IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,721

LUIS CARLOS ARANGO, a/k/a
CARLOS LUIS ARANGO,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

* *

BRIEF OF APPELLEE

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INTRODUCTION

Luis Carlos Arango a/k/a Carlos Luis Arango is the appellant in this Court. He was the defendant in the trial court and the movant in post-conviction relief proceedings. The appellee, the State of Florida, was the prosecution in the trial court. In this brief, the symbol "R" will be used to designate the two volumes of record on appeal originally prepared and transmitted to this Court in this case. The supplemental record will be referred to by the symbol "S.R." The record on appeal from Supreme Court Case Nos. 63,562; 63,563 and 59,678 will be referred to by the symbols "R.T." The transcripts of trial proceedings in the "former" records will be designated by the symbols "T.T."

The parties will be referred to in this brief as they appear before this Court. The State of Florida will be referred to as "Appellee" and the defendant as "Appellant." All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Appellee accepts Appellant's Statement of the Case as a generally accurate account of the prior proceedings in this case with such additions and exceptions as are set forth in the agrument portion of this brief.

STATEMENT OF THE FACTS

Appellee accepts Appellant's Statement of the Facts as being a generally accurate account of the proceedings with the following exceptions and additions. Appellee specifically takes exception to the following statements in Appellant's brief:

1. Appellee objects to Appellant's categorization [at page nine (9) of his brief] of the requests for evidence as "specific" requests. The trial court specifically found that the requests were "general." (S.R. 94-96).

2. Appellee also takes exception to Appellant's categorization [at page eleven (11) of his brief] of the evidence presented at Appellee's trial as "only inflammatory evidence."

3. One of Appellant's requests for favorable evidence referred to statements made by Appellant to a "Detective Diaz." The record does not reflect the involvement of any "Detective Diaz" in this case.

Appellee also notes the following additional, pertinent facts:

1. The gun in question was found on the day after the homicide, outside the back of the apartment complex on the first floor, downstairs from Appellant's apartment, the site of the

murder in question (R. 113). In trying to ascertain the ownership of the gun, the police determined that since the address of the "registered owner" could not be found, such address did not exist. (R. 132, 133).

2. Appellant's theory of defense was that three armed "bandits" or "banditos" forced their way into the apartment and fought with Appellant and the deceased, resulting in the victim's death. He presented this theory to the jury during his testimony at his trial. (See T.T. 716-730). During the course of this testimony, however, Appellant admitted to handling the two guns found on the scene, a .22 caliber pistol with a silencer and a .38 caliber gun. (T.T. 728-730). Appellant also acknowledged placing bullets suited for the .38 caliber gun into his pocket (T.T. 728-730). Appellant did not deny having blood on his body and underwear; nor did he contest evidence that he had washed up and changed his clothes (T.T. 728-730).

3. The victim was found in a state that indicated he had suffered various violent acts. He had been kicked between the legs so as to almost dismember his penis. He was strangled with a television cord connected to a television that was in operation when Police Officers Gable and McHugh (McQue) arrived on the scene. A towel was stuffed down the victim's throat and he had been hit in the head and body with a blunt instrument. He was also shot twice in the temple with a .22 caliber semi-automatic pistol with a silencer. (T.T. 1-973; T.R. 99-100).

4. Doctor Larry Grady Tate, Associate Medical Examiner, testified that the cause of death of the victim was a combination of multiple gunshot wounds to the head, blunt trauma, and strangulation, each being sufficient to cause death and all occurring at or before death. (T.T. 624, 655-656). Dr. Tate testified as to having reported to the scene of the homicide and finding the victim on the bed with a copious amount of blood underneath the body, and a pillow on top of the face. (T.T. 628). When the pillow was removed, he observed a large white towel stuffed into the victim's mouth and a T.V. cord wrapped tightly around the neck. (T.T. 629). There was so much blood that the doctor was unable to determine the nature of the wounds, which were later determined to be lacerations due to blunt trauma. (T.T. 630). It was also determined that there were two gunshot wounds to the head. (T.T. 631).

