OA 5-6-86 047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,279

HENRY LAVADO, JR.

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON THE MERITS

JIM SMITH
Attorney General
Tallahassee, Florida

RANDI KLAYMAN LAZARUS
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
(305) 377-5441

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INTRODUCTION

The Respondent was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The Petitioner, was the defendant in the trial court and the appellant in the Third District Court of Appeal.

In this brief, the parties will be referred to as they appear before this court.

STATEMENT OF THE CASE AND FACTS

Respondent would accept petitioner's Statement of the Case and of the Facts as an accurate account of relevant proceedings.

POINT INVOLVED ON APPEAL

WHETHER THE TRIAL COURT WAS WITHIN ITS DISCRETION IN DENYING DEFENSE COUNSEL'S REQUEST TO INQUIRE OF PROSPECTIVE JURORS THEIR WILLINGNESS AND ABILITY TO ACCEPT THE DEFENSE OF VOLUNTARY INTOXICATION, WHERE THE COURT DID PERMIT QUESTIONING CONCERNING GENERAL ATTITUDES TOWARD INTOXICATION AND WHETHER THE JURY WOULD FOLLOW THE LAW AS GIVEN?

SUMMARY OF THE ARGUMENT

It is firmly established that the extent to which parties may be permitted to go in examining juries on voir dire is subject to the sound discretion of the trial court. Florida has permitted inquires relevant to a determination of whether a prospective juror is biased or prejudiced. Florida has never permitted questions which would present a venireman with a hypothetical question which mirrors the case, and urges an answer which would cause the venireman to tacitly commit himself one way or another, having the effect of prejudging the matter. Several jurisdictions both State and Federal have followed this line of reasoning and refused to find an abuse of discretion.

Respondent would urge this Court to follow firmly established precedent.

ARGUMENT

THE TRIAL COURT WAS WITHIN ITS DISCRETION IN DENYING DEFENSE COUNSEL'S REQUEST TO INQUIRE OF PROSPECTIVE JURORS THEIR WILLINGNESS AND ABILITY TO ACCEPT THE DEFENSE OF VOLUNTARY INTOXICATION, WHERE THE COURT DID PERMIT QUESTIONING CONCERNING GENERAL ATTITUDES TOWARD INTOXICATION AND WHETHER THE JURY WOULD FOLLOW THE LAW AS GIVEN.

It is firmly established in Florida that the extent to which parties may be permitted to go in examining jurors on voir dire is subject to the sound discretion of the trial court. The exercise of such discretion will not be interferred with unless clearly abused. Essix v. State, 347 So.2d 664 (Fla. 3d DCA 1977); Barker v. Randolph, 239 So.2d 110 (Fla. 1st DCA 1970); Mizell v. New Kingsley Beach, Inc., 122 So.2d 225 (Fla. 1st DCA 1960).[1] Other jurisdictions utilize the same "abuse of discretion" standard regarding the limitation of voir dire. State v. Via, 704 P.2d 238 (Ariz. 1985); State v. Rogers, 497 A.2d 387 (Conn. 1985); Riley v. State, 496 A.2d 997 (Del. 1985); Gossmeyer v. State, 482 N.E. 2d 239 (Ind. 1985); Ward v. Com., 695 S.W. 2d 404 (Ky. 1985); State v. Durost, 497 A.2d 134 (Me. 1985); Lineberry v. Shull, 695 S.W. 2d 132 (Mo. App. 1985); State

[1]This Honorable Court recently held in Stano v. State, 473 So.2d 1282 (Fla. 1985) that it is the trial court's responsibility to control voir dire.

v. Wright, 496 A.2d 702 (N.H. 1985); State v. Hopper, 695 S.W. 2d 530 (Tenn. Cr. App. 1985). The United States Supreme Court has recently reaffirmed that a trial court has broad discretion in rulings regarding voir dire. Wainwright Witt, 105 S.Ct. 844 (1985).

In the case sub judice the petitioner urges this court to find that the trial court did abuse its discretion when prohibiting the jury from being asked whether they could entertain the premise of voluntary intoxication as a defense to a specific intent crime. Respondent, would submit, however, that an abuse of discretion has not been demonstrated. Moreover, the trial court's ruling was precisely in keeping with the rationale for voir dire.

