IN THE SUPREME COURT OF FLORIDA

SYE CHRISTOPHER JENKINS,

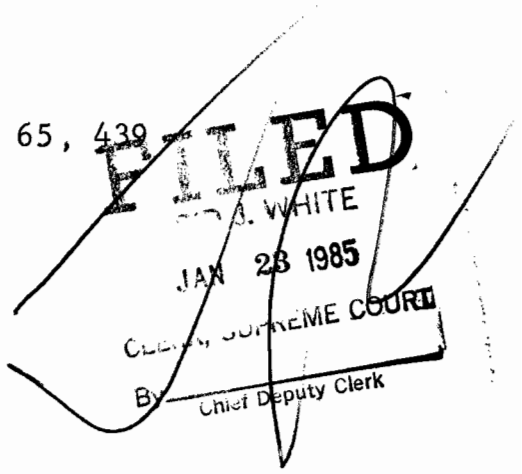
Petitioner,

v.

STATE OF FLORIDA,

Respondent,

CASE NO. 65, 439



RESPONDENT'S BRIEF ON MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

ROBERT S. JAEGERS
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Respondent

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the Appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution and Appellee in the lower courts. In the brief the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statements of the Case and Facts to the extent they are non-argumentative and subject to the following additions:

Richard Dyle was asked by defense counsel, at trial, "What is Your testimony at this point today? to which Dyle testified, "I believe all three came in at the same time." (R 34).

During the time one of the three men had his gun pointed at Dyle, Petitioner moved to the right, toward a door. Nothing blocked Petitioner's view of what was going on. Dyle couldn't really tell what Petitioner was doing because Dyle was looking at the tall man taking the money and glancing at the gun. (R 23). The man with the gun was to Dyle's left, the tall man was directly in front of Dyle, and Petitioner moved to Dyle's right. (R 24, 25). Petitioner remained there until he ran out the door with the man with the money. (R 25).

At sentencing, the trial court judge had received a presentence investigation report indicating Petitioner had been involved with the criminal justice system from the time Petitioner was eleven years old. Evidence was presented showing Petitioner was involved in another armed robbery and a strong armed robbery, in both cases placing victims and witnesses in fear. Evidence that Petitioner had been released from the criminal justice system only seven months before being arrested

in the present case and that rehabilitation was given little chance for success was observed by the judge. (R 130-134). Based upon this evidence the trial judge stated, "I'm satisfied that you've been involved in armed robberies and within seven months after being released from prison. I'm satisfied that when you get released again you're going to be involved once again in abhorent behavior. I wish I could feel differently but I don't. I think that you are a danger to society. (R 134, 135).

Petitioner was permitted to respond to these statements made by the trial court judge and both Petitioner and his defense counsel did so. (R 135-138, 140, 141).

SUMMARY OF ARGUMENTS

I. The trial judge properly retained jurisdiction over the first third of Petitioner's sentence, stating the justification with individual particularity upon the record at sentencing. Petitioner was afforded and partook of the opportunity to respond to the trial judge's statements.

II. The eyewitness testimony of the victims of this armed robbery, including the identification of Petitioner as the man who started an argument with the victimized store manager just before one of the other two men pulled a gun, and who stood by as the third man took the money from the cash register, and who then fled with the third man and was soon followed by the gunman was sufficient to allow the jury to reasonably and fairly infer Petitioner's guilt.

III. The obvious intent of the information in this case was to charge Petitioner with the use of a firearm vicariously. Vicarious possession of a firearm is sufficient to sustain a conviction for armed robbery. Petitioner has waived any defect as no motion to dismiss was ever filed.

IV. The flight instruction was supported by the evidence.

V. The identity of Petitioner as one of three men in the store was not seriously disputed at trial, therefore refusal to give a requested instruction upon identification was not error.

POINTS ON APPEAL

POINT I

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WHETHER THE INFORMATION PROPERLY CHARGED PETITIONER WITH ARMED ROBBERY?

POINT IV

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ARGUMENT

POINT I

THE TRIAL COURT'S RETENTION OF JURISDICTION OVER ONE-THIRD OF PETITIONER'S SENTENCE WAS JUSTIFIED.

The opinion of the District Court of Appeal stated, as to Petitioner's assignment of error regarding retention of jurisdiction, "... [T]he point is not preserved for appellate purposes because Appellant made no objection at the time Whitehead v. State, 446 So.2d 194, Fla. 4th DCA 1984; Hernandez v. State, 425 So.2d 213, Fla. 4th DCA 1983; McFadden v. State, 423 So.2d 456 (Fla. 4th DCA 1982), and because the error is not of fundamental proportions. Whitehead, supra." Respondent urges this decision be upheld.

