IN THE SUPREME COURT OF FLORIDA

TURA YOHN,

Petitioner,

-v-

CASE NO. 65,~~540~~ 504

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The record filed in the lower court is consecutively paginated and references thereto will be made by the symbol "R" followed by appropriate page number. References to the appendix submitted with Appellant's brief will be made by the symbol "A" followed by appropriate page number.

STATEMENT OF THE CASE

In a two count indictment returned December 7, 1981, petitioner was charged with first degree murder in the shooting death of Angeline Hall and attempted murder in the first degree resulting from the shooting of her husband, Charlie Yohn. Following trial by jury, petitioner was found guilty of manslaughter in the death of Angeline Hall. (R 128)

On direct appeal, the Florida First District Court of Appeal affirmed petitioner's conviction (A-4, 9), but certified to this court a question of great public interest, to-wit:

> IF THE STATE HAS THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE WHEN THE DEFENSE OF INSANITY HAS BEEN RAISED, IS THE GIVING OF THE PRESENT INSANITY INSTRUCTION, AS SET FORTH IN STANDARD JURY INSTRUCTION 3.04(b), ALONG WITH THE GENERAL REASONABLE DOUBT INSTRUCTION SUFFICIENT, NOTWITHSTANDIG THE DEFENDANT HAVING SPECIFICALLY REQUESTED THE COURT TO INSTRUCT THE JURY THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE?

STATEMENT OF THE FACTS

Respondent cannot accept petitioner's argumentative statement of the facts and restates them.

Robbie Fuller testified that at about 5:15 p.m. on November 18, 1981, he telephoned petitioner's residence to talk to her son who was not at home. During the conversation, Robbie Fuller told petitioner that he had seen her son at Seashell Lounge the night before and that petitioner began repeatedly asking him if he had seen her husband there as well. Robbie repeatedly refused to answer, telling petitioner that he wished to stay out of it (R 296, 298). Charlie Yohn, petitioner's husband, testified to having had an affair with the victim, Angeline Hall. He testified that at about 6:30 p.m. on November 18, 1981, he was in

the victim's trailer when he heard a knock at the door. Ms. Hall was expecting her brother and answered the door. Mr. Yohn heard a shot ring out and saw Ms. Hall coming back toward him (R 324-332). In fear, Mr. Yohn tried to flee but instead encountered petitioner who had come into the trailer. They struggled for petitioner's revolver after she had pointed it at him and a second shot was fired (R 335). Mr. Yohn managed to get control of the revolver and tried to go to the victim's aid who had fallen dying into a bedroom (R 336-338). Mr. Yohn had to continuously struggle with petitioner and restrain her until the police finally arrived and placed her under arrest (R 340).

Anita Pittman, who lived next door to the victim, heard a popping sound at about 6:30 p.m. She was inside the trailer at the time with her brother and the victim's two daughters (R 415). She called the police and went inside the victim's trailer where she found petitioner struggling with her husband. She also found the victim lying on the floor of the bedroom with a hole in her chest (R 416-419). Randy Pittman, Anita's brother, also heard the shot and, while in the victim's trailer, heard petitioner yell that she meant to kill the whore (R 422).

Dr. Edmond Killman was the pathologist who performed the autopsy. He testified that the cause of death was a bullet wound which entered the victims's back and exited her chest in a trajectory parallel to the ground and slightly to the left

(R 447-462). He also stated that the victim was shot from a distance of only four inches (R 462).

Bay County deputy sheriff Tom Brock was the first officer to arrive at the scene. Inside the trailer he found a man and a woman identified as petitioner and her husband, struggling and noticed a revolver in the man's belt. He also found the victim who was dead (R 491-493). As he exited the bedroom toward the living room, where only petitioner and her husband were located, he heard the woman yell: "I meant to kill the bitch and you too." (R 500) Deputy Brock and Deputy John Klinginsmith, who had just arrived, then placed petitioner under arrest for murder (R 501). Petitioner became so violent that it took all three men to handcuff her (R 504).

Robert Williams, a correctional officer for the sheriff's department, booked petitioner and found that she had five additional cartridges to the revolver in her pants pocket (R 534). Petitioner was heard to say while in the holding cell that she wanted to die and tried to cut her wrists, but Williams testified that he saw no need to take her to the hospital that night (R 540-546).

Bobbie Newell had been the crime scene investigator and testified that two rounds had been fired from the revolver (R 551). Paul Vecker, an investigator with the sheriff's department first met petitioner at the sheriff's office, advised

her of her rights, but asked her no questions. Petitioner told him that she had wanted to kill herself at the trailer and have her husband and the victim watch her die (R 614). The next night, Vecker again advised petitioner of her rights prior to her first appearance but again asked her no questions. At this time, like the night before, petitioner was cooperative and coherent (R 621). Petitioner volunteered that she had received a telephone call from Robbie Fuller, became angry, got in her car where she kept a .38 caliber revolver, and drove to the victim's residence. She said that she knew that what she had done was wrong and that she regretted it (R 621). The prosecution then rested its case in chief.

