

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.

* * * *

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

* * * *

UPON REMAND FROM UNITED STATES
SUPREME COURT FOR RECONSIDERATION
IN LIGHT OF UNITED STATES V. BAGLEY

* * * *

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STATEMENT OF ISSUES FOR REVIEW

I

MR. ARANGO'S TRIAL IS AN AFFRONT TO THE FUNDAMENTAL PRINCIPLES OF DUE PROCESS SINCE A THIRD GUN PURCHASED TWO DAYS BEFORE THE MURDER, REGISTERED TO SOMEONE OTHER THAN MR. ARANGO, WAS FOUND DIRECTLY BELOW THE BALCONY FROM WHICH MR. ARANGO TOLD THE POLICE THE ASSAILANT ESCAPED. THE STATE CONCEALED THIS EXCULPATORY EVIDENCE AND THE PROSECUTOR SPECIFICALLY TOLD THE JURY THIS PHYSICAL EVIDENCE DID NOT EXIST.

STATEMENT OF THE FACTS

This court has already considered this case long and carefully. The facts relevant to the one issue on appeal have been set forth succinctly and accurately in this Court's opinion issued January 31, 1985, and reported at 467 So.2d 692 (Fla. 1985). (Supp. A. 1-4).¹

The Statement of the Facts contained in Appellee's Supplemental Brief served on or about March 31, 1986, should be disregarded since that portion of the State's brief as well as the argument sections contain the following misstatements of certain facts which are uncontradicted in the record and have been established as the law of the case by this court:

1. Appellee's erroneous statements at pages 5, 14 and 15 of Appellee's Supplemental Brief:

Although a semi-automatic pistol was located the day after the homicide of Mr. Jario Arango-Posada, the gun was not found at the actual murder scene, the appellant's apartment. The weapon, a .38 Caliber Walther semi-automatic pistol (R. 216) was found outside the back of the apartment complex, on the first floor, downstairs from Appellant's apartment. (Emphasis added). (Appellee's brief at 5).

* * *

¹References to the Record in this brief will be cited consistent with the symbols set forth at pages 1-2 of Appellant's Initial Brief. References to the cases attached to Appellant's Supplemental Brief will be cited as "Supp. A." followed by the appropriate page number.

Appellant was not denied due process of law by the failure of the State to disclose that a gun had been found on the grounds of the apartment complex where the murder took place. (Appellee's brief at 14). (Emphasis added).

* * *

... The real question presently at issue is whether the mere fact that had a gun found in the vicinity of the murder scene on the day following the homicide been disclosed to the defense, the result of the proceeding would have been different. (Appellee's brief at 15). (Emphasis added).

Correct Facts: The State attempts to downplay the location of the deliberately withheld third gun. The record contains uncontradicted testimony that the third gun was located on the ground one foot to the right beneath the railing of Mr. Arango's second-floor bedroom balcony from which Mr. Arango told police one of the intruders jumped. Defendant's Exhibit F, admitted into evidence at the Brady hearing below, diagrams the exact location of the third gun as marked by the circled number 2, and is further denoted by a white area with little black dots in it. During Oral Argument on November 7, 1984, this Court viewed this diagram and asked questions concerning the exact location of the third gun. The State is disingenuous with this court when it alleges that "the gun was not found at the murder scene," and that it was "in the vicinity."

2. Appellee's Erroneous Statements at pages 16, 18, 20, 24 of Appellee's Supplemental Brief:

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. (Appellee's brief at 16).

* * *

The weapon firing the "fatal" shots was a .22 caliber pistol and was found in the appellant's possession at the murder scene. (Appellee's brief at 18).

Correct Facts: Again, the date distorts the uncontradicted record evidence that the medical examiner was unable to identify a "murder weapon" because the cause of death was from the combination of injuries. Although the gun that fired into the decedent was found in the apartment, the cause of death included multiple blunt trauma which could have been caused by the butt of the third gun found directly under the bedroom balcony. In addition, fingerprints were found on the two guns in the apartment, but the prints did not belong to Mr. Arango. We will never know whether a fingerprint on the third gun matched any of the 28 unidentified prints inside the apartment (F.R. 573), because as the state concedes, it lost the lab reports of tests conducted on the third gun and no longer has possession of the gun. Although shots from the .22 caliber pistol were fired into Mr. Posada, that was not the "murder weapon" because it was not the sole cause of death.

3. Appellee's Erroneous Statements at page 7 of Appellees Supplemental Brief:

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).

Correct Facts: This claim is contradicted by the original trial record. At the original trial, police technician Seymour Stoller, who prepared the sketch of the scene (State's Trial Exhibit No. 10), testified that he was well aware of the bedroom balcony and, in fact, went out onto the balcony and dusted outside of the sliding glass doors for fingerprints, but was unable to dust the railing. (F.R. 528). At trial, Officer McQue also testified that he notice the bedroom sliding glass door and balcony (F.R. 454-455). Neither police officer mentioned a curtain. Technician J. I. Galan, who helped with the crime sketch, testified at trial that he merely did not recall a balcony outside of the sliding glass doors. (F.R. 463-464). The State also misplaces reliance upon the recollection of the errant lead homicide investigator Deborah Young Wiley, three years after the incident, that there was a curtain over the open sliding glass doors obstructing a view of the balcony. See, Supp.R. 19-20, R. 99; see also, R. 335-336.

4. Appellee's Erroneous Statements at page 7 of Appellee's Supplemental Brief:

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. (Emphasis added).

