armed robbery. R 155. The voir dire examination began in this cause on February 15-16, 1990. SR. Mr. John Gaskins was one of the prospective jurors in the jury venire. SR 102, 109-110, 117-118. Mr. Gaskins was the only black juror on the entire venire. R 4, 51. When the prosecutor, moved to peremptory challenge Mr. Gaskins, the trial judge decided conducted an inquiry of the prosecutor's reasons or motives in striking Mr. Gaskins. R 51. Petitioner's trial counsel objected to the striking of this juror. R 52-53. The trial court denied the Respondent-State's request to peremptorily strike Mr. Gaskins. R 53-54. The trial court also denied defense counsel's request to strike the entire jury panel. R 54.

Petitioner was convicted by the jury of robbery with a deadly weapon as charged in the information. R 175. The trial judge placed Appellant on ten (10) year probation to run consecutive to his sentence of (17) years incarceration in Case No. 89-1166. R 179.

Timely Notice of Appeal was filed by Petitioner with the Fourth District Court of Appeal. R 783

The Fourth District affirmed Petitioner's conviction. Jefferson v. State, 16 F.L.W. D2070 (Fla. 4th DCA Aug. 7, 1991) [See Appendix]. Judge Stone writing for the Court noted that this court in State v. Neil, 457 So.2d 481 (Fla. 1984), "established that the remedy for a race-based challenge is to dismiss the jury

panel and start voir dire over." Nevertheless the court found that there was no prejudice to Petitioner-Defendant's through the use of a remedy fashioned by the trial court that is seating the unlawfully challenged juror. In so doing, the Fourth District certified the following question to this Court as one of great public importance:

> WHERE THE TRIAL COURT FINDS THAT A PEREMPTORY CHALLENGE IS BASED UPON RACIAL BIAS, IS THE SOLE REMEDY TO DISMISS THE JURY POOL AND TO START VOIR DIRE OVER WITH A NEW JURY POOL, OR MAY THE TRIAL COURT EXERCISE IT'S DISCRETION TO DENY THE PEREMPTORY CHALLENGE IF IT CURES THE DISCRIMINATORY TAINT?

On August 20, 1991, Petitioner-Defendant timely invoked the jurisdiction of this Court.

STATEMENT OF THE FACTS

Kenneth McMullen was employed as a cashier clerk at the Spur Gasoline station at Sixteen Street and Old Dixie Highway in Vero Beach, Florida. R 111-112. On Sunday, September 17, 1989, at approximately 6:00 p.m., McMullen was approached by a black male carrying a knife in his left hand. R 112. He ordered McMullen to turn over all the money or he would kill him. R 112, 121. McMullen gave all the money to this person. R 113. The man ordered McMullen to follow him outside the store. R 113. He still had the knife in his hand. R 113. Once outside the premises, the man fled on foot. R 114. Over two hundred dollars had been taken. R 119.

McMullen testified that during this incident it was daylight. R 116. He testified that Appellant was the man that held the knife and robbed him. R 117. He had no doubts about this. R 127. After the robber fled, McMullen contacted the police. R 118. He gave the officers a description of the robber. R 118-119. Officer Delise testified that McMullen gave her a complete description of the suspect. R 64-65.

The next day McMullen met with Detective Martin at the Vero Beach police station. He made a composite sketch of the robber. R 123-124. The following day McMullen viewed two (2) photographic arrays prepared by the detective. R 124-125. McMullen testified that he immediately selected Petitioner-Defendant's photograph from a photographic array. R 126-127.

Officer Debra Delise of the Vero Beach police department

responded to the Spur gas station. R 63-65. She spoke with Mr. McMullen, the store clerk, who informed her he was robbed by a black male wearing shorts and a black tee shirt. R 64.

Detective Martin testified that he met with Mr. McMullen who prepared a composite sketch of the robber at the police station. R 91-92. The following day Detective Martin showed McMullen a photographic array. R 94-95. This second photographic array contained Petitioner's-Defendant's photograph. R 94-95. McMullen immediately identified Petitioner-Defendant as the person who committed the robbery. R 95-96, 103.