Notwithstanding whether Petitioner preserved this point for appeal, the objection to retention of jurisdiction because of the failure of the trial court to state justification with individual particularity is without merit.

Petitioner argues, "The trial court gave no reason at the sentencing hearing for the retention of jurisdiction, and entered no written order setting forth grounds for retention. (Petitioner's Initial Brief on Merits, page 6.) Section 947.16(3)(a) requires no such order, but says only that "... the trial court judge shall state the justification with individual particularity, and such justification shall be made a part of the court record. ..."

In accordance with the statute, the trial judge, in open court and on the record, stated he had received the presentence investigation report. (R 130). The trial judge also received testimony from Detective Piroth. (R 131, 132, 138). The trial judge found Petitioner had been involved with the criminal justice system from age 11 and lately was at liberty following release from prison only about seven months before being arrested upon this present charge. He also found the offenses have been serious in nature and there is little chance Petitioner can be rehabilitated. (R 132, 133). The trial judge told Petitioner, "I'm satisfied that when you get released again you're going to be involved once again in abhorent behavior. I wish I could feel differently but I don't. I think you are a danger to society." (R 135) The trial judge then permitted Petitioner to respond to this information and asked Petitioner if he would care to respond to the evidence of the offenses and Petitioner's arrest record. Petitioner and his attorney both responded. (R 136-138).

The statements of the trial judge do definitely state, with particular specificity, the judge's view of Petitioner's violent history and Petitioner's recidivism and show, on the record, reasons for his retention of jurisdiction in accordance with F.S.§947.16(3)(a). Abbott v. State, 421 So.2d 25 (Fla. 1st DCA 1982).

A reputation for and a conviction of aggressive and injurious behavior is certainly sufficient justification for the retention of jurisdiction ... ." Moore v. State, 392 So.2d 277 (Fla. 5th DCA 1981).

The trial judge's retention of jurisdiction complied with the essential requirements of the statute and the judgement should be affirmed.

The requirement of delivering a copy of such justification to the Department of Corrections, can easily be met by delivering a copy of the transcript of the sentencing hearing to the department and does not require remand. In a similar situation, the appellate court in Moore v. State, supra, did not even address the delivery of the copy to the department, although it is apparent that no document existed there as the trial court's justification was, as in this case, stated orally on the record.

POINT II

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION.

Petitioner argues that the trial judge erred in denying the motions for judgment of acquittal and the District Court of Appeal erred in upholding Petitioner's conviction because there was inadequate proof of any participation by Petitioner in the robbery. Respondent maintains that the motions were properly denied and the conviction was properly upheld.

In moving for a judgment of acquittal, or requesting review of the sufficiency of the evidence, Petitioner admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to Respondent that a jury might fairly and reasonably infer from the evidence. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). On appeal, the appellate court's function is to determine only the legal sufficiency of the evidence, and not its weight. Tibbs v. State, 397 So.2d 1120 (Fla. 1981). A difference of opinion regarding what the evidence shows is not sufficient for an appellate court to reverse, since again the only issue is the legal sufficiency of the evidence, and not its weight. See Streeter v. State, 400 So.2d 504 (Fla. 5th DCA 1981).

Respondent maintains that there was sufficient evidence in this case from which the jury could reasonably infer that Petitioner was not merely a witness to the robbery, but was a participant. Richard Dyle, the store clerk, testified that

at approximately 10:30 p.m. on May 1, 1982, three black males walked into the store together, and then walked to the rear of the store to a cooler area and "kind of lingered back there ...." (R 18, 19) Dyle then testified that the three men walked to the counter area together. At that point, Petitioner threw a cigarette on the floor. This angered Dyle, who exchanged words with Petitioner during which time Dyle looked Petitioner directly in the face from one or one and one-half feet away. (R 19, 20). Dyle then walked back around the counter, and the tallest of the men, who was standing between the other two, put a drink on the counter. As Dyle opened the cash register, the shortest of the three men pulled a gun. (R 21, 22). The man with the gun told the tallest of the three to grab the money. (R 23). Petitioner, who had a full view of the scene, did not leave at that time. Dyle could not tell if Petitioner was looking in Dyle's direction since Dyle was preoccupied looking at the gun, but Dyle said nothing was blocking Petitioner's view of what was going on. After the money was taken out of the cash register, including a search under the cash drawer, Petitioner and the tallest man ran out of the store together (R 23-24). The gunman remained for approximately ten seconds. After robbing Melvin Norris, the gunman ran out the same door and in the same direction as Petitioner and the other man (R 26-27). Melvin Norris' testimony was virtually identical (R 51-52), except that immediately after the last man left Norris looked outside the

store and saw all three men running in the same direction for about 40 yards until they rounded a corner. (R 54).

