Supreme Court of Florida

No. 67,082

ROBERT EARL DuBOISE, Appellant/Cross-Appellee,

vs.

STATE OF FLORIDA, Appellee/Cross-Appellant.

[February 19, 1987]

PER CURIAM

This cause is before the Court on appeal of a judgment of conviction of capital felony for which a sentence of death was imposed. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. Appellant Robert Earl DuBoise appeals his conviction of first-degree murder, three convictions of violation of probation, and the sentence of death. The state cross-appeals the trial court's order arresting judgment on a jury verdict of guilt of attempted sexual battery. We affirm the convictions, reverse the order arresting judgment, reverse the sentence of death, and remand with instructions to the trial court to impose a sentence of life imprisonment.

Appellant was indicted for first-degree murder and sexual battery. The body of the victim, Barbara Grams, was found behind a dentist's office in Tampa. The evidence showed that when found, the body of the victim bore a bite mark. The medical examiner testified that the victim died as a result of two blows to the head inflicted with a blunt instrument. The same medical expert also testified that the bite mark occurred roughly around the time of death. The examiner also found semen in the vagina indicating sexual intercourse could have occurred up to seventy-two hours before death.

The police took beeswax impressions of several persons including appellant, and sent them to a dentist, Dr. Powell, who made stone cast models from them. These stone cast models were forwarded to Dr. Souviron, a dentist specializing in forensic odontology, who compared them to a photograph of the bite mark found on the body. On October 21, 1983, Dr. Souviron called the Tampa police and told them that it was appellant who made the bite mark. On October 22, the police brought appellant in at 2:00 a.m. and questioned him for about one hour. He was arrested around 5:00 a.m., and after he started screaming and kicking, he was restrained by ropes and handcuffs and sedated with a tranquilizer called Haldol. At 4:00 that afternoon, the police escorted appellant to Dr. Powell's office to have a stone cast model made of his teeth. Although the officers had a search warrant in their possession, they never served it since appellant agreed to go willingly. After this second stone cast model was made, it was sent to Dr. Souviron. Dr. Souviron testified at trial that within a reasonable degree of dental certainty appellant had bitten the victim.

The other main evidence linking appellant to the crime was the testimony of a cellmate, Claude Butler. Mr. Butler stated that appellant had told him that he, his brother and a friend had tried robbing a woman of her purse. When she recognized his friend, they abducted her and later when he was having sex with her, his friend and brother struck her with boards.

The jury found appellant guilty of first-degree murder and attempted sexual battery. After hearing the evidence and argument presented at the sentencing phase of the trial, the jury recommended life imprisonment.

The court, finding four aggravating circumstances and no mitigating, imposed a sentence of death. The court granted appellant's motion for arrest of judgment as to the second count of the indictment, vacating the verdict of guilt of attempted sexual battery. Appellant also filed a motion for new trial on the ground that the bite mark evidence should have been excluded

since the arrest was illegal. The court agreed that the arrest was illegal, but denied the motion on the ground that voluntary consent had been given. After a notice of appeal was filed, the court entered its written findings in support of the sentence of death leaving out the aggravating circumstance that appellant had previously been convicted of a violent felony.

ISSUES ON APPEAL OF THE CONVICTIONS

Appellant argues that his convictions should be reversed because the stone cast models of his teeth were products of an illegal arrest and therefore should not have been admitted into evidence. He claims that any consent he gave was tainted and rendered involuntary because of the illegal arrest.

The trial judge found, and the state concedes, that the initial arrest was illegal because it was based on bite mark identification made from a beeswax impression. This method of identification was found not to be scientifically reliable so the police needed a second stone cast model of appellant's teeth. The state claims that appellant voluntarily consented to have this stone cast model made.

Appellant relies on Norman v. State, 379 So.2d 643 (Fla. 1980), and Bailey v. State, 319 So.2d 22 (Fla. 1975). In Norman, this Court said:

> The voluntariness vel non of the defendant's consent to search is to be determined from the totality of circumstances. But when consent is obtained after illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search.

