IN THE SUPREME COURT OF FLORIDA

ROBERT PATRICK CRAIG,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 62,184

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LAKE COUNTY

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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POINT I

THE APPELLANT IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND FULL REVIEW BY THIS COURT BECAUSE THE RECONSTRUCTION OF THE PROSECUTOR'S ARGUMENT TO THE JURY DURING THE PENALTY PHASE OF THE TRIAL IS UNRELIABLE AND INCOMPLETE.

The appellee completely misses the point of the appellant's examples of matters which we know are missing from the reconstruction. (Appellee's Brief, p. 2) It is not these matters, in themselves, that constitutes reversible error (although these matters are non-statutory aggravating factors or were designed to play upon the jury's sympathies and thus are reversible error). Rather, if we know that these items are missing from the reconstructed record, what items are missing that we do not know and that the parties are unable to recall?

The appellant has conclusively demonstrated (nothwithstanding any presumption of correctness as argued by the State [Appellee's Brief, pp.7-8]) that the reconstruction is incomplete and inaccurate. Contrary to Appellee's assertion at page 3 of the state's brief, the prosecutor's improper argument to the jury during the penalty phase is listed as a judicial act to be reviewed. (R2125, #29) It is an act

which must receive adequate appellate review. The appellant must be afforded a complete, reliable transcription of the alleged improper argument. (Initial Brief, pp. 15-22) It simply has not been done here. A new penalty phase is constitutionally required.

POINT II

THE TRIAL COURT ERRED IN ADMITTING, OVER DEFENSE COUNSEL'S OBJECTIONS, EVIDENCE WHICH WAS OBTAINED AS A DIRECT RESULT OF THE DEFENDANT'S INVOLUNTARY STATEMENTS, WAS A DIRECT RESULT OF THE DENIAL OF THE DEFENDANT'S RIGHT TO SPEAK TO HIS ATTORNEY, AND WAS A FRUIT OF AN ILLEGAL ARREST, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

Initially, it should be noted that the trial court did not apply the "inevitable discovery" theory, as the state maintains (Appellee's Brief, pp. 10-17); rather the trial court ruled (incorrectly, it is submitted) that the evidence was discovered through an independent source. (R595-596) As clearly shown in the Initial Brief, this finding was erroneous. (Initial Brief, pp. 23-25) Moreover, the "inevitable discovery" theory should not be applied in the instant case. Appellee has not cited any Florida cases or United States Supreme Court cases [see Art. I, § 12, Fla. Const. (1982) Amend.)], approving of this doctrine or denying suppression of evidence based upon it. The state places great weight upon a footnote in Brewer v. Williams, 430 U.S. 387, 406 n. 12 (1977), to support its argument that such theory is acceptible. (Appellee's Brief, pp. 12,14-15)

However, the footnote simply states that any issue concerning the admissibility of the physical evidence (and a possible argument concerning the inevitability of its discovery even without the taint) was not before the Court, and must be decided only at a later date.[1/] See also Williams v. Nix, 700 F.2d 1164 (8th Cir. 1983), cert. granted ___ U.S. ___, 77 L.Ed.2d 1315, 103 S. Ct. 2427 (1983) (the same Williams as in Brewer v. Williams, supra, now on the "inevitable discovery" issue).

Even if the inevitable discovery doctrine exists in Florida, the physical evidence here still should be suppressed.[2/] The evidence here was discovered as a direct result of flagrant violations of the defendant's constitutional rights. (Initial Brief, pp. 23-30) Therefore, absent some exception to the exclusionary rule, the physical evidence is clearly excludable as "fruit of the poisonous tree." The state has the burden of proving some exception. The state has failed in that burden. If the "inevitable discovery" doctrine exists in Florida, the state must prove two elements: (1) the police did not act in bad faith for the purpose of hastening discovery of the evidence in question, and (2) that the evidence in question would have been discovered by lawful means. Williams v. Nix, supra at 1169. Good faith on the part of law enforcement personnel is required since

