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IN THE SUPREME COURT OF FLORIDA

JUAN ROBERTO MELENDEZ,	:	
Appellant,	:	
vs.	:	Case No. 66,244
STATE OF FLORIDA,	:	
Appellee.	:	

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT IN AND FOR
POLK COUNTY, FLORIDA

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PRELIMINARY STATEMENT

References to the Record on Appeal will be made by the designation (R-XX), with the XX representing the page of the record cited as numbered by the Clerk of the Court.

POINTS ON APPEAL

POINT I

IF A LAW ENFORCEMENT AGENCY IS GROSSLY NEGLIGENT IN THE PRESERVATION OF, AND COLLECTION OF EVIDENCE WHICH COULD BE EXCULPATORY TO A DEFENDANT, HAS HE BEEN DENIED DUE PROCESS OF LAW?

POINT II

IF THE STATE FAILS TO PROVE AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT, SHOULD A DEATH SENTENCE BE SET ASIDE?

POINT III

IF A DEFENDANT HAS A POTENTIAL WITNESS WHO COULD GIVE VERY DAMAGING TESTIMONY AGAINST THE PROSECUTION'S MAIN WITNESS, AND POSSIBLY COULD INDICATE THAT THE STATE'S WITNESS WAS A PARTICIPANT IN THE SUBJECT CRIME, IS IT A DENIAL OF DUE PROCESS NOT TO DECLARE A MISTRIAL WHEN THE WITNESS REFUSES TO APPEAR?

POINT IV

IF A DEFENDANT IS FOUND GUILTY OF FIRST DEGREE MURDER AND ARMED ROBBERY, ALL OF WHICH WAS ONE TRANSACTION, IS IT IMPROPER TO SENTENCE HIM FOR BOTH OFFENSES?

STATEMENT OF THE FACTS

This is a direct appeal of a death sentence imposed by the Circuit Court of Polk County, Florida.

The case arose when the body of a beauty salon operator one Delbert Baker, otherwise known as Mr. Del, was discovered in his establishment on September 13, 1983 in Auburndale, Polk County, Florida (R369).

There was testimony that Mr. Del was an open homosexual, and that he often met with lovers in the shop after hours (R383). There was also testimony that a sign-in sheet was kept as a log of incoming customers. The police denied recovering this sheet, and never produced it (R275, 386).

The pathologist, Dr. Drake, stated that the victim had had his throat cut with a razor and had been shot four (4) times (R343-344). He said the shooting was probably subsequent to the cutting, although either would cause death (R346, 352). The gun shot wounds were not discovered until the autopsy, and at least one bullet was delivered to the police (R341, 350). Drake placed the time of death at approximately 7:30 P. M., plus or minus an hour (R352, 353, 355). Dr. Drake said he went to the scene of the crime, and was allowed to use the telephone even though the investigation was not complete and the phone had not been checked for prints (R354).

He was concerned about the footprints on the floor too (R354). Dr. Drake also said the victim's condition was consistent with homosexual activity, but that he did not check the victim's stomach or mouth for sperm (R356, 357). He said the victim would probably not have been able to move after being shot (R349-350), although the blood covered a large area (R369). The victim was dressed in underpants and socks, with a pair of white loafertype shoes nearby (R342, 363, 364). The shoes were lost, and were not checked for ownership or anything (R391).

The victim's clothes were never recovered (R369). Detective Knapp testified that there were bloody footprints leading from the scene out towards the front (R370). A large hunting knife with a brown stain was found in a desk drawer, but it was not submitted to a lab nor examined for fingerprints (R370, 384, 386, 528). A blood sample that would have come from a killer was recovered, but was allowed to putrefy (R391, 397, 529).

Several employee-students of the school went to the scene the next day, and were allowed inside (R264, 290, 291). Sometime later, the police received a call that the victim had been shot as well as cut, and the people were told to leave (R292, 294). One of the students said that people could come to the back door and be admitted if they knocked or blew a car horn (R287).

