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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
Petitioner,)
vs.)
JAY FRENCH MARSHALL,)
Respondent.)
)

CASE NO. 66,374

RESPONDENT'S BRIEF ON THE MERITS

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Assistant Public Defender

Counsel for Respondent.

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the District Court of Appeal, Fourth District, and the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

The Respondent was the Appellant in the Fourth District and the defendant in the trial court.

In the brief, the parties will be referred to as they appear before this Court.

The following symbols will be used:

"R" will denote Record On Appeal.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case.

STATEMENT OF THE FACTS

Respondents accepts petitioner's statement of the facts, but adds the following information in order to clarify the nature of the evidence adduced below.

Appellant was taken into custody pursuant to the Baker Act on November 15, 1981 (R 124-125), shortly after the day on which it was alleged that Brenda Scavone was abducted and sexually assaulted by an unknown assailant, November 9, 1981 (R 73). Appellant was discovered standing in the middle of Oakland Park Boulevard, west of Fort Lauderdale (R 114), aiming and firing an imaginary rifle at attackers from the sun (R 119, 182), a duty he told police was part of his obligation as a resident of Battlestar Galactica (R 120). When police sought to restrain him, he told them that Mr. Becker wanted their guns, but police saw no one there (R 122, 182). Appellant asked to lie on the hood of a squad car and then wanted to hold onto an officer (R 187). All the policemen at the scene agreed Appellant was incoherent and met the standards for commitment under the Baker Act (R 174-176, 183, 186).

Because of certain remarks Appellant made when detained (R 117, 118) and because he seemed to fit a composite picture of her assailant put together by Ms. Scavone (R 86, 117, 133), Appellant's picture was taken and placed into a photo line-up shown to Ms. Scavone (R 135). But she did not identify anyone in that line-up: she was looking for a scar or mark her assailant had beneath his eye, and she didn't see it in the photographs

presented to he (R 87, 97, 136). Ms. Scavone said she had approximately a two hour period to view her assailant, from the time he sprang up from the back seat of her car where he had been hiding and told her to drive away at knifepoint (R 75), to the time when he let her go after twice having vaginal intercourse with her in a deserted field to which she had been directed (R 81-84). But the only thing she remembered about him was that he was wearing long pants and had the scar or mark (R 71, 92).

Convinced that Appellant was the suspect for whom they were looking, police obtained his presence from Florida State Hospital for a live line-up on December 10, 1981 (R 87, 137). At this line-up, Ms. Scavone picked Appellant out (R 88, 139), even though she still did not see any scars or marks on his face (R 97).

Appellant was examined by two psychiatric experts, a psychologist and a psychiatrist, both of whom opined that Appellant was insane at the time the offenses were committed (R 197, 221). In addition, Ms.Scavone agreed that the assailant was acting bizarrely, and was at times incoherent during the period he was with her: she thought he might be on drugs (R 99).

SUMMARY OF THE ARGUMENT

POINT I

There is no compelling reason to overturn the long and well-established line of holdings by this Court and the lower appellate courts of this State which decline to apply the harmless error rule where the State refers to the defendant's exercise of his right to remain silent.

POINT II

The prosecutor's argument below telling the jury that the victim was the only person present at the crime who testified constituted a comment on respondent's exercise of his right not to testify, since respondent was the only other person present, on the State's theory of the case. By its very terms, the prosecutor's remark did not refer to the mere lack of contradictory testimony in the trial as a whole, bringing this case outside this Court's analysis in White v. State, 377 So.2d 1149 (Fla. 1979). Finally, since the evidence in this case was far from overwhelming but raised substantial questions both with respect to the identification issue and respondent's insanity at the time of the offense, reversal of the conviction below is required regardless of whether or not the harmless error rule is applied.

ARGUMENT

POINT I

THIS COURT SHOULD ADHERE TO ITS WELL-SETTLED POSITION THAT COMMENT N A DEFENDANT'S RIGHT TO REMAIN SILENT REQUIRES REVERSAL UPON TIMELY OBJECTION THERETO.

In its brief, petitioner has urged that this Court abandon the principle of stare decisis and overruled its decisions in David v. State, 369 So.2d 943 (Fla. 1979) and Trafficante v. State, 91 So.2d 811 (Fla. 1957).

