IN THE SUPREME COURT OF FLORIDA

BRYAN JENNINGS, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 62,600

FILED
APR 14 1983
SID J. WHITE
CLERK SUPREME COURT
By ______ Chief Deputy Clerk

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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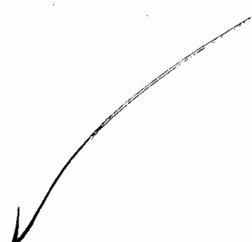

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POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN ADMITTING, OVER DEFENSE COUNSEL'S OBJECTIONS, THE DEFENDANT'S CONFESSION WHERE THE STATEMENT WAS OBTAINED FOLLOWING HIS REQUEST FOR COUNSEL AND WHERE THE STATEMENT WAS NOT FREELY AND VOLUNTARILY MADE, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

The appellee maintains that this Court is precluded from consideration of this issue in the instant appeal. This contention is based upon this Court's decision in Jennings v. State, 413 So.2d 24 (Fla. 1982) where the trial court's denial of Appellant's motion to suppress during the initial trial was upheld. Appellee contends that this Court's opinion affirming the denial of that motion to suppress prior to the initial trial renders that opinion as the law of the case on this issue. See Appellee's brief, p. 3.

Initially, Appellant contends that the language in this Court's opinion in Jennings, supra, is obiter dictum with no binding effect on the judge at the second trial. Appellant also contends that the state is precluded from raising this argument on appeal. The state never raised this argument before the trial court below and now seeks to assert it for the first time in this

proceeding. It is well established that Florida case law prohibits such a practice. Castor v. State, 365 So.2d 701 (Fla. 1978) and Dorminey v. State, 314 So.2d 134 (1975). Since the state failed to argue this contention below, it is heretofor waived for purposes of appeal.

Appellant also disagrees with Appellee's assertion that the case does not fall within the exception to the doctrine of the law of the case based upon a different factual posture on remand. Facts surrounding the confession were brought out at the hearing on the motion to suppress preceeding the second trial which were not developed at the first trial. These include but are not limited to, Officer Hudepohl's confession that every action that he took in the interrogation room was done with the express purpose of getting Bryan Jennings to talk. (R904) Hence, even if this Court finds that its previous opinion does constitute the law of the case, this case falls within the exception to that doctrine since a different factual posture existed on remand. See Cape Coral Bank v. Kinney, 321 So.2d 597 (Fla. 2d DCA 1975).

Appellant also points out that this Court did not deal with Appellant's second argument on the involuntary nature of the confession due to the coercive circumstances in its first opinion. This Court should deal with this second argument on this appeal.

In addition to the new facts adduced at the hearing on the motion to suppress, trial counsel also relied upon new and different case law. An analogous case to the one at bar is the

decision in United States v. Hinckley, 525 F.Supp. 1342 (D.D.C. 1981). Citing Miranda v. Arizona, 384 U.S. 436 (1966), the Court pointed out that the request for an attorney is a per se invocation of an accused's Fifth Amendment rights which requires that questioning cease until he is afforded an attorney. United States v. Hinckley, supra at 1354.

The instant case is distinguishable from Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979), relied upon by this Court in its previous decision of Jennings v. State, supra. In Nash, it was held that when a suspect expressed his desire to continue the interview without the presence of counsel, along with his desire to have an attorney appointed, the questioning official could make further inquiry to clarify the suspect's indecisive expression. It is clear that this was not the case during Jennings' interrogation. He did not express any desire to continue the interview without the presence of counsel. It was only after the law enforcement officials continued their questioning and psychologically coercive technique that Jennings finally relented. This Court must remember Officer Hudepohl's testimony that everything that he said and did in the interrogation room was done in order to prompt Jennings to confess. (R904) Nash, supra, was clarified by Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979), which pointed out that further inquiry cannot be an attempt to dissuade the suspect from exercising his right to counsel. In the instant case, we have direct testimony from the officer that the continuation of the interview was such

an attempt. In view of the circumstances, this Court must revisit its previous opinion and conclude that Appellant's statement should have been suppressed.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY THE COURT'S REFUSAL TO GRANT HIS REQUEST FOR SPECIAL JURY INSTRUCTIONS AT THE PENALTY PHASE.

