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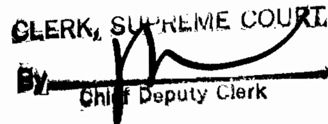
IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
Petitioner,	)	
v.	)	CASE NO. 66,929
CLEVE ANDREW MOBLEY,	)	
Respondent.	)	

FILED
SID J. WHITE
SEP 20 1985



RESPONDENT'S ANSWER BRIEF ON THE MERITS

Respectfully submitted,

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PRELIMINARY STATEMENT

Respondent was the Appellant in the court below and the defendant in the trial court. Petitioner was the Appellee in the court below and the prosecution in the trial court. In this brief, the parties will be referred to as they appear before this Honorable Court of Appeal. A copy of the district court opinion is attached as Appendix I.

The following symbol will be used:

"R" Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts, subject to the following additions and clarifications necessary to decide the issues on appeal:

Respondent was convicted of sexual battery and aggravated assault (R809). The trial court sentenced Respondent to a life sentence on the sexual battery which was to run consecutive to the five year sentence on the aggravated assault (R815,816). The court retained jurisdiction over one-third of Respondent's life sentence and over one-third of Respondent's five year sentence (R815,816). Neither the trial court's sentencing order nor the uniform commitment to custody reflect that the retention of jurisdiction over the life sentence was to be for a period of twelve (12) years (R815,817).

In January of 1977, [redacted] and [redacted] [redacted] were boyfriend and girlfriend. At about 8:30 p.m. or 9:00 p.m. on the evening of January 28th, they went to the beach in Boca Raton (R232-325). There they drank some wine and had intercourse (R325). As they were dressing, three black males approached Ms. [redacted] (R326). One of the men pulled a knife and held it on [redacted] (R327). The other two men forced [redacted] to the ground and had intercourse with her. The men took turns guarding [redacted] until all three had intercourse with [redacted] (R329-336). The men then told [redacted] to walk down the beach, and when the couple turned around the men were gone (R336).

At the police station, [redacted] looked through three to four books of photographs, but could not identify anyone as their assailant (R337). He showed the police where the assault took place and he gave blood and saliva samples (R338). [redacted] testified at Respondent's trial that he had identified the two other assailants in a previous trial, and that Respondent was the third assailant (R341,342). He also testified that at a lineup shown him in 1982, in which Respondent participated, that he picked a man other than Respondent as the third assailant (R346-353). In addition, the witness selected a photograph of Respondent from a photographic show-up on March 15, 1977.

On cross-examination, Respondent brought out that it was night time with only the light of the moon, but the witness doesn't know if the moon was full (R373). He did see the third assailant by the light of a cigarette lighter (R374) once. He gave the police a description of three men, but only made composites of two (R376). At the trial in July, 1977, the witness testified he could not describe the third assailant to the police[1] (R377). In a deposition given in April, 1977, the witness said he did not get a good look at the third assailant (R382). In a deposition given in 1982, he said he wasn't sure he could recognize the third assailant (R385).

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[1] The witness refers to this assailant as the second man. [redacted] refers to him as the third man. They are both referring to the same man in the order in which they encountered him. He was not tried in 1977, with the other two defendants so in this trial he is called the third assailant.

He also admitted that during the investigation he was shown a picture of Melvin Forrest. He said that Melvin Forrest looked familiar, but claims he did not say Forrest was involved (R384). Forrest was a friend of a co-defendant, Raymond Grant (R384). Additionally, while he said at trial that they drank only half a bottle of wine that night, he said in deposition in 1977 that the bottle was empty (R387).

confirmed that she and had gone to the beach, drank wine, and made love (R439,440). She confirmed also that she was raped by three men (R443). In 1977, she was shown a photographic show-up out of which she selected assailants one and two (R450). She was also shown a live lineup and again picked those two assailants (R451). Although she was able to describe these two men to the police, she gave no description of the third assailant (R449,451,452).

