

IN THE SUPREME COURT OF FLORIDA

JAMES WILLIAM HAYES, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC10-2104

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, JAMES WILLIAM HAYES, JR., the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of two volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with Appellant's statement of the case and facts.

SUMMARY OF ARGUMENT

ISSUE I

Appellant contends that the trial court's ruling on the peremptory strike of juror Haupt clearly erroneous. However, under step three of Melbourne, the assessment of the genuineness of peremptory strike relies heavily on an assessment of the credibility of an attorney. The trial judge was in the "superior vantage point" to observe and assess all the relevant circumstances pertaining to the peremptory challenge, including the tone and demeanor of the attorney when giving his reasons. Under the extremely deferential standard to the trial court's findings of fact for credibility determinations, there is no evidence of clear error in the trial court's finding that defense counsel's reason was not genuine.

ISSUE II

Appellant contends that the First District misinterpreted the clearly erroneous standard and gave full deference to the trial court's findings, thus making the standard of review impossible. However, the First District clearly analyzed the evidence that was available in the record and properly weighed it against the trial court's findings. Moreover, the First District gave proper weight to the trial court's findings because of the "superior vantage point" of the trial judge, who was in the courtroom and best able to assess defense counsel's credibility at the time of the peremptory strike. Therefore, the First

District did not misinterpret the clearly erroneous standard as impossible to overcome merely because the record does not support clear error in this case.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT'S RULING ON THE DEFENSE'S PEREMPTORY CHALLENGE WAS CLEARLY ERRONEOUS WHEN THE TRIAL COURT WAS ABLE TO VIEW AND HEAR THE CIRCUMSTANCES RELEVANT TO A CREDIBILITY DETERMINATION? (Restated)

Jurisdiction

The State reasserts its contention that there is no conflict between the First District's decision in the case at bar and Melbourne v. State, 679 So. 2d 759 (Fla. 1996). The First District clearly referenced the proper three-step process in its analysis. See Hayes v. State, 45 So. 3d 99, 103 (Fla. 1st DCA 2010). Further, the First District correctly found that the first two steps of Melbourne were satisfied. See id. As to the third step, the trial court found that Appellant's explanation for the peremptory challenge, while gender-neutral, was not genuine. The First District affirmed this ruling, finding no clear error in the trial court's assessment of defense counsel's credibility and thus the genuineness of the peremptory challenge. See id. at 104. Accordingly, while Appellant may disagree with the First District's application of Melbourne to the facts of this case, the First District properly applied the principals of law set forth in Melbourne. Therefore, there is no direct and expressed conflict, and this Court must dismiss this case for lack of jurisdiction.

Standard of Review

"[T]he appropriate standard of appellate review for determining the threshold question of whether there is a likelihood of . . . discrimination in the use of peremptory challenges is the abuse of discretion standard." Files v. State, 613 So. 2d 1301 (Fla. 1992). "The 'genuineness' of a peremptory challenge will be affirmed on appeal unless clearly erroneous." Young v. State, 744 So. 2d 1077 (Fla. 4th DCA 1999). Review under the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed. See Anderson v. Bessemer City, 470 U.S. 564, 573-74 (finding that the clear error standard does not permit reversal simply because the reviewing court would have decided the case differently). The "genuineness" determination is primarily an assessment of the attorney's credibility, and is a determination best suited to the factfinder. See Young, 744 So. 2d 1077.

Preservation

Appellant preserved this issue by arguing it to the trial court.

Argument

Appellant contends that the trial court erred by denying his peremptory challenge of Juror Haupt. During jury selection, juror Haupt stated that she had "two family members in law

enforcement, but they're out of state." She also stated that her relationships would not cause her any undue biased towards law enforcement. (SII.193). Appellant moved to back strike Juror Haupt, and the prosecutor asked for a gender neutral reason. (SI.153). Defense counsel responded:

I don't have a gender neutral reason. She has some relatives or what not in law enforcement. She really didn't answer many questions at all. She didn't say much of anything. To me, she's somewhat of an unknown quantity.