The victim usually wore a lot of gold jewelry, which was not found, and the petty cash fund of about Fifty ($50.00) Dollars was missing, although the daily receipts were still there (R258, 265, 272, 390). The police therefore assumed that a robbery had occurred (R). The daily receipts were usually Two Hundred ($200.00) Dollars to Five Hundred ($500.00) Dollars (R258).

Knapp did not check any of the barber-station razors for blood stains (R389). He did examine the victim's car and said there was a moist substance on the seat, but did not have it tested for blood (R388).

The police developed a lead, one Terry Barber. Barber testified for the defense that he had been at the school between 5:00 P. M. and 6:30 P. M. on the day of the murder (R572). He saw Mr. Del with two (2) males in the back that he thought were Vernon James and Bobo (R575). Bobo was later identified as Harold Landrum a close friend and partner of Vernon James (R647-48). The police questioned James and took some clothes and shoes with a tread pattern similar to the footprints from him, but returned the items without submitting them to a lab and released James (R631).

Approximately six (6) months later, a David Luna Falcon contacted Agent Roper of the Florida Department of Law

Enforcement and told him that Juan Melendez, Appellant here, had confessed to the murder to him in a bar (R440, 468). Falcon said that he had been sniffing cocaine and drinking beer at the time (R450-51). Falcon said that Melendez told him that he and another man had killed and robbed Mr. Del (R440). Falcon said Melendez told him that John Berrien had driven Melendez and the other man to Mr. Del's (R441). The other man had made an appointment for them with the victim (R442). Melendez allegedly told Falcon that George had cut the victim's throat; and that the victim pleaded for help, he shot the victim using a pillow as a silencer (R443, 444, 456). Falcon also said Melendez said he went to Mr. Del's to have sex with him and rob him (R440, 442).

Falcon testified, over objection, that he had worked undercover for the U. S. Justice Department (R435). He said that he sells information to law enforcement, was working for the Auburndale Police Department at the time (R455,459).

Falcon testified that he had himself been convicted of homicide (R452), but that he had never had a gun in Polk County (R462).

Falcon denied knowing anything about a shooting incident in Auburndale wherein a home was broken into by men alleging they were police officers (R539). Detective Glisson testified that

such an incident was investigated by him (R561). Glisson said that the victims, Mr. and Mrs. Reagan, said that it was David Falcon who broke in, that he threatened Mr. Reagan's life, and he ultimately shot numerous holes in their car (R531, 534). Some of the projectiles were recovered from the car (R533, 561). Mrs. Reagan signed a waiver of prosecution after being told that she could be charged with drug offenses, similarly to her husband (R568). Glisson testified that Falcon had been responsible for drug charges against Mr. Reagan and that Reagan knew Falcon (R567). Glisson said that Falcon was working for him, (R563), but that he did not pressure the Reagan's to drop the charges against Falcon (R538, 540), but he did tell Mrs. Reagan that Falcon could get out of jail and come back and hurt her. Glisson said that he never asked Falcon for his gun because the charges were dropped. (R535-36). He also said he knew about Falcon's homicide conviction. Glisson had been fired from the Polk County Sheriff's Office several years before because he improperly terminated an investigation about a convicted killer shooting into a car and armed robbery (R565).

Appellant had received approval from the court to pay the costs of having the Reagans return from New England to testify in this trial. However, they called the day before they were to testify and refused to come to the trial. The State

stipulated that if they had testified their testimony would have been that Falcon had come to their home and fired shots at their car (R557). Appellant asked for a mistrial.

The State over objection of the defense, called John Berrien, the supposed driver of the car that took Appellant to the scene. Berrien is a convicted felon (R325). He had been charged with first degree murder and spent one hundred six (106) days in jail (R328). He was then offered a deal to be released from jail and to ultimately be placed on probation if he testified against Appellant (R324, Defense Exhibit "9").

