OA 4-14.86 Rq sqft 007

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/
Cross-Respondent,

v.

CHARLES WESLEY PRICE,

Respondent/
Cross-Appellee.

_____/

CASE NO. 67,~~420~~ 240

PETITIONER/CROSS-RESPONDENT'S

REPLY BRIEF ON THE MERITS

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TOPICAL INDEX

AUTHORITIES CITES

STATEMENT OF THE CASE

Price objects to our reference to that part of the record on appeal contained in the volume marked "Evidence" on the basis that an interview of witness Miller was never "placed into evidence or referred to at either of the two trials in this cause." (Respondent's brief, p. 1) This objection is unfounded since the contents of that volume were presented in the record on appeal and therefore were before the court whose decision is being reviewed in this proceeding.

ARGUMENT IN REPLY

With very little in direct response to our position, Price maintains that the decision of the district court should be affirmed and presents several reasons which we will discuss in turn.

As his first reason, Price presents the rather weak contention that the state was not justified in anticipating the impeachment of the witness for the very simple reason that trial counsel informed the court that he planned not to impeach the witness. Trial counsel stated that he was only going to ask the witness "one single question" and if impeachment was had, it would have been with general character and reputation testimony. Price obviously opts for the firm and hard rule that anything any lawyer says in open court must necessarily bind the other party.

To utilize counsel's remarks for the basis of this argument is to overlook the facts and circumstances of this particular case. It is to be remembered that the prosecutor fully and openly communicated that the inconsistent statement of the witness would be revealed as well as the reason for those inconsistent statements. (R 48) It will also be remembered, that without that witness, in all likelihood, there was no case against Price. In light of this, to even suggest that this particular attorney, both experienced and able in criminal law, was actually not going to impeach the sole incriminating witness against his client is to simply ignore the realities of life and the very record in this case which contains perhaps one of the

most vigorous attempts at impeachment ever seen. We dare say that had the state not even mentioned the matter about prior inconsistent statements and the reasons therefor, and had counsel asked but the one promised question, then an issue of effective assistance of counsel would have certainly arisen. We suggest that this argument for affirmance on behalf of the district court is utterly untenable.

As his second reason, Price relies on the general proposition that a party cannot impeach its own witness on direct examination. With that general statement we have no quarrel. However, this case fails to factually support the allegation that the state was either attacking the credibility of the witness or impeaching her on direct examination. We repeat that the sole objective of informing the jury of the prior inconsistent statements and the reasons for those statements was to enhance the credibility of a witness who, for all the record shows, was ostensibly someone not readily worthy of belief. It would have been a different situation had the witness testified as she did in the <u>first</u> trial and the state was attempting to impeach her with the first police statement in an effort to utilize that inconsistent statement as substantive evidence. What occurred at trial was not an attack on credibility; it was an enhancement of incredibility.

Price presents the third reason that the witness's testimony was "too" prejudicial. We certainly agree that the testimony was prejudicial -- the presentation of prejudicial evidence is the objective of all criminal prosecutions. But the question is not

restricted solely to consideration of prejudice. Rather, the issue is whether the prejudicial evidence has been presented in observance of established legal rights of the accused. Price says the prejudicial effect outweighed the relevance of the testimony. His position apparently urges adoption of a rule that if a party threatens a witness against him with death or bodily harm if the witness testifies truthfully, then such an act is not "relevant" to the truth-finding process. We think the merit of such a position, or lack of it, is readily discernable.

The fourth reason Price presents has been made the subject of our motion to strike filed on or about March 14, 1986. For the reasons contained in our motion, this ground is without merit either procedurally or because the facts in Lawhorne v. State, 481 So.2d 19 (Fla. 3d DCA 1986) are materially different than those involved here. (See Motion to Strike)

Finally, Price says that we are "barred" from presenting the position that the actual issue decided by the district court was not that precisely raised in the appeal. He offers no authority for this proposition and apparently would be content to have this court improperly decide the issues in a given case. Whatever transpired below is of no moment; what is important is that this court has been candidly informed that the issue decided by the district court was something not entirely supported by the record in this case. This is crucial since whatever the resolution of the general legal issue involved in this and the companion cases, application of the principal will necessarily be affected by the particular facts and circumstances appearing in this record.

ARGUMENT IN REPLY TO POINT ON CROSS-APPEAL

POINT ONE

Parenthetically, Price's decision to pursue the issue made the basis of his cross-petition for discretionary review completely undermines his fifth reason (previously discussed on page 4) why the court should affirm the district court of appeal. If it were not true that the issue decided was not the one raised, then why does Price continue to argue that there was no link between the threats and himself? In other words, by continuing to present the no-link argument, Price concedes that it was the same and only argument presented to the district court below. Thus, the holding of the district court was not in response to the argument presented.

Price's essential contention that testimony indicating that a witness has been induced to falsely testify for a defendant is inadmissible unless it can be shown that the threats were made by the defendant or with his knowledge is a perfectly accurate statement of law. The authorities he cites perfectly support this proposition of law. We have no quarrel with it. However, it is important to remember that any evidence which even began to show that the threats physically delivered by Elliott came at the direction and/or knowledge of Price was specifically objected to.

