D.A. 2-1-93 D47

IN THE SUPREME COURT OF FLORIDA

EDDIE JOINER,
Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 79,567

REPLY BRIEF OF PETITIONER

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SEVENTH JUDICIAL CIRCUIT

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ARGUMENTS

POINT I

DEFENSE COUNSEL PROPERLY PRESERVED FOR REVIEW ON APPEAL THE ISSUE OF WHETHER THE STATE EXCLUDED JURORS FROM THE PANEL SOLELY BECAUSE OF THEIR RACE.

Petitioner requests that this Honorable Court vacate the decision of the Fifth District Court of Appeal in Joiner v. State, 593 So. 2d 554 (Fla. 5th DCA 1992). The opinion in Joiner created new requirements to be followed before an appellate court will review a Neil inquiry issue, or review an issue relating to the sufficiency of a proffered race neutral reason for alleged discriminatory strikes. See State v. Neil, 457 So. 2d 481 (Fla. 1984). The district court ruled that the error was not preserved for review because Petitioner failed to request that the entire panel be stricken. Joiner, 593 So. 2d at 556.

As provided in Petitioner's initial brief, in Joiner, defense counsel objected to the State's act of peremptorily

excusing two black jurors from the panel, specifically noting that no questions were asked of one of the challenged black venirepersons, and the trial court thereafter requested that the prosecutor provide race-neutral grounds for the strikes (R298-299). The prosecutor provided an arguably neutral reason for striking one of the jurors, but as to the second, the prosecutor stated that, "We struck her because I would like to constitute the jury with some people down the line I prefer more . . . " (R300). Defense counsel argued back and forth with the trial judge, asserting that the proffered reason was not race-neutral (R300-302). The trial judge explicitly found that exercising a peremptory challenge upon a minority because an attorney "prefer[s] the next juror down the line" was valid, and race neutral (R301). Defense counsel again objected, stating that it was incumbent on the prosecutor to provide a legitimate and race-neutral reason for the challenge, but the trial judge overruled the objection, finding the reason submitted to be valid (R302).

The district court refused to review the Neil inquiry issue, and declined to evaluate the propriety of the prosecutor's stated reason for the questionable challenges, ruling that the error was not preserved, despite defense counsel's objections. The district court declared, "We hold that Joiner failed to preserve his objection to the composition of the jury panel." Joiner, 593 So. 2d at 556. The court further stated that the objection and disagreement "did not rise to the level of a request that the trial judge obtain a different jury panel, continue the trial, or

declare a mistrial." Id. Respondent contends that the error is not preserved when the defense counsel "acquiesces in whatever action the trial court takes" (Respondent's Merits Brief, pg. 3).

In holding that Petitioner "failed to preserve his objection to the composition of the jury panel," the entire argument raised on appeal, and considered in Neil, supra, is ignored. The issue raised on appeal was not predicated on an objection to the composition of the jury panel, but rather concerned an objection lodged when the prosecutor impermissibly used racially motivated strikes to exclude certain member of the venire from serving on the jury. As this Court pointed out in State v. Slappy, 522 So. 2d 18, 21 (Fla. 1988), cert. denied, 487 U.S. 1219 (1988), "[T]he striking of a single black juror for a racial reason violated the Equal Protection Clause, even where other black jurors are seated, and even when there are valid reasons for the striking of some black jurors." quoting United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987). The trial judge in the instant case believed that Petitioner's objection was sufficient to require the State to provide reasons for his peremptory challenges under Neil, supra, and the prosecutor attempted to furnish appropriate grounds for the exclusion of the jurors as directed by the trial court. The substance of defense counsel's argument concerned a violation of the rule set out in Neil, and a violation of the Equal protection clause in permitting the State to use discriminatory practices in selecting a jury. Petitioner's argument to the district court was not directed towards the final

"composition" of the jury panel, as this is irrelevant in determining whether a proffered race neutral reason supplied for challenging a particular minority juror is valid and supported by the record. Nonetheless, the Fifth District Court of Appeal held that the issue was not preserved.

The outcome of district court's decision in Joiner is that despite the possibility that the prosecutor may have used racially motivated challenges, and the fact that this tactic was pointed out to the trial court, it is permissible to conduct jury selection in this manner because no objection was made to the final jury panel. The Joiner decision effectively acts to condone racially motivated strikes, so long as the final jury panel is found to be acceptable. This clearly violates this Court's rule in Neil, supra, and Slappy, supra. Contrary to Respondent's position, the acceptance of a jury panel in no way cures the error of allowing racially motivated strikes.