After the jury had retired to deliberate, they requested and received further instruction regarding "all parties participating or not participating." (R 116). It is obvious that the jury carefully considered the issue of Petitioner's participation, and decided the issue adversely to him. This case differs from all cases cited by Petitioner in one very important respect. That is in none of those cases did the defendants enter the place where the crime was committed and stand alongside the other perpetrators, as did Petitioner in the instant case. This is not a situation based solely upon circumstantial evidence as Davis v. State, 436 So.2d 196, (Fla. 4th DCA 1983), where four men entered the store, and then left, after which only two of the four returned and robbed it. Here, Petitioner entered the store with the other two men, walked to the cooler area in the back of the store with the other two, then he walked to the front of the store to the counter area where he engaged in a minor argument with the clerk. Immediately the robbery itself occurred, during which activity Petitioner remained next to the man who took the money from the register. When the cash register was emptied, Petitioner ran away with the man with the money. It is eyewitness testimony, not circumstantial evidence as in Davis, supra, which establishes Petitioner's presence at and participation in the robbery. Petitioner's presence and his actions

(from which the trier of fact could have inferred that he was intimidating Dyle and Norris and deterring additional customers from interrupting the robbery) were sufficient to allow the jury to reasonably and fairly infer from the evidence that Petitioner had acted as a principal in the armed robbery. State v. Guyton, 331 So.2d 392 (4DCA 1976). Of course, the jury also was aware that ten days later Petitioner again ran, that time at the sight of Detective Willaim Piroth when the detective approached him for arrest. (R 64-65). Respondent maintains, given these facts, the jury realistically appraised Petitioner's actions and properly convicted him for participation in the robbery.

POINT III

THE INFORMATION PROPERLY CHARGED PETITIONER WITH ARMED ROBBERY.

Petitioner argues that because of an alleged defect in the information he could not be convicted of armed robbery. To the extent that Petitioner's argument alleges a defect in the information, any such defect has been waived because the record indicates that no motion to dismiss was ever filed. The failure to timely raise a defect in an information constitutes a waiver of the defect unless the information wholly fails to charge a crime. See Haselden v. State, 386 So.2d 624 (Fla. 4th DCA 1980). Here, the information obviously does not wholly fail to charge a crime. Furthermore, unlike the case of Sanders v. State, 386 So.2d 256 (Fla. 5th DCA 1980), upon which Petitioner relies and where the indictment did not charge the use of any weapon by anyone at all, the obvious intent of the information in this case was to charge Petitioner with the use of a firearm vicariously. Vicarious possession of a firearm is sufficient to sustain conviction for armed robbery. See Hillman v. State, 410 So.2d 180, 182 (Fla. 2nd DCA 1982). Thus, Petitioner's complaint here is without merit.

POINT IV

THE FLIGHT INSTRUCTION WAS SUPPORTED BY THE EVIDENCE.

Petitioner argues that the trial court should not have given an instruction on flight because the evidence showed "the flight occurred after petitioner was suspected of the crime." Petitioner's argument ignores what Respondent finds to be self-evident; that is, flight by its nature follows commission. Petitioner demands a strained interpretation of the context of the instruction, apparently requiring this Court to interpret the instruction as saying that flight must occur before the defendant has been suspected of a crime. This is clearly an impossible interpretation of the instruction when read in its entirety. Mr. Dyle, the store clerk, testified that Petitioner and the tallest man ran out the backside door of the store after the cash register was emptied. (R 24). Melvin Norris, the customer who was robbed, said he saw the three men running together for roughly forty yards and around a corner after they left the store. (R 54). This evidence was clearly competent to support an instruction on flight. See Daniels v. State, 108 So.2d 755, 760 (Fla. 1959).

POINT V

THE TRIAL COURT DID NOT ERR BY REFUSING TO GIVE THE REQUESTED INSTRUCTION ON IDENTIFICATION.

The identity of Petitioner as one of the three persons in the store was not seriously in dispute during the trial. The only real dispute in this case was the extent of Petitioner's involvement, an issue which was decided adversely to him by the jury. Thus, pursuant to the case of State v. Freeman, 380 So.2d 1288 (Fla. 1980), there was no error in refusing to give the requested instruction on identity.

CONCLUSION

Based on the foregoing arguments and authorities cited therein Respondent respectfully requests that both the conviction and the sentence of the trial court be UPHELD.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

ROBERT S. JAEGERS
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on Merits has been furnished by mail/courier to GARY CALDWELL, ESQUIRE, Assistant Public Defender, 15th Judicial Circuit of Florida, 224 Datura Street, West Palm Beach, FL 33401 this 21st day of January, 1985.

Of Counsel