379 So.2d at 646-47. In Bailey v. State, the Court said:

> There may be a few rare instances in which a valid consent could be made after an illegal arrest, provided that circumstances were so strong, clear and convincing as to remove any doubt of a truly voluntary waiver. However, ordinarily consent given after an illegal arrest will not lose its unconstitutional taint.

319 So.2d at 27-28. Appellant argues this is not one of those rare instances. We disagree and find there was a valid consent here.

There are many factual dissimilarities between this case and Bailey which render the holding in Bailey inapplicable. First, in Bailey, the search was made immediately after the arrest. In this case several hours had elapsed. Second, in Bailey, the arresting officers' testimony consisted entirely of conclusions. Here the detective who took appellant to the dentist testified that he obtained a search warrant to have the stone cast model made, but never served it because everything appellant did was voluntary. He said that when he explained to appellant that they were going to take him to the dentist to get an impression of his teeth, appellant replied, "Fine, go ahead and do it. I'll prove to you that I didn't bite the girl. I didn't have anything to do with it." While waiting in the dentist's office appellant stated, "I'm glad you're doing it." Finally, the defendant in Bailey testified that she did not give her consent and specifically asked about a search warrant. There is no such conflicting testimony in this case.

Appellant's counsel relies heavily upon the fact that appellant was administered ten milligrams of the tranquilizer Haldol at 6:20 a.m., roughly ten hours before he was taken to the dentist's office. However, both the detective and dentist testified that appellant did not appear to be under the influence of any drugs and acted calmly and rationally. No evidence was presented concerning the nature or length of the drug's effects. We conclude that the evidence clearly and convincingly supports the trial court's finding that appellant had voluntarily consented to have the dental impressions made of his teeth.

Appellant next argues that it was reversible error to allow his cellmate Claude Butler to recount his statements. He argues that the statements, like the second dental impressions, were a product of an illegal arrest and that he was deprived of his sixth amendment right to counsel because Butler was an agent for the state. See Maine v. Moulton, 106 S.Ct. 477 (1985); United States v. Henry, 447 U.S. 264 (1980). We find the incriminating statements were not a product of appellant's

illegal arrest. The statements were made several months after appellant was arrested. They were spontaneous utterances, not the product of active questioning. Furthermore, by the time of the statements appellant had been validly arrested for violating probation.

We also find that Butler was not acting as a state agent. Upon his arrest, appellant was placed in a sixteen-man holding cell in which Butler was already residing. Later some police officers, while questioning Butler about unrelated matters, asked him if he knew anything about appellant. When he indicated that all he knew was that appellant was in the cell and had talked about a girl, they said to him, "If you hear anything, hear a conversation, call us. See what you can do for us or whatever." They did not ask him to question appellant or to take any other affirmative action to obtain information. This is not a case where the police moved an informant into a defendant's cell for the express purpose of questioning the defendant. There is nothing to indicate that the authorities promised Butler any favorable treatment. Several months later when Butler asked appellant how things were going, appellant unburdened himself with his confession. There was no evidence that Butler deliberately attempted to extract a confession from appellant. When questioned why he was testifying against appellant, Butler explained that he knew appellant was not going to say anything against his cohorts and that he did not think appellant should take the sole rap for the murder. Given these facts, we find that there was no deliberate attempt to deprive appellant of his sixth amendment right to counsel. See Dufour v. State, 495 So.2d 154 (Fla. 1986).

Next appellant argues that the trial court erred in refusing to rule upon his motion to suppress the evidence until after the trial. He points out that we have held that, when requested, an evidentiary hearing on the voluntariness of a confession must be held before the confession can be submitted to the jury. Land v. State, 293 So.2d 704 (Fla. 1974). Appellant

concludes that the trial court erred by not holding an evidentiary hearing on the voluntariness of his consent before allowing the stone cast model of his teeth and his statements to his cellmate into evidence.