The autopsy revealed nine distinct blunt wounds to the forehead and face. (T.T 640-643). A towel stuffed into the mouth the size of a baseball, which severely obstructed the airway, making it unable for the victim to scream or yell. (T.T. 646). The T.V. cord was wrapped around the neck tightly enough to leave marks and cut off the air and blood supply as well as causing hemorrhaging inside the neck. (T.T. 647). There were no stippling or powder burns on the bullet hole which would be consistent with a silencer having been used. (T.T. 650). There was a tremendous amount of bleeding in the groin area due to the partial tearing away of the penis from the pubic area. (T.T. 651-652).

5. The police officers who initially reported to the scene did not even notice a balcony (See T.T. 464) as the area was covered by a curtain (R. 99). Civilian witnesses, including those who had summoned the police, present in the apartment building around the time of the homicide heard noises and the sound of glass breaking and did not observe any individuals emerging from the apartment. (T.T 538-542; 545-550; 555-558).

Appellee respectfully reserves the right to argue additional pertinent facts in the argument portion of this brief.

POINT INVOLVED ON APPEAL

Appellee respectfully rephrases Appellant's Statement of the Issue Presented for Review as follows:

> WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF WHERE APPELLANT FAILED TO DEMONSTRATE THAT FAILURE OF THE POLICE TO DISCLOSE FINDING A GUN IN THE VICINITY OF THE APARTMENT WHERE THE VICTIM WAS MURDERED CONSTITUTED A BRADY VIOLATION?
>
> 1). WHETHER THE TRIAL COURT CORRECTLY FOUND THAT THE APPELLANT MADE GENERAL, NOT SPECIFIC, REQUESTS FOR PRODUCTION OF FAVORABLE EVIDENCE?
>
> 2). WHETHER THE TRIAL COURT CORRECTLY FOUND THAT HAD THE GUN IN QUESTION BEEN PRESENTED TO THE JURY, IT WOULD NOT HAVE CREATED A REASONABLE DOUBT THAT DID NOT OTHERWISE EXIST?
>
> 3). WHETHER APPELLANT ESTABLISHED MATERIALITY OF THE EXCLUDED EVIDENCE, IF THE REQUEST IS TREATED AS SPECIFIC?
>
> 4). WHETHER THE FOUND GUN WOULD HAVE BEEN FAVORABLE TO APPELLANT FOR SENTENCING PURPOSES?

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR POST-CONVICTION RELIEF WHERE APPELLANT FAILED TO DEMONSTRATE THAT FAILURE OF THE POLICE TO DISCLOSE FINDING OF A GUN IN THE VICINITY OF THE APARTMENT WHERE THE VICTIM WAS MURDERED CONSTITUTED A BRADY VIOLATION. (Restated).

Appellant contends that the trial court erred in denying his motion for post-conviction relief as to his claim that the failure of the police to disclose the finding of a gun in the area below the apartment where the homicide in question took place deprived him of a fair trial, contrary to the rule set forth in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Appellee submits that this contention is without merit, as the record clearly supports the trial court's specific findings, as well as its ultimate conclusion.

1). THE TRIAL COURT CORRECTLY FOUND THAT THE APPELLANT MADE GENERAL, NOT SPECIFIC, REQUESTS FOR PRODUCTION OF FAVORABLE EVIDENCE.

The trial court specifically found that general requests were made of Appellee and that pursuant to the requests, Appellee gave open-file discovery. The Court also found the gun in question was not given to Appellant because the lead detective did not feel that it was involved in this crime. (S.R. 94).

Appellant contends that the following requests for evidence were "specific:"

> 1. Any witness accounts or statements or physical evidence indicating that other persons in addition to the Defendant and the decedent were in the Defendant's apartment at the time of the homicide.
>
> 2. Any physical evidence indicating that the Defendant did not fire the murder weapon or that another person did in fact, fire the murder weapon.
>
> 3. Any physical evidence or witness statements which corroborate the Defendant's statements to Detective Diaz that other Latin males entered the apartment and committed the homicide.
>
> 4. Any police investigation report made to the police which tends to establish the Defendant's innocence or to impeach or contradict the testimony of any witness whom the State will call at the time of the trial of this case.
>
> (R. 518-519).