The rule of stare decisis effectuates uniformity, certainty, and stability in the law. It is designed to keep the scale of justice steady, and embraces a conservative doctrine directed towards achieving the greatest stability in the law. 13 Florida Jurisprudence 2d, Courts and Judges, §136.

This Court has repeatedly held that a comment on silence renders a conviction reversible as a matter of law. Cf. Bennett, 316 So.2d 41 (Fla. 1975), Shannon v. State, 335 So.2d 5 (Fla. 1979), Clark v. State, 363 So.2d 331 (Fla. 1978), and the cases cited therein. Moreover, these decisions postdate the United States Supreme Court's decision in Chapman v. California, 356 U. S. 18 (1967), refusing to reverse a conviction despite comment on the defendant's failure to testify, where the error was harmless beyond a reasonable doubt. This Court consequently had the benefit of the same federal constitutional argument now posited by petitioner when it arrived at its conclusion in Bennett and

its progeny[1], mandating reversal without regard to the harmless error rule where the State comments on the defendant's exercise of his right to remain silent.

Contrary to petitioner's implication, United States v. Hastings, _US_, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983) adds nothing new to the law in this area. In Hastings, the Supreme Court ruled that Hasting's conviction was not reversible as a matter of law where the prosecutor pointed out to the jury that Hasting did not challenge various parts of the government's case. The Court concluded that the prosecutor's remark was harmless beyond a reasonable doubt. Thus Hastings is not only consistent with the prior rulings of the United States Supreme Court, it is also in agreement with rulings of this Court on these particular facts: in White v. State, 377 So.2d 1149 (Fla. 1979), this Court held that the conviction was not reversible as a matter of law where the prosecutor pointed out that there was no testimony contradicting the State's main witness.[2]

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1 Bennett's progeny are so numerous, and its principle is so well settled, that to overturn it would be rather like uprooting a vast old banyan tree with many roots, leaving a devastation in its place. Petitioner has asserted no particular reason why this should be done.

2 Unlike in White, supra, where the prosecutor was commenting on the general absence of contradictory testimony in the case as a whole, however, the instant case involved a situation where the prosecutor told the jury that only one of the two witnesses present at the scene (the other one being the respondent) testified at trial. The comment in the case at bench clearly, therefore, focussed the jury's attention on the respondent's right not to testify, as the district court of appeal correctly found. See, Argument, Point II, infra.

Petitioner suggests that this Court has receded from its unambigious holding in Bennett v.State, supra, based on the following sentence taken out of context from State v. Murray, 443 So.2d 955 (Fla. 1984): "We agree with the recent analysis of the Court in United States v. Hasting, supra, (1983)." But Murray did not involve a comment on silence. It did not purport to overrule Bennett. In Rowell v. State, 450 So.2d 1226 (Fla. 5th DCA 1984) the court rejected the very argument which petitioner now advances before this Court, writing:

> Murray did not concern a prosecutorial comment on a defendant's exercise of his right to remain silent. Therefore, its expressed approval of the analysis by the Supreme Court in Hastings is not necessarily a retreat from the per se rule of Bennett and Donovan. Despite our agreement with the logic of Hasting and our reservations in regard to the justice of a per se rule, we are bound at this point in time to adhere to Bennett and Donovan. See Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). This conclusion is buttressed by the fact that in the recent case of State v. Strasser, No. 62,665 (Fla. Feb. 9, 1984) [9 FLW 60], released a month after the opinion issued in Murray, the Florida Supreme Court relied on its prior decision in State v. Burwick, 442 So.2d 944 (Fla. 1983), which was issued a month before Murray. In Burwick, it was held to be reversible error to admit evidence at trial that a defendant had intelligently exercised his constitutional right to silence after Miranda warnings in the State's effort to rebut his insanity defense. The Florida Supreme Court recognized the per se rule in Burwick, stating: "There is no dispute that it is reversible error for the prosecution to attempt to impeach a defendant's alibi testimony by asking on cross-examination why he remained silent at the time of his arrest." 442 So.2d at 947. Two United States Supreme Court cases are cited in Burwick: Doyle v. Ohio, 426 U.S. 610. 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), and United States v. Hale, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975). Doyle is irrelevant in regard to the applicability of the harmless

> error rule; it expressly notes that issue was not raised. Hale did not approve a per se rule but confined its holding to the circumstances of that particular case and an express finding of prejudice. Neither Burwick nor Strasser refers to Hasting.

