IN THE SUPREME COURT OF FLORIDA

TAVARES W. SPENCER, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC16-1599

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

For the purposes of this brief, Respondent relies on statement of the case and facts provided in Petitioner's Initial Brief on the Merits, except as argued herein.

SUMMARY OF ARGUMENT

The opponent of a peremptory challenge bears the burden of persuasion of establishing purposeful discrimination. The opponent cannot satisfy this burden without making a claim of pretext and presenting facts and argument supporting the claim. A trial court cannot evaluate a claim of pretext when it has not been placed on notice that such a claim exists or may be supported by the facts. Removing this preservation requirement would promote frivolous objections for strategic purposes. The opinion below did not install new procedural obstructions or preservation requirements. It merely reiterated the requirement that parties must present argument to a trial court for that argument to be considered on appeal. This Court must resolve any ambiguity regarding the preservation requirements for a claim of pretext by explicitly answering the certified question in the affirmative. Petitioner waived any claim of pretext because he failed to make proper objections and arguments to the trial court. Nevertheless, the trial court did make an explicit ruling about pretext and the reasons provided do not appear to be pretextual. Therefore, Petitioner is not entitled to any relief.

ARGUMENT

CERTIFIED QUESTION: DURING A *MELBOURNE* HEARING, WHEN A TRIAL COURT FINDS THAT THE PROPONENT'S REASON FOR A PEREMPTORY CHALLENGE IS FACIALLY NEUTRAL, IS IT THE BURDEN OF THE OPPONENT (1) TO CLAIM THE REASON IS A PRETEXT, (2) TO PLACE INTO THE RECORD THE CIRCUMSTANCES SUPPORTING ITS POSITION, AND (3) TO OBJECT IF THE TRIAL COURT'S RULING DOES NOT CONTAIN ADEQUATE FINDINGS ON THE ISSUE OF GENUINENESS?

The parties in a criminal proceeding are entitled to exercise peremptory challenges of prospective jurors as provided by Florida Rule of Criminal Procedure 3.350. "[U]se of a peremptory challenge need not be supported by a reason, so long as the challenge is not used to discriminate against a protected class of venireperson." *Busby v. State*, 894 So. 2d 88, 99 (Fla. 2004) (citations omitted). In *State v. Neil*, 457 So. 2d 481, 486-87 (Fla. 1984), this Court relied on the right to an impartial jury guaranteed by Article I, section 16 of the Florida Constitution to hold that the proponent of a peremptory challenge may be required to state the basis for its challenge if the opponent makes a valid claim of discrimination. In *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986), the United States Supreme Court relied on the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to reach a holding similar to *Neil*. In *Melbourne v. State*, 679 So. 2d 759, 764-65 (Fla. 1996), this Court outlined the current guidelines in Florida for raising, addressing, and reviewing a claim of discriminatory exercise of peremptory challenges.

The *Melbourne* Guidelines

Melbourne outlined a three-step procedure for addressing claims of discriminatory exercise of peremptory challenges:

> A party objecting to the other side's use of a peremptory challenge on racial grounds must: a) make a timely objection on that basis, b) show that the venireperson is a member of a distinct racial group, and c) request that the court ask the striking party its reason for the strike. If these initial requirements are met (step 1), the court must ask the proponent of the strike to explain the reason for the strike.
>
> At this point, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step 2). If the explanation is facially race-neutral and the court believes that, given all the circumstances surrounding the strike, the explanation is not a pretext, the strike will be sustained (step 3). The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness.

679 So. 2d at 764.

Melbourne reiterated the principles that "peremptories are presumed to be exercised in a nondiscriminatory manner" and that, "[t]hroughout this process, the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination". 679 So. 2d at 764. *Melbourne* also recognized that "the trial court's decision turns primarily on an assessment of credibility and will be affirmed on appeal unless clearly erroneous." 679 So. 2d at 764–65.

The Preservation Requirements

"In general, to raise a claimed error on appeal, a litigant must object at trial when the alleged error occurs. Furthermore,

in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003) (citations omitted). This Court has explained the purposes of these requirements as follows:

> [T]he requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually. The requirement of contemporaneous objection thus not only affords trial judges the opportunity to address and possibly redress a claimed error, it also prevents counsel from allowing errors in the proceedings to go unchallenged and later using the error to a client's tactical advantage.