After testifying about the events of the crime, Whitlow, in response to the question why she had not told the same story as she had told then in court, responded that it was because her life was in danger. (R 95) Upon request, the jury was removed from the courtroom and defense counsel established that James

Elliott and not Price, had communicated a threat to the witness. (R 96) Even though the jury was not in the courtroom and had heard up until that point only that the witness's life was in danger, defense counsel moved for a mistrial, and the defense consistently repeated that the testimony thus far had not established a link between the threat and the defendant. The jury was brought back into the courtroom and heard that the witness came to fear of her life by virtue of something said by James Elliott. (R 101) When asked what that something was, defense counsel objected on the basis of hearsay. Id. The state responded that the statement was being offered not to prove the truth of the matter asserted but rather as a reason why the witness had testify inconsistently in the past. Id. The objection was overruled and upon request of the defense the jury was instructed about an exception to the hearsay rule and told that statement was simply being offered for the purpose of explaining conduct and that the truth of the particular statement was not for their consideration and that it was not an issue before them. (R 102) After establishing facts that the witness was in a courtroom involving a matter against the defendant Price, the state asked, again, what Elliott had said to the witness. (R 103) The defense objected claiming irrelevance, no evidentiary value, and prejudice. Id. The jury was again removed. Extensive questioning on voir dire examination by both parties revealed that Elliott had warned the witness that if she said anything in a courtroom that would have caused Price to get "locked up", she would be a dead person. (R 104) As a direct

result of that she was afraid to testify since Price, Elliott and his brother John had beaten her up and cut all her hair off. (R 104) Elliott never allowed the witness out of his sight and, she did not go anywhere without him beside her, watching every move she made. (R 107) Elliott and Price were friends and they had lived together. (R 108)

In light of appellate arguments and the contentions presented here, counsel then made the remarkable objection that the testimony relating to the relationship between Price and Elliott was prejudical because it tended to establish some guilt of threats by association. Again, as we noted in our initial brief, Price first objected that the threat had not been shown to have emanated from him or in any way been his responsiblity, and then when it appeared that such evidence was forthcoming, he objected to its introduction on the basis of providing the very link he complained was missing in the first place! If the record fails to show a sufficient link between the threats Elliott made to the witness and Price, then it is the direct result of Price's own doing. We are confident that had no objections been made, the state would have able to conclusively show that Price was directly responsible for the threats.

Interestingly, while the state may not have had the opportunity to present all it could regarding the link, the evidence in this record still produces the proper conclusion that Price was responsible for the threats. On cross-examination it was established that Elliott would spend hours with the witness rehearsing her testmiony and telling her what to say. (R

156) Elliott had bonded the witness out of jail on the perjury charge. He told her that if she wanted to stay alive she would testify as he directed. (R 157) The logical inference and reasonable deduction from that evidence alone is that Elliott was acting at the behest of Price. The link was thus established.

POINT TWO ON CROSS-PETITION

Regarding the sentencing issue, Price acknowledges that this issue was not made the basis of any decision by the Fifth District. Jurisdictionally therefore, it would appear that there is no need for further review. Prior to the recent amendments to the Florida Constitution evidencing a desire to further restrict the jurisdiction of this court, the court has stated that once the conflict of decisions which brought a case to the court has been resolved, there is no need to re-decide other issues which were reviewed by the district court. Berezovsky v. State, 350 So.2d 80 (Fla. 1977). If that statement was compelling prior to the constitutional amendment, then it should have even more force today.

Should the court, however, choose to pass on this issue, we suggest that the authority Price presents in support of his claim of error is that which requires affirmance, i.e., Lindsey v. State, 453 So.2d 485 (Fla. 2d DCA 1984). While it is true that the court in Lindsey prohibited the use of speculation as a proper basis for departure, Price fails to divulge that the court there reviewed a departure based on two findings, only one of which was speculation. The sentencing judge in Lindsey stated facts which came out during the trial which showed that Lindsey was a drug dealer. As to that finding, the court held that the judge could properly take into consideration that fact based on facts which were revealed during trial.

Here, the trial judge chose to believe the witness and found as fact, that Price had intimidated, threatened and coerced

witnesses and was thus a serious threat to the community. (R 438) Whether Price agrees with that finding is immaterial; what is important is that the sentencer so found it. Accordingly, there is a clear and convincing reason for departure; it just happens to be one with which Price does not agree.

As an aside, we note that at the sentencing hearing, the trial court found that Price was obviously engaged in dealing with controlled substances. (R 362) While we are aware that the written findings are what controls, we mention this fact only to suggest that the trial court abused no discretion in departing since he also observed that unless the witness just happened to have given testimony completely on her own, it was assumed that Price had the responsiblity of the threat. (R 363)

That Price intimidated, threatened, and coerced a witness is a fact with evidentiary support in the trial record. It thus represents an adequate basis as providing clear and convincing reasons for departure. The sentence was proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner has been furnished by U.S. mail to Samuel R. Mandelbaum, Esquire, Attorney for Respondent, 701 N. Franklin Street, Tampa, Florida, 33602, this 19th day of March, 1986.

Of Counsel