SUMMARY OF THE ARGUMENT

The trial court found that the sole black juror on Petitioner's venire was illegally challenged by the prosecutor in violation of State v. Neil, 457 So.2d 481 (Fla. 1984). In fashioning a remedy, the trial court denied the State's peremptory challenge to this juror and this black juror sat on Appellant's jury. However the trial court denied Appellant's request to strike the entire panel and begin the voir dire process again. This was error.

In Neil, this Honorable Court unequivocally stated: "If the party has actually been challenging prospective jurors solely on the basis of race, then the court should dismiss that jury panel and start voir dire over with a new pool." Neil, 457 So.2d at 487. Thus, the trial court had no choice but to dismiss the entire voir dire panel and begin the jury selection process again. The trial court's attempt to fashion an alternative remedy which was upheld by the Fourth District should be reversed.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED IN DENYING PETITIONER-DEFENDANT'S REQUEST TO STRIKE THE JURY POOL AND START VOIR DIRE OVER WITH A NEW JURY PANEL WHEN THE TRIAL COURT FOUND A NEIL VIOLATION

The Sixth Amendment provides in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury...." Article I, Section 16 of the Florida Constitution (1968) also guarantees the right to an impartial jury. The model impartial jury is composed of jurors who are disinterested individuals, capable and willing to determine the facts based upon the evidence presented at trial. See Irvin v. Dowd, 366 U.S. 717, 722-23, 81 S.Ct. 1639 (1961). A second essential feature of an impartial jury is its character as a democratic institution representing the community from which it is drawn. Taylor v. Louisiana, 419 U.S. 522, 526-30, 95 S.Ct. 692, 695-697 (1975). A jury that satisfies this constitutional mandate is the product of selection methods that provides a fair possibility for obtaining a representative cross-section of the community. See Williams v. Florida, 399 U.S. 78, 100, 90 S.Ct. 1893 (1970).

The Equal Protection Clause of the 14th Amendment prohibits a prosecutor from using the State's peremptory jury challenges "to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a 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." Powers v. Ohio, __U.S. __, 111 S.Ct. 1364, 1370 (1991).

In State v. Neil, 457 So.2d 481 (Fla. 1984), this Court established the procedure for determining whether peremptory jury challenges have been improperly utilized in a discriminatory manner. See also State v. Slappy, 522 So.2d 18, 22 (Fla.), cert. denied, 487 U.S. 1219, 108 S.Ct. 2873 (1988).

If the trial court decides that "there is a substantial likelihood that the peremptory challenges are being exercised solely on the basis of race," Neil, 457 So.2d at 486, then the burden shifts to the state to provide a "`clear and reasonably specific' racially neutral explanation of `legitimate reasons' for the state's use of its peremptory challenges." State v. Slappy, 522 So.2d at 22.

In deciding whether the state has met its burden and has not merely provided reasons as a pretext for discriminatory conduct, the trial court must look for certain acts signaling them in use of challenges, such as: "(1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel have questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror [sic] who were not challenged." Slappy, 522 So.2d at 22. Two years later, the U.S. Supreme Court in Batson v.Kentucky, 476 U.S.

79, 106 S.Ct. 1712 (1986), adopted a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. 476 U.S. at 96-98, 106 S.Ct. at 1722-1724.

In the instant case, Reverend John Gaskin was questioned during voir dire by both counsel. SR 102, 110-112, 117. Mr. Gaskin was the only black juror on the entire venire. R 4, 51. Petitioner is also black. R 51. When the prosecutor, Ms. Park, moved to peremptory challenge Mr. Gaskin, the trial judge conducted an inquiry of the prosecutor as to her reasons or motives in striking Mr. Gaskins. R 51. The prosecutor gave two reasons for her decision. R 51. The first reason was that Reverend Gaskin is a "full time minister." The other reason related to Petitioner's own religious upbringing and the fact that Petitioner's father is a bishop. R 51.