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[1/] Note also, that even if the inevitable discovery doctrine were acceptible to the United States Supreme Court, it still need not be applied in Florida in this case. Article I, Section 12, Florida Contitution (1982 Amend.) controls only in the Fourth Amendment context not on Fifth and Sixth Amendment grounds, as are presented in the instant case.

the prime purpose of the exclusionary rule is to deter unconstitutional police practices:

> [I]f there is to be an inevitable discovery exception the State should not receive its benefit without proving that the police did not act in bad faith. Otherwise the temptation to risk deliberate violations of the Sixth Amendment would be too great, and the deterent effect of the exclusionary rule reduced too far. Williams v. Nix, supra at 1169 n. 5.

See also United States v. Calendra, 414 U.S. 338, 347-348 (1974).

In the instant case, it cannot be seriously contended that the police acted in good faith. Not only was the confession obtained in direct violation of the defendant's constitutional right to remain silent and to an attorney (as agreed by the trial court), but Sheriff Griffin and his deputies deliberately violated the defendant's constitutional rights by their actions while the defendant was showing Sheriff Griffin the way to the bodies, by refusing to acknowledge the repeated requests of the defendant's family-retained counsel and by failing to communicate such requests

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2/ In Williams v. Nix, supra at 1169, the Eighth Circuit neither accepts nor rejects the existence of such a doctrine for the federal courts.

to the defendant. (Initial Brief, pp. 26-30) The police clearly and purposely lied to the defendant's attorney (R2326,2556-2560,2722-2730), with the designed purpose of obtaining evidence in violation of the defendant's constitutional rights. Since Sheriff Griffin acted in bad faith, the "inevitable discovery" exception, if it exists at all, cannot excuse the gross violations here and cannot form the basis for allowing the evidence to be admitted.

Secondly, the state has not adequately shown that the evidence would have been discovered absent the illegality. The state obviously has the burden of proof; even if the evidence is in equipoise, the state must lose. Williams v. Nix, supra at 1171. Here, Sheriff Adams, as pointed out by the state, expressed an opinion that he would have discovered the bodies and the other physical evidence even without the defendant leading police to the scene. An examination of the evidence shows clearly that such opinion is absurd. Sheriff Adams stated that he was going to obtain a helicopter to conduct an aerial search of the sinkholes and that, based upon the particles of hay and particles of thread fiber found around Wall Sink, he would have focused the search on Wall sink. (R2845) It is preposterous to believe that Sheriff Adams could have spotted minute particles of hay and fiber from a helicopter. Also the fact is that even knowing the location of the bodies with the defendant's assistance, the first police dive into the sinkhole was unsuccessful. If not for the

defendant's insistence that the bodies were there, we cannot assume that there existed a "reasonable probability" that the police would have continued at the cite and the evidence would have been inevitably discovered without the illegality. See United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980).

Additionally, Sheriff Griffin, Captain Brown, and Deputy Whitaker all admit that the defendant led them to the bodies, and without Craig's doing so, they would not have found the evidence. (R884,2220-2221,2323,2441) As such, the state has failed its burden of showing that the evidence would have been discovered absent the illegality. At best, the evidence is equipoise and therefore the state has failed Williams v. Nix, supra at 1171. As in the one Florida case which discusses the inevitable discovery doctrine (and rejects it under the facts of the case), "application of the inevitable discovery exception to these situations is simply too attenuated." State v. LeCroy, 435 So.2d 354, 357-358 (Fla. 4th DCA 1983). While it is possible that the police may eventually have stumbled on the evidence [just as they stumbled on the 1926 Dodge automobile in the Wall Sink (R2842)], there is no evidentiary indication that they would have done so at all or that they would have done so in a short amount of time so that the bodies and other physical evidence would not have significantly deteriorated. See Williams v. Nix, supra at 1168.

Moreover, the illegal act did not "merely contribute" to the discovery of the information as argued in an article cited by the appellee (Appellee's Brief, p. 12); rather the illegality totally and directly caused the discovery.

