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IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO.: 80,713

FIRST DISTRICT COURT OF APPEAL

APPEAL DOCKET NO.: 91-3761

DON BROWN,

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

ON PETITION FOR LEAVE OF A
DECISION OF THE DISTRICT COURT,
FIRST DISTRICT OF THE STATE OF FLORIDA
CASE NO.: 91-3761

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner was the Appellant/Cross-Appellee in the District Court of Appeal, First District, and the Defendant in the trial court. Respondent was the Appellee/Cross-Appellant in the District Court of Appeal, First District, and the Prosecution in the trial court. The parties will be referred to as they appear before this Honorable Court.

The record on appeal will be referred to as "R", and the transcript will be referred to as "T".

STATEMENT OF THE CASE AND OF THE FACTS

On April 17, 1991, the Appellant was arrested and taken into custody on an arrest warrant. [R.2]. He was charged by information of attempted first degree murder, armed robbery and attempted armed robbery. [R.38]. He entered a not guilty plea and was tried before a jury on the week of October 14, 1991 in Duval County, Jacksonville, Florida. The jury found the Appellant guilty as charged in all three counts of the information. [R.47]. He was sentenced to twenty (20) years with a three (3) year minimum mandatory, [R.56-70] on all three (3) counts and the sentences were concurrent sentences. This case involves a victim named Daniel Patrick McKenna, who was robbed and shot, and permanently paralyzed from the waist down. [T.215-216]. He testified that he owed his next door neighbor, Anthony Biggins, $10.00 for a ten speed. [T.210-212]. One day the ten speed was gone and he had just woken up, and Biggins and another person came in and started roughing him up. [T.214]. Biggins didn't care that his bike was missing, he just wanted his money. [T.213]. One of the two men hit McKenna on the head and then the other man shot him. McKenna thought he had heard Biggins yelling to the other man not to shoot. [T.215].

During jury selection, the State struck a potential black juror named Kyle. She was a counseling professor at the local community college doing vocational athletic and professional counseling. The State accepted a black male juror but peremptorily

challenged a black female juror without the defense objection. After that, Juror Kyle was up during the striking process and the State peremptorily struck her. Defense requested an inquiry pursuant to **State v. Neil**, 457 So.2d 481 (Fla. 1984), pointing out that Kyle was black and it was the second black stricken by the State. The judge requested the State to give a reason for the challenge and the State explained that the reason for challenging her was on her occupation and that he typically made his practice not to seat psychology majors or mental health counselors as jurors because he feels that they had an undue sympathy for the Defendant and perhaps tend to believe its a society problem and not a defendant problem. Defense further objected that that was not significant enough to warrant a preemptory challenge but the court ruled that the reasons were race neutral and non-pretextural.

The State called James Alligood who testified that he was Daniel McKenna's roommate. [T.181]. On the day in question, Anthony Biggins was knocking on the door and Mr. Alligood opened it a little bit and Biggins pushed open the door passed him. [T.186]. Biggins went into Daniel McKenna's room and then another person came up behind Alligood and put a pistol to his temple, and demanded money. [T.186]. He was told to lay on the floor facing the bed. [T.187]. He could see Biggins hitting the victim, McKenna, and asking for money. [T.188]. Then he heard a gun shot. [T.188]. The person that shot the gun immediately got up and ran out of the house but Biggins remained in the house for a little

while and paced three or four times by the side of the bed. [T.188]. After Biggins left, Alligood contacted the police. [T.189]. On cross-exam, he was not able to pick out the individual from a photo spread who shot McKenna. [T.203].

The State then called the Co-Defendant, Anthony Biggins, who testified that he entered into a plea bargain and he was charged with the robbery of Daniel McKenna, and his understanding of the plea agreement was to testify to the truth, and he'd be sentenced to fifteen (15) month. [T.254]. He testified he did take the bicycle from McKenna's house and later, talked to Don Brown about going over there with him because McKenna owed him some money. He testified he went over to the residence with the Appellant and Appellant, Don Brown, put a pistol on James Alligood. [T.259]. Co-Defendant Biggins then testified he struck McKenna several times. Then he saw the Appellant cock the pistol and shot Danny McKenna. [T.260]. Biggins identified the Appellant in the court room as the person who shot McKenna.

Detective Gilbreath testified that he took a statement from the Appellant after Miranda wherein the Appellant admitted that he was outside of the residence when the shooting occurred and that he had talked to Biggins and that Biggins had told him that he was going to get some money from the cracker that owed him. [T.339]. He also told the detective that some other man who had the gun had already run through the house in the alleyway. [T.339]. He also said that he was not involved in the shooting, that it was Biggins.

[T.339]. This statement was reduced in writing by the detective and signed by the Appellant according to Detective Gilbreath. [T.342]. The State then rested its case.

The Defense then called Detective Parker to the stand. He said he went over to the Appellant's house and saw Mr. Brown running out of the back door. [T.381]. The Defense then called Officer Bisplinghoff who testified he arrived at the scene and the victim told him he was shot by Biggins. [T.392]. Detective Schawb was called by the defense to testify regarding a conversation he had with the victim at the scene also. He testified also that the victim told him that Biggins shot him. [T.396]. The Defense also called Silas Dyas [T.398], who testified Biggins' had a reputation for being dishonest. During closing arguments the prosecutor argued that the jurors had one final duty left and that was to find the Appellant guilty. [T.453].

SUMMARY OF THE ARGUMENT

The Appellate Court correctly certified this question of great public importance regarding exclusion of a black juror for racial reasons.