F.B., 852 So. 2d at 229.

Precedent indicates that the opponent of a peremptory challenge must claim that the proffered reason for the challenge is pretextual and must support the claim with facts and argument.

"[P]eremptories are presumed to be exercised in a nondiscriminatory manner". *Melbourne*, 679 So. 2d at 764, *citing Neil*, 457 So. 2d at 486. Furthermore, "the burden of persuasion never leaves the opponent of the strike to prove purposeful racial discrimination." *Id.*, *citing Purkett v. Elem*, 514 U.S. 765, 768 (1995); *see also Batson*, 476 U.S. at 98 ("The trial court then will have the duty to determine <u>if the defendant has established</u> purposeful discrimination.") (emphasis added). One cannot overcome a presumption of propriety and satisfy a burden

of persuasion by merely standing silent. Therefore, the aforementioned well settled principles alone suggest that the opponent of a peremptory challenge must make a claim of pretext and present facts and argument to support the claim. Nevertheless, other precedent more directly indicates that the opponent of a challenge is required to make the claim and place into the record the circumstances supporting the claim.

In *Rimmer v. State*, 825 So. 2d 304, 319-21 (Fla. 2002), the defendant argued that the trial court erred by allowing a peremptory challenge because the race-neutral reason provided by the State was factually incorrect. This Court held that the defendant failed to preserve the issue because he did not renew his objection and because he did not dispute the race-neutral reason provided by the State. This Court opined, "The trial court in this instance cannot be faulted for accepting the facial reason offered by the State, especially where the State's factual assertion went unchallenged by the defense." 825 So. 2d at 321. The defendant in *King v. State*, 89 So. 3d 209, 229-31 (Fla. 2012), also argued that the trial court erred by accepting the race-neutral reason provided by the State when it was factually incorrect. This Court again held that this argument was waived because the defendant did not dispute or correct the reason provided by the State. *Rimmer* and *King* demonstrate that the opponent of a peremptory challenge bears the burden of

contesting the reason provided by the proponent and that the trial court is not required to conduct a sua sponte investigation of the reason provided by the proponent.

In *Hoskins v. State*, 965 So. 2d 1, 7-15 (Fla. 2007), the defendant argued that the trial court erred by allowing a peremptory strike of a juror because the State accepted other similarly situated jurors and the State singled out the juror with additional questions. This Court held that the "similarly situated" argument was waived with respect to jurors that were not mentioned by the defendant in a similar argument at trial and that the "singling out" argument was unpreserved because it was not raised at trial. In *King*, this Court again held that the defendant waived the "similarly situated" argument because that argument was not raised at trial. 89 So. 3d at 230. *Hoskins* and *King* further held that the defendants' failure to identify the race of other jurors precluded conclusions that the provided reasons were pretextual or that the trial courts were clearly erroneous in allowing the peremptory challenges. 965 So. 2d at 10-11; 89 So. 3d at 231. *Hoskins* and *King* demonstrate that the opponent of a peremptory challenge bears the burden of placing into the record the circumstances supporting its postion.

Federal appellate courts have held that the failure to challenge the proferred reason for a peremptory strike results in waiver of a *Batson* claim. "The impartial [trial] court must

rely on the presentation of the parties in issuing its final ruling on a *Batson* challenge because, of course, there is no independent duty on the trial court to pore over the record and compare the characteristics of jurors, searching for evidence of pretext, absent any pretext argument or evidence presented by counsel." *United States v. Vann*, 776 F.3d 746, 755 (10th Cir. 2015) (citation omitted); *see also United States v. Harris*, 15 Fed. Appx. 317, 321 (6th Cir. 2001) ("Moreover, it is the defendant's burden to rebut, to whatever extent possible, the prosecutor's reasons for exercising his or her peremptory strikes on the record at the time such reasons are proffered."). Therefore, "a failure to dispute an explanation to a *Batson* challenge results in waiver of that challenge." *Wright v. Harris County*, 536 F.3d 436, 438 (5th Cir. 2008) (citation omitted); *see also United States v. Jackson*, 347 F.3d 598, 605 (6th Cir. 2003) ("A movant's failure to argue pretext may even constitute waiver of his initial *Batson* objection.") (citations omitted). Although part of the *Melbourne* procedure may be different from the *Batson* procedure, the third step is the same under both procedures. Therefore, the failure to claim and argue that a proferred reason is pretextual during the third step of the *Melbourne* procedure would similarly result in waiver of claims or arguments of pretext or discriminatory intent.