The decision's effect of sanctioning improper challenges is even more evident in beholding the district court's language which provides, "The [Neil] inquiry can be initiated to forewarn an opponent that caution should be exercised in exercising peremptory challenges without race neutral reasons." Joiner, 593 So. 2d at 556. An objection under Neil is not to "forewarn" another party, but rather is to be used when the objecting party believes the challenging party is using improper strikes. The opinion takes a rather cynical view of a trial attorney's role, and presupposes that an objection pursuant to Neil is not a

forthright legal argument. Defense counsel in the instant case requested a Neil inquiry, and appropriately argued that the prosecutor was systematically excluding black jurors, noting that one black juror who had not been spoken to had been stricken. The district court's finding that this potential discrimination is authorized, merely because the final panel is not objected to is particularly disturbing.

Florida Courts have never required the objecting party to move to strike a panel in order to warrant review of a Neil issue, and as discussed in Petitioner's initial brief, this Court has outlined the procedure for preserving this issue in a number of cases. None of these decisions require a rejection of the final panel, motion to strike the panel, or motion for a mistrial to perpetuate the argument for appeal. See e.g. State v. Castillo, 486 So. 2d 565 (Fla. 1986) (the Court stated, "In Neil, we outlined the procedure required to preserve this issue. A timely objection must be raised and the state must be given the opportunity to demonstrate that the use of a peremptory was not motivated solely by race" (emphasis added)). In many of the cases in which the propriety of a given reason for a challenge is discussed, it is never set forth that court took on the task of evaluating the grounds for exclusion following the denial of a motion to strike the panel. Files v. State, 17 Fla. L. Weekly 742 (Fla. Dec. 10, 1992); Kibler v. State, 546 So. 2d 710 (Fla. 1989); Mansell v. State, 17 Fla. L. Weekly (Fla. 1st DCA Dec. 1, 1992); Johnson v. State, 17 Fla. L. Weekly 1443 (Fla. 3d DCA

June 9, 1992); Alen v. State, 17 Fla. L. Weekly 622 (Fla. 4th DCA Mar. 3, 1992); Hicks v. State, 591 So. 2d 662 (Fla. 4th DCA 1991). This Court in Neil provided that the trial court should dismiss the entire panel, only if the party complained of had "actually been challenging prospective jurors on the basis of race." Neil, 457 So. 2d at 487. In the instant case, the trial court found that the strikes were permissible, and was therefore not required to begin with a new jury pool.

Although the district court in Joiner ruled that the defense would have to move to strike the jury panel in order to preserve the issue, the court did not express what this motion would accomplish. The objection had been preserved, discussed, overruled, and the point was not open to further discussion. If a motion to strike the panel had been granted, the juror impermissibly stricken would still be excluded from the panel.

In Floyd v. State, 569 So. 2d 1225 (Fla. 1990), cert. denied, 111 S.Ct. 1912 (1991), this Court went one step further to require an objection to the State's proffered reason for the strike. Again, defense counsel in the case sub judice clearly and arduously objected to the reason provided by the prosecutor, plainly preserving the issue for review by an appellate court.

Respondent states, "Moreover, where, as here, the challenging party expressed 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)" (Respondent's Merits

Brief, pg. 4). This notion may be embraced by the Fifth District Court of Appeal, but it has never been the law. The decision in Ray dealt with the failure of counsel to object to a jury instruction, the inclusion of which did not constitute fundamental error. The Court in Ray, on the page cited by Respondent, stated, "This Court has made it clear by rule and by decision that in order to preserve for appeal the issue of the giving of or failure to give an instruction, the defendant must make a timely objection." Ray, 403 So. 2d at 962. There is no dispute that defense counsel in the instant case made a timely objection, as required, to the State's impermissible challenges, and to the reasons proffered pursuant to the Neil inquiry which ensued.

