IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
RANDY EUGENE KINCHEN,
Respondent.

CASE NO. 64,043

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court. The Respondent was the appellant and the defendant, respectively, in those lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R"	Record on Appeal
"A"	Appendix of Petitioner
"BP"	Initial Brief of Petitioner
"BR"	Brief of Respondent

All emphasis has been added by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE

Petitioner readopts the case portion of the Statement of the Case and Facts as presented in its initial brief (BP 2-4) and accepts Respondent's supplement thereto (BR 2-3) with the following correction:

Petitioner first raised the question of the standard for determining whether a comment is a comment on a defendant's right not to testify at oral argument not on rehearing (BR 2-3). At oral argument, counsel for Petitioner was asked whether the comment complained of in the case sub judice was fairly susceptible of being taken by the jury as a comment on the Respondent's right not to testify. Counsel for Petitioner responded that the comment may have been fairly susceptible for being taken by a jury of lawyers and law students as a comment on Respondent's right not to testify but that the comment could not have been reasonably so taken by a jury of laymen. Thus, Petitioner did argue, before rehearing, a more reasonable standard than the fairly susceptible one for determining whether a comment is a comment on a defendant's right not to testify.

STATEMENT OF THE FACTS

Petitioner readopts the facts portion of the Statement of the Case and Facts as presented in its initial brief (BP 2-4) and accepts Respondent's supplement thereto (BR 4-12) with the following additions and/or corrections:

Anthony Greulich never stated that the black person in the car with Respondent was a male (BR 4). He stated that it looked like a male (R 546).

John Holland testified that the shouts he heard (BR 5) came from a girl and several men (R 803). He testified that upon going out to investigate he saw two white males throwing bottles, and one of them swinging a chain at a girl in the water who was saying "Don't hurt me. Leave me alone" (R 804-805). Holland testified that one of the men split the girl's head with a beer bottle (R 806) while the other was using the chain (R 808). Mr. Holland testified that the one using the chain was the taller of the two (R 835). Mr. Holland never "admitted that at his deposition he had stated that the person with lighter hair was the shorter of the two" as Respondent would have it (BR 5).

Pamela Lowe never "discussed" performing oral sex (BR 6) but testified that that is what Respondent and his friend wanted (R 565). She never testified "that Respondent had not initiated any violence during the evening" (BR 7). Ms. Lowe likewise never testified that Respondent's co-defendant "initiated all of the violence" as Respondent would have it

(BR 7). She never testified that "she had never picked Respondent out of a photographic live lineup" (BR 7) but rather that she was never shown any photographs of Respondent (R 716). Ms. Lowe never testified that when she tried to get away only Respondent's co-defendant chased her (BR 7) but rather that she did not know whether Respondent chased her also (R 739).

Pamela Lowe testified that Respondent never told his co-defendant to stop what he was doing (R 756-758), never got out of the car and walked away, stayed in the car, and was never forced into driving her away by his co-defendant (R 757). She also testified that Respondent unzipped his pants, did not stop her from performing oral sex on him, and was not forced by his co-defendant into letting her do so (R 762-763).

Detective Richtarcik, of the Broward County Sheriff's Office, testified that a fingerprint lifted off of the belt found at the crime scene matched Respondent's fingerprint (R 974).

Detective Edel, of the Dania Police Department, never testified "that he removed Pamela Lowe from the ocean" (BR 9). He testified that Ms. Lowe had told him that the less agressive individual (BR 9) had brought the chain to the other individual (R 1029, 1031).

Mr. Knesz testified that he would not lie for Respondent's co-defendant because he would not lie for anybody and that Respondent was once his best friend (R 1163).

Respondent's co-defendant testified that he had never before seen the belt that had been used to beat Ms. Lowe (R 1276-1277). He tried the belt on but it was much too small for him (R 1277).

