IN THE SUPREME COURT OF FLORIDA

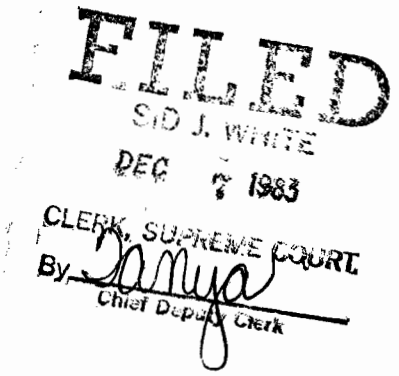
TOMMY S. GROOVER,

Appellant,

v. CASE NO. 63,375

STATE OF FLORIDA,

Appellee.



ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellee's brief will be referred to as "AB". Other references will be as set forth initially.

As to those issues not specifically addressed herein, appellant relies upon his initial arguments.

II ARGUMENT

ISSUE I

THE TRIAL COURT REVERSIBLY ERRED IN ALLOWING TESTIMONY CONCERNING COLLATERAL OFFENSES TO BE INTRODUCED AT APPELLANT'S TRIAL WHERE THE COLLATERAL OFFENSES WERE NOT RELEVANT TO THE CRIMES CHARGED, AND, EVEN TO THE EXTENT RELEVANT, WHERE SUCH TESTIMONY IMPROPERLY BECAME A FEATURE OF APPELLANT'S TRIAL, THEREBY DENYING HIM THE SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AS WELL AS HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

The state posits that the issue of the admissibility of the collateral crimes evidence has not been preserved for appeal. Appellant steadfastly disagrees.

Initially, it should be noted that under Section 90.404(2)(b), Florida Statutes (1981), collateral crimes evidence is presumptively inadmissible and should be excluded unless the state affirmatively establishes its propriety. Malcolm v. State, 415 So.2d 891 (Fla. 3d DCA 1982). Even pre-Code, case law firmly established that if the defendant objected to collateral crime evidence, the burden was upon the state to show the relevance of such evidence. The failure of the prosecution to meet this burden was grounds for reversal. E.g., Franklin v. State, 229 So.2d 892 (Fla. 3d DCA 1969); Roche v. State, 326 So.2d 448 (Fla. 2d DCA 1976).

Here, in accordance with Section 90.404(2)(b)(1), the state served notice of its intention to offer collateral crime evidence. (R-15,20,81,87). There was, however, no pre-trial determination as to the admissibility of that

evidence, as is clearly envisioned by the statute. Nevertheless, following voir dire, defense counsel voiced his objection to the admissibility of the collateral crime evidence. (T-449-451,459-467). Appellant contends that the state totally failed in its burden of establishing the admissibility of such evidence. However, since the trial court firmly ruled that the evidence was admissible (T-467), repeated objections by the defense would have been fruitless, and therefore were not required. Birge v. State, 92 So.2d 819 (Fla. 1957); Brown v. State, 206 So.2d 377, 384 (Fla. 1968).

With respect to the aggravated assault committed by Robert Parker, it is readily evident that the state failed to establish its relevancy. The initial prerequisite for the admission of collateral crime evidence is proof by clear and convincing evidence that the defendant committed that collateral crime. State v. Norris, 168 So.2d 541 (Fla. 1964); Dibble v. State, 347 So.2d 1096 (Fla. 2d DCA 1977); Franklin v. State, 229 So.2d 892 (Fla. 3d DCA 1970); Parnell v. State, 218 So.2d 535 (Fla. 3d DCA 1969). Such proof was totally lacking here. Appellee claims the evidence of Parker's assault in 1980 upon Billy Long was "relevant to prove state of mind, motive, intent, a common scheme or plan, and a general pattern of criminality." (AB-10). Appellee overlooks the obvious -- this was not a trial against Robert Parker or Billy Long, but rather was a trial against appellant, Tommy Groover. A prior crime committed by Robert Parker had absolutely no relevance in the trial against appellant. E.g., Hirsch v.

State, 279 So.2d 866 (Fla. 1973); Whitted v. State, 362 So.2d 668 (Fla. 1978).

Further, appellant maintains that Joan Bennett's testimony concerning threats made to her by appellant was improperly admitted since there was no independent evidence of this collateral crime. Dinkens v. State, 291 So.2d 122 (Fla. 2d DCA 1974). The inadmissibility of this evidence is clearly preserved for appeal since in addition to appellant's objections, previously discussed, defense counsel specifically requested that Ms. Bennett's testimony regarding threats be stricken and that a curative instruction be given, both of which were refused by the trial court. (T-1043). Malcolm v. State, supra.

Likewise, appellant contends that appellee's claim of nonpreservation of the issue relating to the admissibility of the aggravated assaults upon Hal Johns, Lewis Bradley, and Denise Long (AB-7-8) is wholly without merit. Prior to Billy Long's testimony concerning the aggravated assaults at the Bradley residence, defense counsel specifically renewed his prior objections. (T-835-842).[1] Outside the presence of the jury, following lengthy argument, the trial judge overruled the objection. (T-840-841).[2] Since the

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1 Lack of relevancy and "overkill" concerning "the events that supposedly happened out at the Bradley's house" were both asserted by defense counsel. (T-838-839).

