

2021 WL 1897064

District Court of Appeal of Florida, Third District.

Earl BRANNON, Appellant,

v.

The STATE of Florida, Appellee.

No. 3D20-175

Opinion filed May 12, 2021.

Synopsis

Background: Following the denial of his attempted peremptory strike of a potential juror during jury selection, defendant was convicted in the Circuit Court, 11th Judicial Circuit, Miami-Dade County, Spencer Multack, J., of two counts of criminal trespass and one count of resisting arrest without violence. Defendant appealed.

Holdings: The District Court of Appeal, Scales, J., held that:

[1] defendant proffered facially race-neutral reason under *Melbourne v. State*, 679 So. 2d 759, for exercising peremptory strike on prospective juror who was of Hispanic descent; and

[2] record did not support trial court's determination that proffered race-neutral reason was not genuine.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Jury Selection Challenge or Motion.

West Headnotes (14)

[1] **Jury ⇌ Peremptory challenges**

Under *Melbourne v. State*, 679 So. 2d 759, 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, and if these

initial requests are met (step 1), the court must ask the proponent of the strike the reason for the strike.

[2] **Jury ⇌ Peremptory challenges**

At step 2 of the *Melbourne v. State*, 679 So. 2d 759, framework for addressing a party's objection to another party's use of a peremptory strike for alleged racially motivated reasons, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation.

[3] **Jury ⇌ Peremptory challenges**

At step 3 of the *Melbourne v. State*, 679 So. 2d 759, framework for addressing a party's objection to another party's use of a peremptory strike for alleged racially motivated reasons, if the proffered race-neutral explanation for the strike 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; the court's focus in step 3 is not on the reasonableness of the explanation but rather its genuineness.

[4] **Jury ⇌ Peremptory challenges**

If the proffered race-neutral reason for a peremptory strike of a prospective juror is facially race neutral, *Melbourne v. State*, 679 So. 2d at 764, step 3 requires the trial court to determine whether the proffered race-neutral reason is merely a pretext hiding an underlying unlawful discriminatory purpose.

[5] **Jury ⇌ Peremptory challenges**

If the trial court, in its inquiry at step 2 of the *Melbourne v. State*, 679 So. 2d 759, framework for addressing a party's objection to another party's use of a peremptory strike for alleged racially motivated reasons, determines that the proffered reason is not race-neutral, then

the trial court is compelled to disallow the strike and need not proceed to Melbourne's step 3 analysis of pretext.

[6] **Jury** ⇌ Peremptory challenges

In its genuineness determination at step 3 of the *Melbourne v. State*, 679 So. 2d 759, framework for addressing a party's objection to another party's use of a peremptory strike for alleged racially motivated reasons, the trial court must satisfy itself that the proffered race-neutral explanation for the strike is not a pretext.

[7] **Jury** ⇌ Peremptory challenges

The factors relevant to the trial court's genuineness inquiry at step 3 of the *Melbourne v. State*, 679 So. 2d 759, framework for addressing a party's objection to another party's use of a peremptory strike for alleged racially motivated reasons, during which the court determines whether the proffered race-neutral explanation for the strike is pretextual, include the racial make-up of the venire, prior strikes exercised against the same racial group, or singling out the juror for special treatment.

[8] **Criminal Law** ⇌ Summoning; impaneling, or selection of jury

When reviewing the trial court's *Melbourne v. State*, 679 So. 2d 759 step 2 determination of whether the proffered reason for a peremptory strike is race-neutral, an appellate court simply reviews the facial neutrality of the reason.

[9] **Criminal Law** ⇌ Selection and impaneling

An appellate court reviews the trial court's ultimate determination regarding whether a proffered race-neutral reason for the peremptory strike of a prospective juror was pretext for unlawful discrimination primarily on an assessment of credibility, therefore implicating the abuse of discretion standard.

[10] **Criminal Law** ⇌ Jury selection

Notwithstanding the deferential standard applied, a trial court's determination that a peremptory strike of a prospective juror was pretext for unlawful discrimination will be reversed by the appellate court if there is no record support for the trial court's finding.

[11] **Jury** ⇌ Peremptory challenges

Throughout the *Melbourne v. State*, 679 So. 2d 759, framework for addressing a party's objection to another party's use of a peremptory strike for alleged racially motivated reasons, the burden of proving purposeful discrimination never leaves the opponent of the strike, and the exercise of a peremptory challenge is presumed to be nondiscriminatory.

[12] **Jury** ⇌ Peremptory challenges

The objector to a peremptory strike of a prospective juror on the ground the strike was made for racially motivated reasons has a heavy burden to show that the peremptory strike is being sought solely because of the potential juror's race.

[13] **Jury** ⇌ Peremptory challenges

Defendant's stated rationale for exercising peremptory strike on prospective juror who was of Hispanic descent, namely that juror's statement during voir dire, that he was once pulled over by a police officer and issued a ticket for a broken taillight, and that he thereafter immediately repaired the taillight and paid the ticket, evidenced a desire to curry favor with law enforcement, was facially race-neutral under *Melbourne v. State*, 679 So. 2d 759, in prosecution for criminal trespass and resisting arrest.

