IN THE SUPREME COURT OF FLORIDA

CASE NO.

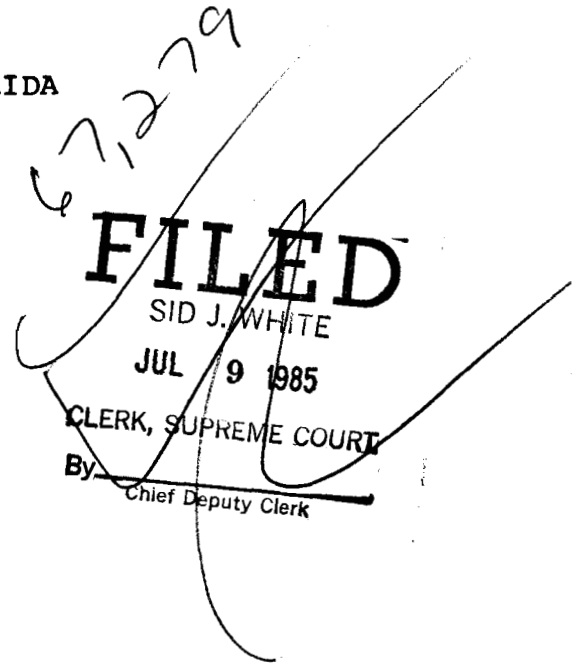
HENRY LAVADO, JR.,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of
Florida
1351 Northwest 12th Street
Miami, Florida 33125

HOWARD K. BLUMBERG
Assistant Public Defender

Counsel for Petitioner

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INTRODUCTION

Petitioner, Henry Lavado, Jr., was the defendant in the trial court, and the appellant in the District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court, and the appellee in the District Court of Appeal. In this brief, the parties will be referred to as they stood in the trial court. All references are to the defendant's appendix, paginated separately and identified as "A", followed by the page numbers.

STATEMENT OF THE CASE AND FACTS

The defendant, Henry Lavado, Jr., was tried on a charge of armed robbery (A. 1). During the voir dire examination of prospective jurors, defense counsel, seeking to learn of their attitudes about voluntary intoxication as a defense to the charge, stated as a predicate to his inquiry that specific intent was an essential element of the crime of robbery (A. 1, 5). The trial judge advised defense counsel that it was "not proper on a jury selection to go into law," but allowed counsel to inquire as to prospective jurors' bias against drinking in general (A. 1, 5). Defense counsel advised the court that it was the prospective jurors' attitudes concerning voluntary intoxication as a defense to a crime, not their attitudes about drinking, that he sought to elicit (A. 1-2, 5). Defense counsel then proffered the nature of the inquiry he sought:

> "One of the elements for the crime is that the defendant have specific intent to deprive the owner of his property and one of the defenses to the crime of robbery especially and specifically this element, is that of voluntary intoxica-

> tion. I was going to ask the jury questions, elicit answers, dealing with their ability to entertain or accept the premise of voluntary intoxication as a defense.

(A. 1-2, 5). The court ruled that defense counsel would be allowed to ask general questions concerning the prospective jurors' willingness to follow the court's instructions, but denied defense counsel the opportunity to conduct the inquiry which he had proffered to the court (A. 2, 4, 5).

On appeal to the District Court of Appeal, Third District, this denial was upheld and the defendant's conviction was affirmed (A. 1-9). The majority opinion based its affirmance on the following rule of law:

> A prospective juror's bias or prejudice may be elicited through specific questions and answers but their disposition as to whether or not they would entertain a particular defense is not appropriate.

(A. 2). Judge Natalie Baskin concurred in the majority opinion, expressing her belief that the opinion "correctly states the applicable law." (A. 4). Judge Daniel Pearson dissented from the majority opinion:

> If he knew nothing else about the prospective jurors, the single thing that defense counsel needed to know was whether the prospective jurors could fairly and impartially consider the defense of voluntary intoxication. Despite this, the majority approves a ruling which precluded counsel from asking the prospective jurors about their bias or prejudice against this defense. As the sole authority for its position, the majority refers to the distinguishable and, indeed, already distinguished, case of Dicks v. State, 83 Fla. 717, 93 So. 137 (1922), and to some generalization about jurors obeying their oaths to follow the court's instructions on the law. I believe the majority is as wrong as it would have been had it approved a ruling which denied counsel the right to question prospective jurors altogether.

(A. 5) (footnote omitted).

Notice of invocation of this Court's discretionary jurisdiction to review the decision of the District Court of Appeal was filed June 27, 1985.

SUMMARY OF ARGUMENT

In the instant case, the Third District Court of Appeal announced the following rule of law:

> A prospective juror's bias or prejudice may be elicited through specific questions and answers but their disposition as to whether or not they would entertain a particular defense is not appropriate.

