OA 12-5-89

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 73,143

RIGOBERTO SANCHEZ-VELASCO,

Appellant,

vs.

THE STATE OF FLORIDA

Appellee

****

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, CRIMINIAL DIVISION IN AND FOR DADE COUNTY, FLORIDA

HONORABLE ALLEN KORNBLUM

.....

REPLY BRI OF APPELLANT

BARBARA S. LEVENSON
Attorney for Appellant
2655 Le Jeune Road
Suite 1109
Coral Gables, Florida 33134
(305) 444-3600

TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

I. THE COURT ERRED IN DENYING THE MOTION TO SUPPRESS CONFESSIONS ADMISSIONS AND STATEMENTS.

Appellee has stated a factual basis throughout her brief which has stretched the facts to the breaking point of that border which leaves persuasion and enters the realm of fiction; overbroad, encompassing matters peripheral to the issues raised and in some cases inaccurate.

For instance, Appellee states that the price of the stereo which led to the grand theft charge against Defendant was ascertained to be $300 or more. Actually, the officers had made much of the fact that they sought proof through receipts of the actual cost of the stereo. This infers that the officers did not believe this witness themselves. (TR 403-404).

The grand theft charge was a moot point. No arrest could be made for this theft. The officers clearly knew that they did not have a victim (TR 495-96), and did not have a value of property of $300 or more. (TR 495).

The office of the state attorney was contacted (TR 509) (contrary to Appellee's Brief), and the officers clearly knew they could not arrest the defendant for grand theft.

The officers also admitted that Mr. Sanchez-Velasco was not free to leave even if he was unhandcuffed. "I wouldn't have allowed him to leave" (TR 424, 408) is not a 'free range of movement!' A reasonable person would believe that the Defendant was in custody if the arresting officers thought so.

The State's assertion that intervening circumstances interrupted the taint of the false arrest is ill-founded. The cases cited have wholly different fact patterns than the case at bar, particularly Michigan v. Chesternut, ___ U.S. ___, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988), which reversed a result of dismissal of all charges. In that case, the police followed a suspect for several yards and saw him throw down drug packets. The magistrate in that case found the officers made an unlawful seizure under Fourth Amendment considerations. That case cannot illustrate the reasonableness of assuming detention in a case where a defendant has been arrested, then is uncuffed, but is still surrounded by officers.

The officer's statement regarding Mr. Sanchez-Velasco's request to go to Hialeah defies credibility. The suspect, who is being detained for questioning about a murder, is alleged to have suggested that he will only discuss this murder with the officers in their own police jurisdiction. How convenient that the defendant's own suggestion aids the officers in returning to their police station and solves their legal jurisdictional problem. Are we to believe that Hialeah Police acted as a taxi service only to transport a detainee to his requested destination?

The State next concludes that no Miranda warnings were necessary since no conversation would take place during a 15 mile ride through city traffic. The State is correct in its brief that "Miranda warnings must be given prior to custodial

interrogation if the prosecution seeks to use statements stemming from it." (Emphasis added). Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). If the State did not wish to use the statements made by Defendant, then there would be no problem with their failure to Mirandize him, and this would not be an issue today.

There was no break between the original wrongful arrest of the Defendant and his eventual statements at the police station. He was never out of the custody or detention of the arresting officers. This case is clearly reminiscent of Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) in which the defendant was wrongfully arrested and interrogated two hours later after being given Miranda warnings. The court held that the statements given must be excluded due to their taint flowing from the unlawful arrest. Nothing of note broke the chain flowing from that arrest in Brown, nor was there any actual break in the instant case. The chain went from arrest to detention to the police car ride to full station house interrogation.

Statements of the Defendant should have been suppressed at his trial.

II. ERRORS COMMITTED DURING JURY SELECTION WERE SO EGREGIOUS AS TO CAUSE REVERSAL AND REMAND FOR A NEW TRIAL.

A. The "Death Qualified" Jury

The cases cited by the State to back the improper exclusion of death-scrupled jurors were all decided prior to Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

Wainwright clearly illuminates the holdings in Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1970); and Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); explaining that these cases are meant as a limitation on the State's power to exclude.

The State's reliance on Barfield v. Harris, 540 F.Supp. 451 (E.D. N.C. 1982) should have reminded them that "the exclusion of even one prospective juror in violation of the Witherspoon standard invalidates a subsequent sentence of death regardless of whether the state went to trial with peremptory challenges unexercised." at p. 465. So it is in this case that this trial must be invalidated due to the skewing of this jury by eliminating prospective jurors who do not favor the death penalty.

B. The Back-Striking Procedure

The State sidesteps the whole issue of the reopening of jury selection by the trial court after a jury was tendered by both sides and the original peremptory challenges were waived. The State does not address how the careful plans for use of peremptories by defense counsel and Defendant were obliterated when the trial court reopened the selection process.

