IN THE SUPREME COURT OF FLORIDA

ANTHONY B. BOYKINS,

Petitioner,

v. CASE NO. SC01-1123

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with the statement of the case and facts as provided by Petitioner, but would supplement them with the following:

Petitioner was charged with robbery with a firearm, a first degree felony punishable by life. (R12, Vol I) Jury selection was conducted on May 17, 2000. The initial fourteen potential jurors were questioned by both the State and Petitioner's trial counsel. (T41-88,121-167, Vol II) Each side was allotted ten peremptory challenges. Defense counsel moved to strike for cause juror number B-13, and without objection from the State, she was stricken. (T88, Vol II) He also moved to strike juror number D-10, Jose Saucedo, contending that this juror indicated he would favor law enforcement, but the State reminded the trial court that Mr. Saucedo had responded to the court's query about family or friends in law enforcement as follows:

> TRIAL COURT: Does your relationship with your son [a criminal investigator for the Florida Highway Patrol] lead you to believe that you would have difficulty listening to law enforcement testimony the same way as the other testimony?
>
> SAUCEDO: No.
>
> TRIAL COURT: Would you tend to believe a law enforcement officer over another witness?
>
> SAUCEDO: Yes.
>
> TRIAL COURT: Okay. If I instructed you that

> you have to give the same weight to the other witnesses[‘] testimony as you do to law enforcement officers but that credibility is up to you, would you be able to do that?
>
> SAUCEDO: Yes.

(T29-30, Vol II) Later on during examination by defense counsel, the juror again stated:

> DEFENSE COUNSEL: Mr. Saucedo....You had indicated that I think your son works for the Florida Highway Patrol?
>
> SAUCEDO: Yes, sir.
>
> DEFENSE COUNSEL: You have some friends that are in law enforcement?
>
> SAUCEDO: Yes.
>
> DEFENSE COUNSEL: Do you think that you would give more weight or more credibility to a law enforcement officer’s testimony just by the virtue that they are a law enforcement officer?
>
> SAUCEDO: I say that I will, but I will listen to the judge’s recommendations. I go with that.
>
> DEFENSE COUNSEL: You would listen to what the judge had to say?
>
> SAUCEDO: Yes.

(T70-71, Vol II)

Mr. Saucedo also agreed with defense counsel that because a law enforcement officer testifies as a witness more frequently than the general public, an officer would be more comfortable, a little smoother, on the stand. (T81-82, Vol II) Moreover, during voir dire by the State, Mr. Saucedo assured the prosecutor that he would

apply the law, even if he disagreed with it. (T60, Vol II)

The trial court denied defense counsel's motion to strike Mr. Saucedo for cause. (T89, Vol II) Defense counsel then moved to strike juror number J-16 for cause, without objection from the State. *Id.* Defense also moved to strike juror number J-24, and the prosecutor advised the trial judge that she preferred to leave this one up to the trial court. (T89-90, Vol II) The trial court concluded that the juror had medical problems which would excuse her from jury duty. *Id.*

Moving onto peremptory strikes, the State struck juror J-4, and defense struck jurors numbered B-10, D-2, D-10 (Mr. Saucedo), J-25, J-23 and B-19, leaving only four jurors from the original panel. (T90-91, Vol II) Accordingly, the trial court empaneled fourteen additional jurors. *Id.*

After voir dire by both sides, the State moved to strike for cause number D-29 without objection by the defense. (T167, Vol II) Counsel for the defense challenged juror number M-19, Andrew Yiznitsky, contending that this juror was biased towards law enforcement. (T168, Vol II) Like Mr. Saucedo, the State contended that this juror indicated he would follow the law, as the following voir dire examination demonstrates:

> TRIAL COURT: ...do you feel that you would be able to sit on this jury in a fair and impartial manner and weigh each witness in the same manner or that you would give them more credibility in their testimony? Law enforcement, I mean.

> YIZNITSKY: Probably more credibility to the law enforcement.
>
> TRIAL COURT: Even if I instruct you that's not what you are supposed to do?
>
> YIZNITSKY: No.
>
> TRIAL COURT: No, you could not follow the instruction?
>
> YIZNITSKY: Yes, I would follow the instruction.

