IN THE FLORIDA SUPREME COURT

JASON DIRK WALTON, :

Appellant, :

vs. : Case No. 65,101

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ISSUE I.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE USE OF JASON WALTON'S CONFESSIONS AGAINST HIM AT TRIAL VIOLATED HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHERE THE POLICE SUBJECTED THE APPELLANT TO CUSTODIAL INTERROGATION AFTER HE HAD EXPRESSED A DESIRE TO DISCONTINUE FURTHER COMMUNICATION.

In their answer brief the State argues that it is "questionable" whether the instant issue has been preserved for review, noting that "[i]n order to appeal the denial of the pretrial Motion to Suppress it is necessary to lodge an objection to the introduction of the subject matter of the Motion to Suppress at trial." (State's Brief at p.8) However, it must be emphasized that Appellant did in fact renew his motion to suppress at trial. (R2120)

The State further argues that Appellant should be "estopped" from raising the instant issue. (State's Brief at p.9) Noting that the defense acknowledged during trial that the defendant's statement was "voluntary" in that he waived his Miranda rights,[1/] the State reasons:

> Appellant cannot advise the court that the jury should know that appellant waived an attorney and yet be permitted to challenge that waiver in this appeal.
> (State's Brief at p.9)

1/ The defense acknowledged that the defendant's statement was voluntary solely for the purpose of obtaining a jury instruction on voluntary statements. (R2113-2114)

From the foregoing reasoning, it is readily apparent that the State has totally misconstrued the instant issue. The issue is not whether Appellant waived his Miranda rights, he clearly did; but whether the police subsequently violated Appellant's Fifth Amendment rights by failing to honor his request to cut off questioning. As the Supreme Court stated in Michigan v. Mosley, 423 U.S. 96,101 (1975), unless law enforcement officers "give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation," any statement made by the person in custody cannot be admitted in evidence against him at trial, "even though the statement may in fact be wholly voluntary."

The State next argues that the instant issue was waived because it "was neither raised in [A]ppellant's Motion to Suppress nor by argument of counsel at the hearing on [A]ppellant's Motion to Suppress." (State's Brief at p.10) However, a review of the record shows otherwise. Appellant's Motion to Suppress specifically alleges that the statements "were obtained in violation of the defendant's right to remain silent under the Fifth Amendment of the United States Constitution....[2/] (R93) This is the precise issue which has been raised on this appeal with respect to the January 20 confession and Appellant's right to cut off questioning. In addition, the Edwards issue relating to the January 24 confession was specifically addressed at the hearing. (R2839-2845)

2/ The motion goes on to assert a Sixth Amendment claim.

The State next argues that Appellant "misconstrued" the conversation in which he expressed a desire to cut off questioning. (State's Brief at p.12) However, the conversation as testified to by the interrogating police officer was as follows:

> ...I asked him, "Well, do you wish to make a statement at this time?" And he said, "Well, yes I would like to but I really don't want to." I asked him if he wanted to have it tape recorded, would you like to have it tape recorded. He said, "No, I kind of want to talk with you and fish around," is the term he used, try to feel you out on the investigation. (R2747-2748)

The State construes the foregoing testimony merely as an indication that the defendant didn't want to make a "taped" statement. (State's Brief at p.12) However, the officer only referred to a tape recording after the defendant had indicated that he really didn't want to make a "statement." The fact that the defendant later said in response to further questioning that he wanted to "fish around" is irrelevant. The police officer had a duty to cut off questioning prior to that response. Miranda v. Arizona, 384 U.S. 436,473-474 (1966).

Finally, the State addresses the merits of Appellant's argument. The State cites a substantial body of case law which indicates that the Appellant can waive his right to counsel. (State's Brief at p.10) Appellant does not dispute this well-recognized fact. Once again however, it must be emphasized that this is not the issue. The issue is whether the police failed to honor Appellant's right to cut off questioning. A waiver of Miranda rights is not a waiver for all time of the right to remain silent. It is clear that an accused may invoke his right to

silence at any time, even after interrogation his begun. Miranda v. Arizona, 384 U.S. at 473-474; Peterson v. State, 405 So.2d 997 (Fla.3d DCA 1981).

For these reasons, the State's arguments should be rejected. Accordingly, Jason Walton's convictions should be reversed and this cause remanded for a new trial wherein the confessions will be excluded.

ISSUES II - IV

Appellant relies upon his initial brief and argument with respect to these issues.

ISSUE V.

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT JASON WALTON WAS DENIED HIS RIGHT TO CONFRONTATION WHEN THE PROSECUTION WAS ALLOWED TO INTRODUCE AT THE PENALTY PHASE PROCEEDING CONFESSIONS AND STATEMENTS MADE BY MR. WALTON'S CO-DEFENDANTS.

The State has not disputed the fact that a capital defendant is denied his right to confrontation when a co-defendant's statement implicating the accused is introduced at the penalty phase. (State's Brief at p.27) Instead, the State, while conceding that Appellant made a timely objection to this admissible evidence, has argued that "it is questionable whether Appellant has properly preserved this issue for appellate review." (State's Brief at p.24) The State's argument is without merit.

The record reveals that the inadmissible hearsay statements were admitted only after a lengthy hearing. (R2507-2513)

The court was repeatedly advised by the parties that the co-defendants would be unavailable for cross-examination. (R2508, 2510) In fact, the State conceded that the statements would not have been admissible against the Appellant at trial for this very reason. (R2508) Nevertheless, the State urged the court to admit the statements, arguing that Florida's capital sentencing statute permits the introduction of hearsay at the penalty phase. (R2508) Defense counsel advised the court that he would have no opportunity to cross-examine the co-defendants and objected to the admission of their statements. (R2510-2511) The court overruled the objection reasoning that they were admissible as hearsay under the statute, but emphasizing that the "objection is noted and protected." (R2512-2513)

Accordingly, the State's reliance upon the waiver doctrine is totally misplaced.

As a back-up position, the State argues that Appellant was not denied his right to confrontation because he was subsequently given an opportunity to cross-examine <u>one</u> of the co-defendants at the subsequent sentencing hearing. However, this belated opportunity for cross-examination could not cure the denial of the right to confrontation which had occurred at the advisory sentencing proceeding and the effect the inadmissible evidence may have had on the advisory jury's recommendation.

More significant however is the fact that while co-defendant McCoy was made available for cross-examination at the sentencing hearing, Appellant was <u>never</u> given an opportunity to cross-examine the other co-defendant, Richard Cooper. While

McCoy's statement was relatively innocuous,[3/] it was Cooper's statements which struck at the heart of Appellant's penalty phase defense by portraying him as the "ringleader" of the group: the person who orchestrated the crimes and ordered the shootings of the victims. (R2527-2530,2554-2558)

For these reasons, the State's arguments should be rejected. Accordingly, Jason Walton's sentence should be vacated and this cause remanded for a new penalty phase proceeding with directions to impanel a new advisory jury.

ISSUE VI - VII

Appellant relies upon his initial brief and argument with respect to these issues.

Respectfully submitted,

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3/ This is not surprising since Appellant and McCoy are brothers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 27th day of February, 1985.

GARY R. PETERSON

GRP:js