[14] Jury ⇌ Peremptory challenges

Record did not support trial court's determination that defendant did not proffer genuine race-neutral reason under *Melbourne v. State*, 679 So. 2d 759, for exercising peremptory strike on prospective juror who was of Hispanic descent, when defendant asserted that juror's statement during voir dire, that he was once pulled over by police officer and issued ticket for broken taillight, and that he thereafter immediately repaired the taillight and paid the ticket, evidenced a desire to curry favor with law enforcement; although record reflected that defendant had previously exercised peremptory strike against another Hispanic male, there was no evidence this prior strike was racially motivated, and there was no evidence regarding the racial make-up of the venire.

An Appeal from the Circuit Court for Miami-Dade County, Spencer Multack, Judge, Lower Tribunal No. F17-23762.

Attorneys and Law Firms

Carlos J. Martinez, Public Defender, and Howard K. Blumberg, Special Assistant Public Defender, and Daniela Tenjido and Mary Rojas, Certified Legal Interns, for appellant.

Ashley Moody, Attorney General, and Kayla Heather McNab, Assistant Attorney General, for appellee.

Before SCALES, MILLER and LOBREE, JJ.

Opinion

SCALES, J.

*1 Appellant Earl Brannon was convicted of two counts of criminal trespass and one count of resisting arrest without violence. He appeals his convictions on the sole ground that the trial court erred by upholding the State's *Melbourne*¹ challenge to Brannon's attempted peremptory strike of a potential juror during jury selection. We reverse Brannon's conviction and remand for a new trial because the record does

not support the trial court's finding that Brannon's race-neutral reason for exercising the strike was not genuine.

I. Facts

In this criminal prosecution, all of the State's witnesses were expected to be police officers; accordingly, the State and the defense sought to probe prospective jurors about their views of the police. Both sides sought to learn how each juror would weigh a police officer's testimony. A theory of the defense at trial was that the arresting officers were covering up an excessive use of force in their arrest of Brannon, who claimed to be an innocent bystander at the scene of a burglary.

During voir dire, Juror 14, a male of Hispanic descent, disclosed that both his sister and his brother-in-law were employed in law enforcement. The trial court asked Juror 14 whether he had ever been pulled over by a police officer for a traffic stop, and Juror 14, replying that he had, explained that he was once issued a ticket for a broken taillight, and thereafter immediately repaired the taillight and paid the ticket.

After Brannon sought to exercise a peremptory strike on Juror 14, the State interposed a *Melbourne* challenge, requesting a race-neutral reason for the strike and asserting: "This is now the second male of the Latin [descent] that they've struck." In response, Brannon's counsel stated that Juror 14's immediate payment of the traffic ticket and repair of the taillight suggested that the juror wanted to "curry favor" with the police.

Rather than asking the State to rebut Brannon's counsel's response, the trial court proceeded to rule on the State's *Melbourne* challenge, stating, in relevant part: "I didn't get the sense that [Juror 14] fixed the ticket to curry favor with the police officers.... He just said that he fixed what was wrong with his car, it was a taillight. ... I'm going to deny the cause.² I don't find it to be [sic] genuine reason. He's on the panel."

Juror 14 was seated, the jury convicted Brannon, and this appeal ensued.

II. Analysis

A. The Melbourne Framework and Our Standards of Review

[1] [2] [3] Melbourne provides the following framework for when a party objects to another party's use of a peremptory strike for alleged racially motivated reasons:

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 requests are met (step 1), the court must ask the proponent of the strike the reason for the strike.

*2 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.

Melbourne, 679 So. 2d at 764 (footnotes omitted).

[4] [5] This case requires us to analyze the determinations made by the trial court in conducting steps 2 and 3 of the Melbourne analysis, and therefore implicates the different standards of review that we apply to each determination. After a party (here, the State), makes the required objection and the proponent of the strike (here, Brannon) asserts its race-neutral reason for exercising the strike, Melbourne's step 2 requires the trial court to determine whether the proffered race-neutral reason is facially race-neutral. If so, Melbourne's step 3 requires the trial court to determine whether the proffered race-neutral reason is merely a pretext hiding an underlying unlawful discriminatory purpose (i.e., the genuineness determination).³ Greene v. State, 718 So. 2d 334, 335 (Fla. 3d DCA 1998).

[6] [7] In its genuineness determination (Melbourne's step 3), the trial court must "satisfy itself that the explanation is not a pretext." Davis v. State, 691 So. 2d 1180, 1183 (Fla. 3d DCA 1997). The factors relevant to the trial court's genuineness inquiry include the "racial make-up of the venire, prior strikes exercised against the same ... racial group, or singling out the juror for special treatment." Norona v. State, 137 So. 3d 1096, 1097-98 (Fla. 3d DCA 2014) (quoting Wynn v. State, 99 So. 3d 986, 989 (Fla. 3d DCA 2012)).

