IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,436

JAMES REAVES,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

PETITION FOR DISCRETIONARY REVIEW BASED ON DECISIONAL CONFLICT FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, CASE NUMBER 82-1493

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SUMMARY OF ARGUMENT

The majority of the District Court below held that the Defendant's post-arrest statements to police were admissible as rebuttal evidence to impeach the Defendant's trial testimony notwithstanding the trial court's ruling on the pre-trial motion to suppress that those statements were "not voluntary." In so holding, the District Court below dispensed with the rule set down by this Court in Nowlin v. State, 346 So.2d 1020 (Fla. 1977): the trial court must find such statements to have been voluntarily made as prerequisite to admission for the limited purpose of impeaching a defendant's trial testimony. The majority below circumvents Nowlin by deeming the trial court's use of the term "not voluntary" to have been inadvertent; however, neither the trial court, nor the District Court expressly found the statements in question to have been voluntary. In so dispensing with the requirement of a voluntariness determination, the District Court below expressly and directly conflicts with Nowlin.

The majority opinion below further conflicts with Nowlin by dispensing with constitutionally mandated predicate to admissibility of such statements--i.e. a defendant must be apprised of the prior statement and given an opportunity to explain or deny.

The majority opinion of the District Court below directly and expressly conflicts with the holding of Breedlove v. State, 364 So.2d 495 (Fla. 4th DCA 1978) by holding as a matter of law that continued readings of Miranda advice to an accused will not be deemed undue harassment designed to break the will of the accused, so as to render any statement thereby obtained coerced and involuntary.

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CITATIONS

STATEMENT OF THE FACTS

On October 30, 1981, defendant James Reaves became involved in an argument with Michael Smith at approximately 7:00A.M. at an apartment in which both men resided, located at 3526 N.W. 199th Street, Miami. The latter angrily confronted the defendant and accused him of stealing his marijuana. Present were Bonnie Graham and her two minor children, with whom Michael Smith lived. The defendant shared a bedroom with Lillian Wimberly, Bonnie Graham's mother. (T. 398, 401, 403, 440, 443, 447).

Michael Smith argued with the defendant for approximately ten minutes in the defendant's bedroom loudly enough to awaken neighbor Faith Williams. (T. 502). Argument was no unusual between the two, and they had been in a fist-fight approximately six months previously. (T. 511, 533).

Michael Smith pushed and shoved the defendant in the latter's bedroom, and he then went into his own bedroom to put on his shoes and get his car keys to take Bonnie Graham's children to school. (T. 471, 700). Smith filled a water container for the car and went outside. (T. 406, 446, 449).

Smith confronted the defendant at the doorway of the residence as Smith's brother Charles arrived. Charles pulled Smith away, and Smith went to the sidewalk, pulled off his shoes, and called for the defendant to fistfight. (T. 454, 456, 476). The defendant pulled and opened a pocket-knife, whereupon Smith started running in the direction of the home of Clarissa Mackey, a woman friend of the defendant. (T. 457-58). According to the defendant, Smith threatened to harm Clarissa Mackey. (T. 704-07).

The defendant chased Michael Smith as he ran toward Mackey's

home to prevent him from harming Mackey, according to the defendant. (T. 705). En route the defendant caught Michael Smith, and the latter was stabbed as the two men struggled. (T. 461, 586-87, 721-22).

The defendant was soon thereafter arrested at the home of Clarissa Mackey, approximately one-half block from the scene. (T. 624).

Michael Smith expired as a result of multiple stab wounds. (T. 670).

The defendant was taken into custody by detective Donald Skoglund, who advised him per Miranda. (T. 166). The defendant told the detective he did not wish to speak to him, and the detective so advised other officers at the scene. (T. 166, 169).

Detective Lucious Wilcox spoke with the defendant's sister Pearly Stovall, who was present in the Mackey home at the time of the defendant's arrest. He allowed her to speak with the defendant after telling her that it would "behoove" the defendant to be cooperative. (T. 179, 183). The defendant's sister spoke with him privately for about five minutes. (T. 179). Detective Wilcox then entered the patrol car in which the defendant was detained and started to advise the defendant per Miranda, whereupon the defendant told Detective Wilcox that he had just been advised of his rights. (T. 183-84). Detective Wilcox then asked the defendant if he wanted to tell about the stabbing, and the defendant responded that he did it in a fit of anger. (T. 185). The detective asked the defendant where the knife was, and the defendant responded that he had thrown it under a car. (T. 185). Detective Wilcox admitted having been told by Detective Skoglund that the defendant did not want to make a statement. (T. 192).