9 FLW at 178.

Petitioner's argument based on Murray is therefore a house built on sand: it has no firm foundation which can withstand the tide of analysis.

Petitioner's fallback on rhetorical pleas against reversal because of a prosecutor's "careless" slip must likewise be rejected upon cold consideration. After almost ten years during which there has been no doubt that comment on the right to remain silent are impermissible, if there is anything that our young state attorneys know when they enter their first courtroom, it must be that they must avoid such comments. Yet these type of comments persistently recur, in various shapes and forms and accompanied by various rationales which seek to distinguish them from a comment on the right to remain silent. See, State v. Burwick, 408 So.2d 722 (Fla. 1983) [defendant's silence at arrest as impeachment of his insanity defense]; Demick v.State , 451 So.2d 526 (Fla. 4th DCA 1984) [prosecutor argues that co-defendant, a state witness, gave statement to police, but defendant didn't]; Jones v. State, 434 So.2d 337 (Fla. 3rd DCA 1983), reversed State v. Jones 9 FLW 529 (Fla. December 20, 1984) [defendant remained silent after being apprehended by retail store detective]; Torrence v. State 430 So.2d 489 (Fla. 1st DCA 1983) [defendant never told anyone about defense before trial,

even though defendant had waived right to silence by talking to police after arrest]; Turner v. State, 414 So.2d 1161 (Fla. 3rd DCA 1982); Thompson v. State, 386 So.2d 264 (Fla. 3rd DCA 1980) [defendant made some statements and then refused to talk further]; Washington v. State, 388 So.2d 1042 (Fla. 5th DCA 1980) [defendant said nothing when police asked him about robbery]; Ruiz v. State 378 So.2d 101 (Fla. 3rd DCA 1979) [defendant fled instead of telling police his story in conformity with trial testimony].

Respondent suggest a rhetorical question of his own: Why, knowing that such tactics court reversal, do prosecutors persist in commenting in whatever way possible on a defendant's exercise of his right to remain silent? Respondent further suggests that the only logical answer is because an assertion of an accused's Amendment right is so damming in the jury's eyes that it constitutes the final nail in the coffin containing the defendant's chances for acquittal. Hardly a voir dire goes by, after all, where a juror does not candidly state that he expects an innocent person to give his story to the police, or that he will wait to decide the case until he hears the defendant's side of the story. See, Waddell v. State. 458 So.2d 1140 (Fla. 5th DCA 1984). It may well be true, as petitioner asserts, that the public is vaguely aware of the existence of a Fifth Amendment right to remain silent by virtue of references thereto in television police shows and soap operas, Petitioner's Brief, page 16, but perhaps petitioner has forgotten that the Fifth Amendment in those forums inevitably becomes a screen behind which the guilty

hide. It is precisely these subconscious but no less devastating visceral responses which the prohibition against comment on the exercise of the right to remain silent is designed to circumvent. And it is precisely because these responses are so insidious that mandatory reversal is the only appropriate prophylactic, both to remove temptation from the path of the prosecution, insofar as the Court is able to, and to ensure that an accused's conviction is not impermissibly tainted.

Petitioner's argument for abandonment of Bennett and its progeny is ultimately grounded upon the disagreement of federal courts with its holding[3]. It would be terrible indeed if this Court's decisions ensuring the rights of its citizens were so sickly and weak as to fall before contrary rulings by inferior or foreign courts.

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[3] Petitioner asserts in its brief that the federal court's rulings are especially puissant because the right to remain silent is "a federal constitutional right." Petitioner's position notwithstandig, our constitution also protects the right to remain silent. Article 1, Section 9, Florida Constitution (1968). And see, Fla.R.Crim.P. 3.250. It is hard to see why the chief legal officer of the state espouses the diminution of the protections of our state constitution.

POINT II

THE PROSECUTOR'S REMARKS THAT ONLY ONE WITNESS OF THE TWO PRESENT AT THE CRIME HAD TESTIFIED AMOUNTED TO AN IMPERMISSIBLE COMMENT ON RESPONDENT'S RIGHT TO REMAIN SILENT.

In White v. State, 377 So.2d 1149 (Fla. 1980), the prosecutor told the jury on conclusion of the evidence that

> "You haven't heard one word of testimony to contradict what she [the prosecutrix] has said, other than the lawyer's argument."

