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IN THE SUPREME COURT OF FLORIDA

DARRELL MITCHELL,

Petitioner,

v. CASE NO. 79,838

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT

RESPONDENT'S MERITS BRIEF

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STATEMENT OF THE CASE AND FACTS

On November 26, 1990 the State Attorney for the Ninth Judicial Circuit filed an information in case no. CR90-11886 (Orange County) charging the petitioner, Darrell Mitchell, with sale of a substance in lieu of a controlled substance.[1] (R 185) On May 22 and 23, 1991, a jury trial was held in that case. During jury selection, defense counsel objected to the state's strike of a single African-American juror, Audrey Booker. (R 317, 200) The state protested that a pattern of apparently race-based strikes had not formed, but voluntarily gave the following reason for the strike:

> I asked her, and she said she was no member of any religious groups. She's single; 37. From her questionnaire, she likes to read. And I asked her what type of reading. And she said--I thought she said, "horror reading." I must have misheard her. So based on that I would strike her.

(R 318) The following colloquy ensued:

> THE COURT: What says the defense with regards to the reasons given by the state?
>
> MR. JEWETT [FOR THE DEFENSE]: He's recited the answers that she gave. And my recollection was that she responded that she read "all." Her reading was all types.
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> * * * * *
>
> MR. GREEN [FOR THE STATE]: Judge, regardless, looking at her questionnaire, she's a member of no groups.

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[1] In violation of Section 817.563, Florida Statutes (1989).

* * * * *

THE COURT: What evidence or argument does defense have to show there's a strong likelihood that she's been challenged because of impermissible bias?

MR. JEWETT: Just, Your Honor, he did not investigate it and talk to her other than the one group question, about whether she belonged to any groups and what her hobbies were, which he asked of everyone.

* * * * *

MR. GREEN: As you know this is subjective. This is a gut feeling. In fact, before I even saw her or knew she was black, I looked at her questionnaire and put a question mark, which is an indication to me of whether I want that juror or not. She has no family, and she's not a member of any groups. She's just not the kind of person I want for this particular jury. And that's all I can say.

(R 318-20) The court allowed the strike, and defense counsel responded that "just for the record" one other venire member had given incomplete responses, and one other venire member had said that he had no family; defense counsel agreed with the court that the venire member who said he had no family was African-American. (R 320-21)

Jury selection proceeded, and six jurors were chosen. With regard to those six defense counsel stated "We'll accept that jury. That's acceptable." (R 322) An alternate was then chosen, without any strikes being exercised, and the following then took place:

THE COURT: What says the state? Is this jury acceptable to the state?

MR. GREEN: Yes, your Honor.

THE COURT: What says defense?

MR. JEWETT: Yes, your Honor, subject to the objection that we made.

THE COURT: I understand. That's fine.

(R 324) The jury was then sworn. (R 325)

The defense did not move to strike the jury panel, or move the court to seat Ms. Booker, or move for a mistrial. (R 317-25) The defense did not allude to jury selection when it made its motions for judgment of acquittal (R 94-105, 109-12), and did not raise the matter again until it filed its motion for new trial. (R 223) It appears from the record that the motion for new trial was abandoned by filing of the notice of appeal, as no order on that motion appears in the record and as the motion is not referred to at sentencing. (R 163-80) Trial counsel's designation of proceedings to be transcribed for appellate purposes expressly directed the court reporter to exclude voir dire. (R 255)

The trial judge, the Honorable Alice Blackwell White, noted on the record that the jury that considered this case included two black jurors, a Ms. Sanders and a Mr. Lewis. (R 156) The jurors who sat on the case, in addition to Helen Sanders and Leslie Lewis, were Lillian Paff, Marcia Berman, Lucia Cruz, and Carol Patterson. Gerard White was the alternate. (R 324, 155) The voir dire responses in the record on appeal establish that Helen Sanders belongs to the Methodist Church, the PTA, and her

neighborhood association. (R 292) Leslie Lewis is an Elk. (R 293) Lillian Paff is active in the Faith Baptist Church. (R 294-5) Marcia Berman takes an active interest in the stock market and is proud of her daughter, the real estate lawyer. (R 292, 281) Lucia Cruz is a member of a church group. (R 287) Carol Patterson has in the past been active in the Presbyterian Church, scouting, and "various women's organizations." (R 284-5) Gerard White is a Knight of Columbus and a deacon in his church. (R 285)

The state exercised two peremptory strikes in addition to that exercised against Ms. Booker, one against Kimberly Mason-Williams and one against William Kilmain. Mr. Kilmain said during voir dire that he belongs to no groups. Ms. Mason-Williams said during voir dire that she would question any police officer's testimony because it would probably be biased in the state's favor. (R 321, 200, 292-3, 301)

