IN THE SUPREME COURT OF FLORIDA

HERBERT LANDER SPIVEY, JR.,

Appellant,

v. CASE NO. 67,010

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I STATEMENT OF THE CASE AND FACTS

Spivey relies upon the Statement of the Case and the Statement of the Facts presented in his initial brief.

II ARGUMENT

ISSUE I

THE COURT ERRED IN PERMITTING CROFTON'S ATTORNEY TO INQUIRE AT TRIAL INTO SPIVEY'S POST-ARREST, POST-MIRANDA SILENCE, WHICH WAS A VIOLATION OF SPIVEY'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO REMAIN SILENT.

In order to respond to the state's argument on this issue, Spivey needs to list its several components.

1. Spivey did not provide a contemporaneous, specific objection to Crofton's inquiry at trial regarding Spivey's silence at the time of his arrest (Appellee's brief at p. 26). Spivey also did not appraise the trial court that DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962) and Sublette v. State, 365 So.2d 775 (Fla. 3d DCA 1978) were inapplicable to the objection raised by Spivey (Appellee's brief at p.24).

2. Because Crofton's attorney asked Spivey about his post-arrest silence, and not the prosecution, no state action is involved that would trigger application of the

Sixth and Fourteenth Amendments (Appellee's brief at pp.25,31).

3. That in any event, this error is harmless (Appellee's brief at p.32).

What is significant is the state has conceded that the court improperly permitted Crofton's attorney to inquire into Spivey's post-arrest silence (Appellee's brief at p.33). The state makes the confession in light of the fact that at the hearing on Spivey's motion for new trial, the trial court claimed that Spivey's responses to Crofton's questions were not fairly susceptible to being interpreted as a comment on his right to remain silent (T 3785-3786). The state's argument thus reduces to either excusing this obvious error because of procedural default on Spivey's part or claiming it was harmless.

1. The Lack Of Objection

The state's position on the lack of a specific objection is contradictory. On the one hand, it says that Spivey made only a general objection to the purported error (Appellee's brief at pp.21,26). Yet, on the other hand, it points out that this issue was extensively argued (Appellee's brief at p.20). In fact, 14 pages of trial transcript are devoted to this issue (T 2798-2813).

The purpose of the contemporaneous objection rule is twofold:

> 1. It puts the trial court on notice of a possible error and gives it a chance to correct or avoid it.
>
> 2. It preserves the issue for intelligent review on appeal.

Castor v. State, 365 So.2d 761 (Fla. 1978); Williams v. State, 414 So.2d 509 (Fla. 1982).

What is particularly frustrating are the general objections which leave the appellate bench and bar wondering what was objected to. On the other hand, if counsel had said nothing more than, "I object" and it was clear from either the trial court's ruling or subsequent discussion of the objection what the basis for that objection was, then the policy underlying the contemporaneous objection rule is satisfied and no matter how deficient the objection, the issue is reserved for appellate review. See, Williams, supra.

In this case, the court was abundantly aware of the basis of Spivey's objection, and from the start, the court was aware of the Fifth Amendment implications of that objection.

> The intent of my order is to balance the Sixth Amendment right of Crofton against the Fifth Amendment right to remain silent of Spivey. (T 2803) (Emphasis supplied).
>
> * * *
>
> THE COURT: All right. The Court understands the nature of your inquiry and I will rule as follows: I will permit you to ask are you sure you did not say anything to anybody that it was a contract killing; are you sure that you didn't tell anybody about Mickey Finch. I think anything beyond that would be undue emphasis on the right to remain silent (T 2810).

Moreover, despite what the state says about Spivey's lack of effort to correct the trial court's misperception as to the relevant case law, it is clear that the trial court ignored or distinguished DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962) and Sublette v. State, 365 So.2d 775 (Fla. 3d DCA 1978) from Spivey's case.

> I am going to recede from any cautionary instruction. Since Spivey has taken the stand he is in a different posture from the defendants in DELUNA and SUBLETTE.

(T 2807).

Moreover, Spivey disagrees with the state's characterization of his trial counsel's response to the trial court's inquiry about the viability of DeLuna. Trial counsel never said, "DeLuna is still viable ..." (Appellee's brief at p.24). What counsel said was that he believed it was still viable (T 2798), indicating some uncertainty on his part. In any event, his objection still was valid as lower court decisions are not binding upon Florida courts, c.f. Witt v. State, 387 So.2d 922 (Fla. 1980), and counsel certainly can ethically argue against "viable" law. EC 7-23, Code of Professional Responsibility.

