



IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 NATHANIEL HILL,)
)
 Respondent.)
)
 _____)

CLERK OF THE COURT
 NATHANIEL HILL
 01/25/10

CASE NO. 67,110

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Respondent was the defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County. In the brief, the parties will be referred to by name.

The symbol "R" will denote the record on appeal.

STATEMENT OF THE CASE

Mr. Hill adds the following information to the State's statement of the case:

Mr. Hill was informed against for robbery with a deadly weapon (R 341). He was tried by a jury, (R 372) which the trial court refused to instruct as he requested on his defense of identification (R 342-349) and on factors to consider in assessing the credibility of a witness (R 213-215, 227-228). An instruction requested by the state that the jury was to consider the absent victim's perpetuated deposition as if she were present (R 370) was given (R 301) over Mr. Hill's objection (R 196-199, 308). The jury concluded its deliberations by finding Appellant guilty as charged (R 313), and Mr. Hill was adjudged guilty of that offense (R 373).

On June 27, 1984, Mr. Hill was sentenced in excess of the sentencing guidelines (R 374) to serve fifteen (15) years in prison, with jurisdiction retained for the first one-third of his sentence (R 375) "so you cannot obtain parole without the previous consent of this court for a period of five (5) years from the date hereof." (R 326). No written order justifying the sentencing departure was ever filed. Mr. Hill's motion for new trial (R 376-377) was denied on July 26, 1984 (R 378).

On appeal to the Fourth District Court of Appeal, Mr. Hill's sentence was remanded to the trial court for entry of written reasons for departing from the guidelines sentence.

STATEMENT OF THE FACTS

Mr. Hill submits the following Statement of the Facts.

The victim in the instant case, Julie Gessler, a carnival worker, did not appear to testify at Mr. Hill's trial. Instead, her evidence taken at a deposition to perpetuate testimony was read to the jury. Ms. Gessler deposed that, while employed as delivery person from Domino's Pizza, she made a delivery to the Alpine Housing Authority at about 3:00 p.m. As she was leaving, she was stopped by a black male standing in a group of about twenty (20) others, who asked her to get a pizza for him (R 56-58). Ms. Gessler returned to the development with the pizza when it was ready (R 56). She was directed toward a building by the black male, who paid her for the pizza (R 61). After Ms. Gessler entered the building, the man turned toward her with a knife, telling her he wanted all her money (R 61). Ms. Gessler gave him about \$3.51 that she had in tips (R 63). Although he searched Ms. Gessler's car, no additional money could be found (R 64). At this point, a woman came up and asked Ms. Gessler to move her car because it was blocking the woman. The man let Ms. Gessler go, and she returned to the store (R 64).

Ms. Gessler told the police that the person who attacked her was five feet ten inches to six feet tall, weighed about 165 pounds, had a round face, and a short afro (R 66). On cross examination, she admitted she described the man's face as long (R 87) and that at a deposition she said he weighed between 140 and 150 pounds (R 97). She never mentioned that the man had scars on his face (R 98) as Mr. Hill did (R 77).

Ms. Gessler viewed a photo line-up about a week after the offense occurred, at which she picked out Mr. Hill's picture as that of her assailant (R 67). The detective conducting the line-up then told her that she had picked the person he suspected (R 92, See R 117). About a week later, Ms. Gessler viewed a live line-up (R 72) at which Mr. Hill was the only person who had also been depicted in the photo line-up (R 170). Ms. Gessler again picked him as the robber (R 75) and also identified him as such at the deposition taken to perpetuate her testimony (R 57).

Over Mr. Hill's objections, the two police officers were allowed to testify as to the account Ms. Gessler gave them of the robbery (R 111-113, 133, 140), as well as her description (R 114) and identification of her assailant (R 141, 148). In addition, the officers testified that when Mr. Hill was arrested, a knife similar to the one described by Ms. Gessler as used by the robber was found in his pocket (R 61, 116, 145).

SUMMARY OF ARGUMENT

POINT I

In State v. Jackson, 10 F.L.W. S.C.O. 564 (Fla. October 17, 1985), this Court adopted the Fourth District Court of Appeal's analysis in Boynton v. State, 10 F.L.W. 795 (Fla. 4th DCA March 27, 1985), requiring the trial court to provide written reasons for departure from a guidelines sentence.

POINT II

Introduction of a witness's prior consistent statements to bolster her trial testimony is improper. The error in allowing such tactics is magnified where the witness has not testified in person before the jury, but only on a deposition made to perpetuate testimony. Admission of the improper hearsay evidence in such circumstances constituted a violation of Mr. Hill's right to confront and cross examine the witness against him.

