IN THE SUPREME COURT OF FLORIDA

RAYMOND LEON KOON,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs	)	Case No. 63,322
	)	
STATE OF FLORIDA,	)	
	)	
Respondent/Appellee	)	

ON APPEAL FROM THE CIRCUIT COURT OF THE
TWENTIETH JUDICIAL CIRCUIT OF THE
STATE OF FLORIDA IN AND FOR COLLIER COUNTY

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. DOUBLE JEOPARDY

Issue: Did the indictment and retrial of appellant for the murder of Joseph Dino violate United States Constitutional guarantee against Double Jeopardy?

Appellant's argument in his Initial Brief clearly makes the case that the State prosecution was in fact a Federal prosecution prohibited by the Fifth Amendment of the Constitution of the United States. The State in its Answer Brief did not choose to address the argument presented, therefore no argument in response and rebuttal to the Answer Brief is necessary.

II. MOTION FOR CONTINUANCE

Issue: Did the court err in denying appellant's motion for continuance based on the failure to receive reports of court appointed physicians prior to trial?

The State's argument addressed to this point is that the psychological and neurological testing ordered by the court could have been done at any time from the time of the indictment until the time of the trial. The argument simply ignores the facts. The court had by order found that such testing was necessary. Of the four physicians' reports ordered by the court, only two

had been received by the time the trial commenced (and immediately before trial). One of the received reports did not address the issue of absence of independent judgment or volition specifically required by the court's order of appointment. The other report from Dr. Lombillo informed the court that the voluntary intoxication defense was possibly present and that the unreceived neurological evaluation was necessary for him to render an opinion to the court on that issue. During the course of the trial, the third psychiatric report was rendered. It, like the first report, failed to address itself to the voluntary intoxication issue.

The neurological evaluation report of Dr. Ertag, not received until after trial, is before this court. (R 1240-1241) His report discloses that appellant's organic brain syndrome may have been more severe at the time of the crime for which appellant was being tried and that appellant, "could have suffered an impairment of judgment affecting the intent of his actions." He recommended that appellant have additional evaluation including a form of psycometric testing to delineate any underlying organic brain syndrome and projective testing to identify any other thought disturbances.

The failure to continue the trial to allow this information to be received and evaluated by counsel for defendant; considered by the court appointed psychiatric experts; and brought to the attention of the jury, is a clear abuse of discretion. The preparation of this defense, as well as other defenses in the case,

were compromised by the court's required substitution of counsel approximately five weeks prior to trial.

III. WITHERSPOON ISSUE

Issue: Did the dismissal of prospective juror Astling for cause violate the rule established by the United States Supreme Court in Witherspoon vs Illinois.

The State apparently does not contend that the prospective juror, Ms. Astling, was properly excluded from the jury panel. Rather, the State contends that the defendant was obligated to reiterate his objection to the disqualification of the prospective juror after the excusal of the juror; that the failure to reassert the objection after the court's ruling on the motion to excuse the juror amounted to acquiescence in the court's ruling; and that the failure to reassert the objection subsequent to the dismissal of the juror made defendant's objection registered prior to the dismissal untimely, thus precluding appellate review.

The authorities cited by the State do not support its position. In Lucas vs State, 376 So. 2nd 1149 (Fla. 1979) the defendant failed to object to the trial court allowing an undisclosed witness to testify, thus not allowing for the trial court to rule directly on the issue. In the instant case, the State moved to excuse the prospective juror for cause; the defense objected thereto; and the court ruled on the issue thus made, wrongfully excusing the prospective juror.

In Rose vs State, 425 So. 2nd 521 (Fla. 1982), defendant

sought to argue that the excusal of three prospective jurors was improper although no objection to their excusal was made in the trial court. This court held that an objection to excusing a juror on the basis of Witherspoon must be made to the trial court before the juror is excused. The defendant had not done so in that case. The defendant did do so in this case. In Maggard vs State, 399 So. 2nd 973 (Fla. 1981), the defendant sought to argue on appeal that a prospective juror was improperly excluded by Witherspoon standards although he failed to object before the trial court. This court again ruled that if a defendant does not want a prospective juror to be excused on the basis of Witherspoon, it is incumbent upon the defendant to make his objection known before the juror is excused. In the instant case, defendant did so.

