IN THE SUPREME COURT OF FLORIDA

CLARENCE HILL,

Appellant,

v.

CASE NO. 63,902

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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I PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "AB". Other references will be as denoted in appellant's initial brief.

This reply brief is directed solely to the state's "procedural default" argument as to Issue I, concerning the excusal for cause of two prospective jurors in violation of the criteria set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968). With regard to the merits of that issue, and with regard to the remaining points on appeal, appellant will rely on the arguments advanced in his initial brief.

II ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN EXCUSING FOR CAUSE PROSPECTIVE JURORS BONNER AND BONDURANT, SINCE NEITHER JUROR MADE IT UNMISTAKABLY CLEAR THAT SHE WOULD AUTOMATICALLY VOTE AGAINST THE IMPOSITION OF CAPITAL PUNISHMENT REGARDLESS OF THE CIRCUMSTANCES, AND SINCE THE TRIAL COURT EMPLOYED AN INCORRECT STANDARD OF LAW IN DETERMINING WHETHER THE JURORS SHOULD BE EXCUSED, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, AND FLORIDA STATUTES 11913.03 AND 913.13.

The state, apparently recognizing that it has no argument on the merits, has advanced a manipulative "procedural default" argument, notwithstanding the fact that defense counsel did exactly what Florida case law requires to preserve a Witherspoon issue. Fla.R.Cr.P. 3.320 provides that "A challenge to an individual juror may be oral. When a juror is challenged for cause the ground of the challenge shall be stated." In the present case, the prosecutor, in challenging Mrs. Bonner for cause, stated, "Mrs. Bonner had quite a bit of problem. She said she couldn't recommend under any circumstances because of her religious feelings" (R 336-37). Defense counsel disagreed with the prosecutor's characterization, "I'm not sure that's what she said, Your Honor. I think there is a communication problem right there. She said she had some religious problems with it, but again she was acting like a person facing the decision for the first time" (R 337). The trial court ruled, "I have unequivocally noted she is unsure if she could recommend death in any case. Based upon her conviction and that is a straight out of the textbook influence on the penalty phase which justifies a challenge for cause, so that challenge is granted" (R 337). Defense counsel requested "an opportunity to voir dire Mrs. Bonner about any equivocation she may have because we did not go into that" (R 337). The trial court refused the request, saying, "You both had an opportunity to voir dire. Again,

I am not going to pursue the matter any further with her" (R 337-38). Defense counsel objected to the exclusion for cause of Mrs. Bonner (R 340). At the close of the bench conference, on the basis of his ruling on the state's challenge for cause, the trial court excused Mrs. Bonner (R 346, 350). [The sequence of events with regard to Ms. Bondurant, the other juror whose exclusion for cause is challenged on appeal, was essentially the same (R 339-40, 346, 350)].

In Maggard v. State, 399 So.2d 973, 975 (Fla. 1981), the defendant claimed that the exclusion for cause of a prospective juror because of his views on capital punishment was a denial of due process which entitled him to reversal even though he did not object at the time of trial. This Court, in rejecting that contention, said:

> If a defendant does not want a prospective juror to be excused on the basis of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), he should make his objection known before the juror is excused. This is not an unreasonable requirement in view of the fact that it is certainly possible that the defendant himself does not want the particular juror to serve and is perfectly content to have the juror excused for cause by the court so that he will not have to use one of his peremptory challenges. Additionally, if the defendant were allowed to raise this point for the first time on appeal, he would be in a position to "sandbag" the trial court and the State by giving the appearance by his silence that he concurs in the court's excusal for cause of a particular juror. He could then proceed, awaiting the outcome of the trial, secure in the knowledge that if he receives the death sentence it would be set aside on appeal. We reaffirm our prior holdings in Brown v. State, 381 So.2d 690 (Fla. 1980), that where no objection is made before the trial court, defendant is in no position to raise this point on appeal.

Accord, Rose v. State, 425 So.2d 521, 524 (Fla. 1982).

In Paramore v. State, 229 So.2d 855, 858 (Fla. 1969), this Court stated:

> If defendant objects to a prospective juror being excused he should make his objection before the juror is excused. Ellis v. State, 25 Fla. 702, 6 So. 768 (1889). When these three prospective jurors expressed their convictions against the infliction of the death penalty, appellant's attorney made no effort to qualify them for service. Perhaps he did not want them for some other reason. It was not the duty of the trial court to take

> other steps toward attempting to qualify the veniremen, and the Witherspoon case, supra, should not be construed as imposing this additional duty upon the trial court in the absence of any expression of a desire by defense counsel to keep the prospective jurors. Pittman v. State, 434 S.W.2d 352 (Tex.Cr.App. 1968). See also State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968). The appellant is in no position to complain in the instant case because no objection was interposed, nor did defense counsel attempt to clarify the juror's attitude as it related to his or her ability to decide the issues impartially.

