OA 4-8-86 047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner
Cross-Respondent,

v.

CASE NO. 67,240

CHARLES WESLEY PRICE,

Respondent
Cross-Petitioner.

_____/

PETITIONER/CROSS-RESPONDENT'S BRIEF ON THE MERITS

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AUTHORITIES CITED

STATEMENT OF CASE AND FACTS

The statement of the facts and case is best understood when presented chronologically. So stated, the facts pertinent to the sole issue before the court are as follows:

On September 30, 1981, an information was filed against Charles Wesley Price charging him with one count of trafficking in methaqualone and one count of aggravated assault. These offenses were alleged to have been committed on May 22, 1981. (R 366)

Being represented by counsel and in the due course of pre-trial preparation, a demand for discovery was filed seeking, inter alia, the names of all persons known to the prosecution to have information relevant to the offenses charged. (R 375) A response to that demand was filed and appearing as one of those persons, was Sonya Lee Whitlow. (R 377) Ms. Whitlow had given a sworn statement to police authorities on May 22, 1981. (See state's exhibit #3 appearing in that volume of record on appeal entitled "Evidence"; R 165) The statement contains the essential facts that Whitlow went to the residence of Price on May 22, 1981, and asked him for two quaaludes. Price secured two quaaludes from a bag located beside the chair in which he was sitting. Whitlow left the apartment and returned to Investigator Cunningham, and gave him the two quaaludes.

The cause was subject to numerous continuances and postponements. Ultimately, however, the cause proceeded to trial. On May 6, 1982, Ms. Whitlow was called as a witness for the state. (Supp.R.2d, p.2) Upon initial questioning, defense

counsel suggested that the witness was attempting to invoke her rights under the Fifth Amendment. (Supp.R.2d, p.3) For reasons not appearing in this record, the defense evidently became aware that Ms. Whitlow was pr pared to testify exactly contrary to the statement she gave the police on May 22, 1981. This is evidenced by the fact that during the proceedings immediately following Whitlow's invocation of her Fifth Amendment right, counsel for Price noted the existence of the police statement and that the forthcoming "truthful" testimony that Whitlow had no knowledge of the drug nor did she receive any from Price could represent the basis for a charge of perjury. (Supp.R.2d, p.8) Further exchanges yeilded the state's intention that Whitlow would be given immunity for everything that occurred beginning on that date to that present time. (Supp.R.2d, p.13) The prosecutor and the defense counsel conferred with Ms. Whitlow and confirmed that fact. (Supp.R.2d, p.14)

Whitlow was then declared a court's witness and upon examination by the prosecutor, she essentially testified that she did not get any drugs from Price. (Supp.R.2d, p.20) On that same day, a mistrial was declared, but the reasons therefor are not revealed. (R 463)

In the meantime, by virtue of an interview held February 24, 1982, relating to a perjury charge against Whitlow, it was learned that when testifying in an attempted first degree murder trial against Price, (See state's exhibit #2 in "Evidence") the reason for Whitlow's lying was her fear for her life as the result of being threatened by one James Elliott. (Evidence,

p.2) Elliott told Whitlow that if she "ran her mouth," she would be shot before she left the courtroom and after that, her father and mother would be killed. Whitlow knew Elliott to have been convicted of a crime and that he was a friend of Price. According to Elliott, if Whitlow opened her mouth, Price said that Jimmy was the one to shoot her. Whitlow stated that an unnamed person (a picture of whom she picked out) gestured to her as she took the stand at trial imitating the firing of a gun at her (Evidence, p. 7) After the trial and Price's acquittal, Price thanked Whitlow and Elliott praised her for her testimony. Friends of Price told Whitlow that even before the trial, they were offered twenty-five thousand dollars ($25,000) to kill her. (Evidence, p. 8)

Apparently by virtue of the above interview, the state fully expected Whitlow to testify in accordance with her police statement of May 22, 1981. Indeed, the prosecutor told the jury in his opening statement that Whitlow had gone to the apartment and obtained the drugs from Price. (R 47) In fact, the prosecutor rather succinctly stated the entire crux of the matter thusly:

> That's our case. Ms. Whitlow saw Mr. Price bring the bag out, got the Quaaludes from him, brought them out, gave it to the cops, cops came in, found just what she said. (R 48)

The prosecutor specifically told the jury that Whitlow had, at a previous time, testified and had given inconsistent statements. (R 48) The jury was told that she would explain the reason for the prior inconsistent statements. No objection or any other form of complaint appears in the record at that point

in time.