Berrien said that about the time of the incident, he had driven Appellant and a cousin, named George Berrien, to the beauty school. John Berrien said that Appellant wanted to get his hair done and get some money. He said Appellant had a bulge under his shirt that could have been a gun or a hairbrush (R311, 330). Berrien said that he dropped off Appellant and George about 4:00 P. M. and picked them up about 5:30 P. M. or 5:45 P. M. but he did not know if they went into Mr. Del's or not (R3330. He said they were not scared, bloody, or excited when he picked them up (R334).

Berrien said that on the way back to Lakeland, Appellant and George spoke in Spanish (R316), and that Appellant said he would have to pay him later for the ride (R318).

George Berrien was called as a witness for the defense and denied everything, including that he speaks or understands Spanish (R667). George was never arrested or charged with any crime (R657). George said he told John he should quit lying about everything; he said John replied that he would be charged with murder again if he changed his statement (R661).

John Berrien also testified that he drove Appellant and George Berrien to the train station the next day. He said that Appellant gave George some rings and a gun to sell in Delaware (R321). George denied that John carried him to the train, although he did take the train to Delaware to see about his children there (R658, 665).

Appellant proffered the testimony of Ed Bigler, Florida Department of Law Enforcement ballistics expert, on a comparison of the bullets fired into the Reagan's vehicle, and the bullets that were recovered from Mr. Del. Bigler stated that one set of bullets were steel-jacketed, and the others were lead. He, therefore could not say with assurance that the bullets were fired from the same gun. He did say that they were comparable, and there was nothing to indicate they did not come from the same gun. Bigler said if he had the gun to test-fire, he could make a definitive judgment (R428-433, 554). The jury did not hear this testimony.

Appellant called as witnesses, Dorothy Rivera, Marie Graham, Angelo Graham and Ruby Cohen; all of whom testified they had seen Falcon with a gun numerous times (R488, 503, 506, 509). Rivera testified that Appellant was with her from about 5:00 P. M. on the day of the killing, until the next morning. She said she remembered the date because it was her first wedding anniversary (R484, 487, 493).

Rivera, Angelo Graham, and Cohen all testified that Falcon had made statements in their presence that he would either get Appellant in jail or kill him (R489, 506-07, 510-11).

Appellant called Vernon James the original suspect in the case, as a witness. However, after being warned by the court that his testimony might be used against him, he refused to testify (R595). James later agreed to testify about the crime, provided Roger Mims did not testify against him (R626).

Appellant then called Roger Mims, Vernon James cellmate. Mims was reluctant to testify because James' reputation made him fearful for his life (R618-19). Mims stated that James told him that he had cut Mr. Del's throat and one of his partners had shot Mr. Del. Mims said James told him that Melendez and George Berrien had nothing to do with the crime (R632-35). Mims said that he had called the State Attorney's Office and reported James statement. Agent Roper then came to

see him about the matter (R636). James told Mims that he and Mr. Del were lovers (R639).

Agent Roper testified that no evidence of the crime was found in John Berrien's car (R641). Roper also said that the fingerprints of Appellant and both the Berriens were submitted to the lab with negative results. Falcon's prints were not submitted (R642-43).

Appellant's counsel asked Roper if James had told him that he was present at the crime. the State objected, and the objection was sustained, even though the defense argued that it would be an admission against penal interest (R643).

STATEMENT OF THE CASE

Appellant was named as a co-defendant with John Arther Berrien in an indictment for first degree murder and armed robbery, filed April 26, 1984 (R2-3). A written plea of Not Guilty was filed May 29, 1984 (R4), and a Demand for Discovery on July 2, 1984 (R5).

Appellant filed a Motion To Compel Disclosure of Impeaching Information and Inducements To Testify was filed August 13, 1984 (R7-9). A Motion To Produce Bullets For Laboratory Testing was filed August 20, 1984 (R10-16). A Motion To Compel Discovery on Sentencing Phase was filed August 22, 1984 (R17). A Motion To Produce Firearm for Laboratory Testing and Comparison was filed September 12, 1984 (R18-24).

