DA 2-8-96

IN THE SUPREME COURT OF FLORIDA

JEANIE H. MELBOURNE,

Petitioner,

v. CASE NO. 86,029

STATE OF FLORIDA,

Respondent.
_____/

On Discretionary Review Of
Decision Of Florida Fifth District Court Of Appeal

PETITIONER'S REPLY BRIEF ON MERITS

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PRELIMINARY STATEMENT

In this brief, the parties and the record on appeal will be referred to as in Ms. Melbourne's initial brief on the merits. Ms. Melbourne's initial brief on the merits will be referred to by "IB." The state's answer brief on the merits will be referred to as "AB."

ARGUMENTS

I.

TRIAL COURT ERRED IN FAILING TO CONDUCT A BATSON/JOHANS INQUIRY WHEN AN OBJECTION WAS RAISED TO THE STATE ILLEGALLY EXERCISING A PEREMPTORY CHALLENGE AGAINST A BLACK VENIRE PERSON

The state first argues that the Batson/Johans peremptory challenge issue must be rejected because it was not properly preserved below (AB 2-5). That is incorrect. It should be noted that the Fifth District ruled on this issue on the merits, 655 So.2d at 127-28, as should this Court.

A review of the facts of this case and applicable law demonstrate that the state is wrong in asserting that this error was not properly preserved. Ms. Melbourne's trial counsel did exactly what was required by State v. Johans, 613 So.2d 1319 (Fla. 1993). Upon the state's exercise of a peremptory challenge against juror number 19, Mr. Wells, defense counsel stated that he was raising a Batson/Johans challenge. Defense counsel pointed out that Mr. Wells was a black male. The very words of raising a Batson/Johans challenge indicate that defense counsel was objecting to the peremptory striking of Mr. Wells on the basis of his race. That is exactly what a Batson challenge involves. Johans made it

clear that "... a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner." Id. at 1321. Trial counsel therefore did exactly what was required by Batson and Johans.

In Bowden v. State, 588 So.2d 225 (Fla. 1991), the defendant pointed out that the only black on the venire had been stricken and requested a Neil inquiry. Id. at 228. This Court noted that by pointing out that the only black venire member had been excused and requesting a Neil inquiry, the defense had met its initial burden, thus shifting the burden to the state to justify the excusal. Id. at 228-29. Ms. Melbourne, by objecting to the exclusion of a black venire member and raising a Batson/Johans challenge, is in the same position as Mr. Bowden as far as shifting the burden to the state. Bowden makes it clear that Ms. Melbourne met her initial burden under Neil, and the state's argument to the contrary must be rejected. See also, State v. Slappy, 522 So.2d 18, 22 (Fla.), cert. denied, 487 U.S. 1219 (1988)(any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor); Jones v. State, 640 So.2d 1161 (Fla. 1st DCA 1994)(defense counsel timely objected to the striking of three black jurors and asked the trial court to require the state to give reasons for its challenges).

The state cites a line of cases from the Third District Court of Appeal (AB 3-4) for support of its claim that the Johans burden was not met. Respectfully, these cases are an attempt to undercut the Johans decision. Johans was intended to do away with the case-

by-case analysis of whether or not the defense had met its initial burden, and instead sought to draw a bright line. 613 So.2d at 1321. The Third District cases cited by the state are an attempt to go back to the old Neil standard of requiring the defense to make a sufficient showing that the peremptory challenge is being used in a discriminatory manner, and should be rejected. See Taylor v. State, 638 So.2d 30, 33 n.3 (Fla. 1994)(Johans eliminated the requirement of making a prima facie showing of a strong likelihood of discrimination and held that henceforth a Neil inquiry must be initiated whenever such an objection is made); Valentine v. State, 616 So.2d 971, 974 (Fla. 1993)(once a party makes a timely objection and demonstrates that the challenged person is a member of a distinct racial group, the trial court must conduct a routine inquiry). Because Ms. Melbourne's trial counsel did what was required by Batson/Johans, when he pointed out that the state was striking a black male and specifically requested a Batson/Johans inquiry, the burden then shifted to the state to present reasons sufficient to satisfy its burden under State v. Slappy, 522 So.2d 18, 22 (Fla. 1988)(IB 11-13).