Sonya Lee Whitlow Miller (hereinafter Whitlow) was called as a witness on behalf of the state. She testified that police officer Cunningham asked her to go into Price's apartment and make sure he was there. (R 88) Whitlow went into the apartment and asked Price if he had any quaaludes and the two walked back to the bedroom. Price gave her two quaaludes that she saw him retrieve from a bag which had been in the living room underneath or near a coffee table where Price was sitting. (R 91, 92) Whitlow left the apartment and gave the two quaaludes to Officer Cunningham. (R 93) At that point, Whitlow was asked if she had ever given statements under oath about the offense before. She replied that she had but that she had not always told the same story because her life was in danger. (R 95) The jury was then taken from the courtroom and on voir dire examination defense counsel established that James Elliott (but not Price) had communicated a threat to Whitlow if she did not lie in the instant prosecution. (R 96) A mistrial was then requested on the basis that no connection had been made between the threat and the defendant; no evidence was presented that Price had made the threats. (R 96,97) This ground was repeated several times in identical or varying forms. Defense counsel maintained that Whitlow was not permitted to so testify unless there was some evidence that the threat emanated from the defendant. (R 97) Defense counsel raised the spectre of speculation suggesting that an enemy of the defendant could communicate a threat to a witness and if that were allowed to come before the jury, it would create

the prejudicial impression that Price was essentially, a bad person. (R 98) Objections were overruled and the motion for mistrial was denied, the court holding that a defendant who has a third person communicate a threat to a witness cannot be insulated from that fact being made known to the jury. (R 100)

Whitlow began to testify regarding the nature of the threats made by James Elliott. The jury was then removed, and on proffer, she said that Elliott told her that if she walked into a courtroom about anything that Price had done which caused him to get "locked up", she would be a dead person. (R 104) As a consequence, she was afraid to testify since Price, James Elliott, and his brother John had beaten her five years ago. (R 104) Whitlow testifed further that James Elliott never allowed her out of his sight. She didn't go anywhere without him beside her, watching every move she made. (R 107) She testified that Elliott and Price were friends and that they had lived together. (R 108) Defense counsel objected to that particular testimony on the grounds that it was an attempt to "get some guilt of threats by association". (R 109) Perhaps as a consequence, when the jury was brought back in, the state only examined the witness regarding the threat to the effect that Elliott told Whitlow that if she testified against Price, and told the truth about anything, she would be shot. (R 112) On cross-examination, Whitlow also testifed that James Elliott would spend hours with her rehearsing her testimony and telling her what to say. (R 156) In fact, he even bonded her out of jail on the perjury charge. Elliott told her that if she wanted to stay alive, she

would testify as he directed. (R 157)

Price was convicted of the lesser included offense of attempted trafficking in methaqualone. (R 436) As one of several issues presented on appeal, Price contended that the trial judge erred in denying his motion for mistrial, presenting the essential contention that the threats from Elliott were insufficiently linked to him such that undue prejudice in the minds of the jury was created by virtue of the evidence. (See Appendix, pp. 5, 13)

On May 23, 1985, the court of appeal rendered its decision holding that the evidence of Whitlow's prior inconsistent statement was untimely and thus improperly admitted such that reversible error was committed in denying the motion for mistrial. Price v. State, 469 So.2d 210 (Fla. 5th DCA 1985)

This court accepted jurisdiction on January 29, 1986, and the cause is now before the court.

SUMMARY OF ARGUMENT

The temporal propriety of introducing the witness's prior inconsistent statement was neither objected to nor pointedly raised as an issue on direct appeal. The objection and derivative appellate contention was that the threat to the witness and the defendant were not properly linked in terms of evidence.

Aside from the above, the facts and circumstances in this particular case portray the state's introduction of the prior statement as an effort to enhance the credibility of the witness rather than an attempt to impeach its own witness. Credibility enhancement, under the circumstances present in this case, did not deprive the defendant of any rights and, allowing the state to so proceed was not reversible error.