POINTS INVOLVED ON APPEAL

POINT I

WHETHER THIS HONORABLE COURT SHOULD ADOPT THE STANDARD USED BY THE FEDERAL COURTS IN DETERMINING WHETHER AN INDIVIDUAL'S FEDERAL CONSTITUTIONAL RIGHT TO REMAIN SILENT HAS BEEN VIOLATED AS THE STANDARD TO BE USED BY THE STATE COURTS IN MAKING SUCH A DETERMINATION?

POINT II

WHETHER THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION FOR SEVERANCE?

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WHETHER THE TRIAL COURT ERRED IN DENYING RESPONDENT'S MOTION FOR A CONTINUANCE?

POINT I

THIS HONORABLE COURT SHOULD ADOPT THE STANDARD USED BY THE FEDERAL COURTS IN DETERMINING WHETHER AN INDIVIDUAL'S FEDERAL CONSTITUTIONAL RIGHT TO REMAIN SILENT HAS BEEN VIOLATED AS THE STANDARD TO BE USED BY THE STATE COURTS IN MAKING SUCH A DETERMINATION.

Petitioner readopts the argument presented on this point in its initial brief on the merits (BP 6-8) and again submits that this Honorable Court should adopt the standard used by the federal courts in determining whether a comment constitutes a violation of a defendant's right to remain silent.

Petitioner recognizes, as pointed out by Respondent (BR 15-16), that the Florida Constitution contains a provision protecting the right to remain silent, Art. I, §9, Fla. Const., and also recognizes, as pointed out in its initial brief (BP 7), that this Honorable Court is empowered to employ a stricter standard in determining whether that right has been violated (BR 16). Petitioner submits, however, that this right is primarily a federal constitutional one, Rowe v. State, 87 Fla. 17, 90 So. 613, 618 (1924); David v. State, 369 So.2d 943, 944 (Fla. 1979), and as such should be adjudged by the standard now used by the federal courts (BP 6). Samuels v. United States, 398 F.2d 964, 967 (5th Cir. 1968); United States v. Garcia, 655 F.2d 59, 64 (5th Cir. 1981); United States v. Vera, 701 F.2d 1349, 1362 (5th Cir. 1983).

Petitioner submits that there is no need for this Honorable Court to be more Roman than the Romans and that it

would be in the interest of comity for this honorable court to adopt the federal court's "manifest intention"/ "naturally and necessarily taken" standard as the one to be used by the state courts in determining whether a comment constitutes a violation of a defendant's right to remain silent. Petitioner submits that an appropriate analogy can be found in Fla. Const. Art.I, §12. That section, prohibiting unreasonable searches and seizures, was amended in 1982 to be construed in conformity with the United States Constitution's fourth amendment protection of the same right. See, Art.I, §12, Fla. Const. (1983). Petitioner respectfully submits that the same result should attain in the case sub judice and requests this Honorable Court to adopt the standard used by the federal courts in determining whether a comment constitutes a violation of a defendant's right to remain silent (BP 6).

Further, Petitioner respectfully submits that application of the federal court's standard to the case at bar requires a reversal of the Fourth District Court of Appeal's decision for the reasons stated in Petitioner's initial brief (BP 7-8). For the reasons there stated, the complained-of comment by Respondent's co-defendant's attorney could not "...strictly be regarded as a comment upon the failure of the accused (Respondent) to testify in his own behalf." Gray v. State, 42 Fla. 174, 28 So. 53-54 (1900). The fact that Respondent's co-defendant's attorney characterized his client's testimony as unrefuted (BR 25-27) is irrelevant since he had the

right to characterize testimony as uncontradicted and undenied, even though the testimony was as to a private conversation between his client's witness, Mr. Knesz, and Respondent. Clinton v. State, 56 Fla. 57, 47 So. 389-390 (1908).