(T97, Vol II) Upon questioning by defense counsel, Mr. Yiznitsky also agreed that law enforcement officers would be more comfortable testifying than the general public. (T160, Vol II) The trial court found that "[h]e was rehabilitated in my opinion, and I will deny the motion for cause." (T168, Vol II)

Defense counsel also challenged juror number M-23 for cause, and, without objection from the State, she was stricken. *Id*. Counsel moved to strike juror number M-24, and, after hearing argument from both sides, the trial court granted the motion to strike the juror. (T168-69, Vol II) Based upon the same ground, defense counsel moved to strike juror number D-18, which was also granted by the court. (T170, Vol II)

The defense challenged juror number D-13, Michele Dibari, because she indicated that she would probably give in to pressure from the other jurors[1]. *Id*. The State contended that defense

[1]She stated that "Unfortunately, I might give in [to the greater number]....[b]ecause we all see the same facts pretty much and I don't know what I could prove that would hold up against the

counsel's basis was not a proper reason to strike a juror for cause, since any juror might give in. *Id.* The State also disagreed that this juror had indicated that she would just give in to the others, arguing that it appeared that the juror presupposed that she had nothing further to offer and was not viewing the evidence like the rest of the other jurors. (T171, Vol II) The trial court concluded by finding "I do not find sufficient basis for cause in this case." *Id.*

The final challenge for cause was juror number M-22, Robert McIlrath. *Id.* Defense counsel argued that this juror believed that a defendant's failure to take the stand would demonstrate guilt[2]. *Id.* The State pointed out that this statement by McIlrath was directed towards himself and not any defendant. The trial court noted:

> TRIAL COURT: ...I think it was one of the reasons rather than the only reason. He asked what was one of the reasons someone might not take the stand [and the juror answered that one reason was] that he might be guilty.

(T171-2, Vol II) Accordingly, the trial court found insufficient

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other people." (T166-67, Vol II)

[2]Defense counsel asked the jurors if they would have to hear from the defendant before they could find him not guilty, and Mr. McIlrath replied "No, I would not. If I was accused though, I would think that I would have to weigh [whether] that [would] be in my best interest though." When asked by counsel if he could think of some reasons why an accused may not want to take the stand, McIlrath responded "Only if I knew down in my heart that I was guilty and the case was going against me." (T163-64, Vol II)

basis to strike for cause. (T172, Vol II)

As to peremptories, the State back struck juror number D-6 from the first panel. *Id.* Defense counsel struck Mr. Yiznitsky, jurors numbered M-21, M-2, and, finally, exhausting his original peremptories, the defense struck Mr. McIlrath. (T172-73, Vol II) The State back struck another juror, number J-8. (T174, Vol II) After unsuccessfully requesting additional peremptories and rearguing his motions to strike for cause, defense counsel was given another peremptory strike as to the alternate juror and struck Ms. Dibari. (T174-75,176 Vol II) Juror number M-78 was selected as the alternate juror. (T176, Vol II) Counsel for the defense noted that:

> DEFENSE COUNSEL: ...in light of the court's ruling that I had another strike I would prefer to have struck Mr. Kern. That is what I would have done had the court granted additional peremptory strikes.

Id.

SUMMARY OF ARGUMENT

The trial court's denial of the motions to strike for cause was not an abuse of discretion, since the jurors indicated that they could be fair and the trial judge was in the best position to determine the ability of the jurors to be fair and impartial, as the trial judge was able to observe the demeanor of the jurors while being questioned by the court and the attorneys. Moreover, Petitioner has failed to demonstrate prejudice as he had peremptories remaining when he moved to strike the jurors for cause, did not use the remaining peremptories to remove all of the allegedly objectionable jurors and was given an additional peremptory which he used to strike the final objectionable juror. As such, the district court properly concluded no reversible error occurred.

ARGUMENT

POINT I

TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO STRIKE FOUR OF TEN JURORS DEFENSE COUNSEL MOVED TO STRIKE FOR CAUSE NOR CAN PETITIONER DEMONSTRATE PREJUDICE AS HE HAD REMAINING PEREMPTORIES WHICH HE EXERCISED ON JURORS OTHER THAN THOSE HE MOVED TO STRIKE FOR CAUSE AND THEN OBTAINED AN ADDITIONAL PEREMPTORY PERMITTING HIM TO STRIKE THE FINAL OBJECTIONABLE JUROR.