The authorities cited by the State in the Answer Brief do not support the State's position on this issue. The trial court's excusal of the prospective juror, Ms. Astling, is contrary to the standard of Witherspoon vs Illinois, 391 U.S. 510 88 S Ct 1770 20 L Ed 2nd 776 (1968) and this court's opinion in Chandler vs State, Case No. 60,790, July 28, 1983, 8 FLW 291, _____ So. 2nd _____ (Fla. 1983)

IV. HUSBAND-WIFE PRIVILEGE

Issue: May a wife be required to testify against her husband over the objections of her husband, with regard to communications between the two of them while they were husband and wife?

First, it should be stated that we are not concerned with whether a wife should be permitted to testify against her husband as the state contends, but whether a wife may be required to testify against her husband with regard to private communications between them over her objections and the husband's objections.

The State takes the position with respect to this issue that the husband-wife privilege was waived because of conversations on the same subject matter with others and further that even if it was not waived, the wife's forced testimony was merely cumulative and thus not grounds for reversal on appeal.

With respect to the first position, it is only necessary to add to appellant's discussion at pages 23 through 28, that Katz vs United States, 389 U S 347, 19 L Ed 2nd 576, 88 S Ct 507 (1967) dealt with a Fourth Amendment, search and seizure issue, wherein the government had attached an electronic eavesdropping device to the outside of a public telephone booth. The court held that such was illegal without appropriate antecedent judicial authorization. With respect to Mr. Justice Harlan's concurring opinion and the twofold requirement expressed by him, society has long recognized as reasonable the expectation of privacy in husband and wife private communications wherein they express and expose their innermost selves to each other. Society's recognition does not depend upon the character of the communication but is based upon the existence of the relationship between them.

The State contends that the wife's testimony was merely cumulative because of prior testimony by J.L. Koon, who had himself admitted to three people on different occasions that he, J.L. Koon, had killed Joseph Dino; by Lois Purvis, who had hearing problems and was blind in the left eye, who testified that while sitting in a vehicle with the defendant on her left, that she thought he had said that he killed Joseph Dino but being unsure, asked him again at a later time, at which time he denied having told her that; and by the defendant's stepson at a time when defendant was drunk and had been on a two week binge, at which time, according to the testimony, he suffered memory lapses and black outs. The reliability of this testimony is, at best, suspect. The Assistant United States Attorney, being unaware of such, reserved the wife with her compelled testimony, as his last witness before resting his case. The testimony of a wife concerning admissions made to her by the husband, adverse in character to his interests, is about as powerful as evidence can be. The prejudicial character of the testimony and the harmfulness to the substantial rights of the accused is apparent.

V. DENIAL OF ASSISTANCE OF COUNSEL

Issue: Was appellant deprived of effective assistance of counsel guaranteed by the Federal and State Constitutions?

The State misapprehends the point made by appellant with respect to this issue. The trial court, despite appellant stating on three occasions that the differences between he and counsel

was susceptible to being worked out, failed to provide the five minutes necessary for doing so; the trial court failed to inquire into appellant's allegations of ineffective assistance of counsel; and then forced appellant to defend himself. This course of conduct by the trial court precluded any meaningful choice by appellant and amounts to the deprivation of effective assistance of counsel as constitutionally guaranteed.

Appellant does not maintain here that his trial counsel was ineffective. That issue was not ruled on by the lower court, although presented to the lower court. Appellant's issue is predicated on the failure of the court to do those things that it should have done as set out above and as more fully set out in pages 29 to 40 of the Initial Brief.

VI. FAILURE TO REOPEN

Issue: Did the court err in refusing to allow the appellant to reopen the case to produce testimony of an additional witness that discharged defense counsel would not or did not call?