In 1982, she viewed a second lineup (R455). She testified at trial that she picked Appellant out of the lineup as being the third assailant (R454). However, she also said that before making the lineup form she asked if she should mark the slot if it just looked familiar (R487). While she said he looked very familiar, Detective O'Hara testified she said he just looked familiar (R589,487). In 1977 selected a photograph of Respondent from a photograph show-up (R456). Again she said it looked very familiar, but it has the word "tentative" written on the back (R456).

On cross-examination, Respondent attacked the witnesses' recollection. She admitted drinking a whole bottle of wine with ██████ (R458). Although on direct, she did not remember if her assailants ejaculated, after her memory was refreshed she recalled that all three did (R444, 445,471). The night of the assault, she told the police she did not know what the third assailant looked like (R476). She selected a photograph of Melvin Forrest because it looked familiar (R478). She did not do a composite of the third assailant (R479). She testified in April, 1977 and July, 1977 that she did not remember what the third assailant looked like (R483,484). Indeed, at the trial in 1977, she said, "I don't remember at all what number three looked like." She selected Appellant's photo from the 1977 show-up because it looked very familiar, but she could not positively identify him from the photo (R491). She also selected Melvin Forrest, who was never tried, because he looked very familiar (R491).

Detective Dennis O'Hara was called by the State to testify to the identification of the co-defendants Grant and Jackson (R504-510). He also testified to the identification of Respondent. On March 15, 1977, the witness displayed a photo lineup with Respondent's picture to ██████████████ (R529). ██████ selected Respondent (R530). ██████ made a tentative identification of Respondent (R530). Detective O'Hara also conducted a physical lineup (R531). ██████ asked if she should

select one if it just looked familiar and then selected Respondent saying he looked familiar (R533,583). [redacted] did not pick Respondent (R581).

[redacted] did not do composites of the third assailant because neither one could remember what he looked like (R585,586). [redacted] also selected Melvin Forrest from photographs (R578). They both said he looked familiar, but [redacted] did not believe he was one of the assailants (R578,591).

O'Hara further testified that he attempted to locate Respondent at the Days Inn Motel and at 528 NW Eighth Avenue, on March 21, 1977 (R572,573). In addition, he sent a "Be On Lookout" (Bolo) to Hillsborough County. Detective John Murray was called to testify that he arrested Grant and Jackson on March 10, 1977 (R598). He also testified that Grant lived at 528 NW Eighth Avenue, and that Grant told him Respondent and Melvin Forrest lived there with him (R598-601). Grant told him this approximately a week before March 10, 1977.

Murray also testified to an incident that occurred while he was going to arrest Grant. He saw Melvin Forrest and another man on the corner (R601,602). He spoke with them and told them he was going to arrest Grant (R601,602). When he returned later with Grant, the second man was gone (R601). He later learned this man was Respondent (R602). Thereafter, he made several unsuccessful attempts to find Respondent at the Grant residence (R604). He also looked for Respondent at the Eight Days Inn (R605).

The state also called Detective Chamberlain to testify to the crime scene work he did at the beach (R284,285,255). The most important of the items he collected were three condoms (R889). [redacted] and two of the assailants used condoms during intercourse with [redacted] (R444). The condoms were later destroyed, but not before they were examined by Richard Tanton, a serologist (R409-411). Because the condoms were destroyed, the state stipulated that [redacted] condom was torn (R424,425). Both [redacted] and Respondent were A secretor blood types (R427). Blood type A was found in a condom and in [redacted] vagina (R426,429). Also blood type B was found in the vagina (R429). The medical evidence is more complex than this, but it did not conclusively point to Respondent since one person in three is an A secretor as was [redacted] (R430).

SUMMARY OF THE ARGUMENT

POINT I

The lack of a contemporaneous objection did not preclude the challenge of the trial court's retention of jurisdiction over one-third of Respondent's life sentence for three reasons.