Respondent notes that the third and first districts have followed the Joiner decision, in three separate cases, namely: Moorehead v. State, 597 So. 2d 841 (Fla. 3rd DCA 1992); Johnson v. State, 593 So. 2d 1237 (Fla. 3d DCA 1992); and Brown v. State, 17 Fla. L. Weekly 2451 (Fla. 1st DCA Oct. 22, 1992). Both Moorehead v. State, 597 So. 2d 841 (Fla. 3rd DCA 1992), and Johnson v. State, 593 So. 2d 1237 (Fla. 3d DCA 1992), however, affirm without discussion, citing Joiner, supra. Yet it is curious that the Third District Court of Appeal in Law v. State, 17 Fla. L. Weekly 2747 (Fla. 3d DCA Dec. 8, 1992), the court found that "Where the State's articulated reason for a peremptory challenge to a black venireperson is clearly a subterfuge for a race-based exclusion, the error will be held adequately preserved

on a showing that a timely objection was interposed and overruled" (citations omitted). Moreover, the decision of the First District Court of Appeal in Brown v. State, 17 Fla. L. Weekly 2451 (Fla. 1st DCA Oct. 22, 1992), in which the court follows and quotes the holding in Joiner, supra, interestingly omits relevant factors from Petitioner's case. Since the court was limited to the actual contents of the Joiner opinion, there is no mention that the defense counsel noted on the record that no questions had been directed to one of the black jurors struck.

The district court in Joiner went on to determine that the defense attorney should have argued against the jury selection process in his motion for a judgment of acquittal. Joiner, 593 So. 2d 556. A judgment of acquittal is argued against the sufficiency of the evidence, and would therefore not appear to be an suitable avenue to make a jury selection argument.

The opinion also stated, "An affirmative action of a trial court must be clearly requested by a party before inaction can be assigned as error." Id. Petitioner did not "assign" the trial court's "inaction" as error. Petitioner argued that the trial court's action of ruling that the prosecutor's proffered reason was valid and race neutral, over objection, was in error.

The decisions from this Court and from the District Court of Appeal have never required that the complaining party move to dismiss the entire venire in order to gain appellate review of a Neil inquiry, or review of an alleged illegally motivated challenge to a potential juror. In light of the arguments made

herein, and in Petitioner's initial merit brief, Petitioner requests that the decision of the Fifth District Court of Appeal in Joiner, supra, be vacated.

POINT II

THE TRIAL COURT REVERSIBLY ERRED IN ACCEPTING THE STATE'S INSUFFICIENT REASONS FOR CHALLENGING BLACK JURORS WHERE THE PROFFERED REASONS WERE A MERE PRETEXT FOR RACIALLY MOTIVATED STRIKES.

Petitioner's trial counsel objected to the systematic exclusion of black jurors from the panel, and pursuant to State v. Neil, 457 So. 2d 481 (Fla. 1984), the trial court required the State to provide race-neutral grounds for excluding two black jurors from sitting on the jury. The reason given for the first strike was arguably sufficient, but the reason provided for the second strike clearly failed to satisfy the State's burden of establishing that the challenges were not racially motivated.

The reason provided by the prosecutor in the instant case was the same as that submitted in Kibler v. State, 546 So. 2d 710 (Fla. 1989), where the State contended that other jurors "down the line" were preferable. This Court in Kibler found that this may be a valid reason for a peremptory challenge, but in the context of Neil, this justification (of trying to get another juror on the panel) did not "carry the burden of showing that the challenges . . . were not exercised solely because of race." Kibler, 546 So. 2d at 714.

Respondent argues that the fact that some of the other jurors "down the line" were "of the same race as the jurors the state struck" renders the explanation sufficient, and further states that "There is nothing in the record to support the inference that the strikes were race-based" (Respondent's Merits

Brief, pgs. 7, 8). Petitioner respectfully disagrees.

The trial court properly required the State to proffer reasons for the challenges, after the defense counsel objected to their exclusion, and established the likelihood of racially motivated strikes due to the fact that the neither the prosecutor of the defense had discussed anything with the second black juror challenged by the State. Respondent relies on Taylor v. State, 583 So. 2d 323 (Fla. 1991), for the proposition that there was no likelihood of impermissible challenges because other black jurors were seated. The facts in Taylor, however, are distinguishable from the case at bar. First, Taylor's counsel objected to the State's first strike of a black juror, and the trial court found that there was no likelihood that there was a systematic exclusion at this point. The State then withdrew its challenge to the second black juror, eliminating the need to inquire into the reasons behind all of the challenges. In the instant case, a "systematic" exclusion of blacks had already been alleged, and the likelihood of impermissible strikes had been established. The ruling in Taylor affirmed the trial court's finding that there was no likelihood of discriminatory challenges shown at the point the objection was interposed, as opposed to the instant case where the pattern had already been established. In Joiner, the argument was made as to the acceptance of the reason provided by the State, as opposed to an argument against the lack of the trial court to require a sufficient Neil inquiry, as in Taylor. In Taylor, the trial court specifically did not call upon the