***Hayes* has not placed a burden on the trial court to perform a genuineness analysis when the opponent of a peremptory challenge does not make a claim or argument of pretext.**

In *Hayes v. State*, 94 So. 3d 452, 455 (Fla. 2012), this Court held that the trial court erred by preventing the defendant from exercising a peremptory challenge after the defendant provided a facially gender-neutral reason for the challenge. *Hayes* held that the trial court erred because it assessed the provided reason under the standard for assessing a challenge for cause and failed to perform the correct genuineness analysis. *Id.*

Hayes included the following language:

> Therefore, where the record is completely devoid of any indication that the trial court considered circumstances relevant to whether a strike was exercised for a discriminatory purpose, the reviewing court, which is confined to the cold record before it, cannot assume that a genuineness inquiry was actually conducted in order to defer to the trial court. This same reasoning applies to instances where the record affirmatively indicates that the trial court engaged in the wrong legal analysis. Deferring to the trial court's genuineness determination on appeal when no such determination has been made invites an arbitrary result.

94 So. 3d at 463. However, this analysis was explicitly done in the context of a peremptory challenge that was disallowed after an inadequate genuineness inquiry. This Court stated:

> An appellate court's inability to review a trial court's genuineness inquiry is of particularly great concern when the trial court prohibits a party from striking a juror despite the absence of evidence of discriminatory intent. A trial court's refusal to permit a peremptory challenge is tantamount to a finding that the strike was being exercised for a discriminatory purpose. Yet, in *Melbourne*, this Court emphasized the presumption that peremptory challenges are exercised in a nondiscriminatory manner and that the burden

> of persuasion is on the *opponent* of the strike to establish support for purposeful discrimination.

Id. (emphasis in original). Thus, *Hayes* does not require trial courts to conduct a genuineness inquiry when genuineness is not contested by the opponent of a peremptory challenge. Rather, *Hayes* prevents a trial court from disallowing a peremptory challenge without a proper genuineness inquiry.

Hayes clearly reiterated that the opponent of the peremptory challenge bears the burden of establishing the factual basis for a finding of pretext and purposeful discrimination. *Hayes* further faulted the appellate court for shifting the burden to the proponent of the peremptory challenge to establish that the provided race-neutral reason was not pretextual. 94 So. 3d at 465-66. Thus, *Hayes* implicitly rejected the notion that the opponent of a peremptory challenge need not present any facts or argument to support a claim of pretext or discriminatory intent.

The certified question must be answered in the affirmative.

In light of the aforementioned precedents and the purposes of the preservation requirements, this Court must answer the certified question in the affirmative. Both this Court and the United States Supreme Court have declared that the opponent of a peremptory challenge bears the burden of persuasion of establishing purposeful discrimination. It is unfathomable that the opponent of a peremptory strike can satisfy its burden of persuasion or its obligation to preserve its argument for appeal

by simply identifying the race, gender, or ethnicity of a prospective juror and asking for a race neutral reason. Yet, this is precisely the interpretation that Petitioner requests.

Petitioner's interpretation would improperly remove the presumption of nondiscriminatory intent and shift the burden of persuasion to the proponent of the peremptory challenge to prove lack of discriminatory intent. This would place the proponent of the peremptory challenge in the absurd position of conjecturing possible arguments against his own veracity and credibility and then disproving those arguments. Petitioner's interpretation would also undermine the purposes of preservation requirements. A trial court cannot be expected to evaluate a claim of impropriety when it has not been placed on notice that such a claim exists or may be supported by the facts. Moreover, removal of the requirement to claim pretext and present argument would merely promote frivolous requests for race/gender/ethnicity neutral reasons for the strategic purpose of fishing for the possiblity of "preserving" a winning appellate argument should the trial result in an undesirable outcome. Since opponents of peremptory challenges would be absolved of any requirement to suspect, claim, or argue discriminatory intent, the *Melbourne* procedure would be further reduced to simple gamesmanship.