Spivey also disagrees with the state's characterization of Spivey's objections as perfunctory (Appellee's brief at p.26). It is clear that Spivey's objection triggered an extensive discussion between all counsel and the court, and Spivey hardly was unconcerned or indifferent about the court's ruling (T 2799, 2806, 2812). The fact

that trial counsel did not say much certainly is no indication that he was unconcerned about what the trial court did, and during the discussion on this issue as well as during Crofton's examination of Spivey, Spivey's counsel repeatedly objected to what the trial court had done and did so to such an extent that he repeatedly requested a mistrial (T 2815-2817).

2. The Lack Of State Action

The state claims that because Crofton's attorney asked the impermissible questions of Spivey, the Sixth and Fourteenth Amendments are not involved as there is no state action (Appellee's brief at pp.25,31). That claim is incorrect as the state jointly tried and charged Spivey and Crofton, and Spivey unsuccesfully attempted to sever the trial (T 150). Those facts should be sufficient state action. Nevertheless, opinions of this Court and those of the United States Supreme Court indicate that a state trial is itself sufficient state action to implicate the Fourteenth Amendment. Cuyler v. Sullivan, 446 U.S. 335, 343 64 L.Ed.2d 333, 100 S.Ct. 1708 (1980), Baggett v. Wainwright, 229 So.2d 239, 242 (Fla. 1970).

> This court's decisions establish that a state criminal trial, a proceeding initiated and conducted by the state itself, is an action of the state within the meaning of the Fourteenth Amendment. Cuyler v. Sullivan at 343 (cites omitted).

3. Harmless Error

The state's final argument is that this error was harmless (Appellee's brief at p.32), and it cites this Court's opinion in State v. DiGuilio, 10 FLW 430 (Fla. August 29, 1985) to support this conclusion. In that case, this Court adopted the constitutional harmless error rule announced in Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967) and applied it to comments on a defendant's silence. The state on page 32 of its brief, quotes that portion of DiGuilio adopting the harmless error rule regarding comments and silence. The sentence following what the state quoted,

however, is an important limitation on the application of the harmless error rule:

> Obviously, the more direct and egregious the comment is, the less likely the state can prevail on this high standard test for harmless error.

In this case, Crofton's attorney's inquiry was as direct an inquiry as possible as the state concedes by not arguing the correctness of the trial court's ruling in its brief (Appellee's brief at p.23). What Crofton's attorney did in Spivey's case is more egregious than what the prosecution did in Doyle v. Ohio, 426 U.S. 610, 49 L.Ed.2d 91, 96 S.Ct. 2240 (1976). Here, the trial court clearly knew (in light of Doyle) that comments on post-Miranda silence were impermissible.

Moreover, this inquiry went to the very heart of Spivey's case. Spivey claimed that he never intended to kill Crofton. Because he was in debt to Ellison, and Ronald Crofton was purportedly carrying $2000 on his person on the night of the murder (T 2075), Spivey intended only to rob Crofton, but not to kill him. This theory has support as Ochuda and Hawkins said that Spivey solicited their assistance to commit a robbery (T 1609-1610), and Spivey never mentioned killing Crofton (T 1609, 1610, 1630). Spivey, moreover, said that Crofton lunged or stumbled at him as he held the pillow he intended use to tie Crofton's hands (T 2779). Finally, the court gave the jury an instruction on independent acts which, if they had believed Spivey's story, would have exonerated him of killing Crofton (R 228).

Now it is clear that the jury at least believed Spivey intended only to rob Crofton as it acquitted Geraldine Crofton of the murder, but convicted her of conspiracy (T 3647). Yet the jury did not believe his independent act argument as it convicted him of Crofton's murder. Thus, it cannot be said with any degree of reasonable certainty that the answer Spivey gave in response to Crofton's questions about his post-arrest silence had no effect on the juror's rejection of his independent act theory. After all, if Spivey was as innocent as he claimed, why did he not tell his story as soon as he had an opportunity to do so? Maybe he "recently concocted"

the story as Crofton suggested (T 2798). Or, maybe he was relying upon the Fifth Amendment rights he was informed of when arrested (T 289). In any event, the jury was not told of the law concerning post-Miranda statements, and they could have concluded that Spivey did not say anything at the time of his arrest because he had nothing to say, and his story on the stand was "recently concocted."

ISSUE II

THE COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF LIFE AND SENTENCING SPIVEY TO DEATH AS THERE WERE SEVERAL REASONABLE BASES UPON WHICH THE JURY COULD HAVE RECOMMENDED LIFE.

