DA 11-5-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,436

JAMES REAVES,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON MERITS

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INTRODUCTION

The Petitioner, JAMES REAVES, was the defendant in the trial court below; the Respondent, THE STATE OF FLORIDA, was the prosecution. References to the parties will be in these terms. References to the Record on Appeal will be denoted by the symbol "R". References to the trial transcript will be denoted by the symbol "TR". All emphasis is supplied unless otherwise indicated.

SUMMARY OF ARGUMENT

The State of Florida urges this court to either dismiss this case for lack of conflict jurisdiction or alternatively affirm the decision of the District Court of Appeal majority. Neither the record evidence nor legal precedent supports petitioner in his claim that reversible error occurred when the prosecution was allowed to impeach him by use of his prior inconsistent statement regarding the crime. Although the prosecution was precluded from using these statements in its case-in-chief due to technical violation of the "bright-line" rule of Mirada v. Arizona, as interpreted in Michigan v. Mosley, nothing on record suggests the statements were coerced or improperly taken. Furthermore, the petitioner failed to allege or prove this claim with any specificity. His allegations of police inducement to petitioner's sister do not rise to a level of due process violation. Recent federal and state court decisions, including Oregon v. Elstad, from this term of the Supreme Court, rebut any notion that a violation of the bright-line rule of Miranda requires exclusion of the statements for impeachment purposes as well. Petitioner's sole case authority, Breedlove v. State, does not support this contention and is factually far afield of this case.

The district court accurately declared that not only was the question of involuntariness not supported by either record evidence or a trial court ruling, it also correctly noted the matter of the lack of a proper predicate to the use of the statements was waived by lack of objection. The State's argument presents a number of federal and state court decisions squarely on point as to this issue.

Lastly, nothing about the admission of this evidence compels a finding that the lack of objection is not needed to preserve the issue for appeal.

ARGUMENT (RESTATED)

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ADMITTING AS REBUTTAL EVIDENCE A PRIOR INCONSISTENT STATEMENT MADE BY THE DEFENDANT TO THE POLICE WHERE THE DEFENDANT FAILED TO OBJECT TO THE INTRODUCTION OF THE STATEMENT ON THE GROUNDS OF A LACK OF A PROPER PREDICATE TO IMPEACHMENT AND WHERE THE RECORD FAILS TO ESTABLISH EITHER A DEFENSE ALLEGATION, OR TRIAL COURT RULING, THAT THE STATEMENTS WERE OBTAINED BY POLICE METHODS THAT VIOLATES CONSTITUTIONAL DUE PROCESS PROHIBITIONS ON COERCION OR DURESS.

The United States Supreme Court's most recent pronouncement on the subject of testimonial self-incrimination, Oregon v. Elstad, __ U.S. __, 105 S.Ct. 1285, __ L.Ed.2d __ (March 4, 1985), reaffirms the traditional view that "...admissions of guilt by wrongdoers, if not coerced, are inherently desireable... Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." Id.at 1291.[1] The decision further reaffirms the well-known standard of Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971); New York v. Quarles, 467 U.S. __ , 104 S.Ct. 2626, 81 L.Ed.2d 550 (1983);

[1]Citing United State v. Washington, 431 U.S. 181,187,97 S.Ct. 1814, 1818, 52 L.Ed.2d 238 (1977).

and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), that the pre-interrogation requirement of a detailed warning as to the consequences of giving statements and the right to the assistance of legal counsel prior to making any statement provides a bright line by which a trial court may expeditiously cull out potentially coerced or involuntary admissions by a defendant for purposes of admission in a prosecution's case-in-chief. Elstad, at 1291-93.

