IN THE SUPREME COURT OF FLORIDA

CASE NO.

84,702

PABLO SAN MARTIN,

Appellant,

-vs-

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLANT

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THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISALLOWING DEFENDANT'S PEREMPTORY CHALLENGES TO PROSPECTIVE JURORS ADRIANA ANDANI AND AURELIO DIAZ.

In addition to, and at the same time separate and apart from, the arguments raised by Defendant under Point III of his initial brief, i.e., that the combination of the misuse of voir dire by State to proselytize the panel as to State's view of the case, the refusal to allow requested voir dire, etc., Defendant challenges the actions of the trial court in disallowing attempted Defense peremptory challenges to panelists Adrian Andani and Auerlio Diaz.

The colloquy regarding Andani is as follows:

> "Adriana Andani, State?
> Mr. Rosenberg (the prosecutor):
> Accept.
> Mr. Diaz (one of Defense counsel: We will excuse her. Strike her.
> Ms. Brill (another of the prosecutors):
> Judge, we would challenge. She gave no answers that I could see that would be even a basis for a peremptory challenge.
> The Court: All right.
> Mr. Diaz: She loves Mr. Rosenberg.
> The Court: I don't have any notes to that effect.
> Mr. Diaz: No Judge, she was very hesitant. She made no eye contact with me. She was very hesitant to answer my questions. She kept reminding me of things that she had heard from Mr. Rosenberg. I think she has developed an affinity with the prosecution that I could not break and I don't think she'd be fair to the defense in this case.
> The Court: All right. Does anybody else want to be heard on that.
> Mr. Cohen?
> Mr. Cohen: No.
> The Court: Ms. Garcia?
> Ms. Garcia: No, sir.
> The Court: I, to be frank found her to be one of the brightest and most receptive jurors to all sides. According to my notes, she

indicated death penalty would not effect her verdict. That every First Degree Murder should not get the death penalty, she specifically said she understood one mitigating factor, could outweigh two or three aggravating factors, I saw no particular affinity towards Mr. Rosenberg, and I don't find it to be I suppose a gender neutral. Is that you --
Ms. Brill: Yes.
The Court: Gender neutral.
Ms. Brill: I am not sure if she's Latin or what. Whatever.
The Court: Nobody pursued it. It sounds Latin sounding name, which is you know, the surname is one of the factors that indicates. Regardless, I find that it is not race neutral. Excuse me, gender neutral. So she will remain.
Mr. Diaz: Judge, I don't feel comfortable with this juror.
The Court: I understand. You made your record.
Mr. Diaz: Whether she be male or female I just feel very uncomfortable with the way she answered my questions and the way that she walked past this table and purposely looks away from the defense table and looks towards the prosecution and makes it a point to get as close to that prosecution table as she can. I don't see how, what is wrong with my exercising of my challenge.
The Court: Personally I think that the entire body of law in this area is outrageous, but it is clear that peremptory challenges no longer exist, and that neutral reasons must be given and you have not given me any. I have not observed any of these things that you have, you are mentioning, all I have in my notes is and from my recollection is that this a very bright and apparently fair juror who can follow the law as she repeatedly asserted. You have made your record.
Ms. Garcia: If I could have access to the record on behalf of Mr. San Martin. I have noticed throughout the whole jury selection that Mrs. Andani who sits next to Ms. Curry is friendly with Ms. Curry and that they confer before and after coming into the courtroom and I feel uncomfortable about her as well even though I didn't get to speak to her as well even though I didn't get to speak to her and I would ask that she be struck also.
The Court: You have made your record, my ruling will remain."
(TR-788-790)(Emphasis Added)

The colloquy pertaining to the attempted Defense peremptory challenge to Aurelio Diaz is as follows:

"Mr. Diaz: At this time we excuse Aurelio Diaz.
Mr. Rosenberg: Who took that Your Honor?
The Court: Mr. Diaz.
Ms. Brill: Wait a minute, Judge, they are striking Aurelio Diaz? State would challenge that strike.
The Court: All right. Please, if you are going to strike these challenges make them immediately or otherwise I have to strike everybody else and we have to go back. On Aurelio Diaz, let me hear your reasons. Mr. Diaz your grounds?
Mr. Diaz: I don't like him.
The Court: Okay, that, in that case I will have to disallow that being the reason, I will have to disallow your strike. As it is not a race neutral reason...." (TR-792, 793)

"....Mr. Casuso: Judge, with regards to Mr. Diaz, we would renew our peremptory based upon the fact that Mr. Diaz has had the same job basically for the last thirty years and we feel that he lacks the life experience and variety of occupations that we are looking for on this jury. He also stated that he has two daughters, he has never had a problem with the daughters and he may not sympathize with our defendants who I am sure have given their parents many many problems in the past, so based on that, we would try to excuse Mr. Diaz.
Mr. Fleischer: In addition to that Judge, many of the witnesses who are expected to testify for the state in this case are employed by Metropolitan Dade County. Which he has an allegiance with them for over thirty years in the County.
The Court: No he didn't. I don't believe that's --.
Mr. Casuso: Not 30 but he has worked for the County. For a number of years.
The Court: Okay. You have preserved your record on that one. But I have ruled. I see no reason to change that ruling]." (TR-823)

In disallowing these two attempted Defense peremptory challenges, the trial judge acted in a manner that was consistent with his expressed belief that there are in effect no longer any peremptory challenges, but the law is clear that even though there are limits on the use of peremptory challenges to strike prospective jurors because of their race, ethnicity, or gender, as prescribed by Batson v. Kentucky, 476 U.S. 79 (1986); State v. Neil, 457 So.2d 481 (Fla. 1984);

Abeshire v. State, 642 so.2d 542 (Fla. 1984); et al, the right to peremptorily challenge prospective jurors is very much alive and well as is evidenced by the fact that in all of the above-cited cases there was not even a suggestion that there was an intent to abolish the use of peremptories. Further evidencing the trial court's misconception of the law in this area was his assertion with reference to prospective juror Tarnowicz, "All right. He's a man so I guess that qualifies him for a challenge" (TR-807).

