

IN THE SUPREME COURT OF FLORIDA

JAMES WILLIAM HAYES, JR.,

Petitioner,

v.

Case Number: SC10-2104

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW

PETITIONER'S REPLY BRIEF

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ARGUMENT IN REPLY

THE FIRST DISTRICT APPLIED AN ERRONEOUS STANDARD OF REVIEW TO THE TRIAL COURT'S RULING ON THE THIRD STEP OF THE MELBOURNE PROCEDURE.

The State contends that the trial court's denial of the defense peremptory challenge to Juror 21 was not clearly erroneous and that the First District's affirmance of that ruling correctly applied the clearly erroneous standard of review (Answer Brief at 9-11, 13-15) ("AB"). The State's argument relies almost exclusively on the trial court's assessment of credibility in determining whether or not the proffered basis for the peremptory challenge is genuine and on the deference an appellate court accords that assessment (AB at 7-8, 9, 11, 13, 14). As did the First District's decision, the State's position renders a trial court's decision regarding the genuineness of the basis for a peremptory challenge unreviewable on appeal.

In reviewing a trial court's decision on the third step of the procedure established in Melbourne v. State, 679 So. 2d 759 (Fla. 1996), this Court does not accord the trial court's credibility determination absolute deference. Rather, this Court examines the record to determine whether or not the trial court's decision was clearly erroneous. See Novell v. State, 998 So. 2d 597, 602-06 (Fla. 2008). Indeed, if the record does

not permit such an examination, "the appellate court would have no basis to determine if the trial court's decision to accept the explanation was clearly erroneous," thus "render[ing] that decision virtually unreviewable." Dorsey v. State, 868 So. 2d 1192, 1200 (Fla. 2003).

The State's position allows it to ignore what the record in Mr. Hayes' case actually reflects regarding the bases of the trial court's decision (See Petitioner's Initial Brief at 14-16). Although a trial court is not required to utter any particular words in making the genuineness determination, as the State argues (AB at 8-9), this does not mean an appellate court may ignore the words the trial court does utter.

Importantly, the State's focus on the trial court's credibility determination renders superfluous other legal principles involved in applying Melbourne. Thus, the State's position dispenses with the presumption that peremptory challenges are exercised in a nondiscriminatory manner and with the opponent's burden of proving purposeful discrimination. Melbourne, 679 So. 2d at 764 (See Petitioner's Initial Brief at 14-17).

The State argues that the First District "noted that the record was sparse with objective evidence of the circumstances surrounding the strike" and thus that the First District correctly deferred to the trial court's decision (AB at 13).

However, the record was not "sparse" regarding other relevant circumstances. The State has simply chosen to ignore them, as did the First District (See Petitioner's Initial Brief at 15-16).

Finally, the State contends, "the fact that the next juror in line would have been a woman of that the final jury included six women is not dispositive that defense counsel's peremptory challenge was not made with discriminatory intent" (AB at 14). In support of this proposition, the State cites Abshire v. State, 642 So. 2d 542 (Fla. 1994), and State v. Johans, 613 So. 2d 1319 (Fla. 1993). These cases involve the second step of the Melbourne procedure, not the genuineness determination. Abshire, 642 So. 2d 542 (Fla. 1994), and State v. Johans, 613 So. 2d at 1321. Moreover, Melbourne allows consideration of such factors in determining whether the reason given for a strike is genuine. 679 So. 2d at 764 n.8.

CONCLUSION

Based upon the arguments presented here and in Mr. Hayes' initial brief, this Court should quash the First District's decision and order a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was furnished by U.S. Mail to Trisha Meggs Pate, Assistant Attorney General, Counsel for the State of Florida, The Capitol PL-01, Tallahassee, FL 32399-1050, and to Mr. James Willams Hayes, Jr., DOC# P37534, New River-East Unit, 7819 N.W. 228th Street, Raiford, FL 32026-3000, on this _____ day of July, 2011.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Courier New, 12 point.

Respectfully submitted,

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