2 It is apparent that the trial judge's ruling also encompassed the testimony of Denise Long and John Bradley. (T-841-842).

trial judge was fully apprised of defendant's objections, the lack of preservation argument is frivolous.

Appellant asseverates therefore that he is entitled to a new trial because irrelevant collateral crime evidence was presented at his trial and since the disproportionate use of other crime evidence destroyed his right to a fair trial.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS MADE MAY 17, 1982 AND JULY 9, 1982.

A. The Statements Were Involuntary As A Matter Of Law Since Obtained By Direct Or Implied Promises Of Leniency.

Appellee relies heavily upon United States v. Davis, 617 F.2d 677 (D.C. Cir. 1980) to support the claim that appellant's May 17, 1982 statement and his July 9, 1982 deposition were voluntary. Appellant submits that Davis misinterprets the rationale of Hutto v. Ross, 429 U.S. 28 (1976). Admittedly, Hutto rejects a "but for" involuntariness test. However, as noted initially, in Hutto, the confession was not an express precondition of the plea bargain. Thus, the confession was not the result of any direct or implied promises on the part of the prosecution. Appellant maintains that a proper interpretation of Hutto mandates the conclusion that where a confession is directly linked to the bargain, in the sense of a quid pro quo, the confession is involuntary and must be excluded. Gunsby v. Wainwright, 449 F.Supp. 1041 (M.D. Fla. 1978), aff'd. 596 F.2d 654 (5th Cir. 1979), cert. denied 444 U.S. 946 (1979); People v. Jones, 331 N.W.2d 406 (Mich. 1982), cert. denied 103 S.Ct. 1775 (1983).

Here, as in Gunsby and Jones, appellant made the May 17, 1982 statement to the prosecutor as a result of the promises made by the state in the plea bargain. It was clear that the plea bargain would not be available unless appellant made the statement and unless he continued to make statements at the

whim of the prosecutor. Therefore, as in Gunsby and Jones, the May 17th statement must be considered involuntary.

The involuntariness of appellant's July 9, 1982 deposition is readily apparent. Appellant did not voluntarily present himself for the deposition, but rather his presence was compelled by subpoena. Gunsby v. Wainwright, supra. The deposition was part of promise of the plea bargain to testify. At no point during the taking of the deposition was appellant ever advised of his Fifth Amendment privileges or of his Miranda rights. Contrast, Davis, supra at 687 n. 26. Appellant's counsel was not even present during the taking of the deposition. Therefore, appellant's deposition was involuntary as a matter of law. Mincey v. Arizona, 437 U.S. 385 (1978) precludes the use of an involuntary confession for impeachment purposes. Appellant maintains therefore that he is constitutionally entitled to a new trial where his involuntary statements are not utilized against him.

ISSUE V

THE TRIAL COURT ERRED BY REJECTING THE JURY'S SENTENCING RECOMMENDATION OF LIFE IMPRISONMENT FOR THE MURDER OF RICHARD PADGETT AND BY IMPOSING A SENTENCE OF DEATH UPON APPELLANT WHICH IMPOSITION, IF SUSTAINED AND CARRIED OUT, WILL UNCONSTITUTIONALLY DEPRIVE APPELLANT OF HIS LIFE.

Appellee claims that the trial judge's override should be sustained because the judge's findings as to the aggravating and mitigating circumstances are supported by the evidence. Appellee's analysis is erroneous. Although the trial judge found no mitigating factors, there was evidence as to statutory and nonstatutory mitigating factors which could have influenced the jury to return a life recommendation. Because the jury's recommendation could have been so based, the recommendation was reasonable, and the override cannot be sustained. Welty v. State, 402 So.2d 1159,1164-64 (Fla. 1981); Gilvin v. State, 418 So.2d 996,999 (Fla. 1982); Cannady v. State, 427 So.2d 723,731 (Fla. 1983); Washington v. State, 432 So.2d 44,48 (Fla. 1983). Thus, appellant's death sentence for the murder of Richard Padgett must be vacated.

ISSUE VIII

THE SENTENCES OF DEATH CANNOT BE SUSTAINED WITHOUT VIOLATING APPELLANT'S RIGHTS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellee seeks to ignore the obvious fact that the factual findings in the sentencing orders of appellant and Robert Parker with respect to threats made against appellant by Parker are factually and inherently inconsistent and contradictory. It is apparent that the trial judge's rejection of the mitigating circumstances set forth in Sections 921.141(6)(b), (d), and (e) was based upon his express finding that no threats of any nature were made against appellant. In Parker's case, however, the same trial judge expressly found that repeated threats to kill appellant were made by Parker. Appellant maintains that these facially inconsistent findings require reconsideration by the trial judge of the sentences imposed upon appellant.

III CONCLUSION

As argued herein and initially, for the reasons set forth in Issues I, II, III, and IV, appellant requests that his convictions be reversed and that the cause be remanded for a new trial. For the reasons set forth in Issue VI, appellant requests a reversal of his sentences and a remand for a new penalty hearing. For the reasons set forth in Issues V, VII, and VIII, appellant requests reversal of his death sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Barbara Butler, Assistant Attorney General, Duval County Courthouse, Jacksonville, Florida 32202 and a copy mailed to appellant, Mr. Tommy A. Groover, #088266, Florida State Prison, Post Office Box 747, Starke, Florida 32091 on this 7th day of December, 1983.

GLENNA JOYCE REEVES