In conclusion, as to Respondent's waiver argument (BR 22-23), Petitioner submits that it argued a more reasonable standard than the fairly susceptible one for determining whether a comment is a comment on a defendant's right not to testify at oral argument (Statement of the Case, supra) and that it therefore did preserve this argument for review by this Honorable Court. Sarmiento v. State, 371 So.2d 1047, 1053 (Fla. 3d DCA 1979). Clearly, the Fourth District Court of Appeal did not accept Respondent's argument that this issue has been waived, as evidenced by their opinion on rehearing acknowledging apparent conflict on the basis of this issue. Kinchen v. State, 432 So.2d 586 (Fla. 4th DCA 1983). Petitioner respectfully submits that the decision of the Fourth District Court of Appeal in the case sub judice, finding an impermissible comment on Respondent's right not to testify, should be reversed.

POINT II

THE TRIAL COURT DID NOT ERR IN DENYING RESPONDENT'S MOTION FOR SEVERANCE.

"Granting or denying a motion for severance is normally a discretionary matter for the trial judge." Crum v. State, 398 So.2d 810, 811 (Fla. 1981). It is immaterial whether any of the judges on this court might have granted a severance; the test is whether the trial judge abused his discretion at the time he made his ruling. Menendez v. State, 368 So.2d 1278, 1280 (Fla. 1979).

Petitioner maintains that the trial court in the case sub judice did not abuse its discretion in denying Respondent's motion to sever. Respondent contends that since his co-defendant accused him of committing the offense, and this danger was raised in Respondent's motion to sever (BR 29-30), his conviction must be reversed. This Honorable Court has held that the mere fact that one defendant may attempt to escape punishment by shifing the blame for the crime to a co-defendant is insufficient to require a severance. McCray v. State, 416 So.2d 804, 806 (Fla. 1982); Hawkins v. State, 199 So.2d 276, 278 (Fla. 1967) vacated on other grounds at 408 U.S. 941 (1972). See also, Sylvia v. State, 210 So.2d 286, 288 (Fla. 3d DCA 1968), cert. denied 393 U.S. 981. Besides Respondent's co-defendant's testimony in the case sub judice there was testimony by Ms. Lowe, the victim, that she had been beaten with a belt and chain by the same individual (R 580-581),

that Respondent was at the scene, that he had earlier unzipped his pants, had her perform oral sex on him, and was not forced into having her do so by his co-defendant (R 762-763). There was testimony by John Holland, who rescued Ms. Lowe from the canal in which she had been thrown, that he saw two white males throwing bottles and one of them swinging a chain at her (R 804-805). He testified that the one using the chain was the taller of the two (R 835) and then indicated Respondent as being the taller (R 840). Finally, Detective Richtarcik testified that a fingerprint lifted off of the belt found at the crime scene matched Respondent's fingerprint. In light of this testimony Petitioner maintains that the failure to grant Respondent's motion to sever was not prejudicial. In view of this testimony Petitioner maintains Respondent would have been convicted regardless of his co-defendant's self-serving testimony and a trial court abuses its discretion in denying severance only if the jury's determination of guilt or innocence might have been different absent a joint trial. Menendez, supra, 368 So.2d at 1280. Again, Petitioner maintains that in view of the overwhelming evidence no other result was possible but that Respondent be convicted whether his co-defendant testified or not.

Respondent's claim that the failure to sever was prejudicial in that it changed the whole character of his defense (BR 31) is inappropriate. This is obviously a question of trial strategy and Respondent has no one but himself to blane for not raising an alibi defense if he thought it meritorious.

Respondent was free to put his alibi witness (i.e., his father) on the stand. The issue would then have been one for the jury, which may have accepted the alibi evidence or rejected it as is its province (in light of the aforementioned evidence involving Respondent with the crime). Dove v. State, 287 So.2d 384, 385 (Fla. 1st DCA 1973).