(SI.154). The prosecutor agreed that she knew law enforcement officers, but she had said it would have no bearing on her potential as a juror. (SI.154). The trial court responded:

All right. Counsel, while you've identified, we talked about - - and I'm not sure that it applies as to a gender neutral reason to strike a potential juror in this manner. She did indicate she knew two law enforcement officers, but it created no problem for her. Otherwise, she had no comments relating to this case. The State's objection?

(SI.154). The prosecutor then mentioned that the next juror in line was a female so striking the potential juror would not change the composition of the jury. (SI.155). The trial court responded that each juror had a right to serve absent a sufficient basis to exclude them. (SI.155). The trial court included Juror Haupt on the jury. (SI.156). Prior to trial, defense counsel renewed his objection arguing that the trial court had not properly followed the steps set forth in Melbourne v. State, 679 So.2d 759 (Fla.1996). The trial court responded

that it had "concluded that your reason was not genuine under the circumstances, which presumes that it was gender - - or excuse me, a gender neutral reason - - explanation." (TI.4).

The process of determining discriminatory use of peremptory challenges was detailed by the Florida Supreme Court in Melbourne v. State, 679 So. 2d 759 (Fla. 1996). The process is: 1) the party opposing the challenge must request a racial- or gender-neutral reason for the strike; 2) the proponent of the strike must present a facially gender-neutral reason; and 3) the court must determine whether the proponent's proffered reason is genuine. See id. at 764. At step three, the court's task is "not to assess the reasonableness of [the attorney's] explanation, but to determine its genuineness; that is, whether or not the stated explanation was pretextual." Id. at 764. The 4th DCA has further explained:

"A trial court must analyze a subjective issue - whether a proffered explanation for a challenge is a pretext, which means it conceals an intent to discriminate based on race. As the Supreme Court recognized, identifying the true nature of an attorney's motive behind a peremptory strike turns primarily on an assessment of the attorney's credibility. In our legal system, credibility is a matter solely within the purview of a finder of fact. For this reason, the 'genuineness' of a peremptory challenge will be affirmed on appeal unless clearly erroneous."

Young v. State, 744 So. 2d 1077 (Fla. 4th DCA 1999).

The trial judge is in a unique position as the fact finder in the courtroom to assess credibility by analyzing all the information surrounding the process of jury selection, including

the demeanor of the attorney, the atmosphere of the questioning, and any hesitancy in response to a challenge to a peremptory strike. See Files v. State, 613 So. 2d 1301, 1305 (Fla. 1992)(explaining that reviewing courts “must rely on the superior vantage point of the trial judge, who is present, can consider the demeanor of those involved, and can get a feel for what is going on in the jury selection process); United States v. Ramirez-Chilel, 289 F.3d 744, 749 (11th Cir. 2002), cert. denied 537 U.S. 114, 123 S. Ct. 850, 154 L.Ed. 2d 789 (noting that a factfinder is in best position to assess credibility and its findings should be accepted “unless it is contrary to the laws of nature, or so inconsistent or improbable that no reasonable factfinder could accept it”).

Moreover, the trial judge is presumed to be inherently fair and color-blind in assessing the genuineness of a peremptory challenge. Reed v. State, 560 So. 2d 203, 206 (Fla. 1990). Thus, the trial court’s assessment of genuineness should be given great deference. See Murray v. State, 3 So. 3d 1108, 1120 (Fla. 2009), cert denied, 130 S. Ct. 396, 175 L. Ed. 2d 273 (2009), quoting Rodriguez v. State, 753 So. 2d 29, 40 (Fla. 2000)(“[T]he most important consideration is that the trial judge actually believes that, given all the circumstances surrounding the strike, the explanation is not a pretext.”).