A jury trial commenced on September 17, 1984, and concluded with a verdict of guilty of both counts (R764). During the course of the trial, Appellant moved for production of a blood sample recovered from the scene of the crime (R223). Appellant moved for the production of certain evidence that he had been unable to obtain. Specifically requested were clothing items, the blood sample, papers and check-in sheets from the scene, and all other items gathered during the course of the investigation (R225). Both motions were granted (R225, 226).

Appellant also moved for a mistrial because two (2) of his critical witnesses refused to come to the trial from New England (R418-421). Motion was denied (R424).

Appellant moved for a directed verdict of acquittal (R476-480). The motion was denied (R481).

A stipulation between the State and Appellant was read to the jury that if James Reagan were called as a witness he would testify that David Falcon entered his home and shot into his car (R558).

Appellant renewed his motion for directed verdict (R681-87); it was denied (R688).

The day after the guilty verdict was returned, the jury reconvened to consider the sentence recommendation. A recommendation of death was made (R798), and Appellant was sentenced to death on the murder conviction and life on the robbery conviction (R803). This appeal followed.

POINT I

ARGUMENT

IF A LAW ENFORCEMENT AGENCY IS GROSSLY NEGLIGENT IN THE PRESERVATION OF, AND COLLECTION OF EVIDENCE WHICH COULD BE EXCULPATORY TO A DEFENDANT, HAS HE BEEN DENIED DUE PROCESS OF LAW?

Yes. This is the sort of situation that is so fundamental and common-sensical, that few cases have reached the appellate courts on this question. The real problem in this case, is that most of the negligence occurred before Appellant was ever charged. Had it been otherwise, the law is clear that a new trial would be mandated, State v. Herrera, 365 So. 2 399 (Fla. 3d DCA 1978); Moore v. Illinois, 408 U. S. 786, 794, 92 S. Ct. 2563, 33 L Ed 2d 706 (1972).

In the case at hand, the investigation was so ineptly handled, that there was virtually no physical evidence to examine. If the blood sample from the scene had been preserved, if the victim's car seat had been tested, if the clothes or shoes of Vernon James had been tested, if David Falcon's gun had been taken and tested, if the shoes found beside the body had been taken and tested, if the hunting knife had been checked for blood traces or fingerprints, if the shoes of Harold Landrum had been tested, perhaps some real evidence

could have been developed, State v. Wright, 557 P. 2d 1 (Wash. 1976); Curran v. Delaware, 259 F. 2d 707, 711 (3d Cir. 1958).

The situation is analagous to that of Johnston v. Pittman, CA5, No. 83-4391, May 14, 1984, 731 F.2 1231 (5th Cir. 1984), Armstrong v. Collier, 536 F2 72 (5th Cir. 1978), (5th Cir. 1984), where the court held that intentional or negligent non-preservation of discoverable evidence is equivalent to an illegal suppression of evidence. The court's reasoning is simple to understand. It prevents situations like that of the case at bar, where there is absolutely no evidence that Appellant was involved in this crime except the statement of Falcon saying Appellant told him he did it. The loss of evidence here that could have been very beneficial to Appellant. Falcon said he told Appellant he had killed men before, and Appellant says, so what, I have too. This occurring when both parties are allegedly drinking alcohol and sniffing cocaine. Nothing in Falcon's testimony is any inside information that Falcon could not have gotten from a news paper (Defense exhibits, R653-54).

John Berrien's testimony was almost irrelevant. He said he drove Appellant and George Berrien to the area of Mr. Del's at some uncertain date, and he drove George to the train station another day. He said Appellant gave George a gun and some rings to sell in Delaware, but he has no idea where they came

from. He never even saw Appellant or George enter or exit Mr. Del's. And he told George, who was never even arrested, that he had to testify against Appellant to save himself from the murder charge. It was very unethical of the State to strike such a deal and to delay John Berrien's sentencing on the Accessory and Violation of Probation charge until after he testified against Appellant, U. S. v. Waterman, 732 F.2d 1527 (8th Cir. 1984).

