

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC12-33

THE STATE OF FLORIDA,

Petitioner,

vs.

HECTOR GARCIA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. Respondent, Hector Garcia, was the defendant in the trial court and the appellant in the Third District Court of Appeal. The parties shall be referred to as they stand in this Court. Attached to this brief is the appendix, paginated separately and identified by “A.”

STATEMENT OF THE CASE AND FACTS

On appeal from a conviction and sentence for burglary after a jury trial, the defendant raised an issue under *Melbourne v. State*, 679 So.2d 759 (Fla. 1996). Defense counsel had attempted to exercise a peremptory challenge with respect to Juror Runno. Upon objection by the State and a request for a race-neutral reason, defense counsel proffered that the juror had prior jury service. The trial court accepted that as a race neutral reason, but proceeded to find that it was not a genuine reason:

There were four other jurors that had participated in jury service; no mention of their prior jury service was used. Specifically, I will point to Cartotto, who is now our alternate on this jury, defense accepted Mr. Cartotto, without mention of his prior jury service.

So, the court is finding that it is not a genuine purpose for a strike...

(A. 2-3). The trial court record, as noted by the Third District below, reflected that it was undisputed that juror Runno was Hispanic. (A. 4).

The Third district found that the trial court failed to conduct an adequate inquiry into genuineness under *Melbounre*:

The circumstances did not indicate that the reason offered for the strike was pretextual or that it would have some prohibited discriminatory intent or effect, and the trial court did not require the State to meet its burden to establish that reason offered was not genuine. The record is simply devoid of any “relevant circumstances” upon which to find the defense’s stated reason for the strike pretextual or other than genuine.

(A.6).

With respect to the trial court’s finding that the challenge of juror Runno was pretextual because a similarly situated juror, Cartotto, had not been stricken by defense counsel, the Third District stated:

Although defense counsel accepted Mr. Cartotto to serve as an alternate juror, and Mr. Cartotto had previously served on a jury, the record did not establish Mr. Cartotto’s ethnicity; accordingly, the fact that he was accepted to serve and Ms. Runno was not does not establish pretext.

(A.). As a result, the Third District reversed and remanded for new trial.

The State has sought discretionary review of the Third District’s decision, and the Third District, on January 5, 2012 granted a stay of mandate pending further review in this Court.

SUMMARY OF ARGUMENT

The decision of the Third District below expressly and directly conflicts with this Court’s decision in *Rodriguez v. State*, 753 So.2d 29 (Fla. 2000), with respect to the question of which party bears the burden of demonstrating the race of venire

member when that individual is being used for the purpose of determining whether an attorney was treating other similarly situated jurors in the same manner.

ARGUMENT

PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW MUST BE GRANTED BECAUSE THE THIRD DISTRICT COURT OF APPEAL'S DECISION DIRECTLY OR EXPRESSLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.

This Court has discretionary jurisdiction to review this issue under Article V, Section 3(b) (3) and (4) of the Florida Constitution. This Court should invoke its discretionary review power to review the Third District Court of Appeal's decision in the instant case *Rodriguez v. State*, 753 So.2d 29 (Fla. 2000).

The trial court in Garcia covered step three of *Melbourne* and noted for the record:

As far as the peremptory of the defense related to Runno's jury service, the defense had stated that they had wanted to strike Runno because of prior jury service...while that's a race neutral reason for a strike, if this case does go to appeal that the Court is finding that not to be a genuine reason. There were four other jurors that had participated in jury service, no mention of their prior jury service was used. Specifically, I will point to Cartotto, who is now our alternate on this jury, defense accepted Cartotto, without mention of his prior jury service.

(A. 3).

Thus, the court did engage in genuineness determination. In concluding the strike was not genuine, the trial judge also determined that the opponent, the state,

had carried its burden of proving purposeful discrimination. It is the responsibility of the party objecting to the peremptory to establish the race, ethnicity, or gender of the juror in question. *Rodriguez*. The Third District rejected the trial court's reliance on juror Cartotto to establish the lack of genuineness of the peremptory challenge. That conclusion conflicts with *Rodriguez*.

