IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,434

JAMES REAVES,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

Petitioner, James Reaves, was the defendant in the trial court. The Respondent, State of Florida, was the prosecution in the trial court. The parties shall be referred to as Petitioner and Respondent in this brief.

JURISDICTIONAL QUESTIONS PRESENTED

I

WHETHER THE DECISION OF THE DISTRICT COURT BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S HOLDING IN NOWLIN V. STATE, 346 SO.2D 1020 (FLA. 1977)?

II

WHETHER THE DECISION OF THE DISTRICT COURT BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN BREEDLOVE V. STATE, 364 SO.2D 495 (FLA. 4TH DCA 1978)?

SUMMARY OF ARGUMENT

The Respondent argues that no conflict exists between the opinion of the District Court and the cases of Nowlin v. State, 346 So.2d 1020 (Fla. 1977), or Breedlove v. State, 364 So.2d 495 (Fla. 4th DCA 1978), in that the opinion below includes factual distinctions which are overlooked or miscontrued by the Petitioner in his brief. Furthermore, certain of Petitioner's arguments were not preserved in the trial court and his attempts to hinge a conflict upon those grounds ignores the general rule that absent fundamental error, a reviewing court shall not decide unpreserved issues. Lastly, Petitioner mistakenly presents a concurring opinion of only four members of this court in Nowlin, supra, as a majority view on the procedural prerequisites to witness impeachment under Rule 614 of the Evidence Code.

ARGUMENT

I

THE DECISION OF THE DISTRICT COURT OF APPEAL BELOW IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THIS COURT'S HOLDING IN NOWLIN V. STATE, 346 SO.2D 1020 (FLA. 1977).

The District Court correctly ruled that the written motion to suppress statements "...was based entirely on the grounds that Reaves' statements were elicited through questioning in violation of Miranda v. Arizona," (slip opinion, p.3), and that no testimony or record evidence supported Reaves' "catch-all allegation that the statements were not freely or voluntarily given..." (slip opinion, p.3, footnote 4). The Petitioner's position, adopted by the dissent below, construes the trial judge's concededly[1] inadvertent remark about "not voluntary" as an absolute bar to use of the statement during trial. This position misconstrues the rule of Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), and this court's decision adopting Harris as a matter of State Constitutional law, Nowlin v. State, 346 So.2d 1020 (Fla. 1977). As explained by Justice Adkins in his dissent, Id. 346 So.2d 1026-28, "It [Miranda v. Arizona] created a single, uncomplicated, universally

[1]Petitioner's Brief, p.4.

applicable test for determining whether a particular confession was coerced. If proper warnings are given voluntariness is assured, at least in the absence of evidence of coercion. Conversely, if an accused is inadequately informed of his rights involuntariness is assumed and the statements are inadmissible at trial." Id at 1027.

When, as was the case below, a defendant challenges a non-coerced confession under the Miranda doctrine on strictly technical compliance grounds, i.e. the police continued questioning after the defendant stated a desire not to speak, he cannot reasonably assume the order of suppression is predicated on anything other than a general deterrence policy. Oregon v. Haas, 420 U.S. 714 (1975), explains this rule in the simplest terms:

> The effect of inadmissibility in the Harris case and in this case is the same: inadmissibility would pervert the constitutional right into a right to falsify free from the embarrasment of impeachment evidence from the defendant's own mouth.
>
> One might concede that when proper Miranda warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are

> defective and the defect is not known to the officer. In any event, the balance was struck in Harris, and we are not disposed to change it now. If, in a given case, the officer's conduct amounts to an abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness.
>
> Id. at 724. (Emphasis added).

Restated, Nowlin holds that a statement which is technically inadmissible due to a legally imposed assumption of involuntariness is none-the-less admissible to impeach the defendant's trial testimony once the prosecution shows by a preponderance of the evidence that the statement was not the result of actual coercion or duress which overbore the free will of the accused.