There is not one shred of reliable evidence to connect Appellant to this crime other than the statement of Falcon, a convicted killer himself.

As the court said in Lancaster v. State, 457 So. 2d 507 (Fla. 4th DCA 1984), where the lost evidence requires scientific or expert analysis, it takes on special significance, at 507. It is fundamentally unfair, and a violation of due process to allow the negligent disposal, or failure to recover, of critical evidence, State v. Ritter, 448 So. 2d 512 (Fla. 5th DCA 1984); Stipp v. State, 371 So. 2d 712 (Fla. 4th DCA 1979); State v. Counce, 392 So. 2d 1029 (Fla. 4th DCA 1981); Johnson v. State, 249 So. 2d 470 (Fla. 3d DCA 1971).

POINT II

ARGUMENT

IF THE STATE FAILS TO PROVE AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT, SHOULD A DEATH SENTENCE BE SET ASIDE?

Yes. Florida Statute 921.141 requires proof beyond a reasonable doubt of aggravating circumstances. In the case at bar, there was zero proof, other than a ten (10) year old conviction for robbery.

Paragraph two of the trial court's findings in Support of Death Penalty states that Appellant committed the crime while committing a robbery (R817). There was no proof of a robbery at all. The police assumed there was a robbery because witnesses said the victim usually wore a lot of jewelry, but none was found. Falcon testified that Appellant told him they robbed Mr. Del. It is submitted that, hopefully, testimony from such a witness is not proof beyond a reasonable doubt.

Paragraph three of the court's findings state that the crime "was especially wicked, evil, atrocious or cruel" as shown by the testimony of Falcon.

But Falcon testified that Appellant said he shot the victim in the head. Dr. Drake testified that the gun shot to the head would have caused instantaneous death (R349). So if, Falcon's

testimony is to be believed, Appellant's participation caused instant death, not a slow, lingering, cruel expiration.

Paragraph four says that the killing was done in a cold, calculated and premeditated manner. There is not even any reasonable inference from Falcon's testimony that would sustain this conclusion. No evidence was produced that there was any premeditation involved in the crime, or whether it was a "heat of battle" type of incident.

Presumptively, all murders dreadful, but the statute envisions something beyond the "norm of capital felonies", State v. Dixon, 383 So. 2d 1 (Fla. 1973). To hold otherwise would be to make the terms without effect, and to presume that the legislature was engaged in a rhetorical exercise, rather than creating a distinct class of murders, Demps v. State, 395 So. 2d 501, 503 (Fla. 1982). Such a holding would also apply the death penalty to every murder, a conclusion already considered inappropriate by the U. S. Supreme Court.

Futhermore, the trial only read the list of aggravating circumstances to the jury without defining or illustrating the technical meaning of any of the words, contrary to the holding of Godfrey v. Georgia, 446 U. S. 420; 64 L Ed. 2d 398 100 S. Ct. 1759, (1980), Proffitt v. Wainwright, 685 F. 2d 1227, 1264 (11th Cir. 1982) that the trial court has a constitutional duty to do so.

POINT III

ARGUMENT

IF A DEFENDANT HAS A POTENTIAL WITNESS WHO COULD GIVE VERY DAMAGING TESTIMONY AGAINST THE PROSECUTION'S MAIN WITNESS, AND POSSIBLY COULD INDICATE THAT THE STATE'S WITNESS WAS A PARTICIPANT IN THE SUBJECT CRIME, IS IT A DENIAL OF DUE PROCESS NOT TO DELCARE A MISTRIAL WHEN THE WITNESS REFUSES TO APPEAR?