By his argument to this honorable court the petitioner, James Reaves, seeks a ruling that his bare-bones assertion of police coercion and the trial court's inadvertent use of the term "involuntarily" in ruling on his motion to suppress constituted a bar to any use of the out of court statement. As an alternative, petitioner presents a novel procedural argument contending the mandatory predicate to impeachment under Florida statute section 90.614(b) (Rule 614) is not subject to the contemporaneous objection standard set out in Florida statute section 90.104(1)(a) (Rule 104), when the case proceeds to the appeal stage.[2] The practical effect of a ruling in

[2]As a subpoint to this argument the petitioner contends he did object with enough specificity to apprise the trial court of the alleged error. This point will be disputed within the framework of the State's response to the above point.

support of these arguments would be a direct and express conflict with the bright-line rule of Miranda and Harris, and a reversal of this court's long-standing adherence to a contemporaneous, specific objection rule in cases involving the admissibility of in-custody statements. e.g., Silver v. State, 188 So.2d 300 (Fla. 1966); Blatch v. State, 249 So.2d 510 (Fla. 3d DCA 1971) and Rule 3.190(i), Fla.R.Crim.Pro. (1977), approved, Wainwright v. Sykes, 433 U.S. 72,85, 97 S.Ct 2497,2506, 53 L.Ed.2d 594 (1977). The State of Florida is confident that the following discussion of the pertinent facts and law will dissuade this court from such drastic action.

A. THE MOTION TO SUPPRESS HEARING[3]

The majority opinion of the district court accurately noted the very limited legal basis upon which the defense proceeded to suppress the confession. In addressing the propriety of defense counsel's argument that he had a right to tell his client that the prosecution could not introduce the statements made to the police for any purpose, the court noted that "the motion was based entirely on the ground that Reaves statements were elicted through questioning in violation of Miranda v. Arizona.[4]" Footnote 4 concluded:

> [4]While the written motion contained a catch-all allegation that the statement were not freely and voluntarily given, no testimony in support of this allegation was adduced.
>
> at 458 So.2d 54.

The trial transcript documents a single Miranda related complaint by the defense. (TR. 233-40). This complaint focused upon the police continuing to advise the defendant of his right per Miranda in hopes of gaining a statement, although the defendant

[3]The State has attached a copy of the motion to suppress (R.47) and a copy of the portion of defense counsel's summation of his legal position (TR. 233-247) on said motion in an appendix to this brief.

had, upon initial advisement, indicated a desire to remain silent. This was the identical legal theory advanced in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).[4] Factually, this case provided a more compelling fact pattern than Mosley, wherein the defendant indicated a desire not to talk. Mosley's request was honored by the police, who waited more than two hours prior to resuming their inquiry and who limited their latter inquiry to an unrelated crime. Id., at 96 S.Ct. 326-27. The crucial issue in Mosley was the manner in which the following portion of the Miranda opinion was to be interpreted:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a

[4] Defense counsel focused his summation to the trial court with a briefing of Mosley and its applicability to the facts of his motion. (TR. 233-240). This passage is contained in the appendix to this brief.

> statement after the privilege has been once invoked." 384 U.S., at 473-474, 86 S.Ct., at 1627.

In rejecting any possible literal interpretation of the above-quoted Miranda passage the high court concluded. "... that the admissibility of the statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.'" Mosley at 96 S.Ct. 326. Application of this rule was to be a matter of circumstance, subject to case-by-case determination.

Obviously the trial court sub judice found the police failed to scrupulously honor the bright line of Miranda under the Mosley standard. The trial court's comments bear out this point:

> ...I specifically find in this case that the police were first told that Mr. Reaves did not desire to make a statement. They were then, on a second occasion--and I am not even going to address the fact of Ms. Stovall coming to soften up the defendant--they were told a second time he did not wish to make a statement. They were told a third time, he did not wish to make a statement. He at no time indicated any desire on his behalf to resume. It was only after the fourth time, when they kept after him to make a statement,

> he signed a waiver of rights at that time. I specifically find under the cases cited to me, and my understanding of the general law, that this was not a voluntary statement, and I will suppress those statements. (TR. 247).