Response to the state's argument regarding Spivey's death sentence involves an examination of what the effect of the Tedder standard has on the imposition of death sentences. Does it significantly narrow the class of people eligible for excution? Or, does it require the trial judge to merely recite certain standard phases which in no significant way limites the class of those eligible for execution?

The state says the trial court can virtually ignore the jury's life recommendation (Appellee's brief at p.37) and rely upon its own appraisal of the aggravating and mitigating factors applicable to a particular case. The state also characterizes Spivey's arguments as that a trial judge must accept the jury's life recommendation (Appellee's brief at p.36), and the life recommendation reduces his role to nothing more than rendering an anticlimatic life sentence. Both characterizations are wrong as the state has misunderstood the complex nature of capital sentencing.

That is, when a jury returns a life recommendation, the presumption arises that its members have seriously weighed the aggravating and mitigating factors, and based upon that weighing, they have recommended a sentence of life. The jury's recommendation, thus is entitled to great weight because it reflects the community's judgment regarding whether a particular person should live or die. As such, the jury recommendations serves the purpose of narrowing the class of convicted murderers eligible to die. Baclay v. Florida, 463 U.S. 939, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (1983).

In Barclay, the U.S. Supreme Court again approved Florida's capital sentencing plan because successive stages of the sentencing process narrow the class of persons eligible for execution. Only after a convicted murderer has passed through a series of "filterings" would he be identified as one deserving of death. In Florida's scheme, the jury's recommendation is one of those filters. In the vast majority of cases, a life recommendation will become virtually binding upon the trial court as it represents the community's view that death should not be imposed in a particular case. This opinion is significant as the Eighth Amendment is particular sensitive to the community's evolving sense of decency, and it is this evolving sense of decency that seeks to ameliorate what might be an otherwise harsh, but legal sentence. See Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976) (juries regularly return not guilty verdicts rather than have a defendant executed).

Thus, the Tedder standard seeks to maintain the "filtering" function of the jury's life recommendation by establishing a very difficult standard for the trial court to meet before it can override the life recommendation and impose death. Only if reasonable people could not differ as to appropriateness of a death sentence is the trial court justified in overriding a jury's life recommendation. This is a very difficult standard to meet, and on appeal, this Court must examine the record to determine if the jury's recommendation should have been followed. The state says that this Court should not engage in such a speculative exercise (Appellee's brief at p.38). There is, admittedly, a speculative aspect to this inquiry, yet the inquiry is not to imagine evidence or conjure facts. Instead, it is an inquiry into whether the available evidence could support a jury recommendation of life. In other words, was the jury's recommendation reasonable in light of the evidence it had to consider? This "speculation" is exactly the sort this Court has regularly done in examining cases of a trial court's override of a life recommendation. For example, in Amazone v. State, Case No. 64,117, Florida opinion filed March 13, 1986, this Court said:

> The trial judge found no mitigating factors. However, we are persuaded that the jury could have properly found and weighed mitigating factors and reached a valid recommendation of life imprisonment. We believe there was sufficient evidence for the jury to have found that Amazon acted under extreme mental or emotional disturbance.... Although Amazon was nineteen, an age which we have held is not per se a mitigating factor, Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964 (1981), the expert testimony about Amazon's emotional maturity suggests that the jury could have properly found age a mitigating factor in this case.
>
> In light of these mitigating circumstances, one may see how the aggravating circumstances carry less weight and could be outweighed by the mitigating factors.... The defense showed on cross-examination that this statement was not recorded anywhere by the detective, and the jury could well have discounted the evidence. While the fact that the victims knew Amazon could allow inference of the aggravating factor, when considered in light of the "frenzied attack" hypothesis. Amazon may well have not considered avoidance of arrest when he killed his victim.
>
> In other words, the jury could have found the crimes sufficiently serious to warrant first-degree murder convictions, but the combination of the "depraved mind" defense and the possible mitigating factors discussed supra mitigated against a recommendation of death. The facts are not so clear and convincing that no reasonable person could differ that death was the appropriate penalty.

(Emphasis added). See also Huddleston v. State, 475 So.2d 204 (Fla. 1985). On the other hand, in Burr v. State, 466 So.2d 1051 (Fla. 1985), this Court sustained a life override because the only basis for the jury's life sentence recommendation was their doubt as to Burr's guilt, and that, this Court said was an unreasonable basis for such a recommendation.

In Echols v. State, Case No. 64,246, Florida opinion filed September 19, 1985, this Court justified a life override because its examination of the record justified the court's sentencing order. Yet, the state suggests that this Court should restrict its review of the sentence to the sentencing order, and cites Echols for authority (Appellee's brief at p.39). Clearly, this Court's review is not so restricted as its opinion in Echols demonstrates.