Detective William Merritt transported the defendant to the homicide office and while en route advised the defendant of his rights per Miranda. After the defendant told the detective he understood his rights, the detec-

tive asked the defendant if he stabbed Michael Smith, to which the defendant responded, "Yes." (T. 207, 209, 224). At the office, the defendant executed a waiver of rights form, and Detective Merritt then questioned the defendant. No transcription was made of the interview. (T. 215). The defendant told the detective that Michael Smith had accused him of stealing marijuana, the two argued, the defendant pulled a knife, Smith ran, and the defendant caught up with Smith and stabbed him. The defendant then expressed his wish to get an attorney. (T. 215-16). Detective Merritt knew that the defendant had told Detective Skoglund that he did not wish to make a statement. (T. 220).

All the foregoing post-arrest statements of the defendant were the subject of a pre-trial motion to suppress, which was granted upon a finding that the statements were involuntary. (T. 249).

An additional post-arrest statement of the defendant which was also part of the motion to suppress was the defendant's comment, "Well, that's the way it goes" when informed of the death of Michael Smith. (T. 232). That comment was not suppressed by the Court. (T. 247).

INTRODUCTION

The Petitioner JAMES REAVES was the defendant in the trial court below; the Respondent STATE OF FLORIDA was the prosecution. References to the parties will be as they stood in the trial court. A reference to the trial transcript in the Record on Appeal is denoted by the symbol "T." The decision of the District Court of Appeal, Third District, below is appended hereto and is reported: Reaves v. State, 458 So.2d 53 (Fla. 3d DCA 1984).

JURISDICTIONAL QUESTIONS PRESENTED

Point 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. 3D DCA 1977).

Point II.

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

Point I.

> 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).

The District Court below held that the Defendant's post-arrest statements to police were admissible ~~as rebuttal evidence~~ to impeach the Defendant's trial testimony notwithstanding the trial court's ruling on the pre-trial motion to suppress that those statements were "not voluntary." In so holding, the District Court dispensed with the long-standing rule set down by this Court in Nowlin v. State, 346 So.2d 1020 (Fla. 1977) that the trial court find by a preponderance of evidence such statements to have been voluntarily made as prerequisite to admission for the limited purpose of impeaching a defendant's trial testimony. (See Appendix).

As this Court stated in Nowlin, 346 So.2d at 1024:

> . . . whenever the state, in order to impeach a defendant's credibility, chooses to present evidence of a defendant's incriminating statements which are inconsistent with trial testimony of the defendant and which are inadmissible in the case-in-chief because of the failure of custodial officers to give Miranda warnings, the statements must be shown to be voluntary before they may be admitted.

The foregoing rule was based upon federal constitutional requirements as construed by the United States Supreme Court in Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) and Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954). This Court further held that "the State has the burden of proof to show by a preponderance of evidence that the confession was voluntarily obtained." 346 So.2d at 1024.

The majority opinion of the District Court below held that the trial court properly admitted evidence as to the Defendant's post-arrest statements on rebuttal as impeachment of the Defendant's trial testimony even though the trial court had ruled those statements "not voluntary" and granted the pre-trial motion to suppress. The majority found the trial court's use of the words "not voluntary" in the ruling to have been "inadvertent." (See Appendix, Slip Opinion at 2). The trial court's ruling was as follows: "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." (See Appendix, Slip Opinion at 5, Hendry, J., dissenting). Thereafter, when the State sought to introduce those statements to impeach the Defendant's trial testimony, the trial court ruled them admissible, stating that defense counsel "could have clarified" the basis of its prior ruling. (See Appendix, Slip Opinion at 4). The majority, while acknowledging the motion to suppress alleged the statements in issue had not been freely and voluntarily given, found, upon examination of the record of the motion to suppress, no record support for that allegation. (See Appendix, Slip Opinion at 3n.4).

Assuming the majority below was correct in deeming the trial court's use of the words "not voluntary" to have been inadvertent in the ruling on the motion to suppress, the majority nevertheless dispensed with the Nowlin requirement that the trial court make a factual determination that the statements were voluntary prior to their admission as impeachment evidence. In fact, the trial court never stated the statements in issue were voluntary. Absent such a finding by the trial court, the majority below departed from Nowlin in making a voluntariness determination based on the cold record

of the motion to suppress. This Court has unequivocally disapproved usurpation of a trial court's fact-finding function by the district courts of appeal. DeConingh v. State, 433 So.2d 501 (Fla. 1983).