The cases to which the trial court referred were the cases cited by defense counsel in his argument, all of which focused on the Mosley bright-line test interpreting Miranda. Cases analyzing constitutional due process limits on police coercion under the more stringent due process of law standard were not mentioned.[5] Accordingly, the district court majority was correct in terming defense counsel's reliance upon such an interpretation of the trial court's ruling "manifestly unjustified...". In a valiant attempt to bolster his position before this court, the petitioner raises the case of Breedlove v. State, 364 So. 2d 495 (Fla. 4th DCA 1978) in support of trial counsel's reliance on a finding of due process violation. In Breedlove the appellate court reversed a ruling admitting statements made by a hysterical, crying woman. The case does not provide the petitioner with the type of landmark legal decision necessary

[5] Examples of such tactics are found in footnote 3 of the majority opinion in Oregon v. Elstad, 105 S.Ct. at 1295. Psychological coercion, physical torture and similar misconduct raise totally different constitutional issues. In cases evidencing actual beating, torture, etc., those statements are completely inadmissible. See Reaves, Footnote 2, supra, citing Harris v. New York, 407 U.S. at 224, 91 S.Ct. at 645.

to justify his belated claim of reliance. Breedlove does not mention the use of statements for impeachment, does not invoke the strict standard of due process and is plainly limited to its own unusual facts:

> In the case at bar, the appellant's emotional confusion raises serious doubts as to whether her statements were knowingly and intelligently made.
>
> Id. 364 So.2d at 497.

The Breedlove case was merely an example of the reason why the bright-line rule of Miranda was formulated. Breedlove itself cites to Jones v. State, 346 So.2d 639 (Fla. 2nd DCA 1977), a case much like this one to show how a bright-line reading of Miranda can deter "... the vice ... of continued, incessant harrassment by interrogation which results in breaking the will of the suspect, thereby making his statement involuntary." Id. at 497. Neither case goes so far as to rule a bright-line rule of deterrance should be extended to impeachment.

Where Petitioner's argument breaks down is in his assumption that the trial court ruled that his right to due process of law was trampled by the conversation he had with his sister while in police custody. True, the police urged the woman to talk with the petitioner. So what? Neither the sister, nor the petitioner, testified during the motion hearing. Indeed,

the trial court made it clear he was not addressing any claim of psychological coercion("... I am not going to address the fact of Ms. Stovall coming to soften up the defendant...") (TR. 247), in his ruling. The district court majority indicated the propriety of that ommission by noting that "such a finding could have no record support in any event." 458 So.2d 55, nt.5 (Fla. 3d DCA 1984). Had Petitioner fostered a genuine belief that his statements were made only after his will to resist had been overborne, he should have requested the trial court make that specific ruling. Such a request would have been in keeping with the accepted view on this matter as announced in United States v. Smith, 538 F.2d 1359, 1363 (9th Cir. 1976):

> Use of an otherwise excludable statement for impeachment was allowed in Hass if it met standards for trustworthiness. Using impeaching statement would aid the jury in assessing the defendant's credibility while barring their admission as substantive evidence of the alleged crime would maintain a sufficient deterrent effect on proscribed police conduct. To prohibit all uses of such statements would pervert the holding of Miranda into a shield protecting a defendant's perjurious testimony from confrontation with trustworthy inconsistent utterances. 420 U.S. at 722-23, 95 S.Ct. at 1221, 43 L.Ed. 2d at 577-78.

* * *

> Smith did not move to suppress the use of his statements for impeachment purposes and thus implicitly conceded that they were not coerced or involuntary. While we cannot condone any violations of Miranda rules, the government cannot be faulted in employing the statements during cross-examination of Smith.

Petitioner's failure to clarify his position by making specific allegations in his motion to suppress, presenting evidence to support those allegations and preserving the issue by requesting a clarification of the trial court's ruling, forecloses the reversal of his conviction on the direct appeal.