The state cannot rely on the "inevitable discovery" theory as an exception to the exclusionary rule: it has not been accepted in Florida (or even by the United States Supreme Court); the police acted in bad faith; and application of such doctrine to the instant situation is simply too attenuated. The physical evidence obtained as a direct result of the illegal, unconstitutional acts of the police, must be suppressed.

POINT III

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS AND DENYING THE MOTIONS IN LIMINE AND FOR MISTRIAL AND ALLOWING DETAILED EVIDENCE AND ARGUMENT ON COLLATERAL CRIMES WHICH BECAME A FEATURE OF THE TRIAL THUS DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The state argues primarily that the issue raised herein was not properly preserved for appeal. (Appellee's Brief, pp. 18,20-21) Aside from the absence of an objection to the failure of the state to provide prior written notice, which the appellant mentioned in his brief only in passing, the issue was properly and exhaustively preserved. The appellant filed a written motion in limine to preclude the evidence. (R1984-1986) The trial court allowed a standing objection to any evidence dealing with the cattle theft. (R702) Defense counsel also objected on relevance grounds to testimony concerning the defendant's using proceeds from the sale of cattle to buy guns, home appliances, cocaine, and marijuana. (R929-930) The issue is surely preserved for appeal.

As to the state's contention that it was not error to force the defendant to exercise before the jury his Fifth Amendment privilege regarding the cattle thefts, the appellant relies on the analogous case of Apfel v. State, 429 So.2d 85 (Fla. 5th DCA 1983), where in the court held that it is improper for a court to permit the jury to hear the witness invoke his privilege. See also Hill v. State, 330 So.2d 407 (Fla. 4th DCA 1976).

POINT IV

IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 12 OF THE FLORIDA CONSTITUTION, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR MISTRIAL BASED ON IMPROPER AND PREJUDICIAL COMMENTS BY THE PROSECUTOR DURING HIS CLOSING ARGUMENT TO THE JURY IN THE GUILT PHASE.

In its brief on pages 24 and 26, the state contends that one of the comments by the prosecutor regarding the principal theory was cured by a court instruction that the court would instruct the jury on the correct law. (R1620-1621) This, however, misses the entire point of the appellant's contention. The defendant is not concerned here with whether the law as was being argued to the jury by the prosecutor was correct. At issue is the prosecutor's comment following the objection implying that the defense attorney did not want the jury to know about the law on principals. The prosecutor commented:

> MR. BROWN: I think that the Court is going to instruct you about the principal law that Mr. Fox [defense counsel] just objected to my talking about .... (R1621)

Such comment on defense counsel or defense tactics is entirely improper. (See Initial Brief, p. 39)

The comments (many of which were objected to) made by the prosecutor in his closing argument, when taken as a whole, were so improper so as to destroy the appellant's fundamental constitutional right to a fair trial. (Initial Brief, pp. 36-42) Reversal is required.

POINT VII

IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 12 OF THE FLORIDA CONSTITUTION, APPELLANT WAS DENIED DUE PROCESS BY THE PREJUDICIAL AND INFLAMMATORY REMARKS OF THE PROSECUTOR.

In its brief on this issue, the state maintains that the prosecutor did not express his personal opinion about a matter in issue. (Appellee's Brief, p. 32) However, the state ignores the prosecutor's personal comments that he carefully thought about the case and his personal assurances that the death penalty is required in this case:

> There is another burden which we bear under the law, that is the decision whether or not to seek the penalty of death. We have made that decision.... That is not an easy decision and I assure you we did not make it lightly.... (RR 165)

Such personal beliefs are improper in argument to the jury. (See Initial Brief, p. 49)

The state also argues that improper argument to the jury on non-statutory aggravating factors do not taint the jury recommendation. (Appellee's Brief, pp. 32-34) However, this contention ignores this Court's recent holding in Teffeteller v. State, ___ So.2d ___, 8 FLW 306, at 307 (Fla. Sup.Ct. Case No. 60,337, decided 8/25/83), wherein the Court reversed a death sentence on the basis of an improper argument to the jury by the prosecutor regarding a non-statutory aggravating factor.