The instant case is in direct and express conflict with the Florida Supreme Court in *Rodriguez v. State*, 753 So.2d 29 (Fla. 2000). In *Rodriguez*, the defendant attempted to exercise a peremptory challenge, and, during a *Melbourne* inquiry, the court found that the reasons were not race neutral. During the genuineness inquiry, the defendant compared his attempt to strike the jurors at issue with a strike previously exercised on another, allegedly similarly situated juror. On appeal, this court held that the defendant could not make such an argument, because the record did not establish the race of the other juror who was alleged to be similarly situated: "On this record, we cannot say that the trial court's ruling was clearly erroneous. This is especially true given that we cannot determine the absence of pretext where the similarly situated venireperson used by Rodriguez to support his argument was never identified as Hispanic. *Cf. Davis v. State*, 691 So.2d 1180 (Fla. 3d DCA 1997) (failure to identify race of venireperson makes it impossible for appellate court to review question of pretext). 753 So.2d at 40-41.

Defense counsel in *Rodriguez* attempted to exercise a peremptory challenge against a Hispanic venireperson. The defense justified the challenge by stating the venireperson had been arrested and eventually had the charges dropped. *Id.* at 39. The trial court determined that the explanation was racially motivated and pretextual because others on the panel who were similarly situated were not challenged. *Id.* at 40. The court noted that peremptory challenges are presumed to be exercised in a nondiscriminatory manner, but the trial court's decision, which turns primarily on an assessment of credibility, will be affirmed on appeal unless clearly erroneous. *Id. citing Melbourne v. State*, 679 So.2d 759 (Fla. 1996). In the end, Rodriguez's conviction was affirmed.

What emerges from this Court's opinion in *Rodriguez* is that the burden of demonstrating the race or ethnicity of jurors alleged to have been similarly situated for genuineness analysis rests on the party aggrieved by the trial court's order, the party seeking review based upon an alleged error on the part of the trial court. When the trial court either accepts or rejects a comparison to another juror, the trial court's acceptance or rejection of that comparison cannot be challenged on appeal when the aggrieved party has failed, in the trial court, to preserve the issue through the identification of the race of that other juror.

Thus, in the instant case, when the trial court relied on the comparison to juror Cartotto, the defendant, on appeal, cannot challenge the court's reliance on

that comparison without having established Cartotto's race. The trial court may well have had access to information, such as juror questionnaire forms, which would have established race or ethnicity, even though such matters did not appear in the transcript on appeal.

In the instant case, it was the defense attorney who established the ethnicity of Runno, the juror they wished to strike. The court noted that Cartotto, who became the alternate, also had jury experience. *Garcia v. State*, 75So.3d 871, 874 (Fla. 3d 2011). Similar to *Rodriguez*, the race or ethnicity of Cartotto was not established during the voir dire proceedings. In direct and express conflict to this Court's ruling in *Rodriguez*, the Third District ruled that the conviction was to be reversed because of the lack of record. *Id.* at 875. This Court reiterated the point that "we cannot determine absence of pretext where similarly situated venireperson used to support argument that Defense challenge was not pretextual was never identified as Hispanic. *Hoskins v. State*, 965 So.2d 1, 11(Fla. 2007).

By rejecting the trial court's reliance on the comparison to Cartotto due to the absence of record indicia of the ethnicity of Cartotto, the Third District transferred the burden of making such a demonstration from the aggrieved party seeking review on appeal to the State, the party that prevailed on the issue in the trial court. The Third District's treatment of the burden for establishing ethnicity of

similarly situated jurors is in express and direct conflict with the decision of this Court in *Rodriguez*.

In short, this Court has held that the burden of demonstrating race or ethnicity rests on the party raising the issue on appeal, and that party, must take steps, at the trial court level, to ensure that the trial court record will support the argument which the appellant wishes to make on appeal. The Third District's opinion in this case expressly and directly conflicts with *Rodriguez*, as the Third District has transferred that burden to the party that prevailed on the issue in the trial court.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Petitioner respectfully requests that this Court grant discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner’s Brief of Jurisdiction was mailed to Robert Kalter, Assistant Public Defender, the Office of the Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida, 33125, this ____th day of February 2012.

JOANNE DIEZ
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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and is double-spaced and typed in Times New Roman 14.

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APPENDIX