If there is any speculation in this case, it arises when the state says that the trial courts order implicitly considered the jury's life recommendation and concluded

that no sufficient mitigation existed (Appelle's brief at p.40). Sentencing orders, however, are not some sort of cryptic message received at a seance that this Court must decipher. If the trial court considered the jury's recommendation and rejected it, it should so state and give its reasons for rejecting it. The reasons stated should be presented with unmistakable clarity. Mann v. State, 420 So.2d 578 (Fla. 1982). Here, implicit considerations lack the unmistakable clarity demanded by this Court.

The state says Spivey is the most culpable defendant because he was primarily responsible for the murder of Crofton (Appellee's brief at p.41), that Hawkins was not as culpable as Spivey (Appellee's brief at p.43), and that Ochuda, Crofton and Ellison did not physically participate in the murder of Ronald Crofton (Appellee's brief at p. 44). This Court, however, has never said that those who are not physically present cannot be executed if they intend the murder to be committed. Antone v. State, 382 So.2d 1205, 1216 (Fla. 1980). In this case, if Spivey acted pursuant to the conspiracy to murder Ronald Crofton, Mrs. Crofton and Ellison can be as culpable as Spivey as Mrs. Crofton and Ellison were the masterminds of the murder. They paid the money to Spivey, and they kept pressuring Spivey to commit the murder (T 2768). Their participation was hardly minor. Without Mrs. Crofton's insistence and Ellison's persistence, Spivey would not have murdred Crofton. Id.

Moreover, Ochuda certainly was not as shocked by the murder as he claims. He physically assaulted Mr. Crofton (T 2677), and after Crofton was dead, it was Ochuda who wanted to sell Crofton's car which Hawkins had stolen and which Spivey wanted to abandon (T 1463, 1525). While he claims he had no intent to kill Crofton, Ochuda's role in the murder is certainly not the innocent bystander he claimed to be.

Similarly, Hawkins was a culpable as Spivey as he helped strangle Mr. Crofton (T 1625), and was as willing as Ochuda to profit from this murder (T 2794). In short, Mrs. Crofton, Ellison, Ochuda, and Hawkins share culpability with Spivey for Mr.

Crofton's death, and their culpability is not so much less than Spivey's that such a gross sentencing disparity as presented here is justified.

Finally, the state argues that because Spivey was charged with and convicted of premeditated murder, his "Enmund" argument must fail (Appellee's brief at p.47). In support of its argument, the state points out that the jury's guilty verdict for conspiracy shows that Spivey had a premeditated intent to kill Crofton (Appellee's brief at pp.48, 49).

There is no requirement that the state must charge felony murder when it charges a person with first degree murder. O'Callaghan v. State, 429 So.2d 691, 693 (Fla. 1983). Moreover, the jury need not be given a verdict indicating which theory they believe the state had proven, premeditation and/or felony murder. C.f. In the Matter of the Use by the Trial Court of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 597 (Fla. 1981).

In this case, the jury was instructed on felony murder (T 227-228), but they were not given a verdict form in which they could have indicated whether or not Spivey was guilty of premeditated murder or felony murder (T 241). The indictment, instructions, and verdict, all support Spivey's argument that the jury could have believed his version of what happened.

This conclusion is not weakened by Spivey's conspiracy conviction. The gravamen of conspiracy is an agreement to do something illegal. Cam v. State, 433 So.2d 38 (Fla. 1st DCA 1983). Florida requires no overt act, State v. Trafficante, 136 So.2d 264 (Fla. 2d DCA 1961), and even if Spivey had never seen Ronald Crofton, he would have been guilty of conspiracy once he agreed with Ellison to murder Crofton. The jury here was so instructed (R 234), and it realized this as they convicted Mrs. Crofton of the conspiracy even though they acquitted her of the murder. The jury, therefore, could,

with perfect consistency, have believed Spivey's story that he had no intent to kill Crofton and yet have convicted him of conspiracy to commit first degree murder and felony murder.

III CONCLUSION

Based upon the arguments presented above, Herbert Spivey respectfully asks this Honorable Court to:

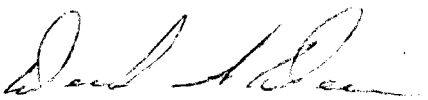
1. Reverse the trial court's judgment and sentence and remand for a new trial.

or

2. Reverse the trial court's imposition of the death sentence and remand with instructions to impose a sentence of life without possibility of parole for 25 years.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Ms. Patricia Conners, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by mail to Mr. Herbert L. Spivey, #060040, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 27th day of June, 1986.

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