Petitioner asserts that the opinion of the Second District Court of Appeal installed "procedural roadblocks" to prevent

review of the merits of a claim of discrimination. However, a claim of discrimination cannot be reviewed when it has never been made. Moreover, the merits of such a claim cannot be considered when there are no facts to weigh. The opinion below did not install "procedural roadblocks" or "new preservation requirements". It merely upheld the requirement that parties must present argument to a trial court before they expect that argument to be considered on appeal. Petitioner also criticizes the breakdown of the *Melbourne* procedure into twelve components, characterizing it as a scripted dialogue to which the opponent of a peremptory strike must adhere. However, the opinion below never stated that the listed steps were mandatory. Thus, no additional hoops, hurdles, barriors, or roadblocks were erected.

Since this Court has repeatedly held that opponents of peremptory challenges waived specific arguments regarding the genuineness of a provided reason because they failed to present those arguments to the trial courts, it is clear that the opponent of a peremptory challenge must present some argument supporting its claim that a provided reason is not genuine. Nevertheless, this Court must provide additional clarity by answering the certified question in the affirmative and explicitly holding that, during the third step of the procedure, the opponent of the peremptory challenge bears the burden of claiming that the provided reason is a pretext, presenting the

circumstances supporting the claim, and objecting if the trial court's analysis or ruling is incorrect or inadequate.

Application to This Case

In this case, Petitioner's counsel objected to the State's exercise of peremptory challenges on two African-American prospective jurors, Johnson (16) and Thermidor (11). With respect to Johnson, the prosecutor stated that she was stricken because she had previously been arrested, Petitioner's counsel confirmed that was correct, the trial court allowed Petitioner's counsel to respond, and Petitioner's counsel stated, "I have no response", and the trial court found that there was no pretext. (T166-67) With respect to Thermidor, the prosecutor stated that he was stricken because he had a friend that had been arrested, Petitioner's counsel responded that Thermidor also had a friend that had been killed but said he could be fair and impartial, and the trial court stated that the proper standard was whether there was pretext and found that there was no pretext. (T169)

With respect to Johnson, Petitioner clearly waived any claim of pretext and any argument in support by stating "I have no response". With respect to Thermidor, Petitioner contested the provided reason but presented improper argument. Petitioner presented facts relevant to analysis of a cause challenge when he asserted that Thermidor stated that he could be fair and impartial. Moreover, Petitioner addressed the reasonableness of

the challenge rather than the genuineness when he pointed out that Thermidor also had a friend that had been killed, apparently implying that he would be a favorable juror for the State. "The court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness." *Melbourne*, 679 So. 2d at 764 (citation omitted). Since Petitioner failed to present a proper genuineness argument, he waived the argument.

Despite Petitioner's failure to claim or argue pretext, the trial court still conducted the proper analysis under step three of the *Melbourne* procedure. After finding the reasons provided by the prosecutor to be facially race-neutral, the trial court explicitly found that the provided reasons were not pretextual. Not only did the trial court allow and hear Petitioner's responses after the prosecutor stated his reasons, it obviously observed the entire voire dire and jury selection process and was aware of some circumstances relevant to the genuineness of the prosecutor's provided reasons. Thus, even if Petitioner was not required to make a claim of pretext to trigger a ruling under step three, he cannot claim that the trial court failed to consider whether the prosecutor's reasons were pretextual. Thus, Petitioner cannot establish clear error by the trial court.

Petitioner's Initial Brief also applies incorrect analysis to the claim of pretext. First, Petitioner faults the prosecutor for not thoroughly explaining why he would strike a juror that

had previously been arrested. Petitioner further implies that the reason should be nearly tantamount to the reason for a cause challenge by stating that an appropriate reason would be that the prosecutor did not believe the juror's statement that she did not harbor a grudge against the State. However, "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible." *Purkett*, 514 U.S. at 767-68. Petitioner then questions why a prosecutor would inquire whether jurors had friends or family members who had been arrested. The lack of requirement for persuasiveness or plausibility of reasons for a peremptory challenge nothwithstanding, Petitioner need look no further than the record in this case for the answer. Prospective juror Greene (1) stated that she had a cousin who was arrested and treated unfairly and acknowledged that those circumstances could possibly be on her mind when considering evidence. (T114-15) Prospective juror Dorman (50) similarly stated that he had a friend who was arrested and treated unfairly and also acknowledged that those circumstances might be on his mind when considering evidence. (T115) Thus, the prosecutor's line of questioning was clearly appropriate.