[8] [9] [10] When reviewing the trial court's step 2 determination of whether the proffered reason for the strike is race-neutral, we "simply review the facial neutrality of the reason." Greene, 718 So. 2d at 335. We review the trial court's ultimate determination of pretext "primarily on an assessment of credibility," therefore implicating the abuse of discretion standard. Wynn, 99 So. 3d at 988. Notwithstanding this deferential standard, however, a trial court's determination that a strike is pretextual will be reversed by the appellate court if there is no record support for the trial court's finding. Julmice v. State, 14 So. 3d 1199, 1204 (Fla. 3d DCA 2009); Hamdeh v. State, 762 So. 2d 1030, 1032 (Fla. 3d DCA 2000).

[11] [12] Importantly, "[t]hroughout this process, the burden of proving purposeful discrimination never leaves the opponent of the strike," and the exercise of a peremptory challenge is presumed to be nondiscriminatory. Hamdeh, 762 So. 2d at 1032 (citations omitted). And, the objector to a strike has "a heavy burden to show" that the peremptory strike is being sought solely because of the potential juror's race. Id.

B. Application to the Instant Case

With these principles in mind, we now turn to the trial court's disallowance of Brannon's peremptory strike on Juror 14.

a. Melbourne's Step 2

[13] It is not entirely clear on this record whether the trial court made the determination of whether Brannon's counsel's proffered reason for the strike was facially race-neutral (Melbourne's step 2). As discussed in more detail below, immediately after Brannon's counsel provided his response to the State's Melbourne challenge, the trial court, without articulating whether the proffered reason was race-neutral, determined it was not "[a] genuine reason." Hence, we assume that, because the trial court reached the genuineness inquiry (Melbourne's step 3), that it determined – albeit implicitly – that the proffered reason for the strike was race-neutral. Otherwise, as mentioned in footnote 3 of this opinion, the trial court would have disallowed the strike without reaching the genuineness issue.

*3 In any event, while the stated rationale – Juror 14's immediate repair of the taillight and payment of the ticket

evidenced a desire to curry favor with law enforcement – may have been feeble, it was facially race-neutral.⁴

b. Melbourne's Step 3

[14] We are concerned, however, with the trial court's genuineness determination under Melbourne's step 3: whether Brannon's proffered reason for the strike was merely pretextual. While we review the genuineness determination under an abuse of discretion standard, the determination must be supported by the record. Julmice, 14 So. 3d at 1204. Further, as mentioned above, factors relevant to this determination include the racial make-up of the venire, prior strikes exercised against the same racial group, and singling out the challenged juror for special treatment. Norona, 137 So. 3d at 1097-98.

While the record reflects that, before exercising a peremptory strike against Juror 14, Brannon exercised one prior peremptory strike against another Hispanic male, there is no record evidence that this one, prior strike was racially motivated. Similarly, there is no record evidence that Brannon tried to exercise strikes against any other Hispanic venirepersons. This, coupled with the absence of *any evidence* regarding the racial make-up of the venire, makes it impossible for us to find the necessary support in the record to uphold the trial court's genuineness finding.

After Brannon proffered his race-neutral reason for the strike, despite the State's "heavy burden" to establish a discriminatory intent behind the strike, Hamdeh, 762 So.2d at 1032, the trial court neither asked the State for argument regarding the genuineness of the proffered reason, nor did the trial court articulate a rationale for its genuineness determination. While this Court has made it clear that Melbourne does not require a trial court to expressly articulate its thought process in making a genuineness determination, Norona, 137 So. 3d at 1098, our case law does require the record to support the trial court's genuineness determination. Julmice, 14 So. 3d at 1204; Hamdeh, 762 So. 2d at 1032; see also Senatus v. State, 40 So. 3d 878, 878 (Fla. 3d DCA 2010).

III. Conclusion

Because the record does not support the trial court's determination that Brannon's proffered reason for exercising its peremptory strike on Juror 14 was not genuine, we are compelled to reverse Brannon's convictions and remand for a new trial.

Reversed and remanded.

All Citations

--- So.3d ----, 2021 WL 1897064, 46 Fla. L. Weekly D1088

Footnotes

- 1 Melbourne v. State, 679 So. 2d 759 (Fla. 1996).
- 2 Because Brannon was attempting to exercise a peremptory, rather than a for-cause, strike on Juror 14, we assume that the trial court simply misspoke in how it characterized the proposed strike.
- 3 If the trial court, in its step 2 Melbourne inquiry, determines that the proffered reason is not race-neutral, then obviously the trial court is compelled to disallow the strike and need not proceed to Melbourne's step 3.
- 4 As noted above, the record indicates a more cogent race-neutral reason to support the strike: that family members of Juror 14 work in law enforcement. See Chambers v. State, 682 So. 2d 615, 616 (Fla. 4th DCA 1996) (holding that a familial relationship to a law enforcement officer is a constitutionally permissible basis for a peremptory challenge).