The District Court opinion below applied the Nowlin rule without deviation. Contrary to the Petitioner's assertion, the District Court reviewed the trial court's action so as to determine whether or not the trial court made a factual determination that the out-of-court statements were voluntary prior to admitting them as impeachment. This determination was made during the motion to suppress held prior to trial.[2] The District Court outlines the facts of

[2]A correct method of procedure. Frazier v. Cupp, 394 U.S. 731, 740 (1969).

that hearing in detail and sets out the trial judge's later, pre-impeachment, reasoning for the suppression order. (slip opinion, p.3-4). The brief quote from that ruling negates Petitioner's claim that the District Court acted as a fact finder in violation of DeConingh v. State, 433 So.2d 501 (Fla. 1983). A reading of footnote five will explain how the majority below actually engaged the issue. A review of the record by the majority in response to a claim that the trial court ruled the statements "involuntary" is not the same as an independent finding of voluntariness. It is merely a way of ascertaining that the defense motion was predicated upon a technical reading of Miranda; that the use of the word "involuntary" was inadvertent; and that the experienced trial lawyer representing Petitioner made a tactical decision not to seek clarification of the trial court's ruling was "...a matter for resolution another day." (slip opinion, p.4).

The Petition also advances a complaint about the District Court's failure to apply the procedural rule for impeachment, Section 90.614 Fla.Stat., in a fashion consistent with the concurring opinion of Justice Overton in the Nowlin case. Id. 1024-1025. The District Court has always followed Rule 614, see Wright v. State, 427 So.2d 326 (Fla. 3d DCA 1983), when an objection is raised on this point. However, as pointed out in footnote three to the

opinion below, "...no such objection was made." The law requires an objection with enough specific information to apprise the court below of the legal basis of the complaint. None was raised in this case. Contrast, Andrews v. State, 263 So.2d 846 (Fla. 1st DCA 1972), (Defense objection to "hearsay" sufficient to apprise trial court of fact that improper predicate turns otherwise relevant testimony into inadmissible hearsay). Furthermore, Petitioner's reliance on the concurring opinion of Justice Overton fails to acknowledge the minority status of that opinion. Errors of constitutional magnitude require objections. Clark v. State, 363 So.2d 331, 33 (Fla. 1978). Since none was made in the trial court, the Petitioner has no conflict to raise in this court under any interpretation of Nowlin.

II

THE DECISION OF THE DISTRICT COURT BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN BREEDLOVE V. STATE, 364 SO.2D 495 (FLA. 4TH DCA 1978).

Petitioner accurately states "In Breedlove, the court held that 'continued readings of Miranda rights to the accused may constitute undue harassment.' 364 So.2d at 496." (Petitioner's Brief, p.9). The problem with his analysis is his failure to compare the facts of each case. According to the Breedlove opinion:

> The record shows that the emotional state of the accused was such as to effectively preclude a knowing and voluntary waiver of her Fifth Amendment rights. At trial an officer testified the appellant ". . . was crying and very upset." Another officer arriving approximately one hour later, testified: "she was very hysterical . . . she was crying and we had to calm her down." In the case at bar, the appellant's emotional confusion raises serious doubts as to whether her statements were knowingly and intelligently made. In Singleton v. State, 344 So.2d 911 (Fla. 3d DCA 1977), the court reversed a conviction when the record showed the accused was confused and indecisive at the time she made inculpatory statements. Clearly, the State failed to meet the heavy burden imposed on it under Miranda. It is for this reason we must reverse the decision below.

In contrast, the facts sub judice reveal the Petitioner made his initial statement during his second police encounter a short time after advising the police of his wish to remain silent. The silence of the opinion below indicates Petitioner was not confused, hysterical, intoxicated or otherwise handicapped so as to allow for an application of the Breedlove rule that continued interrogation may lead to a coerced or involuntary confession. Because the case below is factually distinguished from Breedlove, no conflict exists between those opinions.

Lastly, Respondent contends that Petitioner's inclusion of an excerpt from the transcript is an improper attempt to argue the merits of his claim and should be ignored by this court. The Committee Note to Rule 9.120(d) states

> It is not appropriate to argue the merits of the substantive issues involved in this case or discuss any matters not relevant to the threshold jurisdictional issue.

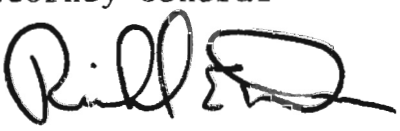
The portions of Petitioner's argument focusing upon the trial judge's initial ruling were not part of his appeal in the District Court. This attempt to infuse the trial record into a jurisdictional brief should not be condoned.

CONCLUSION

Based upon the above-cited legal authority and argument, the Respondent, State of Florida, prays this Court decline jurisdiction of this cause.

Respectfully submitted,

JIM SMITH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to JAMES H. GREASON, Esq., Special Assistant Public Defender, Suite A214, 11400 North Kendall Drive, Miami, Florida 33176, on this 12th day of February, 1985.

RICHARD E. DORAN
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/vbm