Petitioner contends the Fifth District Court of Appeal (DCA) improperly affirmed the trial court's denial of four strikes for cause during voir dire. It is well settled that the standard on review for a determination not to grant a challenge for cause of a juror is abuse of discretion because the trial court can observe and evaluate a prospective juror's demeanor and credibility. *Lambrix v. State*, 494 So. 2d 1143, 1146 (Fla.1986); *see Foster v. State*, 679 So. 2d 747 (Fla.1996) (trial court's determination that challenge for cause is proper not to be disturbed absent showing of manifest error), *cert. denied* 520 U.S. 1122 (1997); *Cook v. State*, 542 So. 2d 964, 969 (Fla.1989)("There is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause. Appellate courts consistently recognize that the trial judge who is present during voir dire is in a far superior position to properly evaluate the responses to the questions propounded to the jurors."), *cert. denied*, 502 U.S.

964 (1991). An abuse of discretion is found "only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1204 (Fla.1980).

Jury selection was conducted on May 17, 2000. The initial fourteen potential jurors were questioned by both the State and Petitioner's trial counsel. Each side was allotted ten peremptory challenges. Defense counsel moved to strike for cause juror number B-13, and without objection from the State, she was stricken. He also moved to strike juror number D-10, Jose Saucedo, contending that this juror indicated he would favor law enforcement, but the State reminded the trial court that Mr. Saucedo had responded to the court's query about family or friends in law enforcement as follows:

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> TRIAL COURT: Okay. If I instructed you that you have to give the same weight to the other

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> SAUCEDO: Yes.

(T29-30, Vol II) Later on during examination by defense counsel, the juror again stated:

> DEFENSE COUNSEL: Mr. Saucedo....You had indicated that I think your son works for the Florida Highway Patrol?
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> SAUCEDO: Yes, sir.
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even if he disagreed with it.

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> TRIAL COURT: ...do you feel that you would be able to sit on this jury in a fair and impartial manner and weigh each witness in the same manner or that you would give them more credibility in their testimony? Law enforcement, I mean.
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> YIZNITSKY: Probably more credibility to the

law enforcement.

TRIAL COURT: Even if I instruct you that's not what you are supposed to do?

YIZNITSKY: No.

TRIAL COURT: No, you could not follow the instruction?

YIZNITSKY: Yes, I would follow the instruction.

(T97, Vol II) Upon questioning by defense counsel, Mr. Yiznitsky also agreed that law enforcement officers would be more comfortable testifying than the general public. The trial court found that "[h]e was rehabilitated in my opinion, and I will deny the motion for cause." (T168, Vol II)

Defense counsel also challenged juror number M-23 for cause, and, without objection from the State, she was stricken. Counsel moved to strike juror number M-24, and, after hearing argument from both sides, the trial court granted the motion to strike the juror. Based upon the same ground, defense counsel moved to strike juror number D-18, which was also granted by the court.

The defense challenged juror number D-13, Michele Dibari, because she indicated that she would probably give in to pressure from the other jurors. She stated that "Unfortunately, I might give in [to the greater number]....[b]ecause we all see the same facts pretty much and I don't know what I could prove that would hold up against the other people." (T166-67, Vol II) The State contended that defense counsel's basis was not a proper reason to

strike a juror for cause, since any juror might give in. The State also disagreed that this juror had indicated that she would just give in to the others, arguing that it appeared that the juror presupposed that she had nothing further to offer and was not viewing the evidence like the rest of the other jurors. The trial court concluded by finding "I do not find sufficient basis for cause in this case." (T171, Vol II)

The final challenge for cause was juror number M-22, Robert McIlrath. Defense counsel argued that this juror believed that a defendant's failure to take the stand would demonstrate guilt[3]. The State pointed out that this statement by McIlrath was directed towards himself and not any defendant. The trial court noted:

> TRIAL COURT: ...I think it was one of the reasons rather than the only reason. He asked what was one of the reasons someone might not take the stand [and the juror answered that one reason was] that he might be guilty.

(T171-2, Vol II) Accordingly, the trial court found insufficient basis to strike for cause.