In the present case, when the state challenged Mrs. Bonner for cause and asserted (inaccurately) that "[s]he said she couldn't recommend under any circumstances because of her religious feelings", defense counsel took issue with the prosecutor's characterization of her statements. After the trial court granted the state's challenge for cause, defense counsel requested an opportunity to further examine Mrs. Bonner on voir dire with regard to her equivocation [i.e. to clarify the juror's attitude as it related to her ability to decide the issues impartially, see Paramore v. State, supra]. And after the trial court denied this request, telling defense counsel that both attorneys had had an opportunity to examine Mrs. Bonner and that he was not going to pursue the matter any further, defense counsel (in the face of these adverse rulings) specifically noted his objection to the exclusion for cause of Mrs. Bonner, before the juror was excused.

Clearly, under established Florida precedent, the improper excusal of Mrs. Bonner is fully preserved for appellate review. Paramore v. State, supra; Brown v. State, 381 So.2d 690, 693-94 (Fla. 1980); Maggard v. State, supra; Rose v. State, supra. The state, in arguing to the contrary, is asking for a manipulative finding of procedural default in order to deprive appellant of his right to review. See Silverstein v. Henderson, 706 F.2d 361, 367-68, n.11 (2d Cir. 1983). It has long been recognized, however, that novelty or hypertechnicality in the application of procedural requirements cannot be permitted to thwart review applied for by those who, in justified reliance on prior decisions,

seek vindication in state courts of their federal constitutional rights. See NAACP v. Alabama ex rel Flowers, 377 U.S. 288, 301 (1964); Wright v. Georgia, 373 U.S. 284, 288-91 (1963); Staub v. Baxley, 355 U.S. 313, 318-20 (1958); Breest v. Perrin, 655 F.2d 1, 2-3 (1st Cir. 1981); Silverstein v. Henderson, supra. The state's reliance on Lucas v. State, 376 So.2d 1149 (Fla. 1979), is particularly misplaced. First of all, Lucas is a discovery violation case (where the burden is on the complaining party to properly raise the issue in order to trigger a Richardson[1] inquiry), while the instant case involves a challenge for cause to a prospective juror, in which the burden is on the party seeking to excuse the juror, in this case the state, to establish that one or more of the statutory grounds exists. Fla.R.Cr.P. 3.320, see Fla.Stat.§§913.03 and 913.13. The party wishing to keep the juror is required to make his objection known before the juror is excused, as is made clear in Paramore, Brown, Maggard, and Rose; and defense counsel plainly did so. Moreover, the holding in Lucas was that while defense counsel did bring the state's non-compliance with the discovery rule to the attention of the trial court, he did not interpose an objection. See Bush v. State, ___ So. 2d ___ (Fla. 1984) (9 FLW 504) (citing Lucas for the proposition that a Richardson inquiry is necessary only when there is a discovery violation and an objection based on the alleged violation). In the present case, in contrast, defense counsel disagreed with the prosecutor's assertion that Mrs. Bonner said she couldn't recommend the death penalty under any circumstances, unsuccessfully requested an opportunity for further voir dire examination with regard to her equivocation, and finally (after the trial court refused to pursue the matter any further, but before the juror was excused) objected to her exclusion for cause.

In Wainwright v. Sykes, 433 U.S. 72 (1977), the United States Supreme Court

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[1] Richardson v. State, 246 So.2d 771 (Fla. 1971)

held that a state prisoner's non-compliance with an established "contemporaneous objection rule" (he had failed to challenge the admissibility of his confession, either prior to trial, as required by Fla.R.Cr.P. 3.190(i), or at trial), precluded federal habeas corpus review of his claim that his confession was involuntary. In discussing the legitimate objectives of contemporaneous objection requirements, the Court observed, inter alia (433 U.S. at 89):

> An objection on the spot may force the prosecution to take a hard look at its hole card, and even if the prosecutor thinks that the state trial judge will admit the evidence he must contemplate the possibility of reversal by the state appellate courts or the ultimate issuance of a federal writ of habeas corpus based on the impropriety of the state court's rejection of the federal constitutional claim.

Here, it was the prosecutor who chose to challenge prospective jurors Bonner and Bondurant for cause. The state insinuates throughout its argument on appeal that it was somehow defense counsel's fault that the trial court excluded these jurors in violation of Witherspoon, when in fact it was the state which moved for the jurors' exclusion and it was the state which mischaracterized the jurors' statements.[2] In attempting (and succeeding over defense objection) to have the jurors excluded for cause, the state certainly must, or should, have "contemplated