State to provide reasons for the challenge, contrary to the situation in Joiner. Taylor argued that the State should have been required to provide its race-neutral reasons. Petitioner is not arguing this point, as the State was required to proffer its reasons. Rather in Joiner, the issue on appeal concerned the validity of the reason submitted. Additionally, the reason the State provided (which was presumably volunteered a reason as opposed to the instant case where the State was required to do so pursuant to the trial court's request), was that another black juror was preferred. This was not the reason proffered in the instant case.

The Fourth District Court of Appeal in Gibson v. State, 17 Fla. L. Weekly 1989 (Fla. 4th DCA Aug. 26, 1992), rejected the State's reason that a prospective juror was properly excused because he was a fruit picker who might feel animosity towards the victims who were also fruit pickers. The district court found that the reason was "reasonable specific and race neutral" but that "the inquiry does not end there. The court must ensure that the reason offered finds support in the record and is not merely a pretext for racial motivations." Gibson, 17 Fla. L. Weekly at 1990.

This Court in State v. Slappy, 522 So. 2d 18, 22 (Fla. 1988), cert. denied, 487 U.S. 1219 (1988), listed factors to be considered in determining whether a reason offered may be solely a pretext for racially motivated strikes. Two of the factors which would tend to show an impermissible pretext include the

failure to examine the juror or perfunctory examination, and a challenge based on reasons equally applicable to a juror who was not challenged. Slappy, 522 So. 2d at 22. In the case sub judice, there was no record support of any reason to exclude the second juror, Mrs. Gamble, from the panel. No discussion was conducted with this juror, by the prosecutor, the trial court, or defense counsel. Furthermore, if the reason the prosecutor offered, i.e. to get another juror on the panel, is equally applicable to any juror, and in no way provided a specific reason to exclude Mrs. Gamble.

Moreover, as in Mansell v. State, 17 Fla. L. Weekly 2726 (Fla. 1st DCA De. 1, 1992), the abuse of discretion test does not apply because the trial court failed to perform a proper evaluation of the reason proffered by the prosecutor in the instant case. In Mansell, the district court noted that the standard of review to be applied when the trial court performs the required evaluation in examining the propriety of the reason offered for a peremptory challenge under Neil, is abuse of discretion. The court in Mansell, however, ruled that when the trial court fails to conduct a proper determination of whether the State's explanation may be a pretext for racial discrimination (as in the instant case, and in Mansell, where the reason given is clearly unsupported by the record), the abuse of discretion test does not apply. Mansell, 17 Fla. L. Weekly at 2727.

The trial court in the instant case committed reversible

error in overruling Petitioner's objection, and finding that the reason given for the prosecutor for the challenge was valid and race-neutral. The prosecutor failed to provide specific reasons based on the juror's responses during voir dire to explain the strike. See Williams v. State, 574 So. 2d 136 (Fla. 1991) (reversal required where prosecutor's alleged race-neutral reason was not supported by the record; questions to juror did not concern the reason the prosecutor submitted for excluding the juror); Johnson v. State, 17 Fla. L. Weekly 1443 (Fla. 3d DCA June 9, 1992) (fact that juror worked with people who had problems or lived in high crime area insufficient and constituted a pretext for a racially motivated strike); Hicks v. State, 591 So. 2d 662 (Fla. 4th DCA 1991) (state's challenge of prospective black juror on grounds that she was a teacher and therefore more liberal, and that the juror's work would cause her to have greater tolerance for the use of controlled substances not supported by the record; reversal required). The district court's decision affirming Petitioner's conviction should therefore be reversed.

CONCLUSION

BASED ON the arguments contained herein and in Petitioner's Merit Brief, and the cases, authorities, and policies cited, Appellant requests that this Honorable Court vacate the decision of the District Court of Appeal, Fifth District, and reverse Petitioner's judgment and sentence, and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal and mailed to Mr. Eddie Joiner, a/k/a John Blue, No. C 886992, P. O. Box 120099 on this 13th day of January, 1993.

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