IN THE SUPREME COURT OF FLORIDA

DONALD WILLIAM DUFOUR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 65,694

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
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POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS PHYSICAL EVIDENCE SEIZED DURING AN ILLEGAL SEARCH OF HIS RESIDENCE.

Appellee has argued that, if Miranda v. Arizona, 384 U. S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), could not be applied to the benefit of defendants whose trials took place prior to the issuance of the decision in that case, then Appellant's rights under Article I Section 12 of the Florida Constitution cannot be enforced because his trial took place after the effective date of an amendment to the Florida Constitution. Appellee makes this argument despite this Honorable Court's unambiguous holdings in State v. Lavazzoli, 434 So. 2d 321 (Fla. 1983), and State v. Williams, 443 So. 2d 952 (Fla. 1983), that the amendment to Article I Section 12 is not to be applied retroactively.

In addition to the law of Lavazzoli and Williams, Appellant would reply that the analogy to the effect of the Miranda decision is not strict. In trials held prior to the issuance of the Miranda decision, trial judges could not have been on notice of the requirements that that case imposed on law enforcement officers and the standards thus promulgated for evaluating the admissibility of a statement by an accused. In the case of the constitutional amendment, however, a substantive right was abrogated by election,

and could only have prospective effect. Appellant's right to be protected from unreasonable searches and seizures, guaranteed to him on October 12, 1982, the date of the search, was enforceable that date and hereafter. It is only those searches conducted subsequent to January 4, 1983, which may be made on less than probable cause but yield admissible fruits.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO EXCLUDE STATEMENTS MADE TO A COUNTY JAIL CELLMATE INFORMANT.

Thomas v. Cox, 708 F.2d 132 (4th Circ. 1983), is cited by Appellee as support for the argument that Richard Miller a/k/a Montgomery was not a Henry-type government informant. United States v. Henry, 447 U.S. 264, 65 L.Ed.2d 115, 100 S.Ct. 2183 (1980). In Thomas, the informant did not decide to cooperate with the government until three days after his release from jail. Although he had spoken with police agents previously, he had made no deals. The difference, the Fourth Circuit said, between Thomas and Henry, is the same difference between Thomas and this case: the informants in Henry and this case had both previously worked as government informants for their own benefit. (R 1295, 1307, 1309, 1137) In this case, it is true that Miller was not specifically directed to gain information from Appellant about the charge herein; but he was acting as an agent to learn about a possible escape plan, and "certainly wasn't discouraged" from eliciting evidence in this case. (R 1129, 1136) The jail captain refused to pay Miller money for his information, but he eventually received consideration for his cooperation and, as the Court in United States v. Sampol, 636 F.2d 621, 638 (D. C. Circ. 1980),

recognized, money is not the only currency in which government agents may deal.

Like the informant in Henry, supra, Miller was "alert" to statements by Appellant and, like those of the informant's in Henry, his actions deprived Appellant of his right to the effective assistance of counsel. Art. I §16, Fla. Const.; Amends. VI and XIV, U. S. Const.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED BY CONDUCTING A PRETRIAL HEARING AND HEARING TESTIMONY OUTSIDE THE PRESENCE OF APPELLANT WHERE HIS PRESENCE HAD NOT BEEN WAIVED.

Appellant reasserts that the record fails to demonstrate that his absence from the May 15th hearing was voluntary. Appellee has cited Herzog v. State, 439 So. 2d 1372 (Fla. 1983), in arguing that conducting the hearing in Appellant's absence was not error. The proceedings conducted in Herzog's absence, however, did not involve the taking of testimony, and his presence was specifically waived by his counsel. Id., 439 So. 2d at 1375. Testimony was taken at the May 15th hearing in this case; Appellant's absence was objected to by his counsel; and Herzog does not in any event answer the question of whether a defendant's involuntary absence during a noncrucial stage of a capital prosecution would be error. (R 1114)

CONCLUSION

For the reasons expressed herein and the initial brief, Appellant respectfully requests that this Honorable Court reverse his conviction and remand this cause to the trial court for a new trial. In the alternative, Appellant respectfully requests that this Honorable Court vacate his sentence and remand this cause to the trial court for a new trial on the penalty.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by hand delivery to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014; and by mail to Mr. Donald William DuFour, P. O. Box 1440, Orlando, Florida 32801, this 28th day of May, 1985.

Brynn Newton

ATTORNEY