As to peremptories, the State back struck juror number D-6 from the first panel. Defense counsel struck Mr. Yiznitsky, jurors

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[3]Actually, defense counsel asked the jurors if they would have to hear from the defendant before they could find him not guilty, and Mr. McIlrath replied "No, I would not. If I was accused though, I would think that I would have to weigh [whether] that [would] be in my best interest though." When asked by counsel if he could think of some reasons why an accused may not want to take the stand, McIlrath responded "Only if I knew down in my heart that I was guilty and the case was going against me." (T163-64, Vol II)

numbered M-21, M-2, and, finally, exhausting his original peremptories, the defense struck Mr. McIlrath. The State back struck another juror, number J-8. After unsuccessfully requesting additional peremptories and rearguing his motions to strike for cause, defense counsel was given another peremptory strike as to the alternate juror and struck Ms. Dibari. Juror number M-78 was selected as the alternate juror. Counsel for the defense noted that:

> DEFENSE COUNSEL: ...in light of the court's ruling that I had another strike I would prefer to have struck Mr. Kern. That is what I would have done had the court granted additional peremptory strikes.

(T176, Vol II)

The trial court did not abuse its discretion in denying defense counsel's motions to strike for cause. The voir dire transcript demonstrates that these four jurors met the standard for juror competency enunciated in *Davis v. State*, 461 So. 2d 67, 70 (Fla.1984), *cert. denied*, 473 U.S. 913 (1985), i.e.: "[T]he juror can lay aside any bias or prejudice and render his [or her] verdict solely upon the evidence presented and the instructions on the law given ... by the court."; *see also Irvin v. Dowd*, 366 U.S. 717 (1961)(a jury is fair and impartial if its members are able to lay aside fixed opinions of the guilt or innocence of the accused and render a verdict based solely on the evidence presented at trial).

For example, while both Mr. Yiznitsky and Mr. Saucedo

indicated some preference for law enforcement, they also assured the court that they would abide by the instructions given by the trial judge. As such, no abuse of discretion occurred. *See, e.g., Cason v. State*, 760 So. 2d 283 (Fla. 4th DCA)(trial court properly denied challenge for cause as to juror, who initially stated that she wanted to hear from defendant, but after being explained the law concerning a defendant's right to remain silent, stated that she could follow the law), *rev. denied*, 779 So. 2d 279 (Fla.2000).

Furthermore, contrary to Petitioner's contention, Mr. McIlrath did not state that the only reason for a defendant to not take the stand was a defendant's guilt, but, rather, that if he were a defendant, he would have to weigh whether or not testifying would be in his best interest. When asked by defense counsel for "some reasons why as an accused *you* may not want to take the stand?," Mr. McIlrath stated that the only reason *he* would not take the stand is because he knew he was guilty and the case was going against him. (T163-64, Vol II)(emphasis added) But, he also affirmatively stated that he would not have to hear from Petitioner in order to find Petitioner not guilty, unlike cases where error has been found. *See, e.g., Williams v. State*, 755 So. 2d 714, 716 (Fla. 4th DCA 1999)(jurors were evasive when asked if they could be fair and impartial if the defendant did not put on a defense). As such, the trial court properly refused to strike Mr. McIlrath for cause.

Regarding the issue which is the basis for conflict, Ms.

Dibari candidly admitted to defense counsel in response to his question "if...there were five votes against you, the other five felt strongly one way and you felt strongly the other way and you are standing there alone with the greater number against you, would you give in to that greater number?," that she *might* give in[4]. (T166, Vol II)(Emphasis added) The Fifth District Court of Appeal properly found such an answer did not demonstrate she was not a competent juror, i.e., able to lay aside any bias or prejudice and render her verdict solely upon the evidence presented and the instructions on the law given by the court. *Davis, supra*. Nor, as the DCA noted, did she fit any of the statutory grounds for challenges for cause. *See* § 913.03, Florida Statutes (1999); *Boykins*, 783 So. 2d at 318.