The defense presented a string of witnesses who testified to petitioner's emotional state during her husband's affair with the victim, including the night following her murder of Angeline Hall. Petitioner testified to the events surrounding her husband's affair and her son's involvement with the victim's daughters. However, with respect to the shooting itself, petitioner testified that she could not remember (R 954). Dr. Wray and Dr. Warner were psychiatrists who had examined petitioner and testified as to her sanity at the time of the offense. Dr. Wray opined that petitioner suffered from psychogenic amnesia (R 985, 986), and Dr. Warner opined that at the time of the offense, petitioner was temporarily and legally insane (R 1049).

In rebuttal, Dr. Sapoznikoff, a psychiatrist who had examined petitioner for the state, disagreed and gave his opinion that at the time of the offense petitioner was legally sane.

QUESTIONS CERTIFIED

IF THE STATE HAS THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE WHEN THE DEFENSE OF INSANITY HAS BEEN RAISED, IS THE GIVING OF THE PRESENT INSANITY INSTRUCTION, AS SET FORTH IN STANDARD JURY INSTRUCTION 3.04(b), ALONG WITH THE GENERAL REASONABLE DOUBT INSTRUCTION SUFFICIENT, NOTWITHSTANDING THE DEFENDANT HAVING SPECIFICALLY REQUESTED THE COURT TO INSTRUCT THE JURY THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE?

The lower court answered the certified question in the affirmative and so did the Fourth District in Reese v. State, So.2d___(Case No. 82-2015, opinion filed July 11, 1984), 9 F.L.W. 1982. It seems there is somewhat of a gray area in the distinction between the burden of proof applicable to proof of the elements of the offense charged and as to affirmative defenses raised by the defendant.

In the trial court petitioner raised the defense of insanity and presented evidence in support thereof and the trial court properly instructed on the issue. The instruction was identical to 3.04(b), Florida Standard Jury Instructions in Criminal Cases (1981 Ed.) (R 146). The instruction given by the

trial judge is in harmony with the one approved in Wheeler v. State, 344 So.2d 244 (Fla. 1977).

Petitioner presented the trial court with several requested jury instructions which deviated from the standard instruction given. The trial court properly found that the standard jury instruction adequately enabled the jury to consider the insanity defense. Scott v. State, 396 So.2d 271 (Fla.3d DCA 1981). The instructions as a whole more than adequately instructed the jury on the applicable burden of proof. The jury was repeatedly and consistently instructed that petitioner must be presumed to be innocent and that the state had the burden of proving her guilt beyond a reasonable doubt (R 145, 146, 148).

The issue raised here is very similar to the one raised in Rotenberry v. State, 429 So.2d 378 (Fla.1st DCA 1983), involving the instructions applicable to the defense of entrapment. Rotenberry contended that the trial court had erroneously failed to instruct the jury that the State had the burden of proving that it had not entrapped him. The trial court had given the standard jury instruction which for purposes of this appeal, does not differ meaningfully from the instruction on the defense of insanity. In Rottenberry, the court noted the general reasonable doubt instruction relating to the state's burden of proof and concluded that "considering the totality of the instructions given," there was no error. Id. at 380. Accord, McCray v.

State, 433 So.2d 5 (Fla.4th DCA 1983). Finally, there was nothing unusual or extraordinary about the evidence relating to the insanity defense which required the trial judge to deviate from the standard jury instruction. Laverette v. State, 295 So.2d 372 (Fla.1st DCA 1974).

Respondent agrees that the state has the burden to prove all elements of a crime charged beyond a reasonable doubt. And this burden remains with the state throughout the entire trial, notwithstanding any affirmative defense raised by the defendant. Of course, insanity is an affirmative defense in the purest sense of the term. Leland v. Oregon, 343 U.S. 790 (1952). While the burden of proof to prove the entire case--all elements of the charge--beyond a reasonable doubt stays with the state throughout the entire trial, the Constitution does permit the Government to allow the burden of persuasion to shift to the defendant.

It is obvious that the trial court instructed the jury on insanity pursuant to the standard instruction set forth in Florida Standard Jury Instructions in Criminal Cases (1981 Ed.). The instruction as given was neutral and fully informed the jury that if a reasonable doubt was raised as to whether she was sane, the jury should find her not guilty. Thus, the instructions as given permitted the jury to consider petitioner's defense and placed the burden of proof on the state.

Nonetheless, petitioner maintains that the jury should have been instructed that the state had the burden to prove that she was sane beyond a reasonable doubt. It is submitted that the instructions as given by the trial judge clearly placed the burden of proof on the state by informing the jury that if petitioner's assertion of insanity raised any reasonable doubt in their mind, then the defendant should be found not guilty. Respondent says this is a correct application of the law.

It should be noted that there is no constitutional requirement for the prosecution to disprove an affirmative defense beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197 (1977); Leland v. Oregon, supra. This being so, it is understandable that neither Patterson nor Leland is cited in petitioner's brief. And this same principle has long been recognized in this jurisdiction. For example, in State v. Kahler, 232 So.2d 166, 168 (Fla. 1970), the court remarked as follows:

> The law requires that the State prove each element of a criminal offense charged. The State is not required, however, to anticipate defensive matters or exceptions and negative them. The obvious result of such a requirement would render prosecution under our criminal laws unfeasible, if not impossible.