The major distinction between Land and this case is that here appellant made no request for a hearing. On the third day of the trial, the trial judge heard arguments from counsel on both sides outside the presence of the jury concerning appellant's motions to suppress certain evidence. At one point the judge suggested that a hearing should be held. However, neither side indicated they wanted one. Even after the trial appellant failed to request a hearing on the voluntariness of his consent. We therefore find no reversible error in the trial court's refraining from ruling upon the motions to suppress until after the trial.

Next appellant argues that the trial court erred in denying a motion for mistrial based upon the prosecutor's improper remarks during closing argument. This point has not been properly preserved since the motion was made after the jury had been given its instructions and had retired for deliberations. State v. Cumbie, 380 So.2d 1031 (Fla. 1980).

Appellant also argues that the trial court erred in not granting a mistrial when it was discovered that state's witness Butler was acquainted with one of the jurors. After testifying, Butler notified the bailiff that he thought he recognized one of the jurors. Butler was then questioned outside the presence of the jury about this comment. He explained that he thought he recognized one of the jurors as a person he was acquainted with at a bar he frequented, but could not give the person's name. Each juror was questioned individually and all denied recognizing or knowing any of the witnesses in the case. Given these facts, we find no reversible error in the refusal to grant a motion for mistrial.

Appellant's next point on appeal is that he was deprived of his constitutional right to be tried by an impartial jury

because of the exclusion of a prospective juror who was opposed to capital punishment. This very issue has recently been decided against appellant's position by the United States Supreme Court in Lockhart v. McCree, 106 S.Ct. 1758 (1986).

The state cross appeals the order granting appellant's post-trial motion for arrest of judgment. The motion claimed that the second count of the indictment for sexual battery was deficient in that it failed to allege the use of actual physical force. The second count specifically provided:

> The Grand Jurors of the County of Hillsborough, State of Florida, charge that ROBERT EARL DUBOISE, between the 18th day of August, 1983, and the 19th day of August, 1983, in the County and State aforesaid, did unlawfully and feloniously commit sexual battery upon BARBARA GRAMS, a person over the age of eleven (11) years, without the consent of the said BARBARA GRAMS, contrary to the form of the statute in such cases made and provided, to-wit: Florida Statute 794.011(3).

In his attempt to sustain the trial court's ruling, appellant argues that the failure to include an essential element of the offense, the use of actual physical force, rendered the indictment fundamentally defective for failure to charge a crime, citing State v. Dye, 346 So.2d 538 (Fla. 1977). We find the holding in that case inapplicable to the facts in this case.

In State v. Dye, the defendant filed a pre-trial motion to dismiss the information. In this case appellant did not move to quash the indictment before trial, but instead waited until after the trial before filing a motion for arrest of judgment pursuant to Florida Rule of Criminal Procedure 3.610. That rule provides that a motion for arrest of judgment shall not be granted unless the indictment is so defective that it will not support a judgment of conviction. The reason for this provision is to discourage defendants from waiting until after a trial is over before contesting deficiencies in charging documents which could have easily been corrected if they had been pointed out before trial. See Sinclair v. State, 46 So.2d 453 (Fla. 1950); State v. Cadieu, 353 So.2d 150 (Fla. 1st DCA 1977). Hence a charging

document which is subject to pre-trial dismissal can nevertheless withstand a post-trial motion for arrest of judgment.

For example, the failure to include an essential element of a crime does not necessarily render an indictment so defective that it will not support a judgment of conviction when the indictment references a specific section of the criminal code which sufficiently details all the elements of the offense. McClamrock v. State, 374 So.2d 1076 (Fla. 2d DCA 1979). In this case the indictment specifically referenced section 794.011(3), Florida Statutes. By referencing section 794.011(3), which specifically defines all the elements of the offense, the indictment placed defendant on adequate notice of the crime being charged. Cotton v. State, 395 So.2d 1287 (Fla. 1st DCA 1981). Indeed the trial judge in this case specifically found that appellant was not misled or embarassed in the preparation of his defense. See Fla. R. Crim. P. 3.140(o). We therefore find that the trial court erred in granting the motion to arrest the judgment.

