IN THE SUPREME COURT OF FLORIDA

J. B. PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

Appeal Case No. 63, 177

Trial Case No. 82-354-CF
(Lake County Case No.
82-912-CF-A-01)

ANSWER BRIEF OF APPELLANT

On Appeal From the Circuit Court of the Nineteenth Judicial Circuit of Florida, In and For Martin County, Florida [Criminal Division].

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POINT I

Appellee would have it that Georgeanne Williams' prior consistent statement was made prior to the existence of a fact said to indicate a motive to falsify, thereby contending that the only facts which could indicate a false motive in order to save Bush from the death penalty were her trial testimony and her deposition.

However, the evidence presented by virtue of her own testimony at trial shows that she knew that Bush, her boyfriend, was facing the death penalty at the time of his arrest (R. 902-903) and that she had previously lied to her family about Bush's prior criminal history in order to continue dating him (R. 902-903). By her own admission, both of these facts existed before she told her mother and sister that the Appellant allegedly confessed to her that he shot the victim.

It is clear there were sufficient facts existing at the time the statement was made to indicate a motive to falsify in light of her prior personal relationship with Bush along with the fact she knew has was facing the death penalty.

Furthermore, Appellee haphazardly contends that the statement made by Georgeanne Williams to her mother and sister does not indicate a motive to falsify in order to save Bush from the death penalty, because neither of them could affect the outcome of the case. This argument fails because it is not the statement itself which is looked at but whether any facts existed at the time the statement was made "to indicate bias, interest, corruption or other motive to falsify." Kellam v.

Thomas, 287 So. 2d 733, 734 (Fla. 4th DCA 1974). As noted above, Appellant's counsel elicited such facts during his cross-examination of the witness.

Assuming there was error, an Appellate Court, in determining whether an erroneous ruling below caused harm to the substantial rights of the Defendant, enquires whether, but for the erroneous ruling, it is likely that the result would have been different. Palms v. State, 397 So. 2d 648 (Fla.), cert. denied, 454 U.S. 882 (1981). However this test cannot be properly applied in the case at bar, until other issues on appeal are decided which in themselves could have had a substantial input on Appellant's conviction, so that, if other errors are found, allowing the state to introduce Georgeanne Williams prior consistent statement could have adversely affected Appellant's substantial rights.

POINT II

Appellee insists that Appellant's attempt to question and cross-examine Georgeanne Williams as to whether she had been previously arrested for petit larceny, in order to demonstrate that she lied to her mother, concerns an immaterial, collateral matter that did not demonstrate Williams' bias or prejudice against the Appellant.

It is clear, however, that inquiry during cross-examination may extend not only to matters relevant to the subject of direct examination and the point in issue to which it relates, but may also include any inquiry which is relevant on the question of the witness' credibility and the weight to be given his testimony. Gard on Evidence, 2d ed., §§21:05-21:06.

The point of this inquiry, as expressed in Appellant's Initial Brief was to impeach Williams' credibility by showing she is a liar and not for the purpose of impeachment by evidence of a prior arrest. That is, it was done in such a manner to show her conduct in the past accounts to a character trait of untruthfulness when viewed with her other testimony.

The rule in Florida has long been that the trial court has discretion as to inquiries into collateral matters and that such cross-examination is proper as to any matter relating to the witness to the cause and tending to affect credibility. Padgett v. State, 64 Fla. 389, 59 So. 946 (Fla. 1912).

POINT III

Appellee's initial contention that Appellant's taped statement was freely and voluntarily given and not within protection of the Fifth Amendment is without foundation until the issues of whether he invoked his right to have counsel present, and if he did whether he subsequently waived this right is determined. Even Appellee admits it is the totality of the circumstances which demonstrate the voluntariness of the statement. Donovan v. State, 417 So.2d 674 (Fla. 1982); Williams v. State, 156 Fla. 300, 22 So.2d 821 (1945).

Clearly, there is at the very least an ambiguous situation created analogous to Cannady v. State, 427 So.2d 723 (Fla. 1983), as to whether Appellant's statements during his conversation with Sheriff Holt constitute a request for an attorney, to-wit:

> Parker: "I want to see if my mom got me a lawyer yet. I don't know, I ain't got in contact with her yet." (R. 777).
>
> Parker: "That is why I was wanting my lawyer. I want to see if my mom has a lawyer so I can have him with me." (R. 778).
>
> . . . . .
>
> Parker: "I was waiting on -- I want my mom to get me a lawyer." (R.779).

After indicating three separate times his desire either to get in contact with an attorney or have another one with him besides Steven Greene, Appellant did not initiate further conversation but only responded to further police-initiated custodial interrogation by Sheriff Holt. The U.S. Supreme

Court has firmly laid down the test that after the right to counsel has been asserted by an accused, further interrogation of the accused should not take place "unless the accused himself initiates further communication, exchanges or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 485, 68 S.Ed. 2d 378, 101 S.Ct. 1880 (1981).