Appellant strongly disagrees with Appellee's assertion that this point has not been adequately preserved for appeal. In order to preserve a denial of a requested jury instruction for purposes of appeal, all that is required is that the request and the basis thereof be placed on the record. Thomas v. State, 419 So.2d 634 (Fla. 1982). This was done in the instant case thus preserving this issue for review.

Appellant is well aware of the differences under Georgia law, in that the jury imposes the sentence of death while in Florida the jury only makes a recommendation. Appellant's reliance upon Godfrey v. Georgia, 446 U.S. 420 (1980), was to point out the importance of a jury's understanding of heinous, atrocious and cruel as it relates to capital crimes. While a jury recommendation of life imprisonment is not binding in Florida as it is in Georgia, it is entitled to great weight. Tedder v. State, 322 So.2d 908 (Fla. 1975); LaMadline v. State, 303 So.2d 17 (Fla. 1974). Thus, we cannot be sure, as the appellee maintains that any inadequacy in the jury instructions would constitute harmless error.

POINT VIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT WAS DENIED DUE PROCESS OF LAW AND A FAIR TRIAL BY AN IMPARTIAL JURY WHEN THE TRIAL COURT INSTRUCTED THE JURY THAT SEVEN OR MORE OF THEIR NUMBER WERE REQUIRED TO RETURN A SENTENCING RECOMMENDATION.

Appellee states that it is ludicrous to assert this point in light of the jury's vote of nine to three. Appellant maintains that this point is not as ludicrous as Appellee maintains when one realizes the very danger of the objectionable instruction. It is entirely possible that the jury may have deadlocked with a vote of six to six. At that point, they should have returned with a recommendation of life. Instead, in view of their last instruction from the judge, they might have continued deliberations before three of the six abandoned their positions, simultaneously changing their votes from life to death. This point on appeal is far from ludicrous.

POINT IX

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN FAILING TO CERTIFY THE DEFENDANT AS A MENTALLY DISORDERED SEX OFFENDER.

At one point in the brief, Appellee seems to suggest that the decision to find that a defendant is a mentally disordered sex offender rests with the jury. See Appellee's Brief, p. 24. Appellant is compelled to point out that this particular decision rests with the trial judge rather than with the jury. §917.19, Fla. Stat. (1977).

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein and in the initial brief, Appellant respectfully requests that this Honorable Court grant the following relief:

1. As to Points I, II, IV and V: Vacate Appellant's judgments and sentences and remand for a new trial;

2. As to Point III: Vacate Appellant's judgment and sentence for first degree murder and remand for imposition of a conviction for second degree murder;

3. As to Points VI, VII and VIII: Vacate Appellant's death sentence for the imposition of a life sentence or, in the alternative, for a new penalty phase;

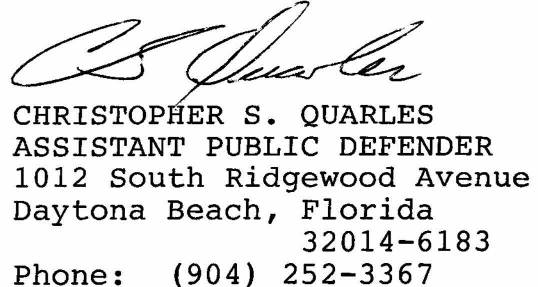
4. As to Point IX: Vacate Appellant's sentences for first degree murder and sexual battery and remand for sentencing as a mentally disordered sex offender;

5. As to Point X: Vacate the death sentence and remand with instructions to impose a life sentence;

6. As to Point XI: Declare the death penalty unconstitutional.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General, at his office located at 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014; and a copy mailed to Mr. Bryan Jennings, Inmate No. 073045, Florida State Prison, P.P. Box 747, Starke, Florida 32091, this 12th day of April, 1983.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER