ORIGINAL

IN THE SUPREME COURT OF FLORIDA

GUY HAMMOND,

Petitioner,

v. Case No.94,780

STATE OF FLORIDA,

Respondent.

_____/

DISCRETIONARY REVIEW OF DECISION OF THE SECOND DISTRICT COURT OF APPEAL STATE OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is substantially accurate for the purpose of this brief.

SUMMARY OF THE ARGUMENT

This Court does not have jurisdiction to hear the instant case because the district court opinion regarding preservation of a jury selection question does not expressly and directly conflict with Trotter, infra. Even if preserved, Petitioner cannot demonstrate that a biased juror was seated, thereby depriving him of a fair trial.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DENYING A MOTION TO STRIKE A JUROR FOR CAUSE AS THE JUROR WAS EMPLOYED BY CHILD PROTECTIVE SERVICES (As stated by Petitioner)

Respondent respectfully asserts that jurisdiction has been improvidently granted in the instant case, as will be more fully explained herein. Although the Second District did not address the merits of Petitioner's argument, that the trial court erred in denying his challenge for cause, a review of the record and pertinent case law reveals that the conclusions reached by Petitioner regarding juror Mulligan are incorrect. Contrary to Petitioner's argument, juror Mulligan unequivocally stated that she could be impartial. In support of his position Petitioner relies on the phrase of the juror - "I think I can be impartial." A review of her entire voir dire, however, demonstrates that her words merely parrot the question posed, particularly the questions from Petitioner. In each instance, when asked do you *think* you can be impartial, the juror responded, I *think* I can. More importantly, that was not her sole response. When Petitioner questioned the possible bias on the part of juror Mulligan stemming from her work, the following transpired:

> MS. KERWIN: Yesterday you told Miss Johnes then, I think the last thing you said was -- she was asking you if you could be fair and impartial. Do you really think you can be impartial given your work relationship at the Child Protection Team whose main purpose is to investigate

these types of cases and working with Sara crane, Genie O'Brien, and Dr. Keely?

PROSPECTIVE JUROR MULLIGAN: I think I can. It's not like we sit in groups and, you know, talk about what is going on or who is interviewed and who was seen by the doctor. When the child comes in I don't put the name with the face because I don't really have interaction with the children, so I do think I could be impartial.

MS. KERWIN: Let me ask you this. Do you think you would be more likely or do you think you'd have some predisposition to give more credibility to the children in this case because they went through your agency or for any other reason?

PROSPECTIVE JUROR MULLIGAN: I don't think so.

MS. KERWIN: Have you had situations at your agency where cases are investigated and arrests are made but the children aren't telling the truth? Is that something you've come up against?

PROSPECTIVE JUROR MULLIGAN: Not that I know.

MS. KERWIN: So in your book, if they come through your agency, are they automatically telling the truth?

PROSPECTIVE JUROR MULLIGAN: Not necessarily. I don't really have any contact with the children, so I can't answer that.

(Vol. VI, T247-248)

These responses evidence that this juror possessed a state of mind that would permit her to render an impartial verdict. Smith v. State, 699 So. 2d 629 (Fla. 1997). This Court has acknowledged the trial court's unique vantage point in evaluating a juror's answers in ruling upon a challenge for cause. Mendoza v. State, 700 So. 2d 670 (Fla. 1997). The record before this Court supports the trial court's decision concerning juror Mulligan.

Petitioner's argument fails for another reason. This court was very clear in Trotter v. State, 576 So. 2d 691 (Fla. 1990), that the refusal to excuse a prospective juror for cause, exhausting all peremptory challenges and being denied an additional challenge is insufficient to create reversible error; the defendant must show that a *biased* juror was seated. The three jurors identified by Petitioner, number 17, Beverly Katzenberger, number 19, Loretta Stephenson, and number 28, Cynthia Hayden Corsin, were cited by Petitioner because they could not be fair, had made up their minds already, or would not accept the burden of proof. (Vol.VI, T270-271; Vol.IV, R455-456). The record however, is completely devoid of any support for Petitioner's stated reasons. Rather, the responses of each clearly demonstrate that she could lay aside any bias or prejudice and render a verdict solely on the evidence presented and the law as instructed by the court. (Vol.V,T66,94-95,98,101,111;Vol.VI,T168-171,178-179,184,188-189,192,194,200-202,210,212,215-216,224-225,244,259). Because all three jurors were competent, Petitioner cannot prove his claim that a biased juror was seated, and his argument fails as a matter of law. Trotter, supra; Farina v. State, 679 So. 2d 1151 (Fla. 1996).