B. THE QUESTION OF TRUSTWORTHINESS

Because the admissibility of petitioner's statements for impeachment was not prohibited by the trial court order, the use of the statements on rebuttal was legally permissible to impeach the petitioner upon a showing by the prosecution that the statement was not the result of actual coercion or duress. See, Harris v. New York, at 91 S.Ct. 645. Rather than rehash this point the state would rely upon the facts set out in the district court opinion and echo that court's majority opinion in declaring the petitioner's statements were voluntarily made. 458 So.2d 54-55. Any concern this court might have with the decision of the district court should be dissipated by the subsequent Supreme Court decision in Oregon v. Elstad, supra, wherein the court rejected arguments that circumstances surrounding the interrogation of a teen-age boy amounted to deliberate coercion or improper duress so as to require suppression of certain of those statements. Among those circumstances were the police communication to the boy's father that his son was a suspect in the crime and the allowance of a confrontation between father and son in which the father chastised the youth in police presence: "I told you that you were going to get into trouble. You wouldn't listen to me. You never learn." Id.,at 105 S.Ct. 1289. Writing for six members of the court, Justice O'Conner noted:

> Certainly, in respondent's case the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best. It is difficult to tell with certainty what motivates a suspect to speak. A suspect's confession may be traced to factors as disparate as "a prearrest event such as a visit with a minister" Dunaway v. New York, 422 U.S. at 220, 99 S.Ct. at 2261 (Stevens, J. concurring), or an intervening event such as the exchange of words respondent had with his father.
>
> Id., at 105 S.Ct. 1295-96.

The State of Florida cannot commend this passage too strongly to this honorable court. If it is not coercive to aoolw a father to yell at his teenage son while the boy waits in a patrol car to be driven to police headquarters it was not coercive, given the lack of further evidence, for the police to briefly urge the grown sister of an adult man to give a statement. While the petitioner accurately claims that the number of times the police advised him of his rights is not immaterial to the issue of coercion and voluntariness, such a claim does nothing to justify a reversal of his conviction. The facts below indicate the trial judge considered the number of advisements as well as all the other material evidence prior to ruling on the motion. (TR.247). This court should adhere to the district court majority view that no threats, promises

or force were used by the police. Reaves noted his voluntarily waiver of rights on a printed form. (TR.215). Given these facts the trial court's finding of trustworthiness was correct. Compare, White v. State, 466 So.2d 1031 (Fla. 1984)(Focus on evidence and not on use or dismission of word "voluntary").

C. RULE 614 AND THE MANDATORY PREDICATE QUESTION

In footnote three the majority opinion of the district court reaffirmed the necessity of preserving an objection to the lack of a proper predicate of time, place and person[7] prior to use of the inconsistent statement of the witness. The rule requiring contemporaneous and specific objection to attempts at improper impeachment or use of substantial hearsay to sway a jury away from the position advanced by a witness, is deeply rooted in Florida jurisprudence. Morasso v. State, 76 So. 777 (Fla. 1917); Andrews v. State, 261 So. 2d 217 (Fla. 1972); Moore v. State, 452 So.2d 559 (Fla. 1984); Wright v. State, 427 So.2d 326, 328 (Fla. 3d DCA 1983); Jones v. State, 452 So.2d 643 (Fla. 4th 1984); See also Hocktor v. Tucker, 432 So.2d 1352, 1356 nt.2 (Fla. 5th DCA 1983)(Cowart, J.,Dissenting). The federal courts express a similar view, holding that failure to object will provide the appellant no hope for reversal unless "plain error" appears on the record. United States v. Bay, 762 F.2d 1314 (9th Cir. 1985); United States v. Gibbs, 739 F.2d 838 (3d Cir. en banc 1984); United States v. Popejoy, 578 F.2d 1346,(10th Cir. 1978) cert. denied 439 U.S. 896; United States v. Fuentes, 563 F.2d 527

[7] Rule 614(b) of the Evidence Code reads in part:
"Extrinsic evidence of a prior inconsistent statement by a witness is inadmissible unless the witness is first afforded an opportunity to explain or deny the prior statement...".