The state further contends that this issue was not preserved because at the close of jury selection Ms. Melbourne did not reiterate her prior objection to the striking of Mr. Wells, nor object to the jury as composed (AB 2). For this proposition, the state relies upon Joiner v. State, 618 So.2d 174, 176 (Fla. 1993) (AB 2). Ms. Melbourne's case is different from the Joiner line of cases. In Joiner, the defendant unqualifiedly accepted the jury

prior to it being sworn. In Ms. Melbourne's case, the record reflects that after voir dire was completed, defense counsel and prosecutors conducted the striking of the jurors on the record at the bench (TII/261). It was during this colloquy that the Batson/Johans objection was made, as were other objections based upon cause which are not now an issue in this Court.[1] There was an inquiry as to whether the parties accepted a particular jury panel prior to it being sworn (TII/271). The state accepted the panel (TII/271). Defense counsel did not respond directly, but instead renewed his attempt to strike juror Davis for cause, and asked for an additional peremptory challenge (TII/271). When trial counsel attempted to reiterate the request for an additional peremptory challenge, the trial court warned him that any further objection could result in a finding of contempt (TII/272). A further discussion was held concerning the request for an additional peremptory challenge, followed by the substitution of one juror for another (TII/272-73), after which the alternates were chosen (TII/274-75). After the alternates were chosen, there was no inquiry by the trial court as to whether there was any further objections to the panel, or whether either side accepted the panel. Instead, jury selection concluded in the bench conference and ended without any further discussion concerning jury selection. The record is therefore dissimilar to that of the Joiner line of cases. In Ms. Melbourne's case, defense counsel had preserved the

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[1] See Melbourne v. State, 655 So.2d 126, 128 (Fla. 5th DCA 1994).

Batson/Johans issue surrounding Mr. Wells, as well as the challenge for cause issues surrounding jurors Csandli, Jilani and Davis referred to in footnote 1, supra.

The purpose of the contemporaneous objection requirement is to make sure that the trial court understands that a legal objection is being made, then rules on its merits, and thereby creates a record which can be reviewed by an appellate court. All that was done in Ms. Melbourne's case. The Batson/Johans objection was made. The trial court clearly understood that the objection had been made, and made a specific ruling that the state's exercise of the challenge was not made for a discriminatory purpose. Particularly in light of the trial court's warning regarding possible contempt if defense counsel continued to reiterate an objection, there was no need for further objection on these points.

The state's reliance on Floyd v. State, 569 So.2d 1229 (Fla. 1990) (AB 2-3) is also misplaced. Floyd involved a situation which the state proffered a facially race neutral reason for the strike, thereby meeting its burden under Slappy. In Ms. Melbourne's case, no such thing occurred. The state did not proffer any facially race neutral reason. Instead, both assistant state attorneys merely pointed out that defense counsel had also previously stricken black jurors.

The state asserts that defense counsel's statement "I have nothing else to say" constitutes a waiver (AB 2). At that point, the state had not presented any racially neutral reason for its

strike, so defense counsel had no burden to say anything else, or object any further.

The state asserts in its brief: "In the instant case, the prosecutors specifically stated that the peremptory was not being exercised because of race, and noted that the state had accepted three black jurors, whereas the defense had stricken two black jurors" (AB 5). That is factually inaccurate. The exact exchange is quoted in the record at TII/269-70, and reproduced at IB 8. Neither prosecutor said anything about the fact that the peremptory was not being exercised because of race. That is simply a creation of fact by appellate counsel. The transcript also reflects that the state asserted that it had accepted two, not three, black jurors.

The state asserts that the district court correctly determined that a sufficient inquiry was conducted (AB 5-6). To accept that argument is to render the "inquiry" requirement meaningless. Slappy makes it clear that the burden shifts to the state to provide a non-discriminatory reason for its peremptory challenge which must be supported by the record. The state's "rebuttal must consist of a 'clear and reasonably specific' rationally neutral explanation of 'legitimate reasons'" for its challenge. 522 So.2d at 22. To call what occurred in Ms. Melbourne's case an inquiry is to void this critical step in the process. Asserting that the other side has stricken a black juror is not a clear and reasonably specific racially neutral explanation of a legitimate reason for the challenge. It is further clear in Ms. Melbourne's case that

the trial court did not fulfil its duty of conducting an inquiry of the state and requiring the state to provide its reason. Rather, the trial court reached its own conclusion without any attempt to satisfy the Slappy requirements.