Id. at 168.

It would be nearly impossible for the state to negative the affirmative defense of insanity by proof beyond a reasonable doubt. Consequently, respondent maintains that the modern jury instruction on insanity is a better statement of the law. The new instruction maintains that the burden of proof beyond a reasonable doubt is on the State. But if the evidence raises a reasonable doubt about defendant's sanity, then the defendant must be found not guilty.

A discussion of some of the cases treating the affirmative defense of entrapment may be helpful. In Moody v. State, 359 So.2d 557 (Fla.4th DCA 1978), decided under the old standard jury instruction (Rule 2.11(e)), Florida Standard Jury Instructions in Criminal Cases (1975 Ed.). It is important to note that while Moody states that the jury must be instructed that the burden was on the state to prove beyond a reasonable doubt that the defendant was not entrapped, reversal was mandated because the Moody court did not comply with the standard jury instruction and did not read to the jury the standard entrapment instruction. Reasonably, the Moody court concluded that the failure to give the standard entrapment instruction in conjunction with the failure to instruct on the state's burden could well have left the jury with the impression that it was encumbent upon the defendant to prove his innocence. However, it is significant to note that the court in Moody recognized that the United States Supreme Court had clearly stated in Patterson, supra, that the

Constitution did not require a state to disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to a defendant's culpability. Moody, 359 So.2d 560.

It is the position of respondent that the jury must be instructed that the state has the burden of proving the elements of the offense charged beyond any reasonable doubt. And, if any affirmative defense asserted by the defendant raises a reasonable doubt, then he must be acquitted. However, respondent emphatically asserts that there is no requirement that the state disprove the affirmative defense beyond a reasonable doubt! Obviously, by making the change in the standard jury instructions, the intent was to clarify the law in this regard in conformity with the law as respondent has stated it. Interestingly, in Wheeler v. State, 425 So.2d 109 (Fla.1st DCA 1982), the court reaches the illogical conclusion that no significance should be attached to the change in the instruction and that the change was made merely to avoid undue emphasis as to the state's burden of proof. Id. at 111. Respondent maintains that the Wheeler court misread the effect of the change in instruction which clarifies the posture of the law. It removes from the state the onus of disproving an affirmative defense and correctly states that if the evidence shows the defendant was entrapped, or raises a reasonable doubt about entrapment, then the defendant should be found not guilty.

What petitioner is really asking for is a special instruction that the state must disprove beyond a reasonable doubt whatever affirmative defense a defendant might raise, e.g., self-defense, insanity, or entrapment. This is not the law and this court should not make it the law. The state has the burden of proof beyond a reasonable doubt as to the offense charged; but as to any affirmative defense the defendant has the burden of going forward with the evidence and assumes the burden of persuasion to the extent that if a reasonable doubt be entertained as to the affirmative defense asserted, then the defendant must be found not guilty.

Rather than requiring the state to disprove the affirmative defense of insanity beyond a reasonble doubt, many jurisdictions require that a defendant asserting this defense assume the burden of proving it by a preponderance of the evidence. I Wharton's Criminal Evidence (13th Ed.), § 30, p. 52[1]. Illustrative of the cases placing the burden of proof on a defendant asserting an affirmative defense is McCool v. State, 187 N.W.2d 206 (Wis., 1971), where the court had this to say:

> By electing the A.L.I. test, the defendant assumed the burden of convincing the trier of fact to a reasonable certainty by the greater weight of the credible evidence that he was insane at the time of the offense.

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[1] See also cases cited under n. 67 in pocketpart.

Id. at 207. The A.L.I. test mentioned by the Wisconsin court is § 4.01(1), Model Penal Code, Vol. X, Uniform Laws Annotated, p. 490. However, the fact that the invoking of this affirmative defense placed the burden of proof on the defendant is based on § 1.112, Vol. X, Uniform Laws Annotated, pp. 461, 462.

The law as it presently stands gives a criminal defendant all the best on this issue; it is only necessary that he assert an affirmative defense to the extent of raising a reasonable doubt in the minds of the jury to entitle him to an acquittal. This court should not give him additional balm by requiring a trial judge to again instruct the jury on reasonable doubt when the affirmative defense of insanity is raised.

CONCLUSION

The question should be answered in the affirmative.

Respectfully submitted,

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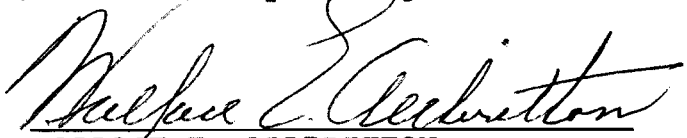
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Respondent's Brief on the Merits to MR. ROBERT B. STAATS, Staats, Overstreet & White, 229 McKenzie Avenue, Panama City, Florida 32401, by U.S. Mail, this 6th day of August, 1984.



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