Finally, the limited facts on the record relevant to a genuineness analysis tend to show that the prosecutor's stated reasons were not pretextual. "Relevant circumstances may include–but are not limited to–the following: the racial make-up

of the venire; prior strikes exercised against the same racial group; a strike based on a reason equally applicable to an unchallenged juror; or singling the juror out for special treatment." *Melbourne*, 679 So. 2d at 764 (citation omitted).

The full racial makeup of the venire is unknown because Petitioner failed to place those facts on the record. However, the following jurors and alternates were selected: Hill (10), Buyi (18), Overdoff (21), Ewell (22), Kelly-White (26), Galley (27), Czerwik (34), and Feaster (40). (T169-71)

The prosecutor exercised eight[1] peremptory challenges for the deliberating jury and two peremptory challenges for the two alternates. Since Petitioner only objected to two strikes, it can be fairly assumed that the remaining eight peremptorily challenged were probably not African-American. The exercise of only two out of ten peremptory challenges against African-Americans does not tend to indicate discriminatory intent.

Moreover, twenty-four jurors stated either that they had previously been arrested or had a friend or family member that had been arrested, specifically: Greene (1), Shoemaker (2), Tillman (3), Harrell (4), Wallace (6), Duncan (7), Nelson (8),

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[1] Petitioner points out that this exceeded the six allocated by the trial court. However, the parties were actually entitled to ten peremptory challenges because Petitioner was charged with a felony punishable by life. *See* Fla. R. Crim. P. 3.350(a)(1).

Titcomb (9), Thermidor (11), Clendening (12), Howard (14), Johnson (16), Howell (20), Salzer (23), Adkins (28), Malchick (33), Czerwik (34), Collins (36), Feaster (40), Rauch (43), Hearn (47), Longwell (49), Dorman (50), and Crowley (number unspecified). (T98-115) Eight of these similarly situated jurors were challenged for cause by the State, specifically: Greene (1), Tillman (3), Nelson (8), Titcomb (9), Clendening (12), Salzer (23), Rauch (43), and Hearn (47). (T157-62) One of the twenty-four similarly situated jurors, Howell (20), was challenged for cause by the defense without objection from the State. (T163) Thus, these nine similarly situated jurors were removed from the pool before the exercise of peremptory challenges. Nine of the ten peremptory challenges by the prosecutor were used on jurors that had been arrested or had friends or family members that had been arrested, specifically: Shoemaker (2), Harrell (4), Wallace (6), Duncan (7), Thermidor (11), Howard (14), Johnson (16), Adkins (28), and Collins (36). (T164-71) Prospective jurors Hearn (47), Longwell (49), and Dorman (50) were never reached during the jury selection process. It is unclear whether prospective juror Crowley was stricken or was never reached, but he did not serve on the jury. None of the six deliberating jurors stated that they had been arrested or had a friend or family member that had been arrested. While the two alternate

jurors did make those statements, they could not be challenged by the prosecutor because they became alternates only after the prosecutor exercised his allocated peremptory challenges on other alternates that were similarly situated. Since the pattern of striking similarly situated jurors is clearly apparent on the record, the prosecutor's provided reasons appear genuine.

Finally, prospective jurors Johnson and Thermidor were not asked any questions by the prosecutor that were not asked of other jurors that had been arrested or had friends or family members that had been arrested. (T104-05; T113) Therefore, the record does not demonstrate that Johnson and Thermidor were singled out for special treatment by the prosecutor.

Petitioner failed to preserve claims of pretext or arguments related to genuineness by failing to present such claims or arguments to the trial court. Even if Petitioner adequately preserved such claims or arguments, the trial court made an explicit ruling regarding pretext and the record indicates that the reasons provided by the prosecutor were not pretextual. Therefore, Petitioner is not entitled to any relief.

CONCLUSION

Based on the foregoing discussions, Respondent respectfully requests that this Honorable Court answer the certified question in the affirmative and approve the opinion below.

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to Karen M. Kinney, Public Defender's Office, Polk County Courthouse, P.O. Box 9000 – Drawer PD, Bartow, FL 33831, kkinney@pd10.state.fl.us, appealfilings@pd10.state.fl.us, mjudino@pd10.state.fl.us, by e-mail on December 19, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,

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