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IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,929

THE STATE OF FLORIDA,

Petitioner,

vs.

CLEVE ANDREW MOBLEY,

Respondent.

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ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the Court below and the prosecution in the trial court. Respondent was the Appellant in the Court below and the defendant in the trial court. In this brief the parties will be referred to as they appear before this Honorable Court. All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

The following symbol will be used:

"R" Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Petitioner readopts the Statement of the Case and facts as presented in its Initial Brief (AIB 2-3), and further accepts Respondent's additions and clarifications as they appear in Respondent's Answer Brief, pages two (2) through seven (7).

POINTS ON APPEAL

POINT I

WHETHER BY OPERATION OF THE CONTEMPORANEOUS OBJECTION RULE, A DEFENDANT IS PRECLUDED FROM CHALLENGING THE TRIAL COURT'S RETENTION OF JURISDICTION OVER ONE-THIRD OF A LIFE SENTENCE WHERE THE TRIAL COURT HAS FULLY COMPLIED WITH ALL THE REQUIREMENTS OF §947.16(3) FLORIDA STATUTES (1983) AND OTHERWISE ANNOUNCES A LEGAL LIFE SENTENCE, AND NO OBJECTION TO SUCH RETENTION IS MADE BY THE DEFENDANT AT THE TIME OF SENTENCING?

POINT II

WHETHER THE TRIAL COURT PROPERLY RETAINED JURISDICTION OVER ONE-THIRD OF THE APPELLANT'S SENTENCE OF "LIFE IMPRISONMENT" PURSUANT TO SECTION 947.16(3), FLORIDA STATUTES (1981)?

POINT III

WHETHER THE TRIAL COURT IMPROPERLY ADMITTED IRRELEVANT OR HERESAY TESTIMONY?

SUMMARY OF THE ARGUMENT

POINT I

Section 947.16(3), Florida Statutes (1983), requires the trial court to notify the defendant of the court's intention to retain jurisdiction over the defendant for one-third of the imposed sentence. In addition, the trial court judge must state with individual particularity the justification for the retention of jurisdiction. One of the purposes of the statute is to give the defendant an opportunity to respond to the reasons stated for retention. Therefore, when the trial court fully complies with the mandatory requirements of §947.16(3), and the defendant fails to object to the retention at the time retention is announced by the trial court judge, the defendant is thereafter precluded from appealing the validity vel non of retention by operation of the contemporaneous objection rule.

POINT II

In the instant case, the trial court, by using mortality tables, determined Respondent's expected life span to be 36 years, and retained jurisdiction over 12 years or one-third of the sentence imposed. The trial court's practice in the instant case demonstrates a life sentence is amenable to computation. Since a life sentence is amenable to computation and life sentence is the maximum penalty for many of the enumerated offenses in §947.16 (3), retention of jurisdiction was contemplated by the Legislature to apply to a life sentence.

POINT III

Under the facts of this case, clearly there was a conspiracy to commit the crimes in controversy Respondent's identification by both victims as one of the perpetrators sufficiently tied him to the conspiracy. These circumstances supported the finding of the trial court that there was a conspiracy and that the co-perpetrator's statement would be admissible pursuant to the co-conspirator hearsay exception.

Second, on the issue of Respondent's flight, the trial court did not err in permitting the prosecution to demonstrate Respondent's apparent flight upon learning of the co-perpetrator's arrest. The jury was properly given an instruction on the presumption of innocence and was also given the instruction on evidence of flight. Therefore, under the circumstances of this case, Respondent has not demonstrated error in the admission of any testimony.

ARGUMENT

POINT I

BY OPERATION OF THE CONTEMPORANEOUS OBJECTION RULE, A DEFENDANT IS PRECLUDED FROM CHALLENGING THE TRIAL COURT'S RETENTION OF JURISDICTION OVER ONE-THIRD OF A LIFE SENTENCE WHERE THE TRIAL COURT HAS FULLY COMPLIED WITH ALL THE REQUIREMENTS OF §947.16(3) FLORIDA STATUTES (1983) AND OTHER WISE ANNOUNCES A LEGAL LIFE SENTENCE, AND NO OBJECTION TO SUCH RETENTION IS MADE BY THE DEFENDANT AT THE TIME OF SENTENCING.

As to Point I Petitioner will re-adopt and rely on its argument as stated in its Initial Brief in the merits (PIB 6-16).