The DCA also pointed out in the final paragraph of its opinion that the decision in *Shannon* is not supported by any authority for its holding that a juror who cannot withstand the reasoning of other jurors is subject to a challenge for cause. *Boykins v. State*, 783 So. 2d 317, 318 (Fla. 5th DCA 2001). Respondent would note that Petitioner has not cited any case law herein save *Shannon v. State*, 770 So. 2d 714, 715 (Fla. 4th DCA 2000, which arguably supports his assertion that Ms. Dibari should have been stricken

[4]As the DCA noted in *Boykins v. State*, 783 So. 2d 317, 318 (Fla. 5th DCA 2001), this admission is quite different from that of a juror who knew from previous experience that he would submit to the will of the majority and would not be able to maintain his view of the evidence if pressured by other jurors. *See Shannon v. State*, 770 So. 2d 714, 715 (Fla. 4th DCA 2000).

for cause. However, there is federal habeas authority supporting the DCA's holding herein. In *Simpson v. Wyrick*, 527 F.Supp. 1144 (W.D.Mo. 1981), *affirmed*, 685 F.2d 438 (8th Cir.), *cert. denied*, 459 U.S. 992 (1982), the federal district court in Missouri was presented with this very same situation, i.e., a juror who indicated she was not sure she could be the only juror in disagreement with the rest of the panel. In response to further inquiry, the juror indicated she would try to do what she felt was right. *Id.* at 1147. The state trial judge refused to strike the juror for cause and the federal district court found no abuse of discretion or violation of any constitutional right. *Id.*

Like the juror in *Simpson*, Ms. Dibari was being completely honest and conceded that she might give in based on those facts presented during voir dire by defense counsel because the other jurors had heard the same evidence and all came to a different conclusion while she, presumably, would have nothing more to argue. While the *Simpson* juror further indicated she would try to do what she felt was right, that fact hardly distinguishes the case from the instant circumstances since she was clearly not sure she could disagree with the rest of the panel. The federal district court found no abuse of discretion or violation of any constitutional right. Like the federal district court in *Simpson*, the DCA properly concluded the trial court did not abuse her discretion by refusing to strike Ms. Dibari for cause.

Even assuming the trial court erred by denying the motions to

strike for cause, Petitioner has failed to demonstrate prejudice. At the time defense counsel moved to strike for cause, he still had several peremptories remaining. It is well settled that "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." *Pentecost v. State*, 545 So. 2d 861, 863 n.1 (Fla.1989). This Petitioner failed to do.

Moreover, rather than using his final four peremptories to strike the three remaining jurors he had moved to strike for cause[5], he exercised his peremptories on only two, i.e., Mr. Yiznitsky (M-19) and Mr. McIlrath (M-22), as well as jurors numbered M-21 and M-2 without striking Ms. Dibari (D-13). Thus, he was not prejudiced by the trial court's denial of his motions to strike for cause. *See Pentecost*, 545 So. 2d at 864, n.1(appellant could not demonstrate prejudice as he had peremptory challenges left and failed to exercise these challenges on the jurors he had moved to strike for cause).

Finally, in *Hill v. State*, 477 So. 2d 553 (Fla.1985), *cert. denied*, 485 U.S. 993 (1988), this court held that ""it is reversible error for a court to force a party to use peremptory challenges on persons who should have been excused for cause, provided the party subsequently exhausts all of his or her peremptory challenges and an additional challenge is sought and

[5]Mr. Saucedo (D-10) had already been stricken by the defense.

denied." Id. at 556. While Petitioner renewed his motions for cause, Petitioner was granted an additional strike after he exhausted all of his peremptory challenges. As such, by using the additional peremptory challenge granted by the court to strike Ms. Dibari, he failed to show prejudice warranting a reversal. *Williams v. State*, 755 So. 2d 714, 716-17 (Fla. 4th DCA 1999); *see Aguilera v. State*, 606 So. 2d 1194 (Fla. 1st DCA 1992).

Based on the foregoing facts and authorities, the trial court obviously was convinced these jurors could be fair and impartial, and the trial court's ability to discern whether or not these particular jurors were qualified was aided by the judge's presence in the courtroom, as she was able to observe the demeanor of the jurors while being questioned by the court and the attorneys. As such, the Fifth District properly determined that it was not an abuse of discretion for the trial court to deny the motions to strike the jurors for cause. Moreover, Petitioner has failed to demonstrate prejudice as he had peremptories remaining when he moved to strike the jurors for cause, did not use the peremptories to remove all of the allegedly objectionable jurors and was given an additional peremptory which he used to strike Ms. Dibari. Accordingly, the Fifth District's decision in this case should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this Honorable Court approve the decision of the Fifth District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief has been furnished by delivery to Brynn Newton, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114-4310, this 17th day of December, 2001.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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