QUESTION PRESENTED

WHETHER A PARTY, WHEN EXAMINING ITS OWN WITNESS IS PERMITTED TO ELICIT THE FACT OF PRIOR INCONSISTENT STATEMENTS WHEN THE PURPOSE OF SUCH QUESTIONING IS NOT TO IMPEACH THE WITNESS BUT RATHER TO ENHANCE THE WITNESS'S CREDIBILITY THROUGH ANTICIPATORY REHABILITATION.

ARGUMENT

On this issue, the district court held that while the evidence relating to the threats made to the witness would have been proper had it come during rebuttal in an effort to rehabilitate the witness who had been impeached on cross-examination, its presentation during direct examination was untimely and thus its admission constituted reversible error.

Before discussing the merits of the issue and the holding of the district court, appellee considers it propitious as an initial consideration to offer its respectful suggestion that the issue decided by the court of appeal was not the same one Price specifically raised. Attached to this brief in the appendix are excerpts of Price's main brief and reply brief on direct appeal relating to this particular issue. Even a casual reading of Price's initial brief quickly shows that his chief complaint was that the evidence never established that he ever threatened the witness or had knowledge of the threats or was in any other way responsible for them. (App. 5-6) Quite properly, he quoted that part of the trial record wherein his attorney requested a mistrial based on the fact that there was no evidence showing that the threat actually emanated from Price. (App. 8) Price summarized his argument contending that the evidence created the

unsupported impression with the jury that he was somehow responsible for the threats. This position was amplified and specifically repeated in his reply brief. Again, Price relied on the necessity of showing a link between the threats and him. Most importantly, he specifically stated:

> In any event, the Appellant is not contesting in this point on appeal the admission of Whitlow's own subjective and fearful state of mind, but rather the admission of her testimony that Elliott expressly and affirmatively threatened to kill her if she testified. (App. 5)

Interestingly, the above quoted statement is the appellate extension of the thought expressed in the first trial thusly:

> And what possible relevance does her statement that she made some statement to some officer have on the guilt or innocence of this defendant? (Supp.R.2d, p. 32)

All of the above leads rather convincingly to the conclusion that Price's chief complaint regarding this phase of trial was not that the witness had previously made an inconsistent statement nor that the jury was being told of the inconsistent statement; what was not to his liking was the reason given for the inconsistent statement, i.e., threats made by Elliott on his behalf. Of more interst is the fact that the "no-link" argument was made despite the fact that evidence of a link between Price and the threats was made the basis on an objection on the very grounds of associative guilt! (R 109) In other words, the proffered testimony that Price and Elliott were friends, knew each other very well, and had been roommates provided the evidentiary link which Price successfully prevented from being

established. He then used this absence of evidence to argue reversible error on appeal -- the very best of both worlds.

Despite the above, the district court took the claim to a point far in excess of the issue framed by the trial record. At no time did Price ever complain about anticipatory rehabilitation nor the timeliness of the presentation of the prior inconsistent statements. We have taken the time to mention this feature since regardless of how the ultimate issue is resolved by this court, its application will and must be governed by the particular facts and circumstances of this case.

As this court well knows, criminal trials involving drug cases rarely, if ever, provide a model of testimonial clarity, letter-perfect evidence, or ideal appellate records. Invariably, it seems that prosecution for drug offenses redounds to testimony from law enforcement authorities, chemists, and informants. The latter are often times themselves involved with drugs. This case is no exception.

Despite opinions and views one may have towards informants in drug deals, their credibility in the eyes of the trier of fact is at the very least critical. This notion is particularly compelling in this case.

Sonya Whitlow Miller, within an hour of the incident, gave a

sworn statement to the police reflecting the essential facts that she had obtained drugs from Price at his apartment. At the first trial, the defense clearly anticipated testimony from her which would have specifically contradicted the contents of that statement. The expected testimony was considered by the defense at that time "truthful". (Supp.R. 2d, p. 8) By virtue of a susbequent statement, however, it was learned that the witness had given false testimony before and that the reason therefor was due to threats on her life. We think it reasonable therefore that the defense expected her to testify at the second trial more along the lines provided in her first police statement. Indeed, the prosecution clearly informed the jury that they were going to hear evidence of prior inconsistent statement as well as an explanation for those statements. (R 48)

As the prosecutor told the jury in his opening statements, the case against Price consisted very, very substantially on the testimony of Ms. Whitlow. (R 48) Given her prior inconsistent statements and the rather obvious likelihood that wholesale impeachment, would be attempted based on those statements, the prosecution, in an effort to bolster credibility and soften impeachment, very candidly attempted to show the jury that although Ms. Whitlow was its witness, she had nevertheless testified differently on a previous occasion. We submit that this effort had nothing to do with untimely rehabilitation nor did it represent an attempt to impeach the state's own witness. Rather, we respectfully suggest that what the state did in this case may be more prooerly described as enhancing the credibility

of the witness, a process not without precedent.

