OA 11-5-85-oft

IN THE

SUPREME COURT OF FLORIDA

CASE NO. 66,436

JAMES REAVES,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.
_____/

REPLY BRIEF OF PETITIONER

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT, CASE NO. 82-1493

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TABLE OF CONTENTS i.

CITATIONS

INTRODUCTION

The Petitioner JAMES REAVES was the defendant in the trial court below and the appellant in the District Court of Appeal, Third District, below. The Respondent THE STATE OF FLORIDA was the prosecution in the trial court and the appellee in the District Court. References to the parties herein will be as they stood in the trial court. References to the Record on Appeal will be denoted by the symbol "R." References to the trial transcript will be denoted by the symbol "T." All emphasis is supplied unless otherwise indicated.

QUESTION PRESENTED

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING OVER OBJECTION REBUTTAL EVIDENCE OF THE DEFENDANT'S POST-ARREST STATEMENTS TO POLICE WHICH HAD BEEN SUPPRESSED PRIOR TO TRIAL AS INVOLUNTARY AND WHERE NO PREDICATE FOR IMPEACHMENT WAS LAID?

SUMMARY OF ARGUMENT

The State's argument that the trial court's finding of involuntariness in granting the defendant's pre-trial Motion to Suppress statements was inadvertent, and that the statements were voluntary and therefore admissible as impeachment of the defendant's trial testimony, is without merit because

(1) the Motion to Suppress expressly alleged the statements were involuntary;

(2) evidence of involuntariness was adduced at the suppression hearing;

(3) involuntariness was urged to the trial court as a ground for suppression and case authority was provided; and

(4) the trial court specifically found the statements involuntary and suppressed them, citing authority supplied by the defendant.

Because there is no finding of voluntariness of the statements on the record below, they were inadmissible under Nowlin v. State, 346 So.2d 1020 (Fla. 1977). The record clearly supports the trial court's finding of involuntariness.

Whether the statements were involuntary or voluntary, they were admitted without the mandatory statutory predicate, which predicate was not waived by lack of objection.

ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING OVER OBJECTION REBUTTAL EVIDENCE OF THE DEFENDANT'S POST-ARREST STATEMENTS TO POLICE WHICH HAD BEEN SUPPRESSED PRIOR TO TRIAL AS INVOLUNTARY AND WHERE NO PREDICATE FOR IMPEACHMENT WAS LAID.

In its Brief on the Merits, the State argues the trial court below properly admitted rebuttal testimony regarding the defendant's post-arrest statements to police as impeachment of the defendant's trial testimony, notwithstanding the trial court's ruling granting the motion to suppress those statements as "not voluntary." The State's argument is predicated upon the tenuous assumption the trial court's use of the words "not voluntary" was inadvertent, that there was no allegation in the defendant's Motion to Suppress that the statements were involuntary, no evidence adduced supportive of involuntariness, and no argument thereon to the trial court. The statements were suppressed merely on Miranda grounds, so the State's argument goes, and therefore admissible as impeachment of the defendant's trial testimony. The State further argues the defendant waived the mandatory predicate to the introduction of such testimony by failing to object in the trial court. The State's arguments are easily answered.

First, the defendant's written pre-trial Motion to Suppress the statements in issue specifically alleged in the second of four allegations that the statements "were not freely and voluntarily given." The motion was not a pre-printed form. The allegation of involuntariness was never withdrawn, nor was it striken on motion of the State.

Second, at the hearing on the Motion to Suppress, the defendant adduced proof of involuntariness. Although neither the defendant nor his sister testified as is correctly noted by the State, defense counsel

adduced testimony from the several arresting officers of their repeated attempts to question the defendant in the face of his express refusal to give a statement and their repeated readings of Miranda warnings to the defendant while he was confined in the back seat of a police vehicle. Moreover, defense counsel elicited an admission from one of those officers that he employed the defendant's sister to convey to convey to the defendant, while he was confined in the police car and after he had expressed his refusal to speak to police, that it "would be in his best interest" to cooperate and give a statement. Therefore, the record is not silent on the issue of psychologically coercive police tactics used to overbear the defendant's will and extract statements from him, as the state would have this Court believe.

Third, defense counsel argued at the close of evidence at the hearing on the Motion to Suppress that the holding of Breedlove v. State, 364 So.2d 495 (4th DCA 1978) was applicable. Therein the Court observed that "continued, incessant harassment by interrogation which results in breaking the will of the suspect" renders his statement "involuntary." 364 So.2d at 496-97. Defense counsel argued, based upon the facts presented, that the repeated attempts at interrogation were designed to "bear down the will of the accused." (T. 236; Appellee's Appendix at 236). Moreover, defense counsel argued that the officers' use of the defendant's sister to convince him to give a statement, "was done solely to overbear the will of the Defendant, to let him know that if he cooperates it might be in his best interest." (Id.) Defense counsel supplied the trial court with a copy of Breedlove v. State, supra; his reliance thereon cannot be characterized as "belated." (State's Brief at 11).