Further, the trial court is “not required to orally perform its ‘genuineness’ analysis, or to articulate the basis for its ruling.” Lidiano v. State, 967 So. 2d 972, 974-75 (Fla. 3rd DCA

2007); See Watson v. State, 841 So. 2d 659, 661 (Fla. 4th DCA 2003); Sharp v. State, 789 So. 2d 1211, 1213 (Fla. 5th DCA 2001). However, the weighing of additional factors beyond race may be evidence of the performance of a genuineness analysis. See Alonzo v. State, 46 So. 3d 1081, 1084 (Fla. 3d DCA 2010)(finding evidence of a genuineness analysis where the trial judge noted the additional fact that a juror was a corrections officer before making a genuineness ruling).

Here, the trial judge determined that the defense attorney's gender-neutral reason for striking Juror Haupt was not genuine. The determination of genuineness rests primarily on the judge's determination of both the credibility of the explanation offered and the credibility of the attorney. See Young v. State, 744 So. 2d at 1077. "Credibility is a matter solely within the purview of a finder of fact." Id. The trial judge had observed the voir dire process and had seen the nature of the questioning, the demeanor of the attorney, and the tone of the response to the State's objection to the strike. Thus, the trial judge had the "superior vantage point" to make the credibility determination of whether defense counsel's strike of Juror Haupt was based on discriminatory intent. See Files, 613 So. 2d at 1305.

While the State agrees that knowing someone in law enforcement may be grounds for a valid peremptory challenge, here, the issue is the genuineness of that reason. The pivotal question appears to be defense counsel's initial statement, "I don't have a

gender-neutral reason," and the tone and delivery of the subsequent reasons given. The length of time between the initial statement and the reasons given, the tone of the remarks, and the demeanor of the attorney can all drastically change an assessment of genuineness. For instance, the dissent in the First District opined that defense counsel's remark, "I don't have a gender-neutral reason," came out merely because the attorney was so surprised by the prosecutor's objection. See Hayes v. State, 45 So. 3d 99, 104 (Fla. 1st DCA 2010). While this is certainly a plausible interpretation of the record, another plausible interpretation is that defense counsel did not have a gender-neutral reason, and vacillated until he remembered that juror Haupt had indicated that she knew people in law enforcement. Under the clearly erroneous standard, a trial court's ruling should not be overturned where there is more than one plausible interpretation of the facts. See Anderson, 470 U.S. at 573-74. Therefore, the First District correctly gave the trial judge, with the benefit of being in the room to see and hear the process, tone, and demeanor of the attorney, the appropriate deference.

Based on all the evidence, including evidence such as demeanor and tone of voice that is not readily evident in the record, the trial judge determined that defense counsel's explanation of the peremptory challenge was not genuine. The trial judge considered the reasons given for the strike, and noted that the juror indicated that the fact that she knew law enforcement

officers would have no bearing on ability to serve on the jury. Moreover, the trial judge noted that she had little else to say about the case. The trial judge also responded to defense counsel's argument, "I concluded that your reason was not genuine under circumstances, which presumes that it was gender - - or excuse me, a gender neutral reason -- explanation." The court is not required to orally articulate how he came to that determination. See Lidiano, 967 So. 2d at 974-75. However, the judge was clearly weighing all of the circumstances surrounding the strike, he was performing the necessary genuineness analysis under Melbourne. See Alonzo, 46 So. 3d 1081 at 1084.

Based on an assessment of the attorney's credibility and all of the circumstances surrounding the strike at that time, the trial judge determined that the strike was not genuine. Because of the unique position of the trial judge to examine all the relevant evidence, his assessment should be given the highest deference. See Murray, 3 So. 3d at 1120. Therefore, the trial court's ruling was not clear error and the ruling should stand.