POINT III

A. A jury does not know from its own experience the factors which may lead to an erroneous identification by a crime victim of her assailant from police photographs. Mr. Hill's request for such specific instruction went far beyond the mere instruction that identity must be proven beyond a reasonable doubt, rejected by this Court in State v. Freeman, 380 So.2d 1288 (Fla. 1980).

Identity was Mr. Hill's sole defense at trial, so that the trial court's refusal to instruct the jury as he requested was reversible error.

B. The trial court refused to instruct the jury as to factors to be considered in assessing a witness's credibility, based on its own conclusion that although the witness's prior statement constituted a "significant variation", they were not "in the realm of inconsistency." Having conceded that the prior statements varied, the trial court erred in subrogating to itself the jury's proper function of determining to what extent the inconsistency rendered unreliable the witness's evidence given at trial. This was especially true where the witness in question was the key and only identifying witness against Mr. Hill, whose credibility with respect to her identification was the heart and soul of the State's case.

POINT IV

Where the trial court retained jurisdiction of Mr. Hill's sentence for the stated purpose of insuring that Mr. Hill would not be eligible for parole for five years, the court demonstrated a lack of awareness of the real effect of its fifteen year prison sentence, which may not have been imposed had the trial judge realized that the guidelines departure sentence it rendered would not be subject to parole.

ARGUMENT

POINT I

A TRIAL COURT REVERSIBLY ERRS ON DEPARTING FROM
THE SENTENCING GUIDELINES WITHOUT STATING ITS
JUSTIFICATION THEREFOR IN WRITING.

The ground has been cut from under the State's position by this Court's decision in State v. Jackson, 10 F.L.W. 564 (Fla. October 17, 1985), holding that the trial court is required to state in writing its reasons for departing from a guidelines sentence. Thus, the Fourth District Court of Appeal's decision in the present case so mandating must be affirmed.

POINT II

THE TRIAL COURT ERRED IN ALLOWING PROSECUTION
WITNESSES TO TESTIFY REGARDING PRIOR CONSISTENT
STATEMENTS MADE BY JULIE GESSLER.

A witness' testimony may not be bolstered by evidence of prior consistent statements. Thus, in Lamb v. State, 357 So.2d 437 (Fla. 2d DCA 1978), the defendant's conviction for aggravated assault was reversed where a police officer testified that the victim of the assault told him when he arrived at the scene basically the same story she gave at trial. Even more directly on point is Brown v. State, 344 So.2d 641 (Fla. 2d DCA 1977). In that case, the defendant was charged with committing a lewd and lascivious act in the presence of a child under fourteen. At trial, a police officer and the victim's mother testified as to statements made to the victim's mother by the child as to what happened. The victim testified to the same version. The conviction was reversed: "the net effect of the mother's testimony was to bolster and lend credence to the subsequent detailed testimony of the victim." Id. at 643.

In the present case, however, the State was allowed to elicit the following testimony from two police officers who investigated the robbery of Ms. Gessler:

Q Go ahead, officer, what did [Ms. Gessler] tell you?

A She told me that as she went to the location to deliver the pizza, a black male who had ordered the pizza came up from behind and put a knife in her back and demanded money from her.

(R 112).

* * *

Q What description did she give you?

A She said he was approximately six feet tall, approximately 165 pounds, he had a short afro type cropped hair. I believe she also mentioned that he was wearing a green muscle type sweatshirt, pullover shirt with blue jeans and that he was approximately 20 years of age.

(R 114).

* * *

And again:

Q What did she tell you, Officer?

A That she had delivered a pizza into the Alpine Village area and on her way out, she was stopped by a black male who asked to order a pizza and have it delivered back to the apartment in Alpine Village. She returned to Domino's Pizza on Davie Road Extension, which is a couple of blocks away from the Alpine Village area, had the order made up and returned with it to the entrance to Alpine Village. There she was met by the same person, a black male who ordered the pizza and he asked her to follow him down to the apartment and she drove her car down through the apartment complex, he ran alongside the car until they arrived at --

MR. WRUBEL: I have to object at this time. It has become a narrative and this is not going to the identification portions. Again, it is a violation of my client's Sixth Amendment right for cross-examination.

(R 134).

* * *

[Prosecutor] Would you pick up where you left off, sir.

A Okay, Miss Gessler had then delivered the pizza and met the black male who later ended up to be the defendant, at the entrance to Alpine

Village. He led her back to the apartment where he wanted it delivered to, at 3341 Alpine Village Drive.

