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IN THE SUPREME COURT OF FLORIDA

RICHARD SUGGS,

Petitioner,

v. CASE NO. 80,529

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

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

Petitioner asserts that the State's challenged peremptory strike of venire member Green involved "the only black member of the jury panel up to that point." (Merits Brief at 1) The defense, when it objected to the State's strike of Mr. Green, referred to him as "the only black juror we've gone through." (R 42)[1] The State did not disagree or establish that any other black venire members had been challenged or seated.[2] The State responded, in part, to the challenge by stating "there's still blacks on the panel, and I haven't stricken any other blacks." (R 43) Defense counsel did not disagree with that statement or establish how many members of the venire belonged to the same minority as Mr. Green.

Venire member White, also referred to in the petitioner's merits brief, did not sit on the jury. (R 46) The transcript of jury selection does not reflect whether the defense struck Mr. White, or whether the parties reached him: jury selection was complete by the time the parties had seated, or struck, jurors

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[1] Pages 36-45 of the transcript of the jury selection proceedings in this case have been attached as Appendix A to this brief.

[2] The petitioner correctly states in his merits brief that the record indicates Ms. Morter, a venire member struck by the defense, is Hispanic. (R 43-4)

one through eleven. (R 40-5) Eighteen venire members participated in voir dire. (R 12)

The State responded to the Neil/Slappy[3] challenge first by protesting that no substantial likelihood of discrimination was shown by the one strike, and second, by stating that

> one of [Juror Green's] responses was to [defense counsel's] announcing that--well, I don't have a reason, Judge, to be honest with the Court. I don't have a reason. I just have a bad feeling about him. I'm making an election to strike him.
>
> THE COURT: Why?
>
> THE STATE: When [defense counsel] announced that his client had some priors and was on probation, and he asked him how he felt about that. He said I'm going to have to look at the evidence a little bit more carefully.
>
> * * * * *
>
> THE COURT: I'm going to ask you again. Why did you strike Mr. Green?
>
> THE STATE: Based on his response to Mr. Jewett's question about the client having a prior record. Once he found that out.
>
> THE COURT: Mr. Jewett, any response?
>
> MR. JEWETT: Nothing. I don't know anything is required, Your Honor.

(R 42-4) The exchange between Mr. Jewett and Mr. Green referred to by the State was as follows:

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[3] State v. Neil, 457 So. 2d 481 (Fla. 1984); State v. Slappy, 522 So. 2d 18 (Fla. 1988).

MR. JEWETT: ...we anticipate [the defendant is] going to be testifying. He has some prior convictions. He has been convicted of felonies before this trial. Is that going--well, what are you going to think about that? Mr. Green, will that make you judge his testimony?

MR. GREEN: Make me listen more intently to the actual evidence in this case.

MR. JEWETT: How about you, Mr. White?

MR. WHITE: I'd just listen to the facts.

MR. JEWETT: Anyone who's going to think because he's a convicted felon he's any less reliable? ...You'll probably hear in addition to his convictions he was currently on probation. Is that going to make any difference to anybody here?

[no response by jurors]

(R 36-7) The court ruled as follows:

THE COURT: Okay. The mere fact that one is stricken, I don't think, shows any type of pattern....I don't think the defense has sustained its burden, and I'm going to allow the strikes....I think quite frankly, I think all this is a tremendous over-reaction to these Neil inquiries about discrimination. I think that the court ought to be totally sensitive if there's any indication that it's racially motivated. But by the same token the courts have still allowed peremptory challenges...for whatever reason.... When you start striking based upon race or religion or nationality or begin--that's something else again. I don't have any indication that is the case here. So I'm going to allow the strikes.

(R 44-5)

Judge Conrad's ruling on the motion for new trial was as follows:

> THE COURT: ...in listening to the entire proceeding I was convinced that although [the state] could not articulate one, that the reason--that the juror was not struck for racial reasons. And that was my feeling.

(R 174)

SUMMARY OF ARGUMENT

The State submits that the district court correctly applied its decision in Joiner v. State, 593 So. 2d 554 (Fla. 5th DCA 1992), review pending no. 79,567 (Fla. 1992), and held that the Neil objection made at trial was not properly preserved for appeal.

The Neil objection was also properly rejected by the trial court. The defense did not show a substantial likelihood that the State's single challenged peremptory strike was race-based; and the reason given by the State for striking Mr. Green was reasonable and race-neutral.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE ARGUMENT NOW MADE WAS NOT PRESERVED FOR APPEAL; THE DEFENSE FAILED TO SHOW THAT THE SINGLE CHALLENGED PEREMPTORY STRIKE WAS RACE-BASED; THE STATE GAVE AN ADEQUATE REASON FOR THE STRIKE.

Preservation.