Furthermore, the Second District's decision[1] below does not expressly or directly conflict with this Court's holding in Trotter

[1]Hammond v. State, 24 Fla. L. Weekly D204 (Fla. 2d DCA January 15, 1999).

v. State, supra. In Trotter this Court held that after a trial court denies the challenge of a juror for cause the defendant must use all of his peremptory challenges, and identify the objectionable juror he would strike. The focus in Trotter was the failure of the defendant to show that a biased juror was seated, not the contemporaneous objection rule. That issue, as it pertains to jury selection, was addressed by this Court in Joiner v. State, 618 So. 2d 174 (Fla. 1993), and Mitchell v. State, 620 So. 2d 1008 (Fla. 1993), where this Court ruled that to preserve a Neil[2] issue for review, in addition to objecting to the trial court's ruling, the claimed error must be called to the trial court's attention once more prior to the jury being sworn. As explained in Milstein v. Mutual Security Life Insurance Company, 705 So. 2d 639 (Fla. 3rd DCA 1998), the reasoning of Joiner is applicable to jury selection *generally* so that the trial court will be apprised that the defendant still believes reversible error occurred, and so that the court will have a chance to take corrective action if needed. The Third District goes on to reconcile the requirements of Trotter with those of Joiner: "[s]ince Trotter's request was insufficient as a matter of law ... the supreme court did not need to reach the additional question whether it was also necessary for Trotter to renew his jury selection objection before the jury was sworn." Id., at 640.

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[2]State v. Neil, 457 So. 2d 481 (Fla. 1984).

Furthermore, this Court has long held that in order to preserve an issue for appellate review it must be presented to the lower court and "the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." Tillman v. State, 471 So. 2d 32,34 (Fla. 1985). The Second District, in the instant case, recognized the requirements of Trotter and although not citing Joiner, noted that Petitioner had failed to preserve the issue because he did not make the same argument to the trial court. That is, when Petitioner sought additional peremptory challenges he did not properly apprise the trial court of a possible reversible error (the denial of his challenge for cause), thereby affording the trial court an opportunity to take additional action. In so holding, the Second District's decision *comports*, not conflicts, with the decisions of this Court, including Trotter.

Additionally, the application of Joiner and Mitchell are particularly important in the instant case. Petitioner initially sought to challenge juror Mulligan for cause immediately following the State's voir dire. The trial court did not rule at that time, but advised Petitioner he could renew his challenge following his questions to the panel. When renewed, the trial court denied Petitioner's challenge of juror Mulligan - the Petitioner did not disagree or object to the trial court's ruling. Although Petitioner never affirmatively accepted the jury, he did not voice

any objections prior to the panel being sworn. Based on Petitioner's inaction both following the denial of his challenge for cause and prior to the jury being sworn, the trial court could reasonably have concluded that Petitioner had *abandoned* his earlier objection. Joiner, supra. Petitioner's silence had a two-fold effect: 1) it foreclosed the trial court addressing further Petitioner's initial challenge for cause, and 2) it resulted in a waiver of the issue for appellant review. Petitioner's action, or rather inaction, is precisely the tactic this Court refused to condone in Joiner, and it should be no more tolerable here.

Accordingly, since there is no conflict between the decision of the Second District below and this Court's decision in Trotter, this court does not have jurisdiction to hear the instant case.

CONCLUSION

Based upon the foregoing reasons, arguments, and citations to authority, this Honorable Court should affirm the decision of the Second District.

Respectfully submitted,

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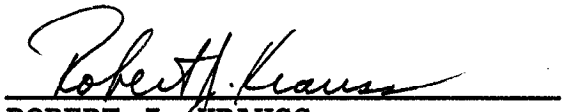

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief has been furnished by U.S. regular mail to Timothy J. Ferreri, Assistant Public Defender, P.O. Box 9000--Drawer PD, Bartow, Florida 33831, on this 4th day of June, 1999.

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