017

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT NO.: 87,397

SIDNEY TYRONE RATLIFF,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL, A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE

JAMES T. MILLER, ESQUIRE
Florida Bar No: 0293679
CORSE, BELL & MILLER, P.A.
233 E. Bay Street, Ste. 920
Jacksonville, FL 32202
(904) 634-1701

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Respondent accepted Petitioner's statement of the case and facts.

ARGUMENT

ISSUE I

THE PARTY SEEKING TO EXERCISE A PEREMPTORY CHALLENGE, AFTER AN OBJECTION PURSUANT TO State v. Johans, 613 So. 2d 1319 (Fla. 1993), SHOULD RETAIN THE BURDEN OF PROOF TO DEMONSTRATE RACE-NEUTRAL REASONS FOR THE CHALLENGES, SUBJECT TO A TRIAL COURT'S CRITICAL EVALUATION OF THE REASONS BASED UPON FACT-FINDINGS SUPPORTED BY THE RECORD PURSUANT TO Files v. State, 613 So. 2d 1301 (Fla. 1992), AND State v. Slappy, 522 So. 2d 18 (Fla. 1988).

A. The issue presented by the certified question.

Respondent has not directly responded to the 3 issues raised by the certified question: (1) should this Court recede from its decision in State v. Johans, 613 So.2d 1319 (Fla. 1993) -- what must a party demonstrate to require an inquiry into the reasons for a peremptory challenge pursuant to State v. Neil, 457 So.2d 481 (Fla. 1984). (2) Once a party gives an explanation for a peremptory challenge, who has the burden to prove or disprove any factual support for the alleged non-discriminatory reason. (3) Once a party has given a reason for a peremptory challenge, how must the trial court evaluate the reason given and any arguments/contrary evidence against the proffered nondiscriminatory reason.

Respondent argues that this Court should recede from State v. Johans, supra and return to the principle that peremptory challenges are presumptively exercised in a non-discriminatory manner; Respondent also urges this Court to adopt the holding in

Purkett v. Elam, __ U.S. __, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). Petitioner will address each of these arguments under the following subheadings of the argument in the initial brief.

B. This Court should adhere to its ruling in State v. Johans, 613 So. 2d 1319 (Fla. 1993).

Respondent has given no compelling reason to overrule State v. Johans. This Court does not have to be consistent with the United States Supreme Court's decision in Purkett v. Elam, supra; this Court decided State v. Neil, 457 So.2d 481 (Fla. 1984) and State v. Slappy, 522 So.2d 181 (Fla. 1988) on state constitutional grounds. Consequently, this Court has already departed from the principles enunciated in Purkett concerning the minimum constitutional standard. There is no need to be consistent with the federal standard just to be consistent. Florida has the sovereign right to give its citizens more protection than is given by the United States Supreme Court. Therefore, consistency is not a compelling reason to overrule Johans.

Respondent overlooks the reason why this Court decided in State v. Johans to eliminate the need to establish a substantial likelihood of racial discrimination. The rule established in State v. Johans is a bright line rule which is easy to administer. This procedure eliminated *per se* reversals when a trial court erroneously refused to conduct an inquiry. It is

simply better to err on the side of an inquiry so that the record will then reflect whether a challenge was appropriate.

In Johans, 613 So.2d at 1321, this Court noted that there was previously an initial presumption that peremptories would be exercised in a non-discriminatory manner; consequently, this Court had previously held that there must be a timely objection to peremptory challenge and the objection must show there is a strong likelihood that the challenge was based upon race. Justice Harding then wrote for the court:

> ... the case law that has developed in this area does not clearly delineate what constitutes a "strong likelihood" that venire members have been challenged solely because of their race. Compare State v. Slappy, 522 So.2d 18 (Fla.)(number alone is not dispositive, nor even the fact that a member of the minority in question has been seated as a juror or alternate), cert.denied, 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1980) with Reynolds v. State, 576 So.2d 1300 (Fla. 1991)(striking one African-American venire member who was sole minority available for jury service created strong likelihood).
>
> Rather than wait for the law in this area to be clarified on a case-by-case basis, we find it appropriate to establish a procedure that gives clear and certain guidance to the trial courts in dealing with peremptory challenges. Accordingly, we hold that from this time forward a Neil inquiry is required when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner. We recede from Neil and its progeny to the extent that they are inconsistent with this holding. 613 So.2d at 1321 (Emphasis supplied.

There is no compelling reason to change the procedure described above. There is no constitutional right to peremptory

challenges, so the placing of the burden to justify a challenge upon the party making the challenge is not inappropriate. Peremptory challenges could be abolished by rule or statute. Consequently, such challenges are a privilege granted to the parties; it is fundamentally unfair to make a party exercising such a privilege to justify its use (especially when considered against possible racial discrimination). There is a converse constitutional right of a defendant to not have members of a certain race excluded and a right of prospective jurors not to be denied the right to serve on a jury due to race.