When she got out of the car carrying the pizza, he was a few feet ahead of her. As they entered the building, it is a complex door that is a two level apartment complex and they didn't actually go into any specific apartment, but they entered the ground floor of the apartment and, at that point, after a couple of feet ahead of her, she said that when she caught up to him, he already had a knife in his hand and turned around at, at that point, put it up to her throat.

(R 140).

Mr. Hill's persistent, renewed objections to this tactic were consistently overruled by the trial court (R 17-18, 112-113, 133). In fact, the trial court strongly admonished defense counsel to quit making the objection and stating his grounds (R 135-139):

One thing I know for a fact, having once made the objection, the objection is preserved, and all the grounds upon which it is based is [sic] preserved unless I ask you to state specifically your grounds.

(R 136).

This exchange was noted and observed by the jury (R 311, See also, R 330-331).

Although an exception to the rule prohibiting prior consistent statements appears to exist where a witness's prior identification of the accused is concerned, Fla. Stat. § 90.801(2)(c), that exception cannot apply to the extensive reiteration of Ms. Gessler's complaint to the police which the prosecutor was allowed to elicit sub judice. Moreover, by having the police detail what Ms. Gessler told them, the State also impliedly

suggested that the police were convinced of the accuracy of Ms. Gessler's account of the robbery and the description of the assailant. Cf. Coleman v. State, 420 So.2d 366 (Fla. 1st DCA 1982).

The evidence in the present case hinged on the weight to be given Ms. Gessler's testimony, particularly as to her identification of Mr. Hill. Allowing her testimony to be bolstered by the police may well have tipped the scales against Mr. Hill in the jury's deliberations, as well as violating his right to confront and cross examine the key witness against him, guaranteed under the Sixth Amendment of the United States Constitution. The conviction must be reversed.

POINT III

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT
THE JURY AS REQUESTED BY MR. HILL.

A. THE TRIAL COURT ERRED IN REFUSING TO
INSTRUCT THE JURY AS TO MR. HILL'S SOLE
DEFENSE OF IDENTIFICATION.

Mr. Hill's sole defense at his trial below was that Ms. Gessler misidentified him as a result of indirect pressure and suggestion placed upon her by Detective Ewing, who conducted both the photo and live line-ups at which Ms. Gessler picked Mr. Hill as the person who robbed her. (R 254-263, 277-278). In order to enable the jury to intelligently assess the validity of Mr. Hill's defense, he requested that it be instructed in some detail regarding identification evidence (R 342-349). In particular, he requested that the jury be charged that identification testimony is opinion evidence, that it should consider the circumstances of identification, the opportunity for identification, and that the certainty of an identification is not conclusive as to its correctness (R 344, 345, 347, 349).

Mr. Hill's requested instructions thus went considerably beyond the mere statement that the defendant's identity as the assailant must be proven beyond a reasonable doubt, as sought in State v. Freeman, 380 So.2d 1288 (Fla. 1980). Here, what was necessary was detail which is neither a part of everyone's common knowledge nor contained in the standard jury instructions. Consequently, the holding in Freeman, supra, is not applicable to the present case. Instead, the trial court was required to

comply with the rule that a defendant is entitled to have the jury instructed on his defense, so long as there is any evidence to support it. Laythe v. State, 330 So.2d 113 (Fla. 3d DCA 1976). The standard jury instructions are no substitute for specific instructions on matters of defense. Dudley v. State, 405 So.2d 304 (Fla. 4th DCA 1981). See, United States v. Cain, 616 F.2d 1056 (8th Cir. 1980). Because the trial court refused to instruct the jury as to any of Mr. Hill's requested instructions on identification (R 185, 342-43), despite Mr. Hill's objections to the refusal (R 308), Mr. Hill was deprived of his right to due process and his convictions must be reversed for a new trial.

B. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS TO FACTORS TO CONSIDER IN ASSESSING THE CREDIBILITY OF JULIE GESSLER.

The Florida Standard Jury Instructions in Criminal Cases 2.04, provides that, where the evidence warrants it, the jury shall be instructed:

It is up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence, and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable, or less reliable than other evidence.

