D.A. 2-1-93 047

IN THE SUPREME COURT OF FLORIDA

EDDIE JOINER, etc.,

Petitioner,

v. CASE NO. 79,567

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT

RESPONDENT'S AMENDED MERITS BRIEF

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STATEMENT OF THE CASE AND FACTS

The state agrees with the statement of the case and facts as set out by the petitioner in his brief on the merits, with the following additions and exceptions:

After the parties chose the jury panel that tried this case, defense counsel stated "I think that's acceptable, Your Honor. That group's acceptable." (R 303) Joiner v. State, 593 So.3d 554, 556 (Fla. 1992). The defense did not move to strike the jury panel or have Mrs. Gamble seated; the defense did not raise the issue again until after a verdict was returned, in a motion for acquittal or new trial. (R 104-6, 131-2, 213-4) Id.

The district court held that the petitioner conceded, on appeal, that the state's reason for striking juror number four, Mr. Sanders, was valid. Joiner at 555.

Defense counsel challenged the state's peremptory strikes after the state struck three venire members, two of them African-American. (R 297-8, 316) Five of the venire members were African-American. (R 316) After the court accepted the state's explanation, when jury selection resumed, the state exercised only one peremptory challenge, against a white venire member. (R 302-3, 316) Two jurors and an alternate were chosen after the court accepted the state's explanation; both of the jurors were African-American, and the alternate was white. (R 302-3, 316)

SUMMARY OF ARGUMENT

Point One: The district court's decision in this case should be approved, since it correctly decided that the sole argument made on that appeal was not properly preserved for appellate review. An objection to a strike or series of strikes does not preserve the point for appeal if the challenging party acquiesces in whatever action the trial court takes. Moreover, where, as here, the challenging party expresses unqualified satisfaction with the jury panel chosen by the parties, that party has affirmatively waived appellate review of any prior challenges.

Point Two: If this court rejects the argument made by the state on Point I above, the district court's decision approving the petitioner's conviction should still be approved. The state acknowledges Kibler v. State, 546 So.2d 710 (Fla. 1989) which stands for the rule that "I prefer other jurors down the line" is an inadequate explanation for a peremptory strike. However, the state submits that Taylor v. State, 583 So.2d 323 (Fla. 1991) controls this case, and that the record does not support any inference that the state's strikes were motivated by race-related concerns.

ARGUMENT

POINT ONE

THE DEFENDANT'S CHALLENGE TO THE STATE'S PEREMPTORY STRIKE WAS NOT ADEQUATELY PRESERVED AS GROUNDS FOR APPEAL.

The district court's decision in this case should be approved, since it correctly decided that the sole argument made on that appeal was not properly preserved for appellate review. The Fifth District's decision in this case has been adopted by panels of the First and Third District Courts of Appeal, and the state submits that it is correct. See Brown v. State, 17 FLW 2451 (Fla. 1st DCA October 22, 1992); Moorehead v. State, 597 So.2d 841 (Fla. 3rd DCA 1992); Johnson v. State, 593 So.2d 1237 (Fla. 3rd DCA 1992).

An objection to a strike or series of strikes does not preserve the point for appeal if the challenging party acquiesces in whatever action the trial court takes. See Castor v. State, 365 So.2d 701 (Fla. 1978). This court has held that if strikes are in fact exercised on an impermissible basis, the challenging party is entitled in some circumstances to have the panel struck, and in others to have a challenged juror or jurors seated. Jefferson v. State, 595 So.2d 38 (Fla. 1992); State v. Castillo, 486 So.2d 565 (Fla. 1986); State v. Neil, 457 So.2d 481, 486-7 (Fla. 1984). If the party challenging the strikes requests neither remedy, it is reasonable for the trial court to conclude that that party has acquiesced in the court's denial of the challenge. See, e.g., Fraterrigo v. State, 10 So.2d 361 (Fla.

1942) (pretrial motion insufficient to preserve objection to introduction of evidence unless renewed at trial).

Moreover, where, as here, the challenging party expresses unqualified satisfaction with the jury panel chosen by the parties, that party has affirmatively waived appellate review of any prior challenges. See Ray v. State, 403 So.2d 956, 962 (Fla. 1981). Defense counsel in this case expressly stated that the panel chosen was acceptable to the defense, with no qualifying language of any kind. (R 303) The point was affirmatively waived; the district court correctly held, in effect, that the defense was estopped from taking a contrary position once the jury returned an unfavorable verdict. Ray, supra, 403 So.2d at 962.

Charles v. State, 565 So.2d 871 (Fla. 4th DCA 1990), relied on by the petitioner, is distinguishable from this case. In Charles, the district court held that defense counsel's announcement of satisfaction with the jury panel did not waive the point for appeal where a Neil discussion took place *after* the announcement. 565 So.2d at 872. Adams v. State, 559 So.2d 1293 (Fla. 3rd DCA 1990), also relied on by the petitioner, is also distinguishable in this regard, as the opinion in that case does not suggest that defense counsel announced that the panel was satisfactory. 559 So.2d at 1295-6.

