IN THE SUPREME COURT OF FLORIDA

CASE NO. 62,691

MARIO LARA,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE OF DEATH IN THE DADE COUNTY CIRCUIT COURT

REPLY BRIEF OF APPELLANT

ADAM H. LAWRENCE, ESQ.
Special Assistant Public Defender
1008 Peninsula Federal Building
200 S.E. First Street
Miami, Florida 33131
(305) 358-3371

TABLE OF CONTENTS

TABLE OF CITATIONS

POINT I

There are several factual inaccuracies in Point I of the appellee's brief. The citation to T.445 on p.3 of the appellee's brief is inaccurate. Nowhere on that page or on the surrounding pages is there support for the thesis that the Miami police told Karabatsos that they merely wanted the defendant arrested on two outstanding warrants. Similarly, appellee is inaccurate in stating, at pp. 3-4, that Florida never told New Jersey to arrest on a homicide charge. The record, and Wolpert's testimony, is replete with evidence precisely to the contrary. (T.401, 403, 424). Appellee's statement in footnote 5 to p.4 that the defendant was not told that he was arrested for the homicides is totally inexplicable in light of arresting officer Wolpert's repeated admissions both in his deposition (Suppl.T. 8,11,12,13,15,26,43) and in court (T. 401-403, 424), that he arrested the defendant for homicide or suspected homicide. The New Jersey teletype, fugitive complaint and arrest report also reveal that the defendant was arrested for the homicides. (R. 86,87,88).

Appellee's observation in footnote 4, p.4 that Wolpert had no independent knowledge of what the New Jersey police told Karabatsos, even if true, is irrelevant. Wolpert, not Karabatsos, was the officer who located the defendant in the apartment, placed him under arrest, and advised him of his arrest for homicide, through an interpreter at the apartment. It is to Wolpert's knowledge, understanding and intent that we must look, not to Karabatsos'. (Suppl.T. 9-13).

At p.5, footnote 7, the appellee attempts to discount the statement by the New Jersey Judge, to the defendant, notifying the defendant that he had been arrested for homicide, as not based upon the Judge's "independent knowledge" of the matter. However, where in the law of speedy trial does the appellee find a requirement, under these circumstances, that the Judge have "independent knowledge"? What is significant is that an experienced New Jersey Judge looking at the New Jersey police paperwork was personally convinced that the defendant

had been arrested for homicide. Of equal significance are the facts that the defendant acknowledged to the Judge that he understood himself to be arrested for the homicide, and that Miami police officer Guzman was silent at the extradition hearing, in the face of the Judge's and the defendant's expression of their mutual understanding of the basis for the latter's arrest. (R.80-85).

In footnote 8, p.5, the appellee next attempts to minimize Napoli's and Guzman's statements to the defendant. Napoli, the lead homicide officer, admitted that he told Guzman "exactly what to do and say and when to say it" (T. 483). One of the things Napoli told Guzman to tell the defendant, in New Jersey, was that the defendant was then under arrest for the murders. (T. 485).

Appellee's reliance on State v. Andrews, 376 So.2d 9 (Fla. 1979), at p. 7 of its answer brief is misplaced. The dual sovereignty doctrine upon which the holding in Andrews is predicated is irrelevant in the instant case where New Jersey was acting as Florida's agent in arresting the defendant, and had no independent state interest in bringing the defendant to justice for the crimes he committed in Florida. New Jersey's apprehension and detention of the defendant was solely for Florida's benefit. State v. Quigg, 107 So. 409, 91 Fla. 197 (1926); Section 941.01 et. seq, Fla. Stat.