ISSUE II

WHETHER THE FIRST DISTRICT INTERPRETED THE
CLEARLY ERRONEOUS STANDARD AS REQUIRING
COMPLETE DEFERENCE TO THE CIRCUIT COURT?
(Restated)

Standard of Review

"[T]he appropriate standard of appellate review for determining the threshold question of whether there is a likelihood of . . . discrimination in the use of peremptory challenges is the abuse of discretion standard." Files v. State, 613 So. 2d 1301 (Fla. 1992). "The 'genuineness' of a peremptory challenge will be affirmed on appeal unless clearly erroneous." Young v. State, 744 So. 2d 1077 (Fla. 4th DCA 1999). Review under the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed. See Anderson v. Bessemer City, 470 U.S. 564, 573-74 (finding that the clear error standard does not permit reversal simply because the reviewing court would have decided the case differently). The "genuineness" determination is primarily an assessment of the attorney's credibility, and is a determination best suited to the factfinder. See Young, 744 So. 2d 1077.

Argument

Appellant contends that the First District Court ignored the "trial court's actual reasons for denying the strike and arbitrarily chose to rely upon defense counsel's initial statement that he did not have a gender neutral reason." (IB-

13). Thus, Appellant reasons that because the First District could not "definitively say the trial court's ruling is clearly erroneous and wholly supported by the record," the court misinterpreted the clearly erroneous standard by applying an impossible standard.

However, Appellant's argument fails on two grounds. First, the First District clearly recognized more than just the defense counsel's initial statement. Most importantly, the court noted that the record was sparse with objective evidence of the circumstances surrounding the strike. See Melbourne, 679 So. 2d at 764 n.8, (noting that relevant circumstances surrounding a peremptory challenge may include the gender make-up of the venire, prior strikes against the minority group, a strike based on a reason equally applicable to another juror, or singling out a juror). Thus, the court recognized that the "most important consideration" here is that the trial judge was present in the room and able to analyze all the relevant evidence and make a determination. See Murray, 3 So. 3d at 1120. Therefore, the First District considered additional evidence beyond just defense counsel's initial statement, and weighed it properly against the "most important consideration" in a credibility assessment. See id.

Second, the clearly erroneous standard is a difficult standard to overcome, with much deference given to the trial court's findings. See Knight v. State, 919 So. 2d 628, 632 (Fla. 3d DCA 2006)(emphasizing that trial judges are best suited to determine

genuineness of peremptory challenges and "absent clear error, appellate judges should be loathe to overturn their findings"); Ramirez-Chilel, 289 F.3d at 749 (noting that a factfinder is in best position to assess credibility and its findings should be accepted "unless it is contrary to the laws of nature, or so inconsistent or improbable that no reasonable factfinder could accept it"). However, the mere fact that the First District did not find clear error does not mean that the court misinterpreted or misapplied the clearly erroneous standard.

Moreover, contrary to Appellant's argument, the fact that the next juror in line would have been a woman or that the final jury included six women is not dispositive that defense counsel's peremptory challenge was not made with discriminatory intent. See Abshire v. State, 642 So. 2d 542 (Fla. 1994); State v. Johans, 613 So. 2d 1319, 1321 (Fla. 1993) ("A [gender]-neutral justification for a peremptory challenge cannot be inferred merely from circumstances such as the composition of the venire or the jurors ultimately seated."). Therefore, these facts do not compel a reviewing court to find the trial court's ruling clearly erroneous.

In the case at bar, the First District recognized that the superior vantage point of the trial judge **and** the absence of evidence to the contrary did not support a finding of clear error. See Hayes, 45 So. 3d at 104. The court's application of the clearly erroneous standard did not give complete deference to the trial judge, but properly weighed the deference due the

trial judge against a lack of opposing objective evidence. The fact that clear error was not found here does not imply that the First District applied an impossible standard, merely that the record did not support clear error. Therefore, the First District correctly applied the clearly erroneous standard.

CONCLUSION

Based on the foregoing, the State respectfully submits that the decision of the District Court of Appeal reported should be approved.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Gail Anderson, Assistant Public Defender by E-MAIL on June 22, 2011.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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