(A. 2). This rule, which totally precludes any inquiry of prospective jurors as to their ability and willingness to entertain a particular defense directly conflicts with two decisions from this Court and two decisions from other district courts of appeal which hold that the scope of inquiry on voir dire properly includes questions concerning the prospective jurors' attitudes toward the legal doctrines involved in the case.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN PAIT v. STATE, 112 So.2d 380 (Fla. 1959) AND POPE v. STATE, 84 Fla. 428, 94 So. 865 (1922), AS WELL AS THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN JONES v. STATE, 378 So.2d 797 (Fla. 1st DCA 1979), cert. denied 388 So.2d 1114 (Fla. 1980) AND THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN WASHINGTON v. STATE, 371 So.2d 1108 (Fla. 4th DCA 1979).

This Court's jurisdiction to review decisions of district courts of appeal because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced in a district court or Supreme Court decision, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior district court or Supreme Court decision. Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960). In the instant case, the Third District Court of Appeal announced a rule of law which conflicts with a rule previously announced by this Court in Pait v. State, 112 So.2d 380 (Fla. 1959) and Pope v. State, 84 Fla. 428, 94 So. 865 (1922), by the First District Court of Appeal in Jones v. State, 378 So.2d 797 (Fla. 1st DCA 1979), cert. denied 388 So.2d 1114 (Fla. 1980), and by the Fourth District Court of Appeal in Washington v. State, 371 So.2d 1108 (Fla. 4th DCA 1979). Accordingly, this Court's exercise of its discretionary jurisdiction to review the decision in the instant case is warranted.

In the case at bar, the defendant was charged with armed robbery and his defense was voluntary intoxication. During his questioning of prospective jurors, defense counsel sought to learn of the jurors' attitudes about voluntary intoxication as a defense

to the charge. As a predicate to such inquiry, defense counsel stated to the jurors that specific intent was an essential element of the crime of robbery, whereupon the trial judge advised defense counsel that it was "not proper on a jury selection to go into law." (A. 1, 5). The judge stated that defense counsel could inquire as to prospective jurors' bias against drinking in general, but counsel advised the court that it was the prospective jurors' attitudes concerning voluntary intoxication as a defense to a crime, not their attitudes about drinking, that he sought to elicit. Defense counsel then proffered the nature of the inquiry he sought:

> "One of the elements for the crime is that the defendant have specific intent to deprive the owner of his property and one of the defenses to the crime of robbery, especially and specifically this element, is that of voluntary intoxication. I was going to ask the jury questions, elicit answers, dealing with their ability to entertain or accept the premise of voluntary intoxication as a defense."

(A. 5). The court ruled that defense counsel would be allowed to ask general questions concerning the prospective jurors' willingness to follow the court's instructions, but denied defense counsel the opportunity to conduct the inquiry which he had proffered to the court.

In upholding this denial, the Third District Court of Appeal announced the following rule of law:

> A prospective juror's bias or prejudice may be elicited through specific questions and answers but their disposition as to whether or not they would entertain a particular defense is not appropriate.

(A. 2). This rule of law, which totally precludes any inquiry of prospective jurors as to their ability and willingness to entertain a particular defense, directly conflicts with the decisions in Pait

v. State, supra, Pope v. State, supra, Jones v. State, supra, and Washington v. State, supra, for in each of those decisions it was held that where a juror's attitude about a particular legal doctrine was essential to a determination of whether challenges for cause or peremptory challenges were to be made, the scope of voir dire properly included questions about and references to that legal doctrine.

In Pait v. State, supra, this Court held that the trial court had not erred in allowing the prosecutor to propound questions to prospective jurors on voir dire concerning their attitudes toward a finding of guilt on a homicide charge based solely on a theory of felony murder. In Pope v. State, supra, this Court found no error where the prosecutor was allowed by the trial court to explain the legal doctrine of criminal responsibility of aiders and abettors to prospective jurors and then ask those jurors if they would render a verdict of guilty if the evidence established all the necessary elements to support a conviction under that doctrine.

In Jones v. State, supra, the court held that the trial judge had erred in refusing to permit defense counsel to ask potential jurors questions on voir dire concerning specific legal doctrines applicable to the case:

> Subject to the trial court's control of unreasonably repetitious and argumentative voir dire questioning, counsel must have an opportunity to ascertain latent or concealed prejudgments by prospective jurors which will not yield to the law as charged by the court, or to the evidence. For that purpose counsel must be permitted to inquire of prospective jurors concerning their willingness and ability to accept the court's charge in a criminal case concerning the presumption of innocence, the state's burden of proof in respect to each element of the offense charged, and the defendant's right not to testify, if the court

> has not first thoroughly examined the prospective jurors on those subjects.