A new penalty phase is required.

POINT VIII

THE TRIAL COURT ERRED IN OBTAINING OFF-THE-RECORD AND IN UTILIZING IN SUPPORT OF THE DEATH SENTENCE AS TO COUNT ONE THE VOTE OF THE JURY IN RECOMMENDING LIFE IMPRISONMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16, FLORIDA CONSTITUTION.

The state erroneously contends that the defendant invited this error. (Appellee's Brief, p. 35) The verdict form drafted by the state, the appellant, and the court did not allow for a vote tally with regard to the life recommendation. (R2016) It was not supposed to. See Fla.Std.Jury Inst. Crim. Cases, pp. 81-82). The defendant did not ask the judge to ascertain the vote. It was done on the court's own initiative outside of court. (R2088,2110) Also, contrary to the state's contention (Appellee's Brief, p. 35), the trial court did not fully apprise the defendant of the vote tally prior to the pronouncement of the death sentence. It was only in its written findings of fact that the court disclosed the tally. (R21-9-2110) The defendant, upon learning of this for the first time after the sentencing hearing, filed a written objection to the extrajudicial matter.

The defendant's death sentence as to Count I must be vacated and reduced to life imprisonment because of this flagrant, unconstitutional error.

POINT IX

APPELLANT'S DEATH SENTENCES WERE IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT UTILIZED IMPROPER STANDARDS IN THE SENTENCING WEIGHING PROCESS, INCLUDING IMPROPER AGGRAVATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state argues that the trial court's finding as to heinous, atrocious, or cruel is supported by the manner of disposal of the bodies. (Appellee's Brief, pp. 37,49-50) This aggravating factor cannot be based upon such a finding. Herzog v. State, ___ So.2d ___, 8 FLW 383 (Fla. 1983).

The state contends that the appellant's argument regarding improper prosecutorial comments is "highly illusory and suppositious; and devoid of merit." (Appellee's Brief, p. 41) The appellee also contends that this issue was not raised in Teffeteller v. State, supra. The issue was raised in Teffeteller and provided the basis for reversal. Teffeteller v. State, 8 FLW at 307.

Additionally, the state incorrectly maintains that the trial court's consideration of the jury votes did not play a part in the court's sentencing determination; they were, according to the state, "mentioned by the trial court only in the introductory paragraph" of the findings of fact. (Appellee's Brief, p. 55) However, an examination of the findings reveals such consideration not only in the introductory paragraph to the findings but also in the part where the trial court weighed the factors and concluded the appropriate sentences:

> The above departure made by the Court from that recommended sentence is made pursuant to the express findings as set forth above and the relatively weak

> vote of the jury in recommending the sentence of life for that offense. (R2110)

And as to Count II:

> ... and the jury having recommended by a strong vote of 10 for and 2 against that the defendant be sentenced to death for the murder of WALTON ROBERT FARMER, there is no question that the circumstances in aggravation... outweigh any possible mitigation. (R2110)

The vote tallies therefore played a large part in the judge's death sentence decision, and, it is submitted, improperly so.

The death sentences are based in substantial part on improper and unsupported aggravating factors. In addition, the sentencing judge ignored the strong and material statutory and non-statutory mitigating factors. The judge overruled one jury recommendation of life without proper compelling reasons, and gave improper weight to the vote tallies of the jury's recommendations. Robert Craig's death sentences must be vacated and remanded for entry of life sentences.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the Initial Brief, the appellant requests this Honorable Court to grant the following relief:

1. As to Points II, III, IV and V, reverse the appellant's judgments and sentences and remand for a new trial; and

2. As to Points I, VI, VII, VIII, and IX, vacate the sentences of death and remand for imposition of life imprisonment, or, in the alternative, for a new penalty phase trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 and Mr. Robert Craig, Inmate NO. 083717, P. O. Box 747, Starke, FL 32091 on this 12th day of December, 1983.

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