The analogies used by Respondent and the decision of the First District Court of Appeal concerning proof in racial discrimination in employment cases are inappropriate in this case. In employment discrimination cases, the plaintiff has the opportunity to investigate and discover the basis for the alleged racial discrimination. The plaintiff will have direct or indirect knowledge of discrimination. During *voir dire*, one party probably would not know the motives of another party in exercising a peremptory challenge.

As the plaintiff in a discrimination case is seeking relief, it is appropriate for the plaintiff to have the initial burden of proof. (Under this view, the party seeking to use a peremptory challenge should also have the initial burden of proof). During *voir dire*, the parties have limited time and limited information about the jurors. How can the person objecting to a challenge, in the context of *voir dire*, always know what the motives of the

party challenging the juror are? Racial motives are easy to hide during *voir dire*, especially in the context of peremptory challenge. (If the challenges are truly peremptory).

In State v. Slappy, supra, this Court expressly recognized that seemingly neutral challenges could be a mask for racial discrimination. Consequently, this Court established the various tests to determine whether a particular challenge was a pretext for racial discrimination. 522 So.2d at 20.

Respondent also argues that this Court should adopt the federal standards to create a single unified procedure: a unified procedure will eliminate the confusion created by the citation of the federal cases in Florida case law. This Court can eliminate any such confusion without adopting the federal standards. This Court can clarify the procedures in this case by adhering to State v. Johans.

C. This Court should adhere to its holding in State v. Slappy, supra.

If this Court adheres to State v. Johans, the next question presented by this case is what are the relative burdens of proof and persuasion after the trial court inquires into the reasons for certain peremptory challenges. This Court should adhere to State v. Slappy, concerning these burdens of proof. The certified question implies that Petitioner had the burden to disprove (or at least contest or disagree with) the reasons given

for the peremptory challenge below (for example, whether the juror had trouble reading the juror questionnaire). This concern ignores the holding of Slappy.

A proffered non-discriminatory reason must (1) be reasonable, (2) not be a pretext, and (3) must be supported by the record. The problem in this case is that the trial court did not make any factual findings which complied with the 3 part test enunciated in Slappy. How can one party "disprove" a proffered reason by the opposing party? Either the reason is reasonable, not a pretext and supported by the record or it is not. This Court has also held that the trial court must evaluate the credibility of the person offering the reason as well as the reasons themselves. Even if counsel for Petitioner had objected (disagreed with the proffered reason) that the juror had trouble reading the questionnaire, the issue was not resolved. The trial court still had not made the requisite factual and credibility findings under Slappy.

D. The trial court has the ultimate responsibility to decide whether a peremptory challenge is nondiscriminatory.

As stated above, the trial court has the ultimate responsibility to make the determination of whether a peremptory challenge is non-discriminatory. Respondent focuses on the issue of whether the juror had trouble reading the questionnaire. (Respondent argues that the trial court did not have to make a

factual finding on this issue because Petitioner did not dispute the State's assertion that the juror had trouble reading the questionnaire. **See** Floyd v. State, 569 So.2d 1225 (Fla. 1990), cert. denied, 501 U.S. 1259, 111 S.Ct. 2912, 115 L.Ed.2d 1075 (1991). Respondent ignores the other proffered reasons: The age of the juror, fact that he was single and had no children. These reasons were not reasonable and were a pretext. In this case, the trial court simply did not critically evaluate these reasons.

The trial court in this case did not perform its function under Slappy. After Petitioner objected and requested an inquiry, the first thing the trial court did was to make Petitioner give his reasons for striking white jurors (the State had not objected to such strikes). After the State gave its reasons, the court found the reasons to be racially neutral. The trial court simply did not critically evaluate the reasons; the approval of the reasons was *pro forma*. Petitioner reiterates his argument that once the trial court requires an inquiry, the trial court must critically evaluate the reasons and make factual findings; the objecting party will retain the burden of persuasion that such challenges are improper.

E. The case law applied to the facts of this case.

Except for the issue of whether the juror had trouble reading the questionnaire, Respondent had not addressed the other reasons given to justify the peremptory challenge of the juror.

Petitioner adopts his arguments in the initial brief on this issue.

CONCLUSION

This Court should answer the certified question as described in this brief and remand this case for a new trial.

Respectfully submitted,

JAMES T. MILLER, ESQUIRE
Florida Bar No: 0293679
CORSE, BELL & MILLER, P.A.
233 E. Bay Street, Ste. 920
Jacksonville, FL 32202
(904) 634-1701

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been delivered, by mail, to the Patrick Martin, Office of the Attorney General, Department of Legal Affairs, The Capitol Building, Tallahassee, FL, this 23rd day of May, 1996.

James T. Miller