378 So.2d at 797-98.

The conflict between the rule of law announced in this case precluding any inquiry of prospective jurors as to their ability and willingness to entertain a particular defense, and the decision in Washington v. State, supra is particularly glaring. In Washington, the court held that a restriction on defense counsel's questioning of prospective jurors concerning the defense of insanity was improper:

> By reason of the ground rules as set forth by the court, the defense was unable to examine the jury concerning the defense of insanity. The defendant filed his notice of intent to rely upon an insanity defense and to prohibit a voir dire examination of prospective jurors concerning that defense is error.

371 So.2d at 1109.

Thus, Washington, as well as Jones, stands for the general proposition that defense counsel must be allowed to question prospective jurors concerning specific legal doctrines applicable to a case. However, in addition to this fact, which standing alone establishes a conflict with the rule of law announced in this case, the specific legal doctrine which the court in Washington held that defense counsel had a right to ask questions about in voir dire is very similar to the specific legal doctrine concerning which defense counsel in the instant case was precluded from questioning prospective jurors. The dissenting opinion in this case notes the similarity between the two doctrines:

> Like the defense of insanity, the defense of voluntary intoxication suggests that the accused was incapable of forming or entertaining the intent necessary to commit the crime charged. Both defenses concede the commission of the acts and request the jury to excuse the conduct. Because, as is well known, such defenses are

> disfavored by a large segment of the public, it is all the more critical that counsel be able to explore with prospective jurors their attitudes about these defenses.

(A. 7) (footnote omitted).

Indeed, the nature of the defense of voluntary intoxication renders the likelihood of juror prejudice against such a defense even greater than the likelihood of such prejudice in a case involving an insanity defense. Although a defendant raising an insanity defense concedes the commission of a criminal act and asks the jury to excuse his conduct, the basis for this request is a mental condition over which the defendant has no control. Where a defendant presents a defense of voluntary intoxication, however, not only does he concede the commission of a criminal act and ask the jury to excuse his conduct, he asks the jury to excuse his criminal conduct because of a mental condition which he himself voluntarily brought on by taking large quantities of drugs or alcohol. The potential for juror prejudice against such a defense is extremely high, and this potential for prejudice establishes an even greater necessity for voir dire inquiry concerning the defense of voluntary intoxication than for voir dire inquiry concerning the defense of insanity. In light of this fact, the decision in Washington requiring that defense counsel be given the opportunity to question prospective jurors concerning the defense of insanity cannot be reconciled with the decision in the instant case which precludes any inquiry of prospective jurors concerning the defense of voluntary intoxication.

The only decisions cited by the majority opinion in support of its announced rule totally precluding any inquiry of prospective jurors concerning their ability and willingness to entertain a

particular defense are Dicks v. State, 83 Fla. 717, 93 So. 137 (1922) and Saulsberry v. State, 398 So.2d 1017 (Fla. 5th DCA 1981). Neither of these decisions support such a complete restriction on the questioning of prospective jurors. In fact, the Dicks case was distinguished by this court in Pope v. State, supra, where this Court held that the scope of voir dire properly included questions to prospective jurors concerning their attitudes toward the legal doctrine of criminal responsibility of aiders and abettors. The nature of the distinction drawn by this Court in Pope, and its applicability to separate this case as well as Pope, from Dicks and Saulsberry, is detailed in the dissenting opinion in this case:

> In Pope, the court distinguished Dicks v. State, 93 So. 137, on the ground that the "nature and purpose of the question in this case are quite different" from the one propounded in Dicks. While the difference is slight, the defendant in Dicks could be deemed to have been asking whether the jurors would acquit based on hypothetical testimony rather than asking jurors about their attitudes toward the defense of self-defense. Accepting that as the distinction, it is clear that in the present case, the defendant was not proposing to ask the jurors whether they would convict or acquit based on certain hypothetical testimony, but was proposing to ask whether the jurors were so biased against the defense of voluntary intoxication that they would reject it without regard to what the evidence showed.

(A. 7).

There is simply no authority to support the drastic restriction on questioning of prospective jurors effected by the rule announced by the Third District Court of Appeal in this case, and that rule stands in direct conflict with the decisions in Pait v. State, supra, Pope v. State, supra, Jones v. State, supra, and Washington v. State, supra. The devastating effect of the rule announced in

this case is correctly described in the dissenting opinion:

> I believe the majority is as wrong as it would have been had it approved a ruling which denied counsel the right to question prospective jurors altogether.

(A. 5). This Court's exercise of its discretionary jurisdiction is necessary to remedy the conflict of decisions created by the decision in this case.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of
Florida
1351 Northwest 12th Street
Miami, Florida 33125

By: _____
HOWARD K. BLUMBERG
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 3rd day of July, 1985.

_____
HOWARD K. BLUMBERG
Assistant Public Defender