Again, the state bases part of its argument upon a situation in which the trial court can weigh the credibility of the prosecutor who asserts that the peremptory challenge was not racially motivated (AB 6-7). That argument is absolutely irrelevant to Ms. Melbourne's case, because, as stated earlier, neither prosecutor in this case stated that the peremptory strike was not racially motivated. Again, that fact is simply a creation of appellate counsel and must be ignored by this Court.

The state erroneously asserts that "... the record demonstrates that every prospective juror who [had] a close family member or friend with alcohol problems or DUI problems was excused" (AB 5). In fact, the jury foreperson Haun (VIII/569-71) had a first cousin who was an alcoholic (TII/256). Juror Scott's grandfather was an alcoholic (TII/257).

Lastly, the state asserts that the harmless error rule should be applicable (AB 7). Of course, that assertion flies directly in the face of Johans, which mandated that it was reversible error, without resort to any harmless error consideration, when no Neil inquiry of the state was conducted. That decision recognizes the fundamental importance of the selection of a jury to a fair trial. It should be noted that the state's assertion that this error is harmless is simply a last sentence throw-in argument. The state

makes no efforts to actually analyze any evidence and meet its burden of demonstrating that such an error in this trial could be harmless.

II.

JUDGMENTS ON COUNTS IV AND V MUST BE VACATED DUE TO DOUBLE JEOPARDY VIOLATION

In response to Ms. Melbourne's argument that the separate convictions for DUI manslaughter and DUI serious bodily injury arising from a single act of driving violate the double jeopardy protection (IB 15-28), the state argues that multiple convictions are proper (AB 8-12).

In part, the state argues that Boutwell v. State, 631 So.2d 1094 (Fla. 1994) is inapplicable to Ms. Melbourne's case simply because it is not a DUI case. The state's brief makes no attempt to argue that the rationale of Boutwell - that a single act of driving while license is suspended should not give rise to multiple convictions - should not be equally applicable to a single act of driving under the influence.

Since the filing of Ms. Melbourne's initial brief on the merits, the Fourth District has issued an opinion which discusses this issue in detail. In Salazar v. State, __ So.2d __ (Fla. 4th DCA 11/1/95) [20 Fla. L. Weekly D2431], the defendant was convicted of one count of DUI manslaughter, one count of DUI with serious bodily injury, two counts of DUI with bodily injury, two counts of DUI with property damage, and one count of driving while license suspended ("DUS"). In discussing the application of Boutwell to Salazar's convictions, the Fourth District stated:

> The statutory offenses of DUI and DUS are strikingly parallel. Both DUI and DUS are status offenses; that is, the offense is complete whenever a driver gets into a vehicle and drives either under the influence of alcohol or with a suspended license. Similar to the offense of DUS, DUI has been held to be a continuing offense; that is, the singular violation, once initiated, continues until the driving episode ends. See Michie v. State, 632 So.2d 1106, 1108 (Fla. 2d DCA 1994)("[T]raffic offenses such as driving under the influence or driving with a suspended license are 'continuing offenses' permitting a single conviction per episode.") The DUI statute is also comparable to the DUS provision in that the penalty for DUI is enhanced, or made more serious, if injury to person or property results during the forbidden driving episode.
>
> We find no reason to distinguish DUI from DUS for determining whether separate convictions are permissible in instances where multiple injuries arise from the same traffic accident. We hold that, like DUS with injury proscribed under section 322.34(3), the commission of DUI with serious bodily injury under section 316.193(3)(c)2 or DUI with property damage or injury under section 316.193(3)1 which arises out of a single driving episode should each be considered single offenses regardless of the number of persons injured or items of property damaged. Salazar did not intend to commit separate crimes by his single act of driving under the influence and, it was, to use the terminology of Boutwell, "fortuitous" that the single traffic accident injured three persons and damaged two separate properties.

20 Fla. L. Weekly D2431. Unlike Ms. Melbourne, Salazar did not challenge his conviction for DUI manslaughter. Id. at D2432, n.1. The Fourth District ultimately upheld the conviction for DUI serious bodily injury, finding that each of the separate enumerated subsections of the DUI statute created a separate crime. Id. at D2432. It ordered the four misdemeanor counts of DUI with damage

to property or person vacated, with instructions to merge them into one conviction. The majority certified conflict with both Melbourne and with State v. Lamoureux, 660 So.2d 1063 (Fla. 2d DCA 1995). Id., nn.2,3.[2] Implicit in the Salazar decision is the fact that the court would have vacated multiple convictions of DUI with serious bodily injury and order them merged into one offense, for the same reasons it ordered multiple violations of DUI with damage to person or property merged.