First, there is no statutory authority to either: (1) retain jurisdiction over one-third of each of Respondent's consecutive sentences or (2) to retain jurisdiction of Respondent's life sentence. Thus, Respondent is not precluded from raising this point on appeal.

Second, the overriding need of the contemporaneous objection rule is not present in a sentencing proceeding.

Third, the retention of jurisdiction over a life sentence is fundamental error, thus a contemporaneous objection is not required.

POINT II

Retention of jurisdiction over a life sentence is not proper since a life span is immeasurable. Even if a life span were measurable for purposes of incarceration, this determination should be left to the legislature, and not to various insurance companies.

POINT III

The identification of Respondent as the assailant was very weak. To bolster its case, the prosecution presented testimony which was irrelevant to any material fact as well as hearsay. The prosecution then improperly used the testimony to create an inference of flight.

Because the other evidence against Respondent was far from overwhelming, this inference may have contributed to the jury's decision, thus his convictions must be reversed.

ARGUMENT

POINT I

LACK OF A CONTEMPORANEOUS OBJECTION DOES NOT PRECLUDE CHALLENGE OF THE TRIAL COURT'S RETENTION OF JURISDICTION OVER ONE-THIRD OF A LIFE SENTENCE.

Respondent was convicted of sexual battery and aggravated assault (R809). The trial court sentenced Respondent to serve a life sentence on the sexual battery which was to run consecutive to the five year sentence on the aggravated assault (R815,816). The court retained jurisdiction over one-third of Respondent's life sentence[2] and over one-third of Respondent's five year sentence (R815,816).

Petitioner urges that the application of State v. Rhoden, 448 So.2d 1013 (Fla. 1984), is limited to instances where a mandatory sentencing requirement has not been met. Even under this limited application of Rhoden, Respondent is not precluded from challenging his sentence.

Section 947.16(3), Fla. Stat. (1983) reads in pertinent part:

> when any person convicted of two or more felonies and consecutive sentences are imposed, then the jurisdiction of the trial court judge as provided herein applies to one-third of the total consecutive sentences imposed.

Thus, where a defendant is convicted of two felonies and consecutive sentences are imposed, the statute mandates that the trial court can only retain jurisdiction over one-third of the

---

2 Neither the trial court's sentencing order nor the commitment order reflect that the retention of jurisdiction over the life sentence was to be for a period of twelve years (R815, 817).

total consecutive sentences imposed. In the present case, the trial court failed to conform with the statutory requirements by retaining jurisdiction over one-third of each of Respondent's consecutive sentences.

In addition, the retention of jurisdiction over one-third of the life sentence was not authorized by statute. Florida courts have consistently held that §947.16(3), Fla. Stat. (1983) does not authorize retention of jurisdiction over a life sentence. Brown v. State, 460 So.2d 988 (Fla.4th DCA 1984); Kosek v. State, 448 So.2d 57 (Fla.5th DCA 1984); Rodriquez v. State, 424 So.2d 892 (Fla.3d DCA 1982). Despite knowledge of such holdings, the Legislature has not seen the need to amend the §947.16(3) to authorize retention of jurisdiction over a life sentence. This Court, in State v. Walcott, 10 FLW 363 (Fla. Case No. 66,391, July 3, 1985) held that where a court had no statutory authority to retain jurisdiction over a defendant's sentence, the defendant was not precluded from raising the point on appeal for lack of a contemporaneous objection. Consequently, Respondent's failure to object to the unauthorized retention does not preclude review of the issue.

In addition, Respondent should not be precluded from appellate review because of lack of a contemporaneous objection to a sentencing error. In Rhoden, this Court analyzed the contemporaneous objection rule:

> The contemporaneous objection rule, which the state seeks to apply here to prevent respondent from seeking review of his sentence, was fashioned primarily for use in trial proceedings.