Those requests are clearly too ambigous to be categorized as specific requests such as the request a actually made in Brady v. Maryland, supra, where the prosecutor was given notice of exactly what the defense desired, the extrajudicial statements made by Brady's accomplice, Boblit. See, United States v. Agurs, 427 U.S. 97, 104, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

The first item requests any witness accounts or statements or physical evidence indicating that other persons in addition to the appellant and decedent were in the apartment at the time of the homicide. (R. 518). This request clearly does not specify which statements or persons are referred to nor does it encompass a gun found outside on the grounds of the apartment building on the day after the homicide. (See R. 111-113). The second item requests physical evidence indicating that the appellant did not fire the murder weapon or that another person did, in fact fire the murder weapon. (R. 518). The gun found on the day following the murder was clearly not the murder weapon. The murder weapon was found at the scene of the murder (See TT. 445-452; 487-494 ; 581-588; 728-729).

The third request was for any physical evidence or witness statements which corroborate Appellant's statements to Detective Diaz that other Latin males entered the apartment and committed the homicide. (R. 518). This statement will not constitute a specific request for the gun in question. The gun was found outside the apartment below Appellant's apartment where the murder took place, a day after the homicide and is in no way corroborative of any statements made by Appellant. The request is in itself defective as the record does not indicate that any statements were made by Appellant to a "Detective Diaz." The record indicates that statements made by Appellant to Detective Angel Nieves (T.T. 373-380) and were discussed to the defense.

The fourth request was also too ambiguous to be considered a "specific" request within the contemplation of the holding in Brady v. Maryland, supra, as interpreted in Agurs, supra. The request was for any police investigation report... which tends to extablish the appellant's innocence or to impeach or contradict the testimony of any state witness (R. 518). The "found property" report as to the gun found on the day following the murder prepared by Officer Dennis Lake (R. 53-54) and allegedly placed in the police case folder in the instant case (R. 111-112) did not fall into the general category enumerated by the request as it neither tended to establish Appellant's innocence since the actual murder weapon was found within the apartment where the murder took place and Appellant was arrested nor would it impeach or contradict the testimony of any state witness.

2). THE TRIAL COURT CORRECTLY FOUND THAT HAD THE GUN IN QUESTION BEEN PRESENTED TO THE JURY, IT WOULD NOT HAVE CREATED A REASONABLE DOUBT THAT DID NOT OTHERWISE EXIST.

Since Appellant's request(s) for allegedly favorable evidence was general, as opposed to specific, the instant case falls within the third category under which teh Brady rule arguable applies. See, United States v. Agurs, supra at 427 U.S. 106-107. Where there is only a general request for the omitted evidence, constitutional error will not found under the omitted evidence creates a reasonable doubt that did not otherwise exist.

See, United States v. Agurs, supra at 427 U.S. 112. In the cause sub judice, the trial court properly found that had the gun that was found been presented to the jury, it would not have created a reasonable doubt that did not otherwise exist. (S.R. 96).

The gun in question was found on the day after the homicide, outside the apartment in the back of the apartment complex on the first floor, downstairs from Appellant's apartment, the crime scene. (R. 113). The "registered owner" could not be located and his alleged address could not be found and was thus presumed not to exist (R. 132, 133). It is therefore readily apparent that had the gun's existence been disclosed to Appellant prior to trial, it would have been of no import. Sinilar to the situation presented in Francois v. State, 407 So.2d 885, 888 (Fla. 1981), the evidence would not have been probative. No actual nexus could be established between the gun and the murder in question. Thus, it is highly speculative of Appellant to presume that the existence of the found gun would be in any way favorable to his defense.

The existence of the found gun does not in any way contradict the circumstanial evidence placed before the jury. It therefore fails to create a reasonable doubt that did not otherwise exist. Appellant actually testified at his trial as to his theory of defense. Appellant's theory of defense was that three armed "bandits" or "banditos" had forced their way into

his apartment and had fought with Appellant and the deceased. (T.T. 716-718). Appellant allegedly hid in the bathroom and did not exit until he heard what he thought was the kitchen door closing (T.T. 719). Appellant went on to admit, however, that he had handled two guns found on the scene, a .22 caliber gun with a silencer and a .38 caliber gun as well as placing bullets for the .38 caliber gun in his pocket (T. 728-730). He admitted to placing the weapons in a bag as well as to washing blood off and changing his clothes. He did not deny having blood on his body as well as on his underwear. (T.T. 728-730).