The Illinois cases cited by appellee at p. 7, footnote 9, do not state the law in Florida. Fla. R. Crim. P. 3.191(a) (1) and (a) (4) fully define when the time provisions of Florida's Rule are triggered. Neither subsection creates an "out-of-state" exception. Illustrative of Florida's approach would be State v. Fives, 409 So.2d 221 (Fla. 4th DCA. 1982). There, the Court observed that Broward's speedy trial period would be activated if the defendant was arrested for the Broward offense while held in Dade County. For the purposes of prosecuting crimes within their jurisdictions, Broward and Dade Counties are as sovereign vis-a-vis each other as Hudson County, New Jersey is to Dade County, Florida.

Another factual inaccuracy in the appellee's brief occurs at p. 9, footnote 10. There is not the slightest support in the record for the observation that as of July 23, 1981, "considerable investigation" of the homicides was yet to be completed. There is also not the slightest support in the record for the statement that an indictment was not filed earlier "because" of the investigation that remained to be done. Detective Napoli, in fact, characterized the case as totally solved. The only things he was waiting for were two lab reports, on materials previously submitted, and a second statement from a witness. (T. 490-492). The last piece of evidence, a lab report, was received on August 28, 1981. The defendant was not indicted until November, 1981 and was not tried until July, 1982.

Lastly, the defendant wishes to call to this Court's attention the absence of a sworn return on the two alias Capias which the appellee has just been given leave to include in the record on appeal. (Suppl. R. 6,11). The absence of a proper entry on each capias showing that the defendant was in fact arrested pursuant to the capias, is evidence of the non-occurrence of that fact. Section 90.803(7), Fla. Stat.

POINT II

At page 11 of its brief, appellee urges that the police were entitled to rely upon Rizo's authority as a co-possessor of the searched premises because he allegedly kept clothes on the premises and lived there with his girlfriend. The allegation that Rizo kept clothes on the premises is based entirely upon the hearsay supposition of Officer Napoli who admitted that he did not see Rizo at the premises but had only been "made aware" by others thatRizo was around. (T. 617). The defendant denied, without contradiction, that Rizo kept clothes on the premises. (T. 635).

The appellee's reliance upon the testimony of Thomas Barcelo and Margarita

Martinez, at p. 11, footnote 11, to show Rizo's connection with the house, is also misplaced. There is no evidenct that the police spoke to Martinez or Barcelo before entering and searching the premises. Furthermore, Martinez and Barcelo's testimony was offered for the first time at trial, not at the hearing on the motion to suppress evidence. The law is well established that probable cause is to be demonstrated by what the police knew at the time of the search, not by what an investigation subsequently discloses.

Appellee states at p. 12, foornote 11, that Arsenio's statements to the police were not in evidence. The statements, however, were placed in the record by the State as exhibits to its Motion for Material Witness Bond. (R. 26-46). The Court held a hearing on the motion on March 10, 1982. The Court was thus in possession of the information contained in Arsenio's statement at the time of the hearing on the Motion to Suppress on July 6, 1982.

The appellee's assertion at p. 12, footnote 11, that the defendant does not contest Rizo's authority to consent to the search represents a misreading of the appellant's brief. A cursory reading of the appellant's brief reveals that the appellant's argument that Rizo's consent was invalid was based largely upon the fact that Rizo lacked sufficient contacts with the premises to consent to its search. Appellant has expressly raised the issue of authority in Point II of his brief.

Appellee urgues that a search of the crime scene without a warrant was justified by exigent circumstances. However, as appellee impliedly recognizes (Brief at 13, footnote 13), the circumstances as they appeared to the police were so exigent, the likelihood to the police of the murderer remaining on the premises so real, and the police so concerned with the safety of the occupants of the house, that the police passively sat around on the first floor waiting for the Fire Department to bring some lights and never felt that it was necessary, using their flashlights, to search the second floor.

Someone identified only as an "elderly female", and obviously not a person

authorized to consent to a search of the defendant's rooms, was the one who had to inform Officer Napoli that there was another body upstairs. The body was not visible to Napoli before the entered the room. (T. 611; 1307-8).