At the beginning of its argument, the State states that appellant elected to represent himself. As the record clearly reflects, the appellant did not at any time elect to represent himself.

The summary manner in which the trial court disposed of appellant's request to call additional witnesses is revealed by the quotation cited by the State at page 13 of its brief and the court's response thereto. It is as follows:

THE DEFENDANT: How about me just taking over and starting from the beginning like I get for him to do? Witnesses out there he didn't call, very important eye witness.

THE COURT: Well, it's too late for that now, sir.

* * *

The general rule requiring a proffer of excluded testimony before review does not pertain to this case. The court's summary disposition effectively foreclosed appellant from proffering testimony and precluded the identification of the witness by name, his availability and the substance of his testimony. Cason vs Smith, 365 So. 2nd 1042 (Fla. 3rd DCA, 1978)

VII. SENTENCE PHASE OF THE TRIAL

Issue: Did the court err in failing to continue the sentencing phase of the trial in order to allow appellant to obtain counsel or in the alternative appoint an attorney for him?

At page 17 of the Answer Brief, Appellee states that appellant conferred with Mr. McDonnell during closing argument (R 1124). The record indicates that any such conference was at Mr. McDonnell's request and not at the request of appellant. Appellee also maintains that appellant gave the impression that he would use Mr. McDonnell in the penalty phase, referring to pages 1151 and 1152 of the record, when all appellant did was ascertain whether or not he could get in touch with Mr. McDonnell by telephone at the trial court's urging.

As the State asserts, the appellant did know that the sentence hearing had been scheduled for the following Monday and while appellant may have been able to obtain new counsel over the weekend had he been free, he was in fact incarcerated. As stated at page 45 of the Initial Brief, he was unable to make a telephone call until 8:30 Sunday evening. He attempted to secure an attorney through his wife and asked for a chance to confer with her, which was refused.

The State admits the right of counsel is a fundamental right. There is nothing in the record to indicate that a continuance for a reasonable time would have obstructed the orderly judicial procedures or deprived the court of the exercise of its inherent powers to control the trial. A reasonable continuance is contemplated by §921.141(1) Fla. Stat. (1981).

Issue: Did the court err in allowing introduction of Exhibit 21, which was ambiguous on its face, into evidence?

Issue: Did the court err in allowing the Assistant United States Attorney to argue that appellant had been previously convicted of assault with intent to commit murder?

Issue: Was it error for the court to instruct the jury with respect to assault with intent to commit murder?

Appellee states, with respect to these three issues, that "All the evidence in this record indicates appellant was convicted in 1971 of assault with intent to commit murder." Not true. The first page of Exhibit 21 is the Bench Docket, which is certified

by the Clerk of the Court, to have been filed and recorded in the minutes of the Criminal Court of Record. It clearly reflects that defendant pleaded nolo contendere to committing two aggravated assaults and that he was adjudged guilty of those offenses based upon his plea of nolo contendere to them. This document, to wit, the Bench Docket, having been recorded in the minutes of the court is the official record of the disposition of that case. It was entered on December 17, 1971 and filed on that date. The charges in the information were not the charges to which he pled nolo contendere and upon which he was adjudged.

The second page of Exhibit 21, through what is apparently a scrivener's error, states that defendant pled to the offense of "aggravated assault with intent to commit murder". There was no such offense under the laws of Florida at the time he was charged or at the time of his plea and adjudication. See §784.04 and §784.06, Fla. Stat. (1969).

The State's reliance upon the presentence investigation report is misplaced. The pertinent portion of the presentence investigation report was disputed by defendant when exhibited to him at the subsequent sentence hearing (R 1219), was not inquired into by the court, and is contrary to the minutes of the court, as reflected by the Bench Docket.

