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FILED
SID J. WHITE
JUL 24 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT

of

THE STATE OF FLORIDA

ALEXANDER DRAGOVICH,
APPELLANT,

vs

STATE OF FLORIDA,
APPELLEE.

CIRCUIT CRIMINAL
NOS. 82-8951 &
83-1636

APPEAL NUMBER
65,382

ON APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR PINELLAS COUNTY.

APPELLANT'S REPLY BRIEF

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TABLE OF CITATIONS

I.

APPELLANT'S RESPONSE AND REPLY TO FIRST ISSUE ON APPEAL, TO WIT: WHETHER THE COURT ERRED IN DENYING APPELLANT'S "MOTION FOR DISQUALIFICATION OF JUDGE."

Appellee agrees with Appellant's contention that the reasonably prudent man test set forh in Livingston v. State, 441 So. 2d 1083 (Fla. 1983) is the proper test for determining the sufficiency of the affidavits in question.

The affidavits (R. 114, 115, 116) and the excerpt from the co-defendant's trial (R. 117-122) speak for themselves. In short, the affidavits suggest as bases for recusal (1) the trial judge's alleged fixed opinion as to the Appellant's guilt and (2) the Affiants' beliefs that the trial judge's overriding of the co-defendant's jury's 10-2 recommendation of a life sentence would put a reasonable man in fear of not receiving a fair trial at the hands of the same trial judge.

Appellee's citation of case law holding that a judge's fixed opinion as to the guilt of the Appellant is not a sufficient basis for recusal does not void the Affiants' other basis for recusal, namely the judge's jury override alluded to in the motion and affidavits. Appellant contends that the second basis set forth in the affidavits warrants careful consideration since the trial judge in a

first degree murder case sits as a trier of fact in regard to evidence of aggravating and mitigating sentencing factors; whereas in the Livingston (supra) trial the judge's belief in the guilt of the defendant would not be prejudicial because the issue of guilt or non-guilt was solely the province of the jury.

Appellee fails to address the holding of Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978) wherein it was held that a legally sufficient motion for recusal cannot be ruled upon by the subject trial judge. Appellant contends that if the motions for recusal in this cause are legally sufficient, Bundy (supra) controls and mandates reversal.

II.

APPELLANT'S RESPONSE AND REPLY TO SECOND ISSUE ON APPEAL, TO WIT: WHETHER THE TRIAL COURT ERRED IN PERMITTING REFERENCES TO BE MADE IN THE PRESENCE OF THE JURY TO APPELLANT'S EXERCISE OF HIS RIGHT TO COUNSEL.

As noted in Appellant's initial brief, the error, if any, was compounded by the Appellee's comments in closing argument concerning Appellant's right to remain silent.

Appellant concedes that the "invited error" exception alluded to in Appellee's reply brief is a long recognized and well founded exception. However, Appellant vigorously disputes that he opened the door or invited the comments complained of. A more just and equitable trial level ruling would simply have been to prohibit the testimony (R. 2844-2850) and to limit Appellant's closing argument in respect to this matter. The trial court had ample opportunity to so rule since the offensive comments were proffered (R. 2837) as compared to the cases cited by both Appellee and Appellant which involved spontaneous comments of witnesses violative of Miranda.

Appellant has carefully reviewed the cases cited by Appellee in regard to the per se reversal issue and Appellant recognizes that this issue is now pending before the Court in multiple cases.

III.

APPELLANT'S RESPONSE AND REPLY TO THIRD ISSUE ON APPEAL, TO WIT: WHETHER THE COURT ERRED IN ALLOWING APPELLEE TO CHALLENGE JURORS B. PAULEY AND T. MOSHER FOR CAUSE.

Appellant has carefully reviewed case citations set forth in Appellee's reply brief on this issue and Appellant concedes that his position on this issue has been previously and recently rejected by this Court.

Appellant requests that the Court reverse its holdings set forth in the decisions cited by Appellee.

IV.

APPELLANT'S RESPONSE AND REPLY TO FOURTH ISSUE ON APPEAL, TO WIT: WHETHER THE COURT ERRED IN ADMITTING EVIDENCE IN THE PENALTY PHASE CONCERNING APPELLANT'S BEING A SUSPECTED ARSONIST.

Appellee cites Delap v. State, 440 So 2d 1242 (Fla. 1983) for a proposition broader than that actually set forth in the cited opinion. Delap (supra) simply permitted evidence of facts surrounding convictions and did not limit the prosecutor to merely presenting evidence of the mere existence of such convictions. Delap (supra) is not authority for bringing in evidence of suspected criminal conduct as Appellee suggests.

Cases cited by Appellant in his initial brief stand for the proposition that (1) the aggravating circumstance set forth in Sect. (5)(b) 921.141 is limited to prior criminal convictions and (2) that hearsay is admissible under Sect. (1) Fla. Stat. 921.141 only if the defendant has a fair opportunity to rebut the hearsay.

Appellee, as noted in Appellant's initial brief, did not attempt to introduce evidence of prior criminal convictions. Appellee simply alluded to reports and hearsay and double-hearsay statements suggesting Appellant was a suspected arsonist. Appellee should not be permitted to do indirectly that which he could not do directly.

Appellee further suggests that Appellant could fairly rebut the hearsay in accordance with the mandate of Sect. (1) Fla. Stat. 921.141 because Appellant had been provided with copies of the arson reports prior to trial. Appellee does not refer to record evidence that the reports had been so provided; however, assuming arguendo that the reports had been provided in advance, the reports were nonetheless not placed into evidence as noted in Appellant's initial brief. How then could Appellant "fairly rebut" reports alluded to which were not placed in evidence? Furthermore, how could Appellant fairly rebut the hearsay and double-hearsay testimony (please see Initial Brief for record cites) complained of since the originators of the hearsay comments were either unnamed or were (apparently) from Indiana?

CERTIFICATE

of

SERVICE

I HEREBY CERTIFY that an original and seven (7) copies hereof have been served upon the Supreme Court of the State of Florida by U.S. Mail and one (1) copy hereof has been furnished to the Hon. Jim Smith, Attorney General (Tampa Office) by U.S. Mail this 22nd day of July, 1985.

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