Rule 3.350, Fla. R. Cr. Proc., sets provides for and provides the procedure for the use of peremptory challenges and it is undersigned counsel's contention that the only exception to trial counsel's right to exercise peremptory challenges is the limitation on the arbitrary use of such challenges to exclude the above-described legally cognizable groups.

The only objection to Defense counsel's attempt to peremptorily challenge Adriana Andani was that, "she gave no answers that I could see that would even be a basis for a peremptory challenge" (TR-787). The trial judge then in effect held " a Neil inquiry" with Defense counsel enunciating as reasons for the challenge that Andani loved the prosecutor; that she failed to make eye contact with defense counsel; that she demonstrated an affinity with the prosecutor, that Defense counsel was uncomfortable with Andani; and that Andani was overly friendly with another female juror (TR-788-790).

As its basis for denying the peremptory challenge to Andani, the trial court found either that none of the reasons, or that Andani's claimed affinity to the prosecutor, constituted a gender neutral basis to challenge; in other words, there was a finding that all of these reasons cited by counsel constituted pretexts to strike Andani because she is a female or because of her ethnicity, whatever that is.

But the prosecutor never raised an argument that Defense counsel were attempting to strike Andani because she was a female or because of her ethnicity and thus there should have been no Neil-Batson inquiry in the first instance, and there certainly shouldn't have been the sustaining of the prosecutor's objection to the attempted exercise of the peremptory challenge.

In Portu v. State, 651 So.2d 791 (Fla. 3d DCA 1995), the court stated, in pertinent part:

> "During jury selection defense counsel attempted to use a peremptory challenge to strike prospective juror Angela Wong De Lee. The prosecutor noted for the record that juror Lee was on Hispanic descent, but made no further comment or objection. Notwithstanding this the trial court, on this assertion alone, then asked the defense its reasons for striking juror Lee.
>
> "In State v. Johans, 613 So.2d 1319 [18 FLW S124, 1993 Fla. S.Ct. 571](Fla. 1993), the Florida supreme court made clear that from that time forward a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner. See State v. Neil, 457 So.2d 481 (Fla. 1984). If there is no timely objection indicating that a peremptory challenge is being used in a racially discriminatory manner, then there is no basis upon which to interfere with the defendant's right to exercise a valid peremptory strike. Johans, 613 So. 2d at 1322. The Johans standard was held to be prospective in application; here, because all parties agree this is a post-Johans case, that is the standard we must apply.
>
> "In the instant case, following the presumption in Florida that peremptories will be exercised in a nondiscriminatory manner, the initial burden was on the state to create the inference that defense counsel's peremptory challenge was made for racially discriminatory reasons. See, e.g., Batson v. Kentucky, 476 U.S. 79, 96, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986)."

In the instant case by even holding the Neil inquiry, the court below completely overlooked the presumption referred to above in Portu that peremptories will be exercised in a non-discriminatory manner. There should have been no such inquiry and certainly no prohibiting

of Defense's attempted exercise of the right to strike Andani.

Likewise, there was no stated factual basis for State's objection to the attempted Defense peremptory challenge to Aurelio Diaz but, nevertheless, the court below specifically elicited Defense counsel's reason for wanting to strike Diaz, which reasons were that Defense counsel didn't like Diaz; that he lacked life experience having worked on the same job for 30 years; that he had two daughters with whom he had never had any problems; and that his 30-year employment with Dade County would cause him to favor some of State's witnesses because they were also employed by Dade County (TR-793). The court disallowed the Defense peremptory challenge of Aurelio Diaz because, "....it is not a race neutral reason" (TR-793).

In Betancourt v. State, 650 So.2d 1021 (Fla. 3d DCA 1995), the appellate court reversed the action of the trial court in conducting a Neil inquiry into Defense's attempted exercise of a peremptory challenge to an Hispanic juror and in disallowing such exercise. In this regard the appellate court concluded that the prosecution had failed to establish its contention that the challenge to the juror was based on constitutionally impermissible prejudice or that it was racially motivated, and in this latter regard it noted that the juror was Hispanic and that the defendant was Hispanic. The appellate court in Betancourt further found that even if the Neil inquiry was proper, Defense counsel had given a sufficient race-neutral reason for the exercise if the challenge, which was that the juror had previously been the foreman of a jury.

Based upon the above, the court in Betancourt stated:

> "Regretfully, we must reverse multiple convictions for serious offenses which followed a lengthy and otherwise spotless trial because, based on a misguided application of Batson-Neil principles, the trial judge erroneously refused to permit the exercise of a defense peremptory challenge."

Without in any manner conceding that the trial of Pablo San Martin was otherwise spotless, such defendant does urge upon the court that he should be granted a new trial because of the failure of the court below to secure to him the right to exercise peremptory challenges against the two involved prospective jurors concerning whom it was felt they would not accord him a fair trial. See Pointer v. United States, 151 U.S. 396 (1894) and Swain v. Alabama, 380 U.S. 202 (1965).

CONCLUSION

Defendant Pablo San Martin again prays the Court to vacate and set aside the guilty verdicts against him, the judgments thereon and the death sentence imposed upon him, and to grant him such other relief as the Court deems necessary.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy hereof is being furnished Assistant Attorney General Randall Sutton, 401 N.W. 2nd Avenue, Miami, Florida, this 19th day of August, 1996

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