You should consider how the witnesses acted, as well as what they said. Some things you should consider are:

* * *

7. Had any pressure or threat been used against the witness that affected the truth of the witness' testimony?

8. Did the witness at some other time make a statement that is inconsistent with the testimony he gave in court?

Since Julie Gessler, the State's only witness as to the circumstances of the robbery and the only witness who could and did identify Appellant as the robber, had described her assailant at a deposition as weighing between 140 and 150 pounds (R 97) although at her deposition given to perpetuate testimony she stated that he weighed 165 pounds (R 66). Her deposition evidence thus certainly qualified as inconsistent with her subsequent testimony presented to the jury, despite the trial court's observation that it created only

A question as to reliability and believability, yes, but inconsistent on material fact, I don't think it quite qualifies.

(R 213).

because

Twenty pounds appears to be a significant variation, but I don't think it falls into the realm of inconsistency.

(R 212-213).

But surely whether an inconsistency in a witness's statements is sufficient to lend doubt to the witness's testimony is precisely the kind of question which the jury, aided by proper instruction, is empaneled to decide. This must be particularly the case where, as here, the key witness did not testify live, so that the jury was deprived of an opportunity to observe her demeanor, traditionally one of the major factors which are considered in determining the credibility to be given a witness's

testimony. Under such circumstances, it was especially critical that the jury be instructed completely and fully as to the law applicable to its evaluation of the evidence before it.

In addition to refusing to instruct the jury as to prior inconsistent statements, the trial court also declined to instruct the jury to consider whether a witness's testimony was the product of pressure, as set forth in paragraph seven (7) of the standard jury instructions quoted on page 13, supra. Mr. Hill's entire defense rested on his contention that it was the indirect but nevertheless significant pressure from Detective Ewing which influenced Ms. Gessler and resulted in her misidentification of Mr. Hill as the person who robbed her. See, Argument, Point IIIA, supra. This being the case, he was entitled to have the jury instructed as to this factor to be considered in assessing the validity of Ms. Gessler's testimony. The fact that the trial court allowed defense counsel to argue the matter to the jury (R 215, 227-228; 254-262) does not cure the error inherent in its refusal to adequately instruct the jury. Argument of counsel is no substitute for accurate jury instruction, since the jury is, after all, specifically admonished to take the law from the court's instructions rather than from the argument of counsel. Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981).

Therefore, the trial court's omission of matters from the jury instructions went to the heart of Mr. Hill's defense in the instant cause. Mr. Hill preserved this issue by his timely

objections to the trial court's refusal to properly instruct the jury (R 213, 227-228, 308). Consequently, the trial court's error in refusing to properly charge the jury must result in reversal of Mr. Hill's conviction for a new trial.

POINT IV

THE TRIAL COURT ERRED IN DEPARTING FROM THE
GUIDELINES BECAUSE OF ITS MISTAKEN BELIEF THAT
MR. HILL WOULD BE ELIGIBLE FOR PAROLE.

In sentencing Mr. Hill to fifteen (15) years in prison, the trial court also ordered that jurisdiction be retained over one-third of that sentence (R 375) "so you cannot obtain parole without the previous consent of this court for a period of five (5) years from the date hereof." (R 326). But a defendant sentenced under the sentencing guidelines is not eligible for parole for the duration of his sentence. A guideline sentence is a sentence to straight time, diminished only by gain time which may be earned. Knicht v. State, 455 So.2d 457 (Fla 1st DCA 1984).

It therefore appears that the trial court imposed its sentence in excess of the guidelines under a serious misapprehension of what the effect of that sentence would be. Thus, the trial judge expressed as his intention that Mr. Hill should actually be required to serve only five (5) years of his fifteen (15) year sentence. Yet the effect of his sentences will be to require Mr. Hill to serve almost three (3) times that amount of time before being released. In the fact of such a fundamental¹ discrepancy between the apparently intended sentence and the real

¹ Sentencing error such as that presented at bench is fundamental. State v. Rhoden, 448 So.2d 1013 (Fla. 1984).

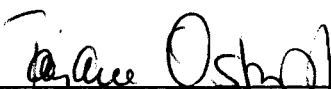
sentence imposed, this court should reverse and remand Mr. Hill's sentence for reconsideration in light of the proper standards. See, Albritton v. State, 10 F.L.W. S.C.O. 426 (Fla. August 29, 1984).

CONCLUSION

Based upon the foregoing Argument and the authorities cited therein, Appellant respectfully requests this Honorable Court to reverse the judgment and sentence of the trial court and remand this cause with such directives as may be deemed appropriate.

Respectfully submitted,

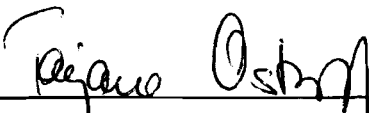
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to ROBERT L. TEITLER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 23rd day of October, 1985.



Of Counsel