Petitioner maintains that Respondent has failed to meet his difficult burden of showing a likelihood that he did not get a fair trial as a result of his co-defendant's presence at trial and consequently that there was no clear showing of abuse of discretion by the trial judge in denying his motion to sever. Abbott v. State, 334 So.2d 642, 646 (Fla. 3d DCA 1976), cert. denied 345 So.2d 420. Stirpling v. State, 349 So.2d 187, 193 (Fla. 3d DCA 1977).

In conclusion, Petitioner maintains that this was a case where judicial efficiency and economy dictated one trial and Respondent was not prejudiced thereby. Tifford v. State, 334 So.2d 91 (Fla. 3d DCA 1976). This issue has been fully briefed and argued before the Fourth District Court of Appeal and that court has obviously found no merit in Respondent's argument. Petitioner respectfully maintains this Honorable Court should find none either.

POINT III

THE TRIAL COURT DID NOT ERR IN DENYING RESPONDENT'S MOTION FOR A CONTINUANCE.

The fundamental principle that runs throughout the subject of continuance is that the granting or refusal thereof rests in the sound discretion of the court to which the application is addressed, Robinson v. State, 325 So.2d 427, 429 (Fla. 1st DCA 1976) and good cause therefor must be shown. Fla.R.Crim.P. 3.190(g)(2). A criminal defendant has the right to a fair trial and is entitled to a sufficient time to prepare for trial, which time is governed by the facts of the individual case. Lowe v. State, 95 Fla. 81, 116 So.2d 240 (1928); Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921, 931 (1964).

Petitioner maintains that under the facts of the case sub judice Respondent's trial counsel had sufficient time to make adequate preparation and did in fact do so: Respondent's trial counsel told the trial court at Respondent's arraignment on August 31, 1981 that he would be gone on vacation from September 12, 1981 to September 27, 1981 (R 15), the trial court said no, that he should not have taken the case (R 15, 34), Respondent's trial counsel then told the court that he was only here for arraignment (R 15) but handled the entire case and went on vacation anyway (R 19, 1720) filing for a continuance through another attorney while he was gone (R 18-20, 1718-1722); there was a continuance to October 5, 1981 (R 22-68); Respondent's trial counsel then asked for another continuance on

October 5, 1981 (R 1748-1761); Respondent's trial counsel never called Vicki English although the Assistant State Attorney stated that he had provided him with a list of the witnesses who would testify as to her credibility or lack thereof (R 1425). The Assistant State Attorney further said that he had gone through his list with Respondent's trial counsel telling him what he thought the witnesses would say (R 1426), and Respondent's trial counsel said that assuming that to be true he still had the right to talk to the witnesses (R 1426-1427); the judge pointed out that he had had at least two weeks to do so (R 1427); the witnesses Respondent's trial counsel was informed of by his co-defendant during trial (R 517-518) were never used; there was no evidence presented from the Sexual Assault Treatment Center; Respondent's trial counsel had the opportunity to depose Mr. Knesz at lunch before he was called (R 74-75); and Respondent's trial counsel reserved his right to make an opening statement (R 517).

Again, under these facts, Petitioner maintains that Appellant has failed to show a palpable abuse of judicial discretion appearing clearly and affirmatively on the record so as to justify his claim of error in the denial of his motion for a continuance. Magill v. State, 386 So.2d 1188, 1189 (Fla. 1980). Again, this issue has been fully briefed and argued before the Fourth District Court of Appeal and that court has obviously found no merit in Respondent's argument. Petitioner respectfully maintains this Honorable Court should find none either.

CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Petitioner respectfully requests that this Honorable Court adopt the standard used by the federal courts in determining whether an individual's federal constitutional right to remain silent has been violated and that it, in applying this standard in the case sub judice, reverse the decision of the Fourth District Court of Appeal finding an impermissible comment on Respondent's right not to testify.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner on the Merits has been furnished, by courier/mail, to RICHARD B. GREENE, ESQUIRE, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida 33401, this 13th day of February, 1984.

James P. McLane

Of Counsel