*   *   *   *

> The primary purpose of the contemporaneous objection rule is to ensure that objections are made when the recollections of witnesses are freshest and not years later in a subsequent trial or a post-conviction relief proceeding. The purpose of the contemporaneous objection rule is not present in the sentencing process because any error can be corrected by a simple remand to the sentencing.
>
> 448 So.2d at 1016.

Judge Cowart, in his concurring opinion in Walcott v. State, 460 So.2d 915 (Fla.5th DCA 1984), explained why implied waiver resulting from the contemporaneous objection rule should be avoided for sentencing proceedings:

> Sentencing is not a part of the adversary aspect of the criminal justice system that is involved in the determination of guilt. In imposing a sentence the court does not stand neutral between contending parties -- the judge represents the interests of organized society in dealing with an offender.
>
> No one who believes in the role of law in our form of government believes that a citizen should be deprived of his liberty and confined as punishment except under a sentence imposed in accordance with all lawful requirements.
>
> It should be recognized that, because persons accused of crime are held to be entitled to competent, effective defense counsel and because defense counsel who unwittingly fails to assert and protect valuable sustantive and procedural legal rights of a defendant are not competent and effective, the concept of implied waiver of such rights by failure of counsel to timely object to, and appeal, the violation of such legal rights is essentially inconsistent with the trend to grant defendants relief from the results of failings of incompetent counsel to timely object and appeal legal errors in criminal cases.

> In view of the fact that citizens are dependent upon competent counsel and judges to insure that legal sentencing requirements are observed, the clear trend is to eliminate or disregard all legal technical obstacles to the correction of sentencing errors.
>
> 460 So.2d at 920,921 (emphasis added).

Sentencing errors which are unobjected to and adverse to a defendant can occur only if defense counsel unwittingly fails to assert and protect the rights of the defendant at sentencing, or does not have an opportunity to do so. In the present case, the failure to object is the result of inadvertence, and not the result of trial strategy. In Rhoden, this Court noted that the contemporaneous objection rule "prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant." 440 So.2d at 1016. Respondent had nothing to gain from deliberately allowing the court to retain jurisdiction over his life sentence. Consequently, the basic need for the contemporaneous objection rule is not present at bar.[3] The interests in insuring that legal sentencing requirements must be met even when there is a lack of a contemporaneous objection.

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3 Respondent realizes that judicial economy - i.e. giving the trial judge an opportunity to correct his error - is another purpose of the rule. However, in cases where there is a lack of objection to a sentencing error adverse to the defendant, the trial court will have an opportunity to correct the error if not by way of remand from appeal, by another collateral form of relief. Thus, the most efficient method of correcting a sentencing error, apparent in the record, would be to allow the error to be raised on direct appeal along with other issues raised.

Finally, the Fourth District concluded that the instant case was appealable. The basis for its conclusion must stem from the following portion of its opinion of March 20, 1985 (Appendix I):

> We agree with this rationale and therefore hold that attempted retention of jurisdiction over a portion of a life sentence constitutes an illegal sentence and is <u>error of fundamental proportion</u>.
>
> Slip.Opinion at Page 2 (emphasis added).

Thus, the Fourth District recognized that the error was fundamental. Consequently, the unauthorized retention of jurisdiction over the life sentence is reviewable even absent a contemporary objection.

POINT II

IT IS IMPROPER TO RETAIN JURISDICTION OVER ONE-THIRD OF A LIFE SENTENCE.

Florida courts have uniformly held that §947.16(3), Fla. Stat. does not authorize retention of jurisdiction over a life sentence. Brown v. State, 460 So.2d 988 (Fla.4th DCA 1984); Kosek v. State, 448 So.2d 57 (Fla.5th DCA 1984); Cordero-Pena v. State, 421 So.2d 661 (Fla.3d DCA 1982). These decisions are based on this Court's conclusion, in Alvarez v. State, 358 So.2d 10 (Fla. 1978), that a life span is immeasurable. The Legislature has been aware of these decisions and their limitations as to retaining jurisdiction over a life sentence. However, the Legislature has chosen not to amend §947.16(3), Fla. Stat. to avoid the prohibition of retention of jurisdiction over a life sentence.