ARGUMENT

ISSUE I

WHETHER THE PROSECUTOR IMPROPERLY STRUCK A BLACK JUROR.

During jury selection, the State struck a potential black juror named Kyle. She was a counseling professor at the local community college doing vocational athletic and professional counseling. The State accepted a black male juror but peremptorily challenged a black female juror without the defense objection. After that, Juror Kyle was up during the striking process and the State peremptorily struck her. Defense requested an inquiry pursuant to **State v. Neil**, 457 So.2d 481 (Fla. 1984), pointing out that Kyle was black and it was the second black stricken by the State. The judge requested the State to give a reason for the challenge and the State explained that the reason for challenging her was on her occupation and that he typically made his practice not to seat psychology majors or mental health counselors as jurors because he feels that they had an undue sympathy for the Defendant and perhaps tend to believe its a society problem and not a defendant problem. Defense further objected that that was not significant enough to warrant a preemptory challenge but the court ruled that the reasons were race neutral and non-pretextural. **Joiner v. State**, 593 So.2d 554 (Fla. 5th DCA 1992) is cited in the First District Court's Opinion as being factually on all fours with the instant case.

Distilling the issue down before the court it is really whether or not this Neil issue is waived by the fact that the defense counsel objected and asserted a Neil Challenge, and then following the prosecutor's explanation objected again to the explanation's validity and thereafter, affirmatively accepts the jury as ultimately constituted. A common sense analysis suggests that the objection is not waived. Why would the defense attorney go through the trouble of initially clearly preserving the Neil issue and following the entire exchange, (including the prosecutor's reasons), object that the reasons were insufficient, and then waive it? To contend that he accepted the jury as suggesting that he didn't really mean to preserve the Neil issue is ridiculous. This would clearly be an argument for a form over substance; the substance being that the issue was originally preserved and the intent of the trial counsel is clear by the fact that a jury was ultimately congregated with his objection still standing. This does not mean that he waives his entire objection.

It is clear that as a general rule, an objection must be made at the time of the commission of the alleged error to be maintained on appeal. **Edwards v. State**, 93 So.2d 182 (Fla. 4th DCA 1966). In fact, a fundamental error in the absence of a timely objection interposed at trial may be raised by the defendant when remarks of the prosecutor are in clear error. **Krulak v. State**, 300 So.2d 315 (Fla. 3d DCA 1974). If the objection is premature, it will not be considered unless it is raised again in the trial at the time when

the error is committed. Here the objection was timely made and was not premature.

A Neil/Slappy problem generally requires a granting of a new trial. **See:** **State v. Neil**, 457 So.2d 481 (Fla. 1984), clarified **State v. Castillo**, 486 So.2d 565 (Fla. 1986); **State v. Slappy**, 522 So.2d 128 (Fla. 1988), **cert. denied**, 47 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 109 (1989). In **Castillo, supra**, the court held that an objection to improper use of preemptory challenges must be made before the jury is sworn. **Id. at Pg. 565.** Here, an objection was made to the challenge and was exercised prior to the swearing of the jury panel which actually deliberated on the case. Therefore, error appears which affects the right of the appellant to have a trial before an impartial jury. In **Gooch v. State**, 17 F.L.W. D2248, (Fla. 2nd DCA, Oct. 2nd, 1992), the First District Court reversed an armed robbery conviction and remanded the case for trial where the State's use of a preemptory challenge to excuse the sole black juror on the panel indicated a strong likelihood that the challenge was based on race. However, in that case, the trial judge declared he did not believe an explanation for the strike was necessary. The State provided a reason anyway and the defense responded that the reason was not race neutral. That case cited the **Barwick v. State, 547 So.2d 612** (Fla. 1989) decision which held that the trial court must make a conscientious evaluation of the appellant's Neil claim by critically considering the reason given by the State for the strike. It is clear the **Neil**

decision was "unmistakenly based" on the guarantee of a trial by an impartial jury drawn from a cross-section of the community contained in Article I, Section 16, of the Florida Constitution. **Kibler v. State** 546 So.2d 710, 712 (Fla. 1989). In **Neil**, Article I, Section 16 was construed to entitle both the defendant and the state to "the issuance that preemptory challenges will not be exercised so as to exclude members of discrete racial groups solely by the virtue of their affiliation." **Kibler at Pg. 713.** Therefore, the State may object to the defendant's use of preemptory challenges in a allegedly discriminatory matter on a constitutional basis. Moreover, **Slappy** has been somewhat limited by **Jefferson v. State**, 595 So.2d 38 (Fla. 1992) where it held that it is within the trial court's discretion to fashion an appropriate remedy under the particular facts of each case, as long as neither parties constitutional rights are infringed, that may include the seating of an improperly challenged juror. That apparently would apply to both the defendant and the State. **See also: State v. Aldret**, 14 F.L.W. 592 (Fla., Sept. 25, 1992). While the **Joiner, supra**, case and **Morehead v. State**, 17 F.L.W. D 796, (Fla. 3d DCA, April, 1992), hold that any such **Neil** error is waived after the entire jury panel was selected, before being sworn, when both the defendant and his counsel accepted the jury as seated. In the **Morehead** case, the defendant and his attorney told the trial judge that they had gone over each juror and the defendant had approved each and every one. There, the issue is different that the one in

our case where there was no "abandonment" issue. The defense abandoned the **Neil** issue in that case but not in the case at bar.

CONCLUSION

Based upon the foregoing, the Petitioner requests this Honorable Court and remand proceedings for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General and Petitioner by U.S. Mail, this 7 day of December, A.D., 1992.

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