IN THE SUPREME COURT OF FLORIDA

CASE NO: 62,691

MARIO LARA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

APPELLEE'S CROSS-REPLY BRIEF TO THE DEFENDANT'S SUPPLEMENT TO POINT III ON APPEAL.

* *

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ARGUMENT

III

(Supplement)

THE STATEMENTS CONCERNING THE HOMICIDES MADE BY THE DEFENDANT TO THE NEW JERSEY POLICE OFFICERS DID NOT VIOLATE THE DEFENDANT'S FIFTH AMENDMENT RIGHTS UNDER MIRANDA V. ARIZONA.

The defendant contends the statements he made concerning the homicides to the New Jersey police following his arrest in New Jersey were taken from him after his Miami attorney had invoked his right to counsel in Miami during the pretrial hearing on the defendant's unrelated cases of robbery and rape. This hearing occurred prior to the defendant being arrested on or charged with the homicides. It was during this hearing that the trial court issued arrest warrants for the defendant's failure to appear on the robbery and rape charges and upon which the defendant was ultimately arrested in New Jersey. The defendant now claims that his subsequent waiver of counsel in New Jersey was not valid under Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed2d 378 (1981), and the interrogation by the New Jersey police regarding the homicides violated his Fifth Amendment rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed2d 694 (1966).

The State first submits this issue has not been preserved for appellate reivew. Although the defendant did move to suppress the statements prior to trial and did object to the admission of the statements during trial, the asserted ground for objection was that there was insufficient evidence that he waived his right to counsel in New Jersey because: (1) the defendant claimed he told the Jew Jersey police he wanted counsel prior to questioning, and (2) waiver cannot be presumed from silence. (T: 548-565, 589-594, 650-655, 710, 716). Now the defendant is raising for the first time on appeal the issue of whether his trial counsel on the unrelated robbery and rape cases invoked the defendant's right to counsel on the homicide charges prior to the defendant being arrest for or charged with the bomicides. Long-standing Florida law provides that a reviewing court will not consider points such as this raised for the first time on appeal. In order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection or motion below. Steinhorst v. State 412 So.2d 332, 338 (Fla. 1982); Stewart v. State, 420 So.2d 862, 865 (Fla. 1982); Castor v. State, 365 So.2d 701, 703 (Fla. 1978); Sims v. State 402 So.2d 459, 460 (Fla. 4th DCA 1981); Daizi v. State, 396 So.2d 1160, 1161 (Fla. 3d DCA 1981). In the present case, even though the defendant's attorney on the robbery and rape cases, Stuart Adelstein, ultimately became his counsel on the homicide case as well, this issue was never raised in the motion

to suppress below. This issue simply has not been preserved for review by this Court.

Moreover, the defendant's claim also fails on the merits. It is clear from the in-court colloquy between the defendant's attorney, Mr. Adelstein, and the prosecutor, Mr. Siegel, that Mr. Adelstein never stated he was representing the defendant on the double homicide investigation or charge and never asserted that he was invoking the defendant's right to counsel and right to remain silent in the face of police questioning on the homicides. Indeed, a review of the colloquy demonstrates that Mr. Adelstein specifically refused to announce whether he was representing the defendant on the as yet uncharged homicides and was merely advising the prosecutor and the court that he was the defendant's attorney on the robbery case and wanted to be contacted prior to any interrogation:

> MR. ADELSTEIN: Stuart Adelstein, once again, for the record.
> I believe the detectives who are investigating the double homicide which just recently occurred and I am announcing in Open Court that I've represented Mr. Lara and, prior to any interrogation, I want it clear that I am to be contacted immediately so I can exercise any of his rights and make sure his rights are preserved.
>
> MR. SIEGEL: May I inquire whether he's going to remain to represent him on the homicide investigation?

> MR. ADELSTEIN: I've been privately retained on the robbery case and, as the Court is well aware and I believe as the State will remember, I'm attorney of record for Mr. Lara. I don't have to make any such announcement, since he's not charged as of yet on any double homicide.
>
> I'd just advise -- since they know I'm his attorney, I'm advising them.
>
> (State's Supplemental Transcript, pgs. 26-27)(Emphasis supplied)

Thus, even though the prosecutor and the Miami police were aware that the defendant was represented by counsel on the unrelated robbery and rape charges, by defense counsel's own statements he was not yet representing the defendant for purposes of the homicide investigation. Even when the defendand finally informed the New Jersey police after the questioning that he was represented by counsel in Miami, he stated that his attorney was representing him on a different charge. (T: 693, 695) Florida law provides that the knowledge of the police that a defendant is represented by counsel on a completely unrelated charge does not preclude the questioning of the defendant about the charge at hand where the defendant has knowingly and intelligently waived his right to counsel and has made a voluntary statement to the police. Miller v. State, 403 So.2d 1017, 1019 (Fla. 5th DCA 1981); Stone v. State, 378 So.2d 765, 769 (Fla. 1979). 1/

1/ The issue of the knowing and intelligent waiver and the voluntariness of the defendant's statements was addressed in point III of the State's answer brief.