Petitioner's trial counsel disputed these reasons put forth by the prosecutor:

> MR. SAVAGE-TIMMEL: Judge, Ms. Park went into that extensively with Mr. Gaskins. Although he is a minister, he indicated he had no problem sitting in judgment. He made the statement that crime has no color when she questioned him about being the only black juror sitting in judgment of another black man. He has not shown any hesitancy about being able to sit in judgment. He says that his particular religion, he's with the Church of God in Christ in Oslo, that his particular religion does not prohibit him from being a juror and sitting in judgment.
>
> I don't believe there is anything about Mr. Gaskins' answers that would indicate that because he's a minister that he would not make an excellent juror on this case.

R 52.

Petitioner's counsel opposed the State's use of this

peremptory challenge. R 53. She argued "that the only reason the state is excusing him is because he is black." R 53.

The trial court denied the State's request to peremptorily strike Reverend Gaskins as a juror. The trial court explained:

> THE COURT: In the Court's opinion, I just can't conceive that it's other than racially motivated and in the Court's opinion, the motion to strike will be denied.
>
> It's the only black on the jury. The juror has been extremely frank when he answered the questions. Crime, he indicated, was of no color, and I honor that.
>
> I think the fact and the defendant's father may be a bishop completely immaterial and irrelevant and on the Court's motion, unless there is a showing of some relevancy on that, I (indiscernible) that type of testimony unless it is shown.

R 53-54.

At this point Petitioner's trial counsel moved to dismiss the entire jury panel. R 54. Defense counsel argued: "I think there is some case law that indicates that if the State can't show that the challenge is not based on race that actually what you have to do is dismiss the jury panel and start all over and we would be moving to strike this panel." R 54. The trial court denied this request by defense counsel. R 54. John Gaskins (Juror Number 3) appeared and participated on Petitioner's jury. R 55, 172.

The crucial issue in the present case revolves around what is the proper remedy to be afforded a defendant when the trial court finds a Neil violation. The trial court so found in the instant case. R 53-54.

In Batson v. Kentucky, the high court declined "to formulate particular procedures to be followed upon a defendant's timely

objection to a prosecutor's challenges." Id. at 99, 106 S.Ct. at 1724-1725. The Court explained this decision as follows:

> For the same reason, we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial judge 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.Sup. 467, 474 (Conn. 1976), mandamus granted *sub nom*, *United States v. Newman*, 549 F.2d 240 (CA2 1977).

Id. at 100 n.24, 106 S.Ct. at 1725 n.24.

In contrast this Honorable Court has expressly formulated a clear procedure to be followed upon a trial court's finding of a Neil violation: "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. This is the remedy devised by this Honorable Court. See also People v. Wheeler, 22 Cal. 3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881, 100 S.Ct. 170 (1979),

In Wheeler, the Supreme Court of California held:

> If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. 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. Upon such dismissal a different venire shall be drawn and the jury selection may begin anew.

583 P.2d at 765. [footnote omitted] [Emphasis Supplied].

In Soares, the Massachusetts Supreme Court held:

> We follow the suggestion of the *Wheeler* court with regard to the remedy which is appropriate in the event the judge finds that the use of peremptory challenges has been predicated on group affiliations: "If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges,the presumption of the validity is rebutted. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. So too it must quash any remaining venire, since the complaining party is entitled to a random draw from an entire venire-not one stripped of members of a cognizable group by the improper use of peremptory challenges. Upon dismissal a different venire shall be drawn and the jury selection process may begin anew."
>
> Id. at 517-518 [Footnote Omitted].

In Mazaheritehani v. Brooks, 573 So.2d 925 (Fla. 4th DCA 1991), rev. granted, Case no. 77,692 (July 11, 1991) the Fourth District Court readily applied this remedy:

> 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).
>
> Id. at 925.