If a lawyer who makes a Neil challenge still believes at the end of voir dire that his client will be deprived of an impartial jury, or that the integrity of the court system mandates one of the remedies referred to in Jefferson, supra, it is incumbent on that lawyer to so advise the trial court, before the jury is

sworn, while the court can still correct the perceived problem.[1] Castor v. State, supra, 365 So.2d at 703. See State v. Castillo, supra, 486 So.2d at 565 (Neil objection not preserved for appeal unless made before jury sworn); Floyd v. State, 569 So.2d 1225, 1229-30 (Fla. 1990) (Neil objection not preserved where challenging party accepts factual accuracy of striking party's explanation).

The respondent submits that the district court's decision correctly applied this court's precedents, and that it should be approved.

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[1]Neither course was taken by defense counsel in this case. On the contrary, the petitioner concedes in his merits brief that an impartial jury considered his case. (Merits brief at 14) Thus, his *sole* contention is that the "excluded jurors and the community at large" suffered in this case, and that his conviction should accordingly be reversed. See Jefferson v. State, supra, 595 So.2d at 40-41. Interestingly, the petitioner also concedes in his merits brief that "[t]he ultimate goal of conducting the procedure set forth in Neil is of course to protect a defendant's right to an impartial jury." (Merits brief at 12)

POINT TWO

THE TRIAL COURT CORRECTLY ACCEPTED THE STATE'S RACE-NEUTRAL REASON FOR THE CHALLENGED PEREMPTORY STRIKE.

If this court rejects the argument made by the state on Point I above, the state submits that the district court's decision approving the petitioner's conviction should still be approved. This court has held that where a challenged party's reasons "ha[ve] at least some facial legitimacy," the appellate courts "must necessarily rely on the inherent fairness and color blindness of our trial judges who are on the scene and who themselves get a 'feel' for what is going on in the jury selection process." Reed v. State, 560 So.2d 203, 206 (Fla. 1990). The trial court's role is to evaluate the credibility of the person offering the explanation as well as the credibility of the asserted reasons. State v. Slappy, 522 So.2d 18, 22 (Fla. 1988). Where the challenged party's explanations "are such that some reasonable persons would agree" with them, they should not be disregarded. Id. at 23. A trial court's determination that strikes have been exercised properly will not be reversed absent a showing of an abuse of discretion. Files v. State, 17 FLW 742 (Fla. December 12, 1992).

The record of this case shows no abuse of discretion. The state acknowledges Kibler v. State, 546 So.2d 710 (Fla. 1989), in which this court reversed the defendant's conviction when the state justified a challenged peremptory strike by saying "I had no objection to him. In this case I preferred other jurors....It was not to discriminate against any particular race." 546 So.2d at 713. This court held that

> Presumably, the prosecutor's assertion that he preferred other jurors means that because of the jury selection procedure in that jurisdiction, he knew which jurors in the venire would be replacing those excused. Eliminating one juror in order to reach another is a legitimate basis for exercising a peremptory challenge. However, in the context of Neil, it would be incumbent on the prosecutor to give nonracial reasons for having challenged the black jurors rather than the white jurors in his effort to make room for the new persons he sought to have join the panel. Having failed to do so, the prosecutor did not carry the burden of showing that his challenges...were not exercised solely because of their race.

546 So.2d at 714. In Kibler, defense counsel objected after the state exercised three peremptory challenges, all of them against the only three African-Americans on the panel. Id. at 713. In this case, defense counsel objected after the state exercised three peremptory challenges, two of them against African-Americans. Five African-Americans were on the panel. The record also shows that after the court accepted the state's explanation, when jury selection resumed, the state exercised only one peremptory challenge, against a white venire member. Two jurors and an alternate were chosen after the court accepted the state's explanation; both of the jurors were African-American, and the alternate was white.

The record in this case establishes that the "people down the line" the state reached by exercising its peremptory strikes were, in fact, of the same race as the jurors the state struck. There is nothing in the record to support the inference that the

strikes were race-based. In Taylor v. State, 583 So.2d 323 (Fla. 1991), this court held that no inference of racism arises when the state strikes one of four African-American members of a venire, particularly when the strike had the effect of placing another person of that same race on the panel. 583 So.2d at 327. In this case, the state struck two of five minority members in order to reach "people down the line;" both of the people down the line that sat on the jury belonged to the same minority. The state submits that Taylor is indistingushable on this point.

The record of this case shows "nothing more than a normal jury selection process," see generally Parker v. State, 476 So.2d 134, 138-9 (Fla. 1985), and the district court's decision affirming Mr. Joiner's conviction should be approved.

CONCLUSION

The respondent requests this court to approve the decision of the district court of appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Merits Brief has been delivered by hand to Sophia Ehringer, Assistant Public Defender, at 112-A Orange Avenue, Daytona Beach, Florida 32114, this 24th day of December, 1992.

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