Petitioner claims that the trial court correctly retained jurisdiction over twelve years of Respondent's sentence through the use of mortality tables. First, neither the sentence nor the commitment order reflect that the trial court retained jurisdiction over the first twelve years of Respondent's sentence. These orders only reflect a retention of jurisdiction over one-third of the life sentence (R815,816,817). From these orders, the Parole Commission will be left guessing the actual period of time of retention of jurisdiction.

More importantly, this Court has held that mortality and life expectancy tables are not relevant toward calculating a life sentence. Alvarez, supra, at 12. Setting the length of time for

retaining jurisdiction on a life sentence should be left to the Legislature and not done by insurance companies with, as the trial court stated, "a best guestimate" as to life expectancy.

Petitioner also argues that a defendant's life sentence may be commuted pursuant to §944.30 Fla. Stat. (1983). This is not pertinent as to whether the trial court presently may retain jurisdiction over a life sentence, but is a situation for the legislature to correct. If it were a relevant consideration, it should be noted that the Board of Pardons decision on commutation is discretionary and the Board can take into account recommendations by the trial court.

Finally, Petitioner maintains that the current prohibition of retention of jurisdiction over a life sentence is especially egregious when one considers that under the new sentencing guidelines a defendant with a life sentence is ineligible for parole, whereas a defendant with a capital felony life sentence will be eligible for parole. The fact is, this apparent inequity will exist regardless of whether the trial court is permitted to retain jurisdiction over a life sentence. Again, this apparent inequity is a matter for the Legislature to rectify.

POINT III

THE TRIAL COURT REVERSIBLY ERRED BY ADMITTING IRRELEVANT AND HEARSAY TESTIMONY.

Because this Court, in acquiring jurisdiction, has authority to dispose of all contested issues, Respondent submits this argument which was passed upon by the District Court. See, Dania Jai-Alai Palance, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984); Bould v. Touchette, 349 So.2d 1181 (Fla. 1977); Negron v. State, 306 So.2d 104 (1974); D'Agostino v. State, 310 So.2d 12 (Fla. 1975) (once Court acquires jurisdiction, the Court may proceed to consider entire cause on the merits).

As can be seen from the Statement of the Facts, the identification of Respondent was quite weak. Both Darcy Smolke and Randy Jellis had, beginning on January 27, 1977, consistently stated they could not identify the third assailant until Ms. Smolke selected him from a lineup in 1982 as looking familiar. Neither witness positively identified the defendant until his trial in 1983. To bolster its case, the prosecution presented testimony which was irrelevant to any material fact as well as hearsay. They then improperly used the testimony to create an inference of flight.

The state elicited this testimony from Detectives O'Hara and Murray over the objection of Respondent. As previously noted, Detective O'Hara testified he went to the Days Inn and 528 N.W. Eighth Avenue looking for Respondent (R572). Detective Murray testified that Grant lived at 528 N.W. Eighth Avenue (R545). He further testified that Grant told Detective Murray that Respon-

dent lived at that address with him (R500,601). He also testified to seeing a person he later learned was Respondent on a street corner, and then thirty to forty-five minutes later Respondent was gone (R502,603). He also testified to going to 528 N.W. Eighth Avenue and other locations looking for Respondent. All of this testimony had been proffered and the court ruled it was admissible over Respondent's objection that it was hearsay, irrelevant and immaterial (R534-571,598,540).