Yes. The testimony of James and Rita Reagan, as outlined by defense counsel, should have created a strong doubt in the jury's mind about Falcon's credibility. The testimony that Falcon had forced his way into the Reagan's home, threatened to kill Mr. Reagan, and then shot into their vehicle several times, would have cast an extremely heavy cloud on the character of Falcon. It may have even caused the jury to believe that a person of such violent tendencies, who would impersonate a police officer when coupled with his supposed knowledge of the subject crime, was the sort of person who would commit the subject crime. Of course, if Detective Glisson had taken Falcon's gun and submitted it for ballistic tests, that question would have been answered. It is submitted that the actions of Glisson in trying to protect Falcon were sufficient in and of themselves to deny Appellant due process of law. The testimony of Glisson as to the statements he made to Mrs. Reagan, and then to say he had not pressured her to

sign a waiver of prosecution, is ludicrous. It is transparent that Glisson was trying to protect himself from a misconduct charge because of the actions of Falcon. That is the same sort of conduct which precipitated his termination from the Polk County Sheriff's Office.

Glisson's misconduct deprived Appellant of a fair trial, as guaranteed by the Sixth Amendment to the U. S. Constitution and Section 9, Article 1, Florida Constitution and the court should have granted a mistrial when the Reagans' failed to appear. The interests of justice will not be served by any less efficacious remedy, Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979). The acts of the police should be imputed to the prosecution Antone v. State, 355 So. 2d 777 (Fla. 1978); Krantz v. State, 405 So. 2d 211 (Fla. 3d DCA 1981).

POINT IV

ARGUMENT

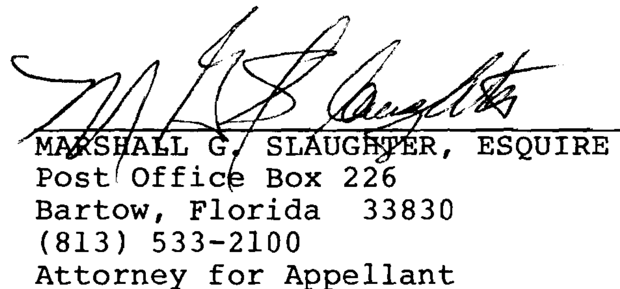
IF A DEFENDANT IS FOUND GUILTY OF FIRST DEGREE MURDER AND ARMED ROBBERY, ALL OF WHICH WAS ONE TRANSACTION, IS IT IMPROPER TO SENTENCE HIM FOR BOTH OFFENSES?

Yes. The robbery was the underlying predicate offense for a felony murder. The jury made no specific finding that premeditation was existent, therefore, the advisory opinion could have rested upon a felony murder theory. Therefore, a sentence upon both offenses was inappropriate, Smith v. State, 453 So. 2 505 (Fla. 4th DCA 1984); Brlecic v. State, Case No. 83-2130, (Aug. 31, 1984).

CONCLUSION

Based upon the foregoing argument and the law cited, Appellant's conviction should be dismissed.

The misconduct of the law enforcement personnel in not preserving pertinent evidence, and not recovering the weapon of Falcon for testing; the failure of the court to grant a mistrial when critical defense witnesses failed to appear; the denial of Appellant's question to Agent Roper about whether Vernon James had confessed to him; the dearth of evidence against Appellant; the character of David Falcon and his credibility; the deal to John Berrien to secure testimony against Appellant; the sentencing on the murder conviction and the robbery conviction; the absence of any evidence of a robbery; all demonstrate that Appellant was denied due process of law. The fact that George Berrien was not even arrested is a violation of equal protection.



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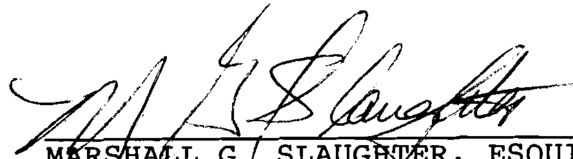
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to Honorable Candice Sunderland, Assistant Attorney General, Park Trammell Building, Room 804, 1313 Tampa Street, Tampa, Florida 33602, by U. S. Mail, this 20th day of May, A. D., 1985.



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