Appellant agrees with the premise of Jackson v. State, 464 So.2d 1181 (Fla. 1985) that a trial court cannot ban backstrikes. However, the trial court should not abuse its discretion by announcing that a jury is tendered and then reopening the process merely because the State liked the "new recruits" better who were

being examined only as alternate jurors. Where the sentence facing the Defendant is the death penalty, the Eight Amendment requires a greater degree of reliability than is required in other criminal proceedings. Woodson V. North Carolina, 428 U.S. 280, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

III. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL FOLLOWING THE DEFENDANT'S OUTBURST DURING TRIAL.

Defendant's outburst in front of the jury was so prejudicial to his receiving an untainted trial that a mistrial was imperative. The State, in its brief, makes light of what occurred. Yet the prosecutor in the courtroom realized the real damage done when he stated at TR 1700:

> It's not what was said, as much that was significant. It's the fact that Mr. Sanchez, who has been charged with a very serious crime, he's indicated that he's not able to control himself by making this outburst to the court. - - - - and I don't know that the jury can or should be asked to totally ignore the fact - -

It is outrageous that Appellee in her brief impugns defense counsel by asserting that he sought to promote a mistrial since he took no heed of a prior statement that Defendant "felt like he was going to explode or something like that." (TR 1686). This remark was made some time before the outburst. (TR 1687). Defense counsel did not even have to share the knowledge of this remark with the court but he freely did so as an illustration of how bizarre the behavior of the defendant had become.

The trial court certainly did not consider this an everyday trial occurrence when the court told the jurors: (TR 1701)

> First, I want to apologize for inconveniencing you and also for the outbursts. Secondly, I want to say, for the last five minutes I've been trying to think of what I want to tell you, if anything----

This pseudo instruction solidified in the jurors' minds how unorthodox this outburst had been.

The Supreme Court long ago noted that "it is vital in capital case that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1894). It is crucial that a defendant facing the death penalty have a fair and impartial jury. This means "a jury capable and willing to decide the case solely on the evidence before it - - -" Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940 (1982).

Jury verdicts should be set aside where it is shown that the impartiality of jurors may have been affected or where tainted material has come before the jury. Faress v. United States, 428 F.2d 178 (5th Cir. 1970). Accordingly, this judgment should be reversed.

THE PENALTY PHASE

IV. THE COURT IMPOSED THE DEATH PENALTY BY IMPROPERLY APPLYING AN AGGRAVATING CIRCUMSTANCE NOT PROVEN BEYOND A REASONABLE DOUBT, BY UTILIZING A NON-STATUTORY AGGRAVATING CIRCUMSTANCE AND BY FAILING TO WEIGH THE MITIGATING CIRCUMSTANCES.

The jury was only partially instructed as to the definition

as used in this state, Florida, for heinous, atrocious or cruel. The full definition is quoted in Appellant's Initial Brief at p. 38, as it is taken from State v. Dixon, 283 So.2d 1 (Fla. 1973) at p. 9:

> ---It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

This limiting construction sets Florida apart from Oklahoma - if the full definition is given. But compare what Appellee cites in her brief at p. 63, also from Dixon at p. 9:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is Unnecessarily tortuous to the victim. Id. at 9. (Emphasis supplied).

This was the problem in the instant case; the jury did not receive a full definition upon which to base its decision. This jury ended up with the same vague wordage complained of in Maynard v. Cartwright, 484 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

The medical examiner's testimony did not go to the cause of death but was received as evidence of the commission of the sexual battery. Yet it was clearly relied on by the court in its sentencing order.

The cases cited by Appellant regarding strangulation as itself an aggravating factor are far different from the characteristics in the instant case: Alvord v. State, 322 So.2d 533 (Fla. 1975) (three separate strangulations during a burglary show a cold calculated design to kill); Adams v. State, 412 So.2d 850 (Fla. 1982) (a kidnapping, rape and a killing to avoid identification and engaging in flight coupled with the strangulation); Quince v. State, 414 So.2d 185 (Fla. 1982) (a severe beating, wounding, raping and manual strangulation of a frail 82-year-old woman): Lemon v. State, 456 So.2d 885 (Fla. 1984) (repeated stabbings and strangulations preceded by victim begging not to be killed).

All of these cases involve crimes which rise beyond the facts in evidence in the instant case in proof of the heinous, atrocious, cruel standard.

Appellee fails to evaluate any of the cases cited by Defendant as they apply to the measure of mitigation in this case.

The sentencing errors in this case mandate that the sentence of death be vacated and the case be remanded to the trial court for resentencing. The consistent recognition of death as a special punishment mandates the court to carefully scrutinize the

procedures under which it is imposed.

CONCLUSION

For the reasons given and upon the authorities cited, Appellant respectfully requests that this Honorable Court reverse the judgment and sentence of the lower court.

Respectfully submitted,

BARBARA S. LEVENSON
Specially Appointed Assistant
Public Defender
Counsel for Appellant
2655 Le Jeune Road
Suite 1109
Coral Gables, Florida 33134
Telephone (305) 444-3600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was furnished by mail this 9th day of August, 1989, to the Office of the Attorney General, 401 Northwest Second Avenue, Suite 820, Miami, Florida.

Barbara S. Levenson

BARBARA S. LEVENSON
Specially Appointed Assistant
Public Defender
Counsel for Appellant