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[2] The prosecutor, as previously discussed, stated as his ground for challenging Mrs. Bonner that "[s]he said she couldn't recommend under any circumstances because of her religious feelings" (R 336-37), which (as defense counsel argued below and as the state now concedes on appeal (see AB 18)) is not what she said at all. In fact, when the prosecutor asked her if her opinion about the death penalty was such that she could never recommend it, she replied, "No, I can't say that" (R 259). In challenging Ms. Bondurant, the prosecutor stated as his ground, "[s]he stated quite equivocally [sic] she cannot assure the Court she can follow the Court's instructions" (R 339-40). Defense counsel Loveless said he did not recall her saying that, and defense counsel Terrell said, "We got the impression she was equivocating and was not sure what she could do under the circumstances much like a person confronted with a situation for the first time should do. I suspect she said she could follow the law" (R 340). In point of fact, Ms. Bondurant was equivocating on her ability to recommend a sentence of death, saying at one point that she believed she could (R 255) and at another point that she had reservations and didn't think she could (R 263-64). With regard to her ability to follow the court's instructions, Ms. Bondurant was asked by the prosecutor, "What we are trying to find out, if you can give the State of Florida and the defendant a fair trial, and assure His Honor that you will follow the law in this case?" (R 255). Ms. Bondurant replied, "I will follow the law" (R 255).

the possibility of reversal'' in the event that their exclusion violated the criteria of Witherspoon v. Illinois. See Wainwright v. Sykes, supra, 433 U.S. at 89. This is particularly true in the instant case, where defense counsel not only objected to the exclusion of the jurors, but also took issue with the mischaracterizations of the jurors' testimony as stated by the prosecutor, and requested an opportunity to further examine the jurors to clarify any equivocation or ambiguity. The state's reliance on a "procedural default" argument under these circumstances is spurious. The state has apparently conceded that at least one of the jurors in question, Mrs. Bonner[3], never made it unmistakably clear that she would vote against the death penalty without regard to the evidence (see AB 18). That being the case, the exclusion of this juror for cause, over defense objection, requires reversal of appellant's death sentence[4]. Witherspoon v. Illinois, 391

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[3] While the state makes no similar concession as to Ms. Bondurant, appellant maintains his position that she, too, never made it unmistakably clear that she would vote against the death penalty without regard to the evidence. See appellant's initial brief at p.16-18.

[4] The state in its answer brief has asked this Court to overrule Chandler v. State, 442 So.2d 171 (Fla. 1983), which holds, consistently with Davis v. Georgia, 429 U.S. 122 (1976), that removal for cause of a juror on grounds broader than those constitutionally permissible under Witherspoon cannot be sanctioned as "harmless error", regardless of whether the state might have peremptorily challenged the juror. The state suggests no affirmative reason why the holding of Chandler should be overruled [Contrast Grijalva v. State, 614 S.W. 2d 420, 424-25 (Tex.Cr.App.1980), quoted in appellant's initial brief at p.15-16, which cogently points out why the existence of remaining peremptory challenges does not render the Witherspoon error harmless]; instead, the state merely argues that Davis does not compel the conclusion reached in Chandler because the dissenting opinion in Davis indicates that in that case it was "unclear whether the State was entitled to another peremptory challenge" (AB 21). In Chandler itself, however, this Court recognized, "As noted in a dissenting opinion by Justices Blackmun and Rehnquist and Chief Justice Burger, the plain language of the majority in Davis precludes application of a harmless-error test." Other appellate courts, including the Fifth and Eleventh federal circuits and the Supreme Court of Georgia, have similarly concluded, based on the plain meaning of Davis, that the exclusion of even one prospective juror in violation of Witherspoon requires reversal of any subsequently imposed death sentence, regardless of whether an available peremptory challenge might have reached the juror. See Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979), adhered to ~~en banc~~ 626 F.2d 396 (5th Cir. 1980); Hance v. Zant, 696 F.2d 940, 956 (11th Cir. 1983); People v. Szabo, 447 N.E.2d 193, 207 (Ill. 1983); White v. State, 674 P.2d 31, 36 (Okla.Cr. 1983); Blankenship v. State, 280 S.E.2d 623 (Ga. 1981).

U.S. 510 (1968); Davis v. Georgia, 429 U.S. 122 (1976); Chandler v. State, 442 So.2d 171 (Fla. 1983); Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), adhered to en banc, 626 F.2d 396 (5th Cir. 1980). Appellant further submits that, for the reasons discussed in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D.Ark. 1983), he is entitled to a new trial as well.

III CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court grant the following relief:

Reverse the conviction and death sentence and remand for a new trial [Issues I, II, III, IV, V, VI, VII, X, XI, XII].

Reverse the death sentence and remand for a new penalty proceeding before a newly empaneled jury [Issue I (alternative relief), VIII, IX, XIII].

Reverse the death sentence and remand for resentencing by the trial court [Issues XIV, XV].

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERT FY that a copy of the forego-ng has been furnishe by hand to Assistant Attorney General John Tiedemann, The Capitol, Tallahassee, Florida; and by mail to Mr. Clarence Hill, #089718, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 14 day of December, 1984.

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