POINT III

State v. Craig, 237 So.2d 737 (Fla. 1970), cited by appellee in support of its argument is not at all helpful to the appellee. As appellee concedes at page 15 of its brief, Craig requires at least "a defendant's verbal acknowledgment of ...willingness to talk." The defendant in Craig had prefaced his statement to the police with the words "I will make a statement..." and he was also given an opportunity to call his attorney.

The defendant in the present case, by contrast, was not afforded the opportunity of calling his attorney, and never once expressed a verbal willingness to talk. It is obviously not enough that the defendant understood his rights before he incriminated himself. He had to first affirmatively waive those rights. The record below is absolutely devoid of any evidence that the defendant was ever asked if he wanted to give a statement. There is absolutely nothing in the record even remotely suggesting an affirmative waiver or desire to speak, by the defendant. The first, last, and only conduct of the defendant that the State can rely upon to show waiver is the defendant's act of incriminating himself following his receipt of the Miranda warnings. The State has completely failed to provide the keystone of the Miranda edifice - proof that the defendant waived his rights to silence, and counsel.

POINT V

After warning us that jurors' words are not to be treated as "free floating icebergs" (Appellee's brief at 23), appellee seizes upon the only verbal "iceberg" in juror Watkins' testimony, that is remotely hospitable to its position, in an attempt to convince us that Ms. Watkins was resolute in her opposition to capital punishment. A reading of Ms. Watkins' voir dire in full, as the appellee

acknowledges should be done shows, to the contrary, that Ms. Watkins fell squarely within the Adams v. Texas, 448 US 38, 49-50 (1980), class of reluctant but law-abiding jurors. Ms. Watkins simply did not show the requisite fixed unwillingness or inability to follow the court's instructions.

The same may be said of juror Alexander whose voir dire revealed only that the death penalty would weigh heavily upon her in the penalty phase, and that it would possibly not affect her at all in her deliberations on guilt and innocence.

POINT VI

The state's only eyewitness to the killing of Fumero, Thomas Barcelo, was allegedly abducted by the defendant's brother on the eve of Barcelo's appearance as a witness. It was the defendant's theory of the case that his brother and Rizo had done the killings and that Barcelo was lying when he attributed the killing of Fumero to him. The chief of homicide, Napoli, also believed that the defendant's brother had been involved in the killings. (T. 491). Arsenio refused to testify at trial. Rizo, the second alleged accomplice, was a fugitive at the time of trial.

It thus became critical for the defendant to be able to fully cross-examine and impeach Barcelo based upon the circumstances of his abduction. It would have been highly relevant to the defendant's case for the jurors to know, for instance, that Barcelo might have cooperated with his alleged abductors, that his brother may have kidnapped Barcelo out of fear that Barcelo would implicate him at trial, or that his brother might have asked Barcelo to change his testimony in certain ways. Without a transcript with which to impeach Barcelo, the defendant would naturally choose, as he apparently did, to forego a searching cross-examination of the abduction incident out of fear he could not rebut Barcelo's misrepresentations of fact. The absence of a written deposition, in short, chilled the defendant's motivation to cross-examine Barcelo.

The irony of the situation is that while the appellee in its brief at pp. 29-30, saw no impeachment value in Barcelo's deposition, the trial judge realized that the deposition would be potentially useful for impeachment, (T. 1725), but nevertheless felt that the court reporter's notes were an adequate substitute for the transcribed deposition. Contrary to the appellee's interpretation of the record at p. 30 of its brief, the defendant twice stated that he could not properly cross-examine Barcelo without a written deposition. (T. 1667; 1726).

The appellee at p. 30, footnote 25, has missed the point of the defendant's allusion to the Jencks case. Jencks, and the cases interpreting it, was cited not as controlling precedent but as an analogy to a situation where material that the defendant was entitled to have attrial was not supplied but the defendant was nevertheless not required to strictly prove how he was prejudiced by its absence.