Also, it is evident from the face of the record that Mr. Adelstein's intent was to exercise the defendant's general constitutional rights at some future time. This intent to invoke general rights in the future as to charges which have not yet been filed against the defendant and for which the defendant has not yet been arrested, and as to which defense counsel does not even represent the defendant was not effective to invoke the right to counsel under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed2d 694 (1966).

Furthermore, the defendant's attorney simply may not invoke the defendant's right to counsel. The determination of the need of counsel is the defendant's prerogative. Norris v. State, 429 So.2d 688, 689 (Fla. 1983); Palmes v. State, 397 So.2d 648 (Fla. 1981); State v. Craig, 237 So.2d 737, 740 (Fla. 1970). The State cannot force a person to be represented by counsel any more than it can deny a person the right to be represented by counsel. Palmes v. State, supra at 652; Clowers v. State, 244 So.2d 140 (Fla. 1971). Thus, just as Mr. Adelstein had no right to waive the defendant's constitutional rights to counsel without the defendant's consent, Mr. Adelstein had no right to unilaterally invoke the defendant's right to counsel as to the homicides without the defendant's consent either. Without determining whether or not the defendant desires to assert his rights and make no statement to the police, counsel is vicariously asserting the rights of another without authority and without even the defendant's knowledge.

Moreover, even if the defendant's right to counsel on the homicides was properly invoked by his attorney, the totality of the circumstances shows that the defendant properly waived that right and freely and voluntarily made his statement to the New Jersey police. It is well-established that a defendant may waive his Fifth Amendment rights under Miranda without notice to his counsel and even when his counsel had advised him to the contrary. Ferguson v. State, 417 So.2d 631, 634 (Fla. 1982); Kimble v. State, 372 So.2d 1014 (Fla. 2d DCA 1979); Monroe v. State, 369 So.2d 962 (Fla. 3d DCA 1979); Sanders v. State, 378 So.2d 880 (Fla. 1st DCA 1979); Ashley v. State, 265 So.2d 685, 690 (Fla. 1972). As the State's argument in point III of the State's answer brief shows, the defendant was properly read his rights in Spanish by Officer Garcia and he admitted that he understood each right, including the right to remain silent, the right to have an attorney present and the right to appointed counsel, and that he signed the rights waiver form and answered questions. (T: 675-680, 701-703). The record thus affirmatively shows the defendant understood his rights and knowingly and voluntarily waived those rights and willingly answered questions. Cannady v. State, 427 So.2d 723, 729 (Fla. 1983); Witt v. State, 342 So.2d 497 (Fla. 1977); Monroe v. State, 369 So.2d 962 (Fla. 3d DCA 1979). The presence of the accused's counsel is not essential to the validity of effectiveness of

the accused's waiver of the right to counsel. Johnson v. State, 268 So.2d 544, 546 (Fla. 3d DCA 1972), approved 294 So.2d 69 (Fla. 1974).[2/]

And finally, even if it were error to admit the defendant's statements into evidence on these grounds, the error was harmless in view of the eyewitness testimony of Tomas Barcelo, the background testimony of Margarita Martinez, and the fact that the gun used in the homicides had already been properly seized by the Miami police at the scene of the crime.[3/] Error, if any, was harmless and would not warrant a reversal of the defendant's conviction. Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed2d 1 (1972); Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed2d 284 (1969).

2/ This conclusion is not altered by Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed2d 378 (1981). Edwards is inapplicable to the present case because Edwards specifically holds that when an accused has invoked his right to have counsel present during custodial interrogation, he is not to be subjected to further interrogation until counsel has been made available to him. Id., 101 S.Ct. at 1884.

3/ The only questions asked of the defendant by the New Jersey police were as follows. Officer Garcia first asked him whether he knew the lady, Victoria Mature, who owned the apartment where he was arrested in New Jersey and he responded that he just met her and was merely using her phone to call Florida. Officer Garcia then asked him what he did with the gun after he killed the woman, and he stated he took it to his apartment and left it on the table. Officer Garcia also

CONCLUSION

Based upon the foregoing, the State of Florida respectfully submits that the trial court did not err in admitting the defendant's statements into evidence and that the defendant's conviction and sentence of death should be affirmed.

Respectfully submitted,

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3/ (continued)

asked him where his clothes were and he answered he did not bring any from Florida because he left in a hurry. (T: 682)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Cross-Reply Brief to the Defendant's Supplement to Point III on Appeal was mailed to Adam H. Lawrence, Esq., attorney for defendant, 200 SE 1st Street, Peninsula Federal Bldg., Suite 1008, Miami, Florida 33131, on this 7th day of September, 1983.

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