IN THE SUPREME COURT OF FLORIDA

JUAN ROBERTO MELENDEZ, :

Appellant, :

vs. : CASE NO. 66,244

STATE OF FLORIDA, :

Appellee. :

REPLY BRIEF OF APPELLANT

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

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TABLE OF CITATIONS

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.

STANDARD OF REVIEW

The standard of review in this case is abuse of judicial discretion, weight and sufficiency of the evidence, and misapplication of the law.

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?

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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 FACTS

Appellant would dispute certain allegations that the Appellee states as though they were confirmed facts.

Appellee alleges that the facts alleged as to the details of the crime, as testified to by David Luna Falcon, were confirmed by Co-Defendant, John Berrien (Appellant's Brief P.3). Actually, John Berrien testified that he did not even know if Appellant and George Berrien even went inside the beauty shop (R333-34).

Appellee alleges that the day after the crime, that George Berrien had John take him to the train station, and that Appellant accompanied them. This statement was denied by Appellant and George Berrien. George Berrien was never charged with any crime.

Appellee alleges that numerous witnesses substantiated the State's theory of the murder. In fact, no witness substantiated the State's theory. It was solely a product of David Luna Falcon's testimony.

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?

Appellee urges that Appellant's Point I is without merit because the loss of the evidence sought was unimportant. The Appellee's position will be addressed in the same order presented in it's Brief.

1. The Blood Sample

Sergeant Knapp did not testify that the floor was covered with the "victim's" blood, he only said "the floor was covered with blood" (R331). If the blood had been tested and found to be that of someone other than the victim, it would have weakened the State's case substantially, because John Berrien testified that neither of the alleged perpetrator's was bloody (R334).

If the blood had not been that of the victim or the alleged perpetrators, the trial most likely would not have been held. Clearly the blood sample was a critical piece of evidence.

2. Stain on the victim's car seat

Sergeant Knapp did not testify that there was a "white substance" on the victim's car seat. He said there was "a moist substance or a wetness on the driver's seat" and that he did not test it to see if it was blood (R388).

If the wetness had been found to be blood, that would have changed the case considerably, and would have made fingerprinting the car rather important.

3. Vernon James shoes

Mr. James shoes were ver important because he was an early suspect in the case. There was testimony that he was possibly at the beauty shop around the time the crime was committed with Harold Landrum (R575). Landrum's shoes were of the same pattern as the shoeprints found at the scene, but neither James' nor Landrum's shoes were sent to a lab to see if any trace of blood could be found (R575, 631). Also, Roger Mims testified that Vernon James had confessed to him that he was one of the killers (R634-35). The significance of that lost evidence does not require elaboration.

4. David Falcon's gun

Again, the importance of testing a weapon which might have been used in the killing, and almost certainly was used in the violent crime committed against the James Reagan family is

self-evident.

Florida Department of Law Enforcement Agent Bigler testified that there was nothing inconsistent between the bullets that killed Mr. Del, and those fired at the Reagan's home. However, he needed the gun to make test firings to make an absolute determination.

Appellee urges that, even if Falcon's gun had turned out to be the murder weapon, it doesn't matter, because Falcon was not in Polk County when the killing took place. Of course, the only evidence that Falcon was not in Polk County is his own assertion. And even if he were not present at the scene, his possession of the murder weapon would surely be of some importance.

5. The shoes found beside the body

Appellee states that the obvious conclusion is that the shoes found beside the body belonged to the victim. In a murder investigation, where the identity of the killer is in doubt, that sort of assumption should not be allowed. It would have been a simple matter to check the shoes, or ask someone, if they belonged to the victim. To merely surmise that they probably did is gross speculation. Suppose they didn't? Would it not be relevant to look for people who wore the same size? Perhaps some perspiration or skin samples could be recovered

to make a genetic analysis. It is gross negligence on the part of the police not to meticulously investigate every possibility, and not to preserve critical evidence.