If the jury did not believe that the murder weapon, the .22 caliber gun (with the silencer) and the .38 caliber gun were left by the alleged "banditos", it surely would have made no difference whether an alleged "third" gun was located. Moreover, even though Appellant testified that all three of the alleged bandits were armed, the existence of an additional gun would nonetheless be equally consistent with Appellee's theory of prosecution and the circumstantial evidence presented in support thereof. Appellant's claim that a "third" gun would break the "chain" of circumstantial evidence is totally incorrect. Even if the gun were to be connected to the instant case, it would have been equally reasonable for the jury to ascertain that Appellant had "planted" the found gun and was in the process of removing the other physical evidence from the crime scene when the police made their way into the apartment. (See T.T. 428-463; 735-746).

The victim was found in a state that indicated he had suffered various violent acts. He had been kicked between the legs so as to almost dismember his penis. He was strangled with a television cord connected to a television that was in operation when Police Officers Gable and McHugh (McQue) arrived on the scene. A towel was stuffed down the victim's throat and he had been hit in the head and body with a blunt instrument. He was also shot twice in the temple with a .22 caliber semi-automatic pistol with a silencer. (T.T. 1-973; T.R. 99-100). Appellant was present in the apartment when the police entered. He was found in, at minimum, the constructive possession of a bag with cocaine, a large amount of American currency, two guns and a silencer, as well as in possession of bullets in his pocket. He had just completed washing blood off of himself and changing his clothes. He had the victim's teeth marks on the top of his hand, yet did not have any marks below (therefore consistent with the towel being found in the victim's throat). See also: T.R. 99-100).

The police officers who initially reported to the scene did not even notice a balcony (See T.T. 464) as the area was covered by a curtain (R. 99). Civilian witnesses, including those who had summoned the police, present in the apartment building around the time of the homicide heard noises and the sound of glass breaking and did not observe any individuals emerging from the apartment. (T.T. 538-542; 545-550; 555-558).

It is therefore clear that the present record is supportive of the trial court's finding that the omitted evidence, the found gun, would not have created a reasonable doubt that would otherwise not have existed. (S.R. 96). The simply opted not to believe Appellant's defense.

3). EVEN IF THE REQUEST FOR EVIDENCE IS TREATED AS SPECIFIC, APPELLANT DID NOT ESTABLISH MATERIALITY OF THE EXCLUDED EVIDENCE.

In Agurs, supra at 427 U.S. 109, 110, the United States Supreme Court cited to its opinion in Moore v. Illinois, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972) and stated that there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish "materiality" in the constitutional sense. Even if this Court should ascertain that the trial court erred in determining that the requests in question in the instant case amounted to specific requests, for the reasons enumerated above it is apparent that Appellant failed to demonstrate "materiality" of the omitted evidence in the constitutional sense. Appellant has therefore failed to demonstrate that the omitted evidence deprived him of a fair trial.

4). THE FOUND GUN WOULD NOT HAVE BEEN FAVORABLE TO APPELLANT FOR SENTENCING PURPOSES.

Appellant alleges that the found gun would have possibly resulted in the jury's recommendation of a lesser sentence. Appellee submits that this claim is highly speculative and unreasonable in light of the totality of the circumstances presented herein. The jury was made aware that Appellant was found in the apartment with two guns. It is therefore highly unlikely that introduction of another gun would have led the jury to impose a lesser sentence. It is clear that the jury disbelieved the totality of Appellant's story. Moreover, the trial court specifically found that had the gun been introduced, the Court would not have changed its finding that Appellant merits the death penalty in this matter. Appellee therefore submits that the trial court properly denied Appellant's motion for post-conviction relief and that the Court's Order should therefore clearly be affirmed.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the Appellee respectfully submits that the trial court's Order Denying Defendant's Motion for Post-Conviction Relief Re: Brady Violation should clearly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to SHARON B. JACOBS, Esq., Chaykin, Karlan & Jacobs, 114 Giralda Avenue, Coral Gables, Florida 33134 on this 20th day of August, 1984.

CALIANNE P. LANTZ
Assistant Attorney General

/sah