Correct Facts: Here not one of the neighbors who testified was in a position to view the bedroom balcony and,

therefore, there is no evidence in the record capable of rebutting Mr. Arango's claim that one of the armed murderers escaped by jumping off the bedroom balcony. [See, F.R. 533-573; 538-545; 545-555; 555-559).

5. Appellee's Erroneous Statement at page 15 of Appellee's Supplemental Brief:

Contrary to Appellant's repeated assertions in his brief, there was no affirmative secretion of evidence.

Correct Statement: This is the very first time the State has made the argument that the suppression was not deliberate. The rookie lead homicide investigation conceded that she purposefully did not disclose the existence of the third gun or her extensive involvement tracing the gun, during her deposition (R. 166, 168, 170, 171) despite the fact that the investigation and lab reports cross-referenced the gun to this case by number as "trial evidence." (R. 118; 131; 251; 235-237; 403). The prosecutor testified at the Brady hearing that had he known of this gun he would clearly have had a duty to disclose it to the defense. (R. 320).

Since the Appellee's Supplemental Brief distorts the facts, this court should rely upon Mr. Arango's Statement of the Facts.

ARGUMENT

I

MR. ARANGO'S TRIAL IS AN AFFRONT TO THE FUNDAMENTAL PRINCIPLES OF DUE PROCESS SINCE A THIRD GUN PURCHASED TWO DAYS BEFORE THE MURDER, REGISTERED TO SOMEONE OTHER THAN MR. ARANGO, WAS FOUND DIRECTLY BELOW THE BALCONY FROM WHICH MR. ARANGO TOLD THE POLICE THE ASSAILANT ESCAPED. THE STATE CONCEALED THIS EXCULPATORY EVIDENCE AND THE PROSECUTOR SPECIFICALLY TOLD THE JURY THIS PHYSICAL EVIDENCE DID NOT EXIST.

This court has previously found that "due process requires retrial under the circumstances." Arango v. State, 467 So.2d 692, 695 (Fla. 1985). This court should be outraged that the Attorney General's Office of the State of Florida would attempt to uphold the results of a trial in which the prosecutor conceded that he unwittingly lied to the jury about crucial material exculpatory evidence which the police had deliberately concealed from both the defense and prosecutor.

In its Supplemental Brief, the State of Florida utterly fails to address the inescapable unfairness of the trial regarding the subverted truth-seeking process.

The trial prosecutor told the jury that the State's evidence was inconsistent with Mr. Arango's testimony. (F.R. 793-794). The prosecutor explained in closing argument that this created only a "possibility of a doubt" and not the "reasonable doubt" necessary for acquittal, because there was no physical evidence to corroborate Mr. Arango's defense that three Latin males, each armed, forced their way into the apartment, struggled with the

two men² and killed Mr. Posada. (F.R. 793-794).

The prosecutor told the jury that the state's circumstantial evidence consisted of "... strong pieces all pointing fingers to [Mr. Arango]" (F.R. 782). The prosecutor urged the jurors to rely upon the physical evidence, and promised that "... nothing was kept from you, whatever we had is on the table." (F.R. 81). (Emphasis added).

The prosecutor clearly misled the jury because as he spoke those words, there lay in the police property room and police files, a third gun with casings which had been found directly under the balcony from which Mr. Arango told police that one of the murderers had jumped. Mr. Arango's defense clearly would have been corroborated by the gun, together with the police and lab reports and registration showing that it had been purchased two days before the killing by someone other than Mr. Arango.

Therefore, following the logic of the prosecutor's closing argument, Mr. Arango's testimony would have created the reasonable doubt requiring his acquittal.

The jury was deprived of all of the relevant evidence

²Appellee points to the bitemark on Mr. Arango's finger as evidence that he participated in Mr. Posada's demise. To the contrary, Mr. Arango testified that the intruders knocked both men onto the bed where there were many flailing arms and blood flying everywhere. It is equally likely that during this fracas, Mr. Arango's finger was bitten by Mr. Posada as both men were tumbling over each other. This also explains how the blood got on Mr. Arango's underwear.

necessary to render a fair verdict and Mr. Arango was tried and sentenced without the barest of essentials of due process.³

Under the standards of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) as explained in United States v. Bagley, ___ U.S. ___, 105 S.Ct. 3375 (1985), the actions here of the police concealment of exculpatory evidence taken together with the prosecutor's misinforming the jury was of sufficient significance to result in the denial of Mr. Arango's right to a fair trial.

CONCLUSION

This court, upon reconsideration of this matter in light of United States v. Bagley, ___ U.S. ___, 105 S.Ct. 3375 (1985), must arrive at the same conclusion as it did in Arango v. State, 467 So.2d 692 (Fla. 1985) because the state prevented the truth-seeking process of the trial to operate in accordance with fundamental notions of due process. The order denying the Amended Motion for Post-Conviction Relief must be reversed, Mr.

³This court has already determined that this third gun would have been admissible in evidence. Arango v. State, 467 So.2d 692, 695 fn. (Fla. 1985). Therefore, the claim by the Appellee to the contrary is just meant as a red herring. See, Appellee's Supplemental Brief at page 24. It should also be noted that at the Brady hearing below the state's argument assumed that the concealed evidence would have been admissible. (Supp. R. 1-102).

Arango's conviction reversed and the matter remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Reply Brief was mailed this 24th day of April, 1986, to: Calianne Lantz, Assistant Attorney General, Suite 820, 401 N. W. 2nd Avenue, Miami, Florida 33128.

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