Lastly, Harkins v. State, 380 So.2d 524 (Fla. 5th DCA. 1980), cited by the appellee at p. 31, is factually inapposite. In Harkins, the defendant moved for but was denied the right to open the case to put on an impeachment witness. In affirming the denial, the District Court noted that the testimony of the impeaching witness was cumulative to that already offered by two other witnesses at trial, and that the results, even if the case had been opened, would likely have been the same. Obviously, the first two Harkins criteria are not satisfied in this case. The last criterion is also inapplicable since anything that could impeach a key state's witness, even slightly, could clearly affect the trial outcome.

POINT X

Webb v. State, 347 So.2d 1054, 1056-7 (Fla. 4th DCA. 1977) cited by the appellee at p. 38 of its brief, is a case that directly supports the defendant's

arguments in this Point. In Webb, the State elicited from its police witness a description of his unsuccessful attempt to locate two eye witnesses. In response to the defendant's objection that such testimony impermissibly suggested evidence of his involvement in other crimes, the Court stated that "it was not only proper but expedient for the prosecutor to account for the absence of" the witnesses in order to preclude the defendant from arguing, in essence, that the State was hindering the jury in its search for the truth.

Thus, in Webb, the State at trial had forthrightly shouldered the evidentiary burden that the appellee here has avoided explaining directly to the jury why it did not produce obviously relevant witnesses such as Rizo and Arsenio Lara. Secondly, nothing in Webb remotely suggests that the State may excuse its ommissions of proof through a jury instruction. Webb, in fact, did not involve the absent witness instruction at all.

Hernandez v. State, 369 So.2d 76 (Fla. 3rd DCA. 1979) cited by the appellee at p. 39, is of no value as a precedent in the way appellee has cited it because the reported decision does not provide the text of the jury instruction in question.

POINT XI

The defendant contends with regard to the unobjected to prosecutorial comments, that their cumulative effect in the case allows them to be considered as fundamental error.

Throughout its argument on this Point, the appellee attempts to justify the prosecutor's statements as simply legitimate forms of responsive comment and reply. Appellee has plainly confused fair comment and fair response with vituperative and personal attacks on defense counsel.

Appellee somehow has read Wesley v. State, 416 So.2d 18 (Fla. 1st DCA. 1982), and Simpson v. State, 352 So. 2d. 125 (Fla. 1st DCA. 1977), as standing for the proposition that prosecutorial comments, like the ones in the present

case, are "not improper". In Simpson, id. at 126, the Court personally named and admonished the prosecutor for his intemperate language which the Court characterized as "a gratuitous insult to the adversary system of justice which he serves". In Wesley, id. at 20, the Court stated that it was again warning prosecutors, as it had done in Simpson, "that the prosecutor's indulgence in improper argument is a perilous practice". (Emphasis supplied).

POINT XII

Appellee raises the procedural objection at p. 43 of its brief, that the defendant's motion for mistrial failed to alert the trial court to the basis for the motion so that the trial court could take the proper remedial action. Here, however, the court not only directed the defendant to argue the motions at a later point in the trial (T. 1977), but, when the motions were elaborated upon later in the trial, clearly revealed that she completely understood the basis for the motions for mistrial at the time they were made. (T. 1994-6). To require the defendant to articulate the obvious basis for his motions, when the trial court stated that the bases were understood, would be to unnecessarily elevate form over substance.

Each of the federal cases cited by appellee at p. 43 of its brief involves a testifying defendant and is thus completely distinguishable from the present case in which defendant did not testify. Since the defendant offered no proofs, the relevance of appellee's citation to the footnote of J. Stewart's concurring opinion, at pp. 43-44 of its brief, approving use of proofs of pre-arrest silence for "rebuttal", is not apparent.

Lastly, appellee at pp. 44-45 goes off on the tangent of "flight". It was not the State's right to comment on his alleged flight that defendant addressed in Point XII of his main brief, but the State's comments on his pre-arrest silence.