6. The hunting knife found in a drawer

Sergeant Carroll testified on cross that the knife did have "blood or rust" on it (R384). But he did not send it to the lab. He thought Detective Glisson, who took over the case, and was also Falcon's controller, sent it to the lab later. In any event, the knife was never checked for fingerprints, or anything else (R386).

7. Harold Landrum's shoes

Appellee states that there was no need to have Landrum's shoes analyzed because he had an alibi for the time of the crime. However, Sergeant Knapp said he eliminated Landrum as a suspect because his boss said he was at work. There was no other verification. People are convicted every day, although they present alibi testimony. In fact, Appellant here presented alibi testimony as well (R484, 487, 493).

Appellee argues that the evidence discussed was not critical; that there was "more than sufficient" evidence (Appellee's brief Page 10) upon which to find Appellant guilty of first degree. Appellant would respectfully challenge

Appellee to state what evidence there is to show any connection between Appellant and the subject crime here, other than the testimony of David Luna Falcon - a self-admitted killer with a violent nature, and an admitted dislike of Appellant.

Appellee argues that Falcon's testimony was verified by John Berrien and the medical examiner. Appellant is unable to find any such substantiation in the record. The story told by Falcon could have easily been gleamed from the newspapers, his so-called private investigation of the case, (R453-54) or conversation with one of the real killers. Appellee has apparently overlooked the fact that all of the people involved in this case were involved with and had dealings with one another.

Appellee argues that John Berrien's testimony that Appellant gave George Berrien Mr. Del's jewelry to sell in Deleware is also proof of Appellant's guilt. However, all John testified to was two (2) rings and a watch, and he said Appellant had tried to sell him the watch a month before (R474-75). He also said he had seen Appellant with rings before.

POINT II

ARGUMENT

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

Appellant will primarily stand by his exposition on this point contained in his initial brief. It should be pointed out though, that the medical examiners opinion that the gunshot wound occurred after the victim's throat was cut, was precisely that, his opinion. Nowhere did he say that he was certain that the shot was second. And he did say that the heartbeat "might have gone on for another minute or so." (R349). It should be axiomatic that this sort of opinion is based primarily upon speculation. Unless actual experiments are carried out upon human beings to test their reactions to gunshot wounds to the head and having their throats cut, no one can say with certainty what the result will be. And since there is great variation between humans and their reactions, the experiment would only be valid if performed upon the person in question.

Appellant would also assert that there was not sufficient evidence for the jury to conclude that premeditation existed, and therefore the principles enunciated in State v. Pinder, 375 So. 2d 836 (Fla. 1979), are applicable, McCampbell v. State,

421 So. 2d 1072 (Fla. 1982). As stated previously, only the suspect testimony of Falcon gives any details of how the crime took place, or who the persons involved were.

The court should have found a lack of significant prior criminal history. There was one conviction for simple robbery ten (10) years previously. The statute does not say a lack of any prior criminal history, it says significant, and Appellant definitely qualifies for that mitigating circumstance.

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 DECLARE A MISTRIAL WHEN THE WITNESS REFUSES TO APPEAR?

The importance of the Reagans testimony was to show the violent nature of Falcon, and the collaboration between Falcon and Detective Glisson. Glisson was in charge of the investigation of the subject crime. It was in his best interests to protect and bolster Falcon, because of their close association. Although it is not a part of the record of this case, Glisson was fired from the Polk County Sheriff's Office for misconduct.

The testimony of the Reagans could have had a profound effect upon the jury by creating doubts about the credibility of Falcon and Glisson. Once again, the only evidence that Falcon was not in Polk County, Florida at the time of the crime was his own testimony.

There can be no truer statement than that the basic reason for the existence of our judicial system is to see that justice is accomplished. The obtaining of convictions is not

necessarily a corollary to that statement, nor, is the expedient conclusion of a trial. It was a matter of absolute necessity to have the Reagans testify

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?

It is Appellant's position that no reply to Appellee's argument, other than that contained in Points I and II, is necessary.

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 26th day of August, A. D., 1985.

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