The sexual battery occurred on January 27, 1977 (R767). Grant was arrested March 10, 1977. Grant told the police during the first few days of March that Respondent lived with him (R600-601). Clearly the court erred when it ruled that Grant's hearsay statement that Respondent lives with him came within the co-conspirators exception to the hearsay rule. Section 90.803(18)(e), Fla. Stat. As Respondent noted at trial, aiding and abetting a rape is not a conspiracy. See, Ramirez v. State, 371 So.2d 1063 (Fla.3d DCA 1979). To show a conspiracy, the state must show an express or implied agreement and not merely aiding and abetting. Ramirez, at 1065. No conspiracy was or could be shown in the instant case. The only evidence introduced at trial which showed a conspiracy was the possible aiding and abetting. Again, conspiracy cannot be inferred from aiding and abetting because conspiracy is a separate and distinct crime from the offense which is the object of the conspiracy. Swindle v. State, 254 So.2d 811 (Fla.2d DCA 1971). This Court, in Goldberg v. State, 351 So.2d 332 (Fla. 1977), spoke of the danger of making a conspiracy charge "so elastic, sprawling and pervasive

as to defy meaningful definition." The Third District adopted the Goldberg rationale by declining to expand conspiracy to include aiding and abetting since "to do so would blur the demarcation line" between the conspiracy and the object of the conspiracy. Ramirez, supra, at 1066.

Furthermore, to be admissible against a co-defendant, the statements must be in furtherance of the original plan or during the pendency of the criminal enterprise. Jenkins v. State, 35 Fla. 737, 18 30 182 (1895). When the criminal enterprise is at an end, whether by accomplishment or abandonment, no one of the confederates can be permitted by his act or declaration to affect the others. Jenkins; Thomas v. State, 349 So.2d 743 (Fla.1st DCA 1977). There was no showing of a conspiracy here. Moreover, even had there been a conspiracy this statement by Grant was not in furtherance of that conspiracy. It was thus inadmissible.

This hearsay was the key fact from which the state argued that Appellant fled and so he must have felt guilty. The other facts introduced were meaningless and irrelevant. Under the Florida Evidence Code, Section 90.401, "Relevant evidence is evidence tending to prove or disprove a material fact." In Williams v. State, 110 So.2d 654 (Fla. 1959), this Court held that the "test of admissibility is relevancy. The test of inadmissibility is a lack of relevancy.... We interpole for caution that we do not overlook the rule that prohibits the admissibility of irrelevant or immaterial evidence that has no bearing on any of the material facts in issue." Id., at 660. In addition the party seeking admission of testimony must demon-

strate why sought after testimony is relevant. See Haager v. State, 83 Fla.41, 90 So.812 (1922); Hitchcock v. State, 413 So.2d 741 (Fla. 1982).

This irrelevant testimony was given credibility by the trial court through the giving of a flight instruction (R714). The jury should never have considered this evidence with regard to an inference of guilt from flight.

Flight is an inference of guilt only where a defendant flees the vicinity of the crime. Noeling v. State, 40 So.2d 120, 121 (Fla. 1949). Further, the actions of Respondent not only show that he did not flee the vicinity of the crime, but also that he did not hide himself or do anything indicating an intent to avoid detection for the crimes of aggravated assault of sexual battery. See, Barnes v. State, 348 So.2d 599 (Fla.4th DCA 1977).

How can the fact that the police went to various locations looking for Appellant be relevant? Yet, the jury would naturally infer that the police had reason to believe he would be there (R569). In fact, Respondent had an outstanding warrant for a violation of parole, which would furnish a reason to leave other than guilt of these crimes (R562). Nevertheless, the court admitted all of this testimony believing the hearsay was admissible and that the hearsay informed the other testimony with relevance (R569). As the identification evidence against Respondent was quite weak, the inference of flight may have contributed to the jury's decision, and thus Respondent's convictions must be reversed.

CONCLUSION

For the reasons stated in Point III, Respondent respectfully requests this Honorable Court to reverse his convictions and sentences and to remand this cause to the trial court for a new trial.

If the Court declines to reverse Respondent's convictions and sentences, Respondent requests that this Honorable Court affirm the Fourth District's opinion of March 20, 1985.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, Room 704 Elisha Newton Dimick Building, 111 Georgia Avenue, West Palm Beach, FL 33401, this 27th day of September, 1985.

Of Counsel