The majority opinion below directly expresses conflict with Nowlin in another respect. Nowlin clearly provides that incriminating statements obtained in violation of Miranda may be admissible, provided such statements have been found voluntary, for the limited purpose of impeachment of a defendant's trial testimony. Nowlin v. State, 346 So.2d at 1024. Nowlin set forth the procedural prerequisite for the introduction of such impeachment evidence in light of the federal constitutional requirements of Harris v. New York, supra:

> The purpose of impeachment is to attach the credibility of a witness. The admission of the prior inconsistent statement must be used only for the purpose of questioning the credibility of the witness, not as evidence in chief. The procedure for the impeachment of a witness is prescribed by Section 90.10, Florida Statutes (1975), as follows:
>
> **Impeachment of witness by adverse party.--** If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statements.
>
> Prosecutors should proffer to the trial court any impeachment examination of a defendant concerning prior inconsistent statements outside

> the presence of the jury. Failure to do so may contaminate the trial and require a mistrial. The standard evidentiary rules establishing the proper predicate for the impeachment of a witness are applicable. The proper predicate for impeachment requires the State to advise the defendant of the substance of the prior inconsistent statement and the time and place it was made as well as the person or persons to whom made. Although this rule does not require perfect precision, the predicate for impeaching the testimony must be such that the efendant cannot be taken by surprise. Further, an opportunity must be afforded the defendant to refresh his memory, to make intelligent answers, and to offer such explanation as he may desire. [citations omitted]. 346 So.2d at 1024-25. (Overton, C.J., concurring).

The majority opinion below adknowledged that the State failed to establish a predicate for the introduction of the impeaching testimony, but deemed the point waived because, although objection was made prior to the State's introduction of the tainted statements, the magic words "insufficient predicate" were not used by defense counsel. (See Appendix, Slip Opinion at 2n.3). However, the mandatory predicate set forth in Nowlin is a constitutional standard of admissibility, and when defense counsel objected on constitutional grounds, it can hardly be said that the trail judge was not adequately apprised of the putative error, or that the point was not preserved for appellate review. See Williams v. State, 414 So.2d 509 (Fla. 1982). Moreover, the State's failure to confront the defendant with the supposed prior inconsistent statements and afford him an opportunity to explain or deny, as is required by Nowlin, was error of constitutional dimension resulting in a fundamentally unfair trial. As such, the entire matter of the State's impeachment use of the statements was reviewable notwithstanding any "technical" defect in the objection before the trial court. Castor v. State, 365 So.2d 701 (Fla. 1978).

Point II.

> The decision of the District Court below expressly and directly conflicts with the decision of the District Court of Appeal, Forth District, in Breedlove v. State, 364 So.2d 495 (Fla. 4th DCA 1978).

The majority opinion of the District Court below sets forth the following recitation of facts in support of its finding that the post-arrest statements of the Defendant were in fact voluntary:

> The evidence adduced at the suppression hearing reveals that the questioning of Reaves violated the principles of Miranda v. Arizona, but that his statements were voluntarily made: Reaves first received Miranda warnings upon his arrest soon after the stabbing occured, and he responded that he did not wish to speak. A short time later, a second police officer, aware that the appellant had said that he did not want to make a statement, began to advise Reaves of his rights again. Reaves interrupted and told this officer that he had already been advised of his rights. The officer then asked Reaves if he wanted to tell him about the stabbing, and Reaves replied that he did it in a fit of anger, and, responding to an inquiry reguarding the knife, Reaves said that he had thrown the knife under a car. A third officer, Detective Merritt, readvised Reaves of his Miranda rights en route to the homicide office. Merritt too knew Reaves had earlier been advised of his rights and had said he did not wish to make a statement. Upon arriving at the office, Reaves was taken Merritt to an interview room and again read his Miranda rights from a printed waiver of rights form. Reaves indicated on the form that he understood his rights and voluntarily agreed to answer questions. No officer threatened Reaves; no promise was made to him; no force was used against him. . . . (See Appendix, Slip Opinion at 3-4).

The majority opinion below correctly noted that the Defendant, in his pre-trial motion to suppress, relied upon the case of Breedlove v. State, 364 So.2d 495 (Fla. 4th DCA 1978).

In Breedlove the Court held that "continued readings of Miranda rights to the accused may constitute undue harassment." 364 So.2d at 496. The trial judge below, in ruling on the motion to suppress, not only cited Breedlove but echoed its holding:

> 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. (T. 247).

In Breedlove, as in the case below, the defendant was read Miranda warnings repeatedly, i.e. four times in approximately an hour, before giving up a statement. The Breedlove court quoted the following language in support of its holding: ". . . the vice sought to be removed is the evil of continued, incessant harassment by interrogation which results in breaking the will of the suspect, thereby making his statement involuntary." 364 So.2d at 497.

The majority opinion below, in failing to recognize the rule as stated in Breedlove that repeated Miranda warnings may render a

statement coerced and involuntary, directly expressed conflict with Breedlove, as well as substituting its own finding of voluntariness for the contrary finding of the trial judge.

CONCLUSION

Based upon the foregoing arguemnt and citations of authority, the Petitioner prays this Court accept jurisdiction of the cause herein and render a decision on the merits.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petitioner's Brief on Jurisdiction was mailed to Richard E. Doran, Esquire, Assistant Attorney General, 401 N.W. Second Avenue, Suite 820, Miami, Florida, 33128, this 19th day of February, 1985.

By: _____
JAMES H. GREASON, ESQ.