The proof at trial showed that the petitioner sold a single rock which he falsely represented to be a cocaine rock. (R 185, 219, 35, 21-4) He was convicted of a third-degree felony and sentenced to seven years' incarceration as a habitual felony offender. (R 220-21, 247-8)

On appeal from his conviction and sentence, Mr. Mitchell argued that the conviction should be reversed because he had shown during voir dire that the state exercised its peremptory challenge against Ms. Booker on the basis of race. The state argued that the point was not preserved for appeal, and argued on the merits that the trial court's ruling allowing the strike to stand was not an abuse of discretion. The District Court of

Appeal for the Fifth District affirmed Mr. Mitchell's conviction and sentence per curiam without opinion, but with a citation to Joiner v. State, 593 So.2d 554 (Fla. 5th DCA 1992). See Mitchell v. State, 595 So.2d 1120 (Fla. 5th DCA 1992). Joiner is now pending review in this court's case no. 79,567.

SUMMARY OF ARGUMENT

Point One: The district court's decision in this case should be approved, since the sole argument made on appeal was not properly preserved for appellate review. Defense counsel, albeit equivocally, accepted the jury panel that tried his case. Even if he had not done so, the record of this case would still be insufficient to preserve the point for appeal; the defense neither sought to strike the jury panel nor sought to have a particular juror seated.

Point Two: Even if this court finds that the point raised on appeal was preserved, the state submits that the district court's decision should still be approved. The reasons given by the state for striking Ms. Booker were reasonable and race-neutral, and the trial court properly accepted them.

ARGUMENT

POINT ONE

THE DISTRICT COURT'S DECISIONS IN JOINER v. STATE AND IN THIS CASE ARE CORRECT.

The district court's decision in this case should be approved, since the sole argument made on appeal was not properly preserved for appellate review. The Fifth District's decision in Joiner v. State, 593 So.2d 554 (Fla. 5th DCA 1992), review pending no. 79,567 (Fla. 1992), has been adopted by the Third and First 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).

The district court in Joiner held that the party challenging a peremptory strike must clearly indicate to the trial court what remedy is desired. 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 challenging party requests neither remedy, the trial court is reasonable to conclude that neither is desired. 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).

Moreover, where, as here, the challenging party expresses 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). In Joiner, Moorehead, and Brown, supra, either defense counsel or the defendant, or both, expressly stated that the jury panel chosen by the parties was acceptable; in this case, Mr. Mitchell's lawyer stated, albeit equivocally, that the panel was acceptable. If a lawyer who makes a Neil challenge believes that his client will be deprived of an impartial jury by the action the trial judge took on the challenge, 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. Castor v. State, supra; 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). See also Jefferson v. State, supra, 595 So.2d at 41 (Neil protects right to an impartial jury, not the right to peremptory challenges).

The respondent submits that Joiner correctly applies this court's precedents and that the district court's decisions in Joiner and in this case should be approved.

POINT TWO

THE TRIAL COURT CORRECTLY ACCEPTED THE STATE'S RACE-NEUTRAL REASONS FOR STRIKING A SINGLE MINORITY VENIRE MEMBER.

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. The reasons given by the state for striking Ms. Booker were reasonable and race-neutral, and the trial court properly accepted them.

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 reasons given by the state for striking Ms. Booker were that she

belongs to no groups and that she expressed no interest in any activity other than reading. The state peremptorily struck two other jurors; one was suspicious of police officers' credibility, and the other, like Ms. Booker, belongs to no groups. Each of the seven jurors the state did *not* strike revealed himself or herself, through his or her voir dire responses, as likely to be politically conservative, strongly community-minded, or both: Helen Sanders belongs to the Methodist Church, the PTA, and her neighborhood association. (R 292) Leslie Lewis is an Elk. (R 293) Lillian Paff is active in the Faith Baptist Church. (R 294-5) Marcia Berman takes an active interest in the stock market and is proud of her daughter, the real estate lawyer. (R 292, 281) Lucia Cruz is a member of a church group. (R 287) Carol Patterson has in the past been active in the Presbyterian Church, scouting, and "various women's organizations." (R 284-5) Gerard White is a Knight of Columbus and a deacon in his church. (R 285)

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). The petitioner was tried for, and convicted of, the felony of selling a single pebble which he falsely represented to be a cocaine rock. The state, predictably, preferred members of conservative organizations to try the case. See and compare generally S. Lewis, Babbitt (Harcourt, Brace & World, 1922), with H. Thoreau, Walden (Ticknor & Fields, 1854). The record shows no abuse of the trial court's discretion, see Files and Reed, supra, and the district court's decision affirming the petitioner'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 Anne Moorman Reeves, Assistant Public Defender, at 112-A Orange Avenue, Daytona Beach, Florida 32114, this 21st day of December, 1992.

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