In Jacobson v. State, 375 So.2d 1133 (Fla. 3d 1979), the prosecution was faced with presenting its case by virtue of witnesses who were former associates and members of the defendant's criminal organization. The witnesses, most of whom were in federal custody at the time of trial, were granted immunity for cooperation with the prosecution and the prosecution elicited the fact of immunity during direct examination. Relying on several of its previous decisions relating to the right to cross-examination which might bear on bias or self-interest, the district court held that the prosecutor was justified in anticipating the attack upon the credibility of the witnesses by virtue of their past criminal background. The court was of the opinion that such information was equally valid whether brought out on direct or cross examination.[1] At attempt to enhance the credibility of a witness should not be subservient to considerations of timeliness of the introduction of evidence.

Even if one were to consider the process, as did the court below, as anticipatory rehabilitation, such a procedure does

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[1] The notion of credibility enhancement as it applied to a federal prosecution under Rule 607 of the Federal Rules of Evidence was discussed in United States v. Hedman, 630 Fed.2d 1184, 1198 (7th Cir. 1980) cert. denied, 450 U.S. 101 S.Ct. 1481, 67 L.Ed.2d. 614 (1981). It was observed that informing the jury of a witness's immunity, even on direct examination, aides assessment of credibility as well as frequently providing a convenient opening for more exploration of a fertile area on cross-examination. Cf. United States v. Medical Therapy Sciences, Inc., 553 F.2d 36 (2d Cir. 1978) cert. denied, 439 U.S. 1130, 99 S.Ct. 1049, 59 L.Ed.2d 91 (1979).

little or nothing to deprive a defendant of any rights. This was recognized by the Second District Court of Appeal in Bell v. State, 473 So.2d 734 (Fla. 2d DCA 1985). There, the court properly considered the elicitation of the existence of prior inconsistent statements as not altering the totality of the testimony heard by the jury, nor, and we submit more importantly, did it impair the jury's task of determining the truth--the object of any judicial investigation or trial. See, Brannen v. State, 114 So. 429 (Fla. 1927). The Bell court elaborated on rehearing in response to and despite the decision in the instant cause, and held that provided that the objective of such questioning is the bolstering of credibility, then no violation of the rule against impeachment of one's own witness is committed. Bell v. State, 10 F.L.W. 1396 (Fla. 2d DCA June 7, 1985,) See also, Sloan v. State, 472 So.2d 488 (Fla. 2d DCA 1985).

In summary, the state submits that whether considered anticipatory rehabilitation or more properly as credibility enhancement, the procedure utilized in this case violated no rule of procedure nor deprived Price of any rights. Facts and circumstances unique to this case quickly show that witness Whitlow was nothing of a surprise to the defense. (In fact, the defense might have been pleasantly surprised when it learned that she intended to testify favorably to the cause in the first trial.) All her statements and testimony were fully known by the defense as well as her anticipated testimony before the start of the second trial. Defense was told that her inconsistent statements would be revealed to the jury and to say that they

formed the basis of an exhausted, exploratory cross-examination is to make a classic understatement. The jury heard only that her prior inconsistent statement was made in fear of threats communicated by a friend of Price. It was at the very most harmless error, if error at all. The appropriate test in determining this was aptly set forth in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946):

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. (Citation omitted). But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substanitally swayed by the error, it is impossible to conclude that substantial rights were not effected. The inquiry cannot be merely whether there was enough to support the results, apart from the phase effected by the error. It is rather even so, whether the error itself has substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. 66 S.Ct. at 12 48.

Applying the above, there is extreme doubt that the action complained of substantially affected the rights of Price especially when the right being discussed is neither constitutionally based nor specifically identified.

CONCLUSION

Based on the above and foregoing, the State of Florida submits that the decision of the Fifth District Court of Appeal be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Samuel R. Mandelbaum, Esquire, Attorney for Respondent, 701 N. Franklin Street, Tampa, Florida 33602, this 18th day of February, 1986.

Of Counsel