The state makes no effort to distinguish the cases relied upon by Ms. Melbourne (IB 27-28), wherein appellate courts have applied this Court's "core offense" analysis to vacate one or more convictions which arose from a single underlying offense. See also, Rios v. State, 660 So.2d 795, 796 (Fla. 5th DCA 1995)(defendant cannot be convicted of both grand theft of motor vehicle and failure to return a hired vehicle).

For that reason, the state's reliance upon State v. Smith, 547 So.2d 613 (Fla. 1989) (AB 10), is misplaced. While this Court in Smith did hold that multiple punishments may be imposed for separate offenses even if only one act is involved, the "core offense" cases demonstrate that there are exceptions to that rule. Boutwell does not fall within the Smith confines because in

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[2] It should be noted that the Salazar panel did not discuss the Fourth District's en banc decision in Jackson v. State, 634 So.2d 1103 (Fla. 4th DCA 1994). In Jackson, the Fourth District applied the Boutwell rationale in connection with the driver's license revocation statute. In that context, the court ruled that a single driving episode can be counted as only one conviction, even if the defendant suffers multiple criminal convictions. Id. at 1106.

Boutwell the court ruled that one offense, not multiple offenses, occurred when the driver with a suspended license was involved in a single accident which resulted in multiple injuries. So too, only one core offense is involved where an impaired driver is involved in an accident which results in multiple injuries or death.

Additionally, the state argues that Boutwell is inapplicable because it is not a homicide case. However, that ignores this Court's statement in Boutwell that "... a violation of section 322.34(3) in a single driving episode should be considered as one offense." 631 So.2d at 1095. Of course, § 322.34(3) contains a homicide element, as it clearly applies to a driver who, with a suspended license, causes the death of a person in a car accident. The result in Boutwell would not have been different had Boutwell caused the death of four people, rather than simply causing serious bodily injury to them. The state fails to acknowledge that argument and address that point.

III.

SCRIVENER'S ERROR REQUIRES JUDGMENT BE CORRECTED

The state argues the judgment was properly entered because the information specifically charged Ms. Melbourne with violating § 877.111, Fla.Stat. (1991)(AB 13). That is not accurate. In pertinent part, the information charged Ms. Melbourne with violating § 316.193, Fla.Stat. (1991). The DUI counts alleged in part that Ms. Melbourne was impaired by either alcohol, drugs (§ 893.13), or chemical substances (§ 877.111). Ms. Melbourne was

convicted as charged, i.e., convicted of violating § 316.193. By no stretch of the imagination can it be said that Ms. Melbourne was convicted of a violation of § 877.111, any more than she was convicted of a violation of § 893.13, as there was no evidence that chemical substances or drugs played any part in any alleged impairment. The reference in the information to § 877.111 is merely a reference to the type of chemical substances which, if proved to be ingested by a driver, could result in a finding of impairment sufficient to satisfy the § 316.193 requirement. It is inaccurate and incorrect to assert that Ms. Melbourne was convicted of any § 877.111 offense. All references to that section must be stricken from the judgment.

CONCLUSION

Based on the arguments and authorities set forth in this brief and in Ms. Melbourne's initial brief on the merits, this Court must reverse the decision of the Fifth District Court of Appeal, and remand Ms. Melbourne's case for a new trial. In the alternative, this Court must reverse the Fifth District's opinion and order Counts IV and V vacated, and remand for resentencing as to Count II only.[3]

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[3] The conclusion to Ms. Melbourne's initial brief (IB 29) incorrectly requests this Court to vacate Counts II and IV, and remand for resentencing as to Count I only.

RESPECTFULLY SUBMITTED this 10th day of January, 1996, at Orlando, Orange County, Florida.

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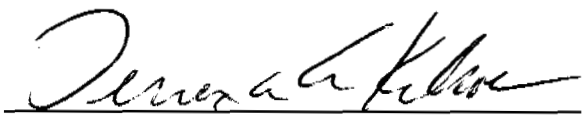

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 1996, a true copy of this brief has been furnished by United States mail, first class postage prepaid, to Kellie A. Nielan, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118.

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