

Third District Court of Appeal

State of Florida

Opinion filed July 24, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-1469
Lower Tribunal No. 16-19007

Timmy Beal,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Martin Zilber, Judge.

Carlos J. Martinez, Public Defender and Robert Kalter, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Linda S. Katz, Assistant Attorney General, for appellee.

Before EMAS, C.J., and FERNANDEZ, and GORDO, JJ.

FERNANDEZ, J.

Timmy Beal appeals his conviction and sentence. Beal was initially charged with grand theft auto, driving without a valid driver's license, trespass of a

conveyance, and careless driving. The jury found Beal guilty of trespass of a conveyance, as the lesser included offense of grand theft of an automobile. The issue on appeal is whether the State's peremptory challenge of Mr. Weiser, a white male juror, was proper after the trial court found that white males are not a protected class. After a review of the record and relevant case law, we affirm that white males are part of the protected class of "gender" and reverse and remand this case for a new trial.

Beal objected to the State's peremptory challenge of Mr. Weiser, requesting a gender neutral reason. The State began to volunteer a gender neutral explanation but was interrupted by the trial judge, who concluded that the challenge was improper as white men are not a protected class. The relevant section of the transcript is provided as follows:

[PROSECUTOR]: Yeah, One moment, your Honor. State is exercising its fourth peremptory on juror number 14.

[DEFENSE COUNSEL]: Judge, we ask for a gender race neutral reason, Mr. Weiser is a white male.

THE COURT: And what class is that?

[DEFENSE COUNSEL]: White male class, your Honor. And this could be based –

THE COURT: And I don't believe that's a class.

[DEFENSE COUNSEL]: It is your Honor.

[PROSECUTOR]: I don't believe that's a protected class.

THE COURT: I don't believe that's a protected class. No.

[DEFENSE COUNSEL]: Judge.

THE COURT: You wanna show me where that's a protected class.

[PROSECUTOR]: Additionally, for the record, the State would note that he said he thought prostitution should be legal. So, the state has a concern about whether he would follow the law.

THE COURT: *It's not a protected class, stops right there. It's not a protected class, okay? So that's where it's not a proper challenge. So, I will allow the fourth. Fourth peremptory. We'll move on to juror number 24, Daniel Ramirez. Defense accept.*

(Emphasis added). Beal's attorney renewed all previous objections made during the jury selection before the jury was sworn.

Florida case law, including precedent from this Court, plainly articulates that white men fall under the protected class of *gender*. See Abshire v. State, 642 So. 2d 542 (Fla. 1994); Carrillo v. State, 962 So. 2d 1013 (Fla. 3d DCA 2007); Thompson v. State, 648 So. 2d 323 (Fla. 3d DCA 1995); Preston v. State, 641 So. 2d 169 (Fla. 3d DCA 1994). In its answer brief, citing to this case law, the State admits and concedes that the trial court erred in finding that white men are not a protected class. Nonetheless, the State argues against a new trial by focusing on: 1) the genuineness analysis, arguing that the trial judge's analysis was inferred and 2) Beal's failure to cite to applicable authority to support his objection. We find neither argument valid.

To focus on the genuineness analysis, is to put the cart before the horse. The judge concluded that the challenge in and of itself was improper due to the judge's false assumption that white men are not a protected class. Without a protected class, there is no pretext, and the analysis of Melbourne v. State, 679 So. 2d 759 (Fla. 1996), is not triggered. Thus, a genuineness analysis could not be inferred. Even if this Court were to find that the Melbourne analysis was triggered, the trial judge did not provide Beal an opportunity to respond to the State's explanation, which is required by Melbourne.

Though the State concedes the trial court's error, the State continues to argue that Beal was required to cite to authority in support of his objection, but does not provide any authority of its own to support this assertion. Melbourne does state that the "party objecting . . . [must] show that the venireperson [sic] is a member of a distinct racial group" Id. at 764. However, because the trial court cut off further discussion when it said "stop right there," there was no opportunity for the party objecting to make the required showing. We, therefore, find this argument is without merit.

This case is most similar to Thompson v. State, 648 So. 2d 323 (Fla. 3d DCA 1995), where two men were struck during the course of the peremptory challenge conference. As in our case, "The defense objected but the trial court ruled that the

case law applied to women only and, therefore, the state would not be required to provide gender neutral reasons for the strikes.” Id. This Court found:

It is necessary to reverse and remand this case for a new trial based on the recent decisions of J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed. 2d 89 (1994); Abshire v. State, 642 So. 2d 542 (Fla.1994); Preston v. State, 641 So. 2d 169 (Fla. 3d DCA 1994), wherein the courts held that prospective jurors, in this case *male jurors*, *may not be excluded on the basis of gender*.

Id. (emphasis added).

The State cites to Carrillo v. State, 962 So. 2d 1013 (Fla. 3d DCA 2007), another opinion from our Court. In this case also, the trial judge found that men are not a protected class, but before striking the male juror, the State volunteered a gender neutral explanation. Id. at 1014. Afterward, the Judge, the defense, and the State continued with a brief discussion reviewing the juror’s statements, after which, the Judge struck the juror. Id. This Court found that, “the trial court implicitly ruled that such reason was genuine,” and affirmed. Id. In the present case, no such discussion took place where a genuineness analysis could be inferred. The trial judge prevented any further discussion upon finding the challenge was improper immediately after concluding that white men are not a protected class.

For the reasons stated, the State’s peremptory challenge of Mr. Weiser was improper as the trial court erred in finding that white men are not a protected class. We reverse and remand this case for a new trial.

Reversed and remanded for a new trial.