POINT XIII

Appellee assumes that there was absolutely no evidence of any mitigating or aggravating factors other than those which the trial judge believed existed. As defendant has demonstrated in his main brief, however, at least two additional mitigating factors - age, and lack of a significant history of prior criminal activity - cannot be said, as a matter of law, to be totally without some factual support in the record. Secondly, based upon the defendant's defense that Rizo, his own brother, and possibly Barcelo, were the culprits, a jury should have been permitted to at least consider the mitigating circumstances of defendant being an accomplice and having a minor role in the crime.

The value to the defendant in having the jury instructed on all aggravating circumstances lies in the obvious fact that if a jury is shown the full range of aggravating factors for which the State will execute a murderer, the jury's realization that the defendant possesses only one or two of those 9 heinous attributes may result in the jury's giving them less weight either alone or when weighing them against mitigating factors. Obviously, a jury should be able to know how bad the defendant is on the State's officially promulgated 1-9 scale of badness. Otherwise stated, a defendant whose killing satisfies all nine criteria should be, and is certainly going to be, more harshly judged by a jury than one who only satisfies one or two of those criteria. The defendant was improperly denied the intangible benefits of a fully informed jury.

At least two fallacies exist in the appellee's argument that by instructing the jury that they could consider all non-statutory mitigating factors the Court remedied its failure to instruct on specific statutory mitigating factors. First, under the appellee's reasoning as long as the catch-all mitigation instruction was given, it could not be error even if a court totally failed to instruct on a single applicable statutory factor. Secondly, the Legislature has stated that certain mitigating factors are deserving of special emphasis in the sentencing process. A trial court is not at liberty to ignore this statutory scheme

and deemphasize the factors in mitigation which the Legislature deemed especially significant.

Lastly, appellee argues at p. 47 of its brief that the trial court, at least, discharged its duty to consider all relevant factors and thus cured its earlier failure to fully charge the jury. It has been shown that the court did not in fact consider all relevant factors. But even if the court had discharged its own duties, this action could not neutralize its failure to properly instruct the jury so that the jury could discharge its own independent duties within Florida's trifurcated sentencing scheme.

POINT XV

Appellee contends that the prohibition against "doubling up" applies only to the trial court and not to the jury. The jury, under appellee's theory, is thus entitled to act contrary to law. Appellee cites no authority for this unusual theory and of course there is none.

Secondly, the appellee alleges at p. 49, footnote 39, that the defendant never argued that the trial judge (as opposed to the jury) erred in doubling up aggravating factors. However, a review of Point XVI, Subpoints I and II, reveals that this argument was necessarily subsumed within those sections.

POINT XVI

Contrary to appellee's assertions at p. 54 of its brief, there is absolutely no way in which a dispassionate reader of Dr. Cava's testimony could fail to understand that Dr. Cava was rendering an opinion on the childhood causation of the defendant's adult behavior.

A serious procedural question is presented at p. 55-57 of appellee's brief by the appellee's use of its Supplemental Record in support of its arguments under this Point. The appellee's motion to supplement the record stated that the supplementary materials were submitted in support of its arguments on the speedy trial rule. The appellant did not object to supplementation of

the record for that purpose. It is improper for these materials to now be used in support of appellee's sentencing arguments. Furthermore, there is no evidence in the record that these supplementary materials were viewed or considered by either judge or jury. Appellant, concurrently with the service of his reply brief has filed a motion addressed to this issue, the allegations of which he incorporates herein by reference.

LAWRENCE & DANIELS
Attorneys for Appellant
1008 Peninsula Federal Building
200 Southeast First Street
Miami, Florida 33131

BY: _____
ADAM H. LAWRENCE, ESQ.
Special Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief Of Appellant was furnished by mail to MARTI ROTHENBERG, Assistant Attorney General, Ruth Bryan Owen Rohde Building, Florida Regional Service Center, 401 N. W. 2nd Avenue, Suite 820, Miami, Florida, 33128, this 12 day of July, 1983.

_____
ADAM H. LAWRENCE, ESQ.