Fourth, the trial court in ruling from the bench on the Motion to Suppress, expressly denied Paragraphs Three and Four of the motion, implying his ruling was predicated on either of Paragraphs One or Two or both.

(T. 247; State's Appendix at 247). The trial court discussed the repeated attempts at interrogation and cited Breedlove v. State, supra, and discussed the facts therein. The trial court mentioned the use of the defendant's sister in an aside, ". . . and I am not even going to address the fact of Ms. Stovall coming to soften up the Defendant . . ." (misquoted by the State at 12) and thereupon ruled:

> 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. 249; State's Appendix at 249).

The trial court's ruling was plain and unambiguous. The State's contention that defense counsel should have sought clarification under such circumstances flies in the face of principles of advocacy. Confronted with a ruling adverse to the State, it would appear to have been the State's burden to apply for modification of the finding of involuntariness. The State never did so.

Absent a showing by the State, by a preponderance of the evidence, that the statements were voluntary, they were inadmissible under the rule set forth by this Court in Nowlin v. State, 346 So.2d 1020, 1024 (Fla. 1977). The trial court made the contrary finding. The trial court acknowledged his use of the words "not voluntary" in his ruling on the Motion to Suppress when the issue of admissibility of the statements for impeachment purposes arose. At the close of all evidence at the trial the trial judge stated he did not intend "to imply a due process violation" by his finding. (T. 751; Appendix hereto). However, the trial judge made no reference to the defendant's fifth amendment right against self-incrimination, upon which the Motion to Suppress was grounded in part, nor did the court state that his use of the words "not voluntary" was a mistake. The record therefore falls short of the express finding of voluntariness

which is prerequisite to the admission of the statements, under Nowlin. Neither this Court nor the District Court below is in a position to reweigh the facts adduced in the hearing on the Motion to Suppress and transmute an express finding of involuntariness to one of voluntariness. See DeConigh v. State, 433 So.2d 501 (Fla. 1983) cert. denied 104 S.Ct. 995 (1984).

There is ample evidentiary support of the trial court's finding that the statements in issue were, in fact, involuntary. See United States v. Hernandez, 574 F.2d 1362 (5th Cir. 1978)(number of times person in custody advised of rights prior to making statements not immaterial to question of voluntariness); Breedlove v. State, supra. Oregon v. Elstad, ___ U.S. ___, 105 S.Ct. 1285, ___ L.Ed.2d ___ (1985), relied upon by the State, is totally inapposite. There the Court held:

> . . . [A] suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings. 105 S.Ct. at 1298.

The Court distinguished cases involving suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation, citing e.g., United States ex rel. Sanders v. Rowe, 460 F.Supp. 1128 (N. D. Ill. 1978); People v. Braeseke, 25 Cal.3d 691, 159 Cal.Rptr. 684, 602 P.2d 384 (1979), vacated on other grounds, 446 U.S. 932, 100 S.Ct. 2147, 64 L.Ed.2d 784 (1980); Smith v. State, 132 Ga.App. 491, 208 S.E.2d 351 (1974). 105 S.Ct. at 1295-96. It is well-settled that the kind of coercive police tactics employed herein, to wit, repetitive Miranda readings and questioning, and using the defendant's sister to "soften up" the defendant, will produce a coerced, or involuntary, statement. The Court in Oregon v. Elstad, 105 S.Ct. at 1298, was careful not to condone "inherently coercive police tactics or methods offensive to due process that render the intial admission

involuntary and undermine the suspect's will to invoke his rights once they are read to him."

Finally, whether the statements in issue were voluntary or not, they were admitted without the mandatory statutory predicate. Prior to the introduction of the defendant's supressed statements on rebuttal, the defendant was not directly confronted with the statements on cross-examination and therefore not afforded the opportunity to explain or deny, as required by §90.614(b), Florida Statutes, and Nowlin v. State, supra. The purpose of the mandatory predicate is to insure the trustworthiness of the statement being introduced for impeachment purposes. The issue of trustworthiness of the statements under constitutional standards was thoroughly argued by counsel for the defense and the state. (T. 233-47; 729-34; 738; Appendix hereto). Use of the word "predicate" by defense counsel would have been surplussage in the context of his lengthy objection on constitutional grounds. The State's contention that the predicate requirement was waived by the defense for failure to object to the lack of "predicate" is merely an atavistic argument for the requirement of "magic words" in objections. As stated by this Court in Williams v. State, 414 So.2d 509, 512 (Fla. 1982), ". . . [M]agic words are not needed to make a proper objection." Under the test set down in Castor v. State, 365 So.2d 701, 703 (Fla. 1978) and reiterated in Williams v. State, 414 So.2d at 511, an objection is sufficient if specific enough to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal. The test was satisfied below.

CONCLUSION

Based upon the foregoing argument and citations of authority, the defendant prays his conviction and sentence be vacated and the cause reversed and remanded for a new trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing Reply Brief was served on Richard E. Doran, Esquire, Assistant Attorney General, 401 N.W. Second Avenue, Suite 820, Miami, Florida, 33128, by United States Mail this 8th day of August, 1985.

JAMES H. GREASON, ESQUIRE