ISSUES ON APPEAL OF THE SENTENCE OF DEATH

After the sentencing hearing the jury recommended life imprisonment. The trial judge refused to abide by the recommendation and imposed a death sentence. The trial court's findings of fact in support of the sentence of death set forth the following aggravating circumstances: that the murder was committed during the course of a felony, section 921.141(5)(d), Florida Statutes (1983); that the murder was committed to avoid arrest, section 921.141(5)(e); and that the murder was especially heinous, atrocious and cruel, section 921.141(5)(h). He found no mitigating circumstances.

Appellant argues that the trial judge erred in overriding the jury's recommendation. We find merit in this argument. Appellant also says that his death sentence violates Enmund v. Florida, 458 U.S. 782 (1982). He is correct. The evidence fails to demonstrate that DuBoise killed, intended to kill or contemplated whether lethal force would be employed.

The trial judge's findings failed to take into account the standard we enunciated in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." One of the factors upon which a jury can reasonably base a recommendation of life imprisonment is the disparate treatment of others who are equally or more culpable in the murder. E.g., Brookings v. State, 495 So.2d 135 (Fla. 1986); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). According to the only direct evidence of the circumstances of the murder (appellant's statements to cellmate Butler), appellant's two companions were the actual perpetrators of the killing. These principal perpetrators of the murder were never arrested or charged for the crime. This fact could reasonably have influenced the jury and was a reasonable basis for the jury to recommend life imprisonment. Moreover, although we note that the jury, in finding appellant guilty of first-degree murder, could have based its verdict either on the felony murder doctrine or on circumstantial evidence of appellant's joinder in the premeditated intent of the others to kill the victim, in making its sentencing recommendation the jury could have been influenced by the lack of direct evidence of such premeditated intent on the part of appellant. We therefore conclude that the trial court should have followed the jury's recommendation.

In summary, we affirm appellant's convictions for first-degree murder and three counts of probation violation. We reverse the trial judge's order granting appellant's motion for arrest of judgment on count two of the indictment charging appellant with sexual battery and order that judgment be entered pursuant to the verdict of guilt of attempted sexual battery. We vacate the sentence of death and remand with directions that appellant be sentenced to life imprisonment without eligibility for parole for twenty-five years.

It is so ordered.

McDONALD, C.J., OVERTON and BARKETT, JJ., Concur
SHAW, J., Concurs in result only as to the sentence with an opinion.
EHRLICH, J., Concurs in the conviction, but concurs in result only of the sentence.
ADKINS, J. (Ret.), Concurs in the conviction, but dissents from the sentence.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

SHAW, J., concurring in result only as to the sentence.

Appellant was present at the scene and actively participated in both the robbery and rape. Indeed, if we believe the evidence of the cellmate on which the majority relies, he was raping the victim at the instant the murder occurred. We are currently awaiting decision on a case where the issue is the applicability of Enmund v. Florida, 458 U.S. 782 (1982), to a murder where the defendant was present and actively participated in the underlying felonies, unlike Enmund, but did not himself kill a victim. State v. Tison, 142 Ariz. 446, 690 P.2d 747 (Ariz. 1984), cert. granted, Tison v. Arizona, 106 S. Ct. 1182 (1986), argued November 3, 1986. Because we dispose of the death sentence on other grounds, I would forego addressing the Enmund argument.

An Appeal and Cross-Appeal from the Circuit Court in and for

Hillsborough County,

Harry Lee Coe III, Judge - Case Nos. 82-11925, 82-11926, 82-11670 & 83-12669 Division "A"

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