In Palmer v. State, 572 So.2d 1012 (Fla. 4th DCA 1991), the defendant objected to peremptory challenges of his jurors by the prosecutor. The Fourth District held that the defendant waived any defects in the voir dire process because the defendant declined the trial court's offer of relief "to which he was entitled under

Neil, namely the dismissal of the panel and the recommencement of voir dire with a new panel." Id. at 1013. Interestingly enough the Fourth District, here, affirmed Petitioner's conviction even though he expressly requested the only "relief to which he was entitled under Neil, namely the dismissal of the panel and the recommencement of voir dire with a new panel." The Fourth District explanation for its refusal to apply the Neil remedy devised by this Court to Petitioner was an unexplained "no prejudice to the defendant." However nowhere in the Jefferson opinion does the court even attempt to explain how Petitioner was not prejudiced by the use of this alternative remedy.

The Fourth District in this cause is absolutely wrong in devising its own type of remedy and applying it to a Neil violation. This Court has carefully devised the appropriate remedy. Lower courts can not and must not ignore the clear dictates of this Honorable Court. This Court already weighed the balances, assessed the prejudices to the parties and calculated the appropriate response in devising its sole remedy for a Neil violation.

In Wheeler, 583 P.2d at 765, the Court articulated the various prejudice which occurs when a racially motivated peremptory challenge is found by the trial court.

1. The trial court must conclude that the jury as constituted fails to comply with the representative cross-section requirement. This is the first prejudice to Petitioner. His jury failed to comply with the representative requirement.

Two rationales support the representative cross-section requirement: first, it protects the accused by bringing an impartial jury's common sense to bear on the evidence to support the charges, and second, it makes a vital contribution to public confidence in the integrity and democracy of the judicial system. Booker v. Jabe, 775 F.2d 762, 770 (6th Cir. 1985), vacated, 478 U.S. 1001, 106 S.Ct. 3289 (1986), reinstated, 801 F.2d 871 (6th Cir. 1986), cert. denied, 479 U.S. 1046, 107 S.Ct. 910 (1987). Also minority underrepresentation on juries undermines the goal of racial equality in the criminal justice system and undermines the legitimacy of the criminal justice system.[1] See Developments in the Law - Race and the Criminal Process, 101 Harv. L. Rev. 1472, 1559-1561 (1988).

2. The trial court must dismiss the jurors so far selected and quash any remaining venire. Why? Because "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." Wheeler, 583 P.2d at 765. At bar, a different venire may very well have numerous minority members as opposed to the unrepresentative venire Petitioner initially received.

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[1] "Selecting jurors from diverse groups in society infuses the judicial system with community values and thereby legitimates the system in the eyes of the community....To the extent that racial bias in jury selection procedures infringes on the constitutional rights of minority defendants, the participatory rights of minority citizens, and the interests of minority victims of crime, such bias undermines the system's legitimacy of minority groups and thus for the community as a whole." Developments in the Law, supra, at 1561.

And finally to say that Petitioner actually had a "black person" on his jury thus no prejudice can be found totally ignores that line of cases that hold that the State did not carry its burden of providing a racially neutral explanation for an exercise of peremptory challenges even though the impaneled jury includes one black member. See Slappy v. State, supra; Tillman v. State, 522 So.2d 14, 17 (Fla. 1988) Foster v. State, 557 So.2d 634, 636 (Fla. 3d DCA 1990); Williams v. State, 551 So.2d 492 (Fla. 1st DCA 1989).

Under all of the above circumstances, the Fourth District erred in finding that the trial court could devise its own remedy for a Neil violation. There was prejudice to Petitioner. By failing to strike the panel as requested, Petitioner was denied his right to an impartial jury drawn from a representative cross-section of the community. In addition, the important purpose of these rights was not served.

The trial courts' failure to comply with the mandate of Neil violated the Sixth Amendment to the United State Constitution, Article I, Section 16 of the Florida Constitution, the Equal Protection Clauses of the Fourteenth Amendment and our constitution, Article I, Section 2. The decision of the Fourth District Court of Appeal and Petitioner's conviction should be reversed, and this cause remanded to the trial court for a new trial.

CONCLUSION

Based on the foregoing Argument and the authorities cited therein, Appellant respectfully requests this Honorable Court to reverse the decisionof the Fourth District Court of Appeal and Petitioner's conviction and remand this cause with such directives as may be deemed appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Joan Fowler, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401 by courier this 27th day of September, 1991.

Of Counsel