Even if Sheriff Holt's further inquiry is construed as an attempt to clarify the suspect's wishes analogous to Cannady, in that decision this court noted that the Appellant (Cannady) signed a written waiver after being readvised of his right to have counsel present and after being given the opportunity to call his attorney, and based on these facts, found that he knowingly and intelligently wavied his right to have counsel present.

However, in the case at bar, Appellant was never given the opportunity to call an attorney or to call his mother to find out if she got him one after expressly making known this desire to Sheriff Holt. Appellant also never signed a written waiver. Based on these facts, it cannot be said that Appellant's statement was spontaneous and freely given where only after he indicated an effective assertion of a desire to have another attorney with him he responded to Sheriff Holt's persistent questioning which amounted to a police-initiated custodial interrogation.

Miranda v. Arizona, explains how police should govern themselves when questioning suspects in custody:

"If the individual indicates in any manner, at any

> time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of an in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been invoked. 384 U.S. at 473, 86 S.Ct. at 1627, 16 L.Ed.2d at 723.

The Appellant's taped statement was erroneously admitted into evidence by the trial court in violation of the principles set forth in Miranda and in violation of the Fifth Amendment.

It should be noted that reviewing courts may not regard constitutional error as harmless if there is a reasonable possibility that the error may have contributed to the accused's conviction or if the error may not be found harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87, S.Ct. 824, 17 L.Ed.2d 705 (1967).

Such error cannot be construed to be harmless because, although he denied the actual killing of the victim, he admitted being present during the robbery, killing and murder and in light of the felony murder rule such statement cannot be said to be wholly exculpatory.

POINT IV

In support of the argument that the evidence supports the "heinous, atrocious and cruel" aggravating factor, Appellee apparently relies on a demonstration of fear and emotional strain which the victim was allegedly submitted to. However, as the U.S. Supreme Court noted, this Court has accorded a limited interpretation to this aggravating factor. Proffit v. Florida, 428 U.S. at 255, 96 S.Ct. at 2968, 49 L.Ed.2d at 924. This court has required that the "horror of the murder be accompanied by such additional acts as to set the crime apart from the norm." Cooper v. State, 336 So.2d 1133 (Fla 1976), cert denied, 431 U.S. 925; State v. Dixon, 283 So.2d 1 (Fla. 1973). More specifically, the court has held that the murder must be "conscienceless or pitiless" in the sense that it is "unnecessarily torturous to the victim." Id. The numerous cases in which the Florida Supreme Court has considered challenges to the application of this aggravating factor support the interpretation requiring acts of physical harm or torture to the murder victim prior to or accompanying the act resulting in death. Compare, e.g., Welty v. State, 402 So.2d 1159 (Fla. 1981) (Factor upheld where defendant robbed victim, later returned to victim's residence, struck sleeping victim several times in neck, and then set fire to his bed); Straight v. State, 397 So.2d 903 (Fla.), cert denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981) (factor upheld where defendant participated in murder inflicted by multiple stab wounds and bludgeoning); Thompson v. State, 389 So.2d 197 (Fla. 1980)

(factor upheld where victim died of wounds from gruesome series of torturous acts by defendant); Lucas v. State, 376 So.2d 1149 (Fla. 1979) (factor upheld where defendant shot victim, pursued her into house, struggled with her, hit her, dragged her from house and shot her to death while she begged for her life); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert denied, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980) (factor upheld where defendant tortured his child over prolonged period and murdered her to prevent discovery of her battered condition); Washington v. State, 362 So.2d 658 (Fla. 1978), cert denied, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979) (factor upheld where evidence showed bullet did not penetrate victim's skull and cause of death was four of nine stab wounds, none of which was instantly fatal) with Maggard v. State, 399 So.2d 973 (Fla.), cert denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598, (1981) (factor reversed where victim died quickly from single gunshot blast fired through window and victim was unaware he was going to be shot); Armstrong v. State, 399 So.2d 953 (Fla. 1981) (factor reversed where murderers were only at scene of crime for very brief period and shooting was precipitated by armed resistance); Williams v. State, 386 So.2d 538 (Fla. 1980) (factor reversed where victim died almost instantaneously from gunshot wounds); Fleming v. State, 374 So.2d 954 (Fla. 1979) (factor reversed where killing of policeman accomplished by single shot fired when hostage grabbed defendant's gun); Kampff v. State, 371 So.2d 1007 (Fla. 1979) (factor reversed where defendant directed pistol shot straight to head

of victim); Halliwell v. State, 323 So.2d 557 (Fla. 1975) (factor reversed where mutilation of victim's body occurred only after victim's death). The Florida court has repeatedly rejected application of this factor to killings accomplished quickly by acts of shooting or stabbing involving no additional torturous acts to the victim. E.g., Lewis v. State, 398 So.2d 432 (Fla. 1981); Demps v. State, 395 So.2d 501 (Fla.), cert denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Kampff v. State, supra,; Menedez v. State, 368 So.2d 1278 (Fla. 1979); Riley v. State, 366 So.2d 19 (Fla. 1978).