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, 606 So. 2d 742 (Fla. 1st DCA 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. Suggs'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.

Merits.

If this court rejects the argument set out above, the State submits that the district court's decision approving petitioner's conviction should still be approved. The defense did not show a substantial likelihood that the single challenged peremptory strike was race-based; and the reason given by the State for striking Mr. Green was reasonable and race-neutral.

The petitioner, in his merits brief, refers to Mr. Green as "the lone black juror in the jury box." (Merits brief at 6, 14) The defense, at jury selection, did not object to the State's assertion that there were "still blacks on the panel" after Mr. Green was struck. The record, accordingly, establishes that Mr. Green was one of at least three African-American venire members available for jury service that day. See Floyd v. State, 569 So. 2d 1225 (Fla. 1990). Reynolds v. State, 576 So. 2d 1300 (Fla. 1991), is accordingly inapplicable to this case; in Reynolds, this court held that where only one member of a minority is available for jury service, the party that strikes that potential juror may be required to explain the strike. The rule of Reynolds was born of necessity; the challenging party cannot, of course, show a pattern of strikes that suggests discrimination when there is only one minority member present.

As the trial court found in this case, the fact that the State's first peremptory strike was against an African-American does not meet the challenging party's burden to show a strong likelihood that the strike was based on race. Judge Conrad's finding on that point correctly applied this court's decisions.

Compare Taylor v. State, 583 So. 2d 323 (Fla. 1991) (peremptory strike of one of four black potential jurors insufficient to shift burden, where strike had effect of placing another black potential juror on venire) and Woods v. State, 490 So. 2d 24 (Fla. 1986) (five of ten peremptories against potential black jurors, two of which were patently race-neutral, insufficient to shift burden) with Blackshear v. State, 521 So. 2d 1083 (Fla. 1988) (eight of ten peremptories used to strike all potential black jurors; pattern shown) and State v. Jones, 485 So. 2d 1283 (Fla. 1986) (five of six peremptories used to strike all potential black jurors; pattern shown).

The State's reason for striking Mr. Green was reasonable and race-neutral. The petitioner argues that Mr. Green's comment about viewing the evidence more closely would have supported a strike by the defense, but not by the State. The comment, again, was this:

> MR. JEWETT: ...we anticipate [the defendant is] going to be testifying. He has some prior convictions. He has been convicted of felonies before this trial. Is that going--well, what are you going to think about that? Mr. Green, will that make you judge his testimony?
>
> MR. GREEN: Make me listen more intently to the actual evidence in this case.

The petitioner's argument assumes that Mr. Green meant that he would closely scrutinize whatever the defense submitted. On the contrary, Mr. Green may well have meant that having heard Mr. Suggs was a convicted felon, he would make a concerted effort to

put that fact out of his mind during the trial so as not to judge the defendant by his record, but instead by "the actual evidence." The facts that the defense did not challenge Mr. Green for cause, or peremptorily strike him, or object to the State's explanation for its strike, all suggest that it was clear from Mr. Green's tone and manner that he was *not* announcing bias against the defendant.

As this court recently held,

> we must rely on the superior vantage point of the trial judge, who is present, can consider the demeanor of those involved, and can get a feel for what is going on in the jury selection process.... Substituting an appellate court's judgment for that of the trial judge on the basis of a cold record is not a solution because it would provide an automatic appeal in every case where a prospetive minority juror was challenged.

Files v. State, 17 Fla. L. Weekly 742, 744 (Fla. December 12, 1992). Accord Reed v. State, 560 So. 2d 203, 206 (Fla. 1990). Judge Conrad expressly found "in listening to the entire proceeding" that the State's strike was not an act of racial discrimination; the petitioner is asking this court to second-guess the trial judge's conclusion.

The petitioner also argues that the fact the State did not strike potential juror White suggests that striking Mr. Green was probably race-based. The record does not show whether or not the defense struck Mr. White, and does not show whether or not the parties reached him in jury selection; the panel was chosen after eleven of the eighteen jurors were seated or struck. Moreover,

Mr. White's words were neutral, and his demeanor may have been equally neutral. Files, supra; Reed, supra. Also, Messrs. Green and White were not, as the petitioner asserts, singled out for questioning during voir dire; defense counsel asked the panel as a whole, and Green and White individually, if they would assume that a convicted felon is probably guilty.

The record of this case shows no abuse of discretion. Files, supra. The district court's decision should be approved.

CONCLUSION

The State requests this court to approve the decision and opinion of the district court.

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 James R. Wulchak, of 112-A Orange Avenue, Daytona Beach, Florida 32114, at the Public Defender's in-basket at the Fifth District Court of Appeal, this 8th day of February, 1993.

NANCY RYAN
Assistant Attorney General

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APPENDIX

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