POINT II

THE TRIAL COURT PROPERLY RETAINED JURISDICTION OVER ONE-THIRD OF APPELLANT'S SENTENCE OF "LIFE IMPRISONMENT" PURSUANT TO SECTION 947.16(3) FLORIDA STATUTES (1981).

As to Point II, Petitioner will re-adopt and rely on its argument as stated in its Initial Brief in the merits (PIB 17-26).

POINT III

THE TRIAL COURT DID NOT IMPROPERLY ADMIT IRRELEVANT OR HEARSAY TESTIMONY.

Undisputably, it was the State's intent to demonstrate evidence of flight as indicative of Respondent's guilty knowledge. In that regard, Respondent's first objection is to the hearsay

testimony regarding Mr. Grant's (A co-perpetrator) statement that Cleve Mobley also resided at the same residence with Grant (R 558). The trial judge properly admitted this hearsay testimony as the statement of a co-conspirator made during the course of the conspiracy under Section 90.803(18)(e) Florida Statutes. After a lengthy discussion on the matter in which the assistant state attorney pointed out that this statement was made approximately one week to ten days prior to Grant's arrest and at a time when all the defendants were still at large and cooperating among themselves to avoid prosecution, the trial judge made a determination that a prima facie case of conspiracy had been established. (R 447-457).

Clearly, there was a conspiracy to commit the crimes in controversy and Respondent's identification by both victims as one of the perpetrators sufficiently tied him to the conspiracy which supported the finding of the trial judge that there was a conspiracy and that Grant's statement would be admissible pursuant to the co-conspirator hearsay exception. In order to comply with section 90.803(18)(3), Florida Statutes, the prosecution must establish the conspiracy by a preponderance of the evidence, not prove beyond a reasonable doubt, to warrant admission of a co-conspirators' statement. Saavedra v. State, 421 So.2d 725, 727 (Fla. 4th DCA 1982). In the instant case, the trial judge made that determination prior to the admission of the co-conspirators' statements, and Respondent fails to demonstrate an abuse of

discretion in that regard. See also Tresvant v. State, 396 So.2d 733 (Fla. 3rd DCA 1981) and Mobley v. State, 409 So.2d 1031, 1039 (Fla. 1982).

The case of Yanes v. State, 418 So.2d 1247 (Fla. 4th DCA 1982), holds that the admission of hearsay testimony pursuant to the co-conspirator exception to the hearsay rule was acceptable provided that the trial court instructed the jury at the time as requested by counsel in accordance with the statute or as outlined in Boyd v. State, 389 So.2d 642 (Fla. 2nd DCA 1980). That was done in this case (R 599-600), consequently, Respondent has not demonstrated that the trial judge abused his discretion in allowing in this hearsay statement.

Respondent also objected to Detective O'Hara testifying as to his attempts to locate the Respondent thereby creating the inference of flight. Flight itself does not create a presumption of guilty, but it is a circumstance to be considered by the jury along with totality of the evidence. In the instant case, Respondent apparently fled on the day when the two co-perpetrators of crime were arrested, the date being March 10, 1977, less than a month and a half after the crime itself occurred. Respondent's contention that "flight is an inference of guilt only where a defendant flees the vicinity of the crime" (RAB 20) is erroneous. In the case of Straight v. State, 397 So.2d 903 (Fla. 1981), it was definitively stated that:

When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible being relevant to the consciousness of guilt which may be inferred

from such circumstances. (Citations omitted).

Id. at 908. In the instant case, the trial court did not err in permitting the prosecution to demonstrate Respondent's apparent flight upon learning of the co-perpetrator's arrest. The defense was certainly permitted to argue the weight of this evidence. The jury was properly given an instruction on the presumption of innocence and was also given the instruction on evidence of flight (R 714). Petitioner maintains that under the circumstances of this case, Respondent has not demonstrated error in the admission of any testimony, and certainly not error so egregious to require reversal of the conviction.

CONCLUSION

Based on the facts and foregoing arguments, Petitioner urges this Honorable Court to reverse the Fourth District's Opinion of March 20, 1985, and to affirm Respondent's conviction and sentences as determined by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to JEFFREY ANDERSON, Assistant Public Defender, Counsel for Respondent, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 17th day of October 1985.

Georgina Jimenez-Orosa
Of Counsel