It was thus error to allow the introduction of Exhibit 21; it was error to admit and publish to the jury the probation sheets, admitted by the State to be not relevant and prejudicial to defendant; (A 67-68); it was error to allow the Assistant United States Attorney to argue that appellant had been previously convicted of

assault with intent to commit murder; (R 1191) and it was error for the court to instruct the jury with respect to assault with intent to commit murder. (R 1199)

In Elledge vs State, 346 So. 2nd 998 (Fla. 1977) and Morgan vs State, 415 So. 2nd 6 (Fla. 1982), evidence of previous convictions and testimony concerning the circumstances of those convictions were allowed. However, in this case, the court allowed into evidence documents reflecting charges for which he was never convicted; documents reflecting adjudication of guilty to a non-existent crime; argument that he had been convicted of a crime for which he had never been convicted; and instructed the jury with respect to a crime for which he had never been convicted.

VIII. SENTENCE HEARING

Issue: Did the court err in failing to provide for effective assistance of counsel to appellant prior to and at the sentence hearing?

The State's reliance upon State vs Barber, 301 So. 2nd 7 (Fla. 1977) and Perri vs State, ____ So. 2nd ____ (Fla. 1983), 8 FLA 398, Case No. 57,142, is misplaced. In each of those cases, this court held that the adequacy of representation of counsel could not be raised for the first time on direct appeal. The rationale of the pronouncement is set out in State vs Barber.

> "...[W]e hold that it can not properly be raised for the first time on direct appeal, since, as was recognized in Chester,' it is a matter that has not previously been ruled upon by the trial court...." (p. 9)

In this case, the issue is not raised for the first time upon direct appeal. It was presented to the trial court in a petition read at the sentence hearing. The court denied the motion (R 1213). This issue is not here raised for the first time but was raised before the trial court and ruled on by the trial court adversely to the appellant.

Issue: Did the court err in failing to continue the sentence hearing in order to allow appellant an opportunity to obtain private counsel?

No argument in response or rebuttal is necessary.

Issue: Did the court err in basing its judgment ordering the execution of appellant upon portions of the Presentence Investigation Report, which were controverted by appellant?

Again, appellant was never convicted of assault with intent to commit murder, as set out on pages 48 and 49 of the Initial Brief and discussed under section VII, pages 9 and 10, supra.

Issue: Did the court err in finding no mitigating circumstances in the case?

Appellant's discussion with respect to Dr. Ertag's report in section II, page 2, supra is equally applicable here.

The State's statement that appellant was given the opportunity to have either Mr. McDonnell or Mr. Osteen represent him at the penalty hearing begs the question. While the Public Defender had been appointed to represent the defendant in post-conviction matters,

defendant had not seen or consulted with an attorney since his conviction (R 1213). The failure of the trial court to allow opportunity for receipt of the court appointed physician's reports, as discussed in section II, supra and the denial of appellant's petition with regard to ineffective assistance of counsel made at the commencement of the sentence hearing, as discussed above, effectively prevented appellant from presenting these items in mitigation to the court.

Issue: Was the homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification?

Issue: Was the homicide especially heinous, atrocious and cruel?

No argument in response or rebuttal is necessary.

IX. DENIAL OF DUE PROCESS

Issue: Did the proceedings in the trial court afford appellant fundamental fairness as required by due process?

The State's reliance upon old cases (all of which were rendered in the year 1930 or prior thereto) dealing with the technicalities of assignments of error under the rules governing appeals at that time, is misplaced and do not provide authority for the State's argument.

To determine whether the procedure employed by the trial court offered fundamental fairness as required by the due process

clauses of the United States and Florida constitutions requires examination of the issues underlying that question. Appellant may be incorrect about one or more of those matters cited showing a lack of fundamental fairness but such does not render the remaining matters moot as urged by the State.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy hereof has been furnished to Office of the Attorney General, Park Trammel Building, 8th Floor, 1313 Tampa Street, Tampa, Florida, 33602; Office of the State Attorney, P.O. Box 399, Ft. Myers, Florida, 33902; and Appellant, Raymond Leon Koon, #831760, Florida State Prison, P.O. Box 747, Starke, Florida, 32091 by United States mail this 2d day of December, 1983.

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