Obviously, a trial consists of the testimony of more witnesses than just the defendant and the victim, however. Thus, the prosecutor's reference in White to the testimony in the case was properly held to refer to the general lack of contradictory evidence adduced from the testimony of all the witnesses who appeared, who neither in direct examination or on cross examination said anything which was inconsistent with the prosecutrix's account.

In the present case, on the other hand, the prosecutor did not limit himself to remarking on the uncontradicted testimony in the case, Instead, he told the jury:

> Ladies and gentlemen, the only person you heard from in this courtroom with regard to the events on November 9, 1981, was Brenda Scavone.

(R 269)

And the prosecutor further rammed his point home when respondent's timely and well-founded objections were overruled:

> The only person who saw, who was there, who testified to us as to what occurred on November 9, 1981, which is all that you can legally consider in this case --

(R 269)

Respondent's renewed objection and motion for mistrial were again denied.

Thus, even the most superficial comparison of the remarks made in the present case with those in White v. State, supra, reveals the crucial difference between them. For in the present case, the prosecutor told the jury, twice, that the only witness who was present at the scene of the crime who testified was the victim. The other person who was there, respondent, did not testify. Patently, this is quite a different kettle of fish than the prosecutor's statement in White that the testimony in the case (as a whole) did not contradict what the victim said. Petitioner's attempts to bring the remarks in the present case within the permissible type of comment described in White must, therefore, be rejected.

Because the prosecutor's closing argument commented on respondent's right not to testify at his trial, respondent's motion for mistrial should have been granted, and his conviction must now be reversed. See, Argument, Point I, supra. Even should this Court determine that the harmless error rule applies to such cases, it cannot be said that the prosecutor's error below was harmless beyond a reasonable doubt. United States v. Hastings, __U.S.__,103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). Contrary to petitioner's blanket assertion that the evidence in the instant case was overwhelming, the State's case that respondent was the assailant rested solely on the identification by Brenda Scavone. Ms. Scavone had not picked respondent's photograph out of a lineup composed shortly after the offense, however. In fact,

respondent did not match the description she gave of the rapist, which included as its most recognizable feature a scar that Ms. Scavone observed on her assailant's face (R 71, 92). Respondent had no such marks (R 97). Ms. Scavone first identified respondent in a live lineup conducted after the photo lineup. She thus picked the man who had already been presented to her, via the photograph, as the focus of police interest in the case. Moreover, Ms. Scavone was told, after the lineup, that she had identified the person who the police thought was guilty (R 24, 29), thus reinforcing her confidence in the validity of her identification based on factors extraneous to her own recollections of her assailant.

Finally, even assuming that Ms. Scavone correctly identified respondent as the person who assaulted her, the instant case exhibited compelling evidence of insanity. Respondent initially drew police attention to himself, shortly after the crime against Ms. Scavone, as a result of his bizarre behavior, and he was actually committed involuntarily under the Baker Act at that time. (R 114, 119-125, 174-176, 182-183, 186-187). The only two psychiatric experts who testified agreed that respondent was insane at the time of the offense (R 197, 221). Ms. Scavone herself stated that the rapist acted bizarrely, was at times incoherent, and appeared to be on drugs (R 99). That the jury was concerned, at least, by this question of insanity is demonstrated by its request for a rereading of one of the defense expert's testimony, which was denied upon the States's objection (R 294).

In view of the troubling evidence of respondent's lack of sanity at the time the offense was committed and the questions raised as to the correctness of the victim's identification of him as the rapist, it is impossible to fairly conclude that the evidence in the case at bench was overwhelming beyond a reasonable doubt. Consequently, respondent's conviction must be reversed under any test, including the federal one urged by petitioner.

CONCLUSION

Based on the foregoing argument and the authorities cited, respondent requests that this Court answer the Fourth District Court of Appeal's certified question as follows:

> The harmless error doctrine may not be applied to cases in which a prosecutor has violated defendant's Fifth Amendment rights under Griffith v. California, 38 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1976).

Moreover, respondent requests that this Court affirm the Fourth District Court of Appeal's holding that the prosecutor's remarks below were a comment on respondent's exercise of his right not to testify, constituted reversible error, which require reversal in his case whether or not the harmless error rule is applied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to CAROLYN V. McCANN, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 20th day of FEBRUARY, 1985.