In the case at bar, there was no evidence that the Appellant or any co-defendant perpetrated any physical act on the victim other than a slight knife wound immediately followed by a single gunshot directed to the back of the head which resulted in her instantaneous death (R. 671). The Record indicates that after she was taken from the store, she was placed in the back of Bush's car, subjected to a short ride out of town and shot immediately (R. 954, 1051). Certainly, these facts do not show that the murder was "conscienceless or pitiless" in the sense that it is "unnecessarily torturous to the victim." Cooper v. State, supra; State v. Dixon, supra.

Contrary to Appellee's contention, the facts in Smith v. State, 424 So.2d 726 (Fla.), cert denied, U.S. , 103 S.Ct. 3129, 79 L.Ed.2d 1379 (1983), are not identical to those in the case at bar. In Smith, this court held that the finding of heinousness was proper where the facts showed the victim was abducted, confined, sexually abused in a hotel room and ulti-

mately taken to a wooded area where she was killed, and cited Knight v. State, 338 So.2d 201 (Fla 1976), in support thereof.

In Knight, this court affirmed the trial court's finding of this aggravating factor based on the fact that the hours preceding the actual killing constituted exceedingly cruel treatment of the victims. This court even admitted it was a close question as to whether these murders were especially heinous, atrocious or cruel, because of the fact that when the defendant killed the victims, death was almost instantaneous. 338 So.2d, at 202, 205.

The distinguishing factor in Knight setting the murders apart from the norm was the fact that the victims were under continuous strain, fearing for their lives for a long period of time. In Smith, the facts show that, after abducting the victim, all three co-defendants took her to a motel and sexually abused her before ever taking her to a wooded area and killing her.

As previously indicated, the victim in the case at bar was subjected only to a short ride after her abduction and killed immediately and instantaneously; the victim was not sexually abused. There are no "additional acts" here to set the crime apart from the norm of capital felonies, hence, the evidence is insufficient to support a finding of the heinous, atrocious and cruel aggravating factor.

The caselaw relied on by Appellee to support the jury's finding that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral justification

is distinguishable from the case at hand. In Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976), the victim was purposely driven to a remote swampy area and forced to walk with his hands taped while the co-defendants pointed a shotgun at him.

Similarly, in Combs v. State, 403 So.2d 418 (Fla. 1981), cert denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 836 (1982). This court found the facts constituted a premeditated murder. The facts presented in Combs indicated that the defendant lured the victim and her boyfriend to a remote wooded area under the pretense of going to a party and then brandished a gun and proceeded to coldly and cruelly taunt the victim about her imminent death before shooting her three times in the head while the boyfriend watched.

Although Appellant concedes that execution-type murders fit within the cold, calculated and premeditated category, this court, in Jent v. State, 408 So.2d 1024 (Fla. 1981), held that this aggravating circumstance requires a greater level of premeditation than the amount necessary or first degree murder convictions.

The facts in Sullivan and Combs show that each defendant apparently had planned well ahead of time to kill their victims by taking them specifically to a chosen, remote area after their abduction while here the facts show that Appellant had no intention at the time of the robbery of harming the girl. Although there is some evidence that co-defendant Bush men-

tioned he was going to kill her, there is also some evidence that there was a discussion in the car after the robbery and abduction as to whether to kill her or just let her go. (R. 953, 1050).

Furthermore, the victim was not driven to any pre-planned remote area which also indicates a lack of a calculated and premeditated murder. Thus, the fact that there is an ambiguity as to whether the intent to commit murder was developed and calculated prior to the commission at the robbery the evidence below does not prove the existence of this factor beyond a reasonable doubt, as is necessary according to State v. Dixon, supra.

Assuming, without conceding, the evidence supports the findings that the capital felony was committed for pecuniary gain and while the Appellant was engaged in the commission of a kidnapping and robbery, these two factors are insufficient as a matter of law when weighed against the three mitigating circumstances found by the court to exist to impose the death penalty. The Appellant would submit that the court erred in submitting two of the statutory aggravating circumstances for consideration by the jury [i.e., F.S. 921.1415(h)(i)] and further erred in its finding that these two statutory aggravating circumstances existed. The Appellant would submit, therefore, that the remaining statutory aggravating factors, when counterbalanced against the three mitigating circumstances found by the lower tribunal to exist, do not warrant the imposition of the death penalty.

POINT V

Although Appellant's counsel at the trial proceedings did not specifically object or seek curative instructions, the caselaw relied upon by Appellee simply holds that this is the proper remedy to preserve the issue of whether there was error so prejudicial and fundamental as to warrant a mistrial. Mancebo v. State, 350 So.2d 1098 (Fla. 3rd DCA 1977), cert denied, 359 So.2d 1217 (Fla. 1978); Ferguson v. State, 417 So.2d 639 (Fla. 1982); Bolen v. State, 375 So.2d 891 (Fla. 4th DCA 1979).

The issue is still a proper one for appellate review. Even in Bolen and Ferguson, each court still considered and ruled on the issue of whether the comments complained of in final argument to the jury were objection to such degree as to deprive the defendant of a fair trial.

Thus, this court should consider the merits of Appellant's argument and announce its ruling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellant has been furnished to LYDIA M. VALENTI, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, this 16 day of February, 1984.

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