(2nd Cir. 1977); and United States v. Johnson, 525 F.2d 999 (2nd Cir. 1975). The record shows the petitioner's counsel failed to object to the impeachment on grounds of lack of predicate. (TR.729-33). Counsel's final objection "... to the questions that are posed by the prosecutor." (TR.734), calls to mind the opinion of the en bance Third Circuit Court of Appeal in United States v. Gibbs, 739 F.2d 849. In that case the prosecution had failed to run through the litany of prerequisites to admission of statements of a co-conspirator as mandated by Rule 801(d)(2)(6) of the Federal Evidence Code. However, recalling the contemporaneous objection stricture of Rule 103(a) and finding "Gibbs objection is the model of an objection that fails the Advisory Committee's test" for precision and clarity, the court affirmed his conviction. The majority opinion showed little patience for Gibbs. In its view Gibbs could have uttered the word "availability" in his objection and made it simple for the government to cure the oversight. This court should give similar treatment to the current claim. Even Judge Hendry admits, by way of concluding his dissent, "... in the context of the present case it was very likely clear to appellant and his counsel that the statements inquired about on cross-examination were those made to the police and challenged in the Motion to Suppress." Reaves, at 458 So.2d 57. Petitioner's reliance on Williams v. State, 414 So.2d 509 (Fla. 1982) to support his view that the objection

was specific enough to apprise the trial court of the error is misplaced. In Williams this court found the objection articulated concern over the effective date of a particular state law. This clarity of rhetoric was sufficeint to preserve a challenge to ex post facto application of the law. Id., at 414 So.2d 510-11. Nothing in the record of this trial suggests a similar result could occur. Trial counsel limited his complaint to his "reliance argument" discussed infra. Accordingly, this point fails not for lack of legal scholarship, but rather lack of record support.

What remains to be discussed is the possibility that this alleged error might be fundamental in nature or otherwise exempt from the contemporoneous objection rule. The State of Florida finds no basis to suggest the decision in Nowlin v. State, 346 So.2d 1020 (Fla. 1977) raises the predicate requirement to a state standard higher than the federal constitutional view. Indeed, prior decisions indicate that the Florida Evidence Code rules, when based on federal rules or decisions, should be interpreted in a manner similar to the federal standard. Moore v. State, 452 So.2d 560, citing Hightower v. Bigoney, 156 So.2d 501 (Fla. 1963). In that the federal view does not provide an exception to the rule of contemporaneous objection for lack of a predicate to impeachment, see, United States v. Popejoy, supra., the tate is

confident a similar view, if not already specifically stated, shall be forthcoming in this case. As noted so succinetly by the Popejoy court:

> We believe that evidentiary objections with constitutional footings can be waived in a case like this by failing to object, particularly where the basic factual and legal predicate was available.
>
> Id., at 578 F.2d 1350.

No Florida court has ever reversed a case involving this issue absent a lack of specific objection and petitioner's brief provides no argument to change the status quo.[8] On this sparse record the district court stated the applicable rules of law with great clarity and insight. Adoption of the views of petitioner would not only run contrary to previous Florida and federal cases, it would place form over substance.

[8] An example of a situation wherein lack of objection was declared unimportant would be this courts ruling in State v. Rhoden, 448 So.2d 1033 (Fla. 1984)(primarily purpose of contemporaneous objection rule not present in cases involoving questions of juvenile sentencing process and utilization of such a rule in contrast to clear mandate of legislature).

CONCLUSION

In conclusion the respondent, State of Florida, would respectfully urge this court to dismiss its previous order granting certiorari review of the opinion of the district court of appeal or, in the alternative, affirm the decision of the district court of appeal based upon the above-cited legal authorities.

Respectfully submitted,

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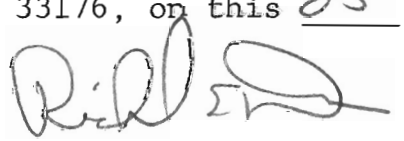
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF was furnihed by mail to JAMES H. GREASON, P.A. Special Assistant Public Defender, Suite A214, 1140 North Kendall Drive., Miami, Florida 33176, on this 23rd day of July, 1985.



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