The reason for examining jurors on voir dire is to reveal any potential biases and prejudices, in order to determine if a juror is qualified to serve. Peri v. State, 426 So.2d 1021 (Fla. 3d DCA 1983). Florida has permitted the use of hypothetical questions toward achieving that end. This Court, however, has specifically rejected the use of hypotheticals where the answer would have the effect of ascertaining a verdict in advance of trial. Dicks v. State, 93 So. 137 (Fla. 1922); see also Saulsberry v. State, 398 So.2d 1017 (Fla. 5th DCA 1981); Com. v. Everett, 396 A.2d 645 (Pa. 1978)(Pennsylvania also holds that questions of

hypothetical nature designed to disclose juror's decision under certain facts are prohibited.) By propounding such a question a juror would be providing a "tacit commitment" to either convict or acquit, depending on the scenario given. A juror might then feel that a final decision must be in keeping with his original response on voir dire. The resulting situation would be that cases would be tried on voir dire.

Many jurisdictions have recognized that voir dire may not be used to seek commitments. In State v. Norton, 681 S.W. 2d 497 (Mo. T. Appeals, East. Dist., Div. 1, 1984) a rape victim's mother had offered to accept $5,000 from the defendant in exchange for dropping the charges. On voir dire the prosecutor asked:

> And is there anyone on the jury panel - does everyone on the jury panel agree, that a victim of rape would prefer not to have to testify to the details of such a crime in a public trial?

The court found the question a subtle attempt to overlook damaging evidence which the prosecutor knew would be forthcoming. The Missouri Court noted the following:

> Any question requiring prospective jurors to 'agree' with some proposition stands in danger of violating the proscription against seeking commitments during voir dire examination.
>
> Norton, at 499.

The Georgia Appellate Court discussed the issue of obtaining prejudgments on voir dire in Smalls v. State, 331 S.E. 2d 40 (Ga. App. 1985). That court found that the trial judge did not abuse his discretion when he refused to permit questions regarding prospective jurors' knowledge of the effects of certain medication. A major portion of the defense was that the defendant was so intoxicated that he could not have formed any criminal intent. The appellate court stated:

> Voir dire should allow both parties an opportunity to ascertain the ability of the prospective jurors to decide the case on its merits, with objectivity and freedom from bias and prior inclination. [cit.] However, no question should require a response from a juror which might amount to a prejudgment of the case. [cit.] Waters v. State, 283 S.E. 2d 238 (Ga. 1981).
>
> Smalls, at 41.

The foregoing analysis comports with this Court's longstanding proscription of obtaining "tacit commitments" and "prejudgments" on voir dire.

In fact many other state jurisdictions have ruled precisely as did the majority of the Third District in Lavado v. State, 469 So.2d 917 (Fla. 3d DCA 1985). In Ervin v. State, 399 So.2d 894 (Ala. Cr. App. 1981) that defendant sought to ask the following question of a prospective juror:

> Do any of you have difficulty with the proposition that a person over the course of a number of years can become so addicted to alcohol that as a result thereof his mental condition can deteriorate to a point where he is no longer legally responsible for his actions?
>
> Ervin, at 897.

The Alabama Court of Appeals found that prohibiting the foregoing question was within the broad discretion of the trial court. The court recognized that general questions regarding the jurors' feelings toward the use of alcoholic beverages was proper. Steel v. State, 363 So.2d 1060 (Ala. Cr.App. 1978). They concluded that the defendant's inquiry bordered on argument, and should be avoided. In so ruling, they noted that voir dire was otherwise lengthy and extensive and refused to find an abuse of discretion where a single question was excluded by the court.

In Commonwealth v. Biebighauser, 300 A.2d 70 (Pa. 1973), the Pennsylvania Supreme Court held that the trial court's refusing to allow defense counsel on voir dire examination to propound questions regarding jurors' prejudice against the defense of insanity, was not an abuse of discretion. They succinctly stated:

> It is well-settled that the scope of voir dire examination rests in the sound discretion of the trial judge and his decisions, even in a challenge for cause, will not be

> reversed except for a palpable abuse of discretion (cit. omitted) Reflecting upon the proposed questions in this case leaves us uncertain as to their probable effect if allowed, i.e. whether they would have assisted in securing a fair and impartial jury or whether their evident purpose [was] to have the jurors indicate, in advance, what their decisions [would] be under a certain state of the evidence, or upon a certain state of facts, and thus possibly commit them to definite ideas or views them the case [should] be fairly submitted to them for their decision. (cit omitted) Had the court permitted the two questions to be asked, we think it would not have been in error, but by no means did it commit a palpable abuse of discretion is excluding them. (cit. omitted).
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> Biebighauser, at 75.

The Federal Courts have also addressed the extent of inquiry on voir dire. In Sandidge v. Salen Offshore Drilling Co., 764 F.2d 252 (5th Cir. 1985) the court stated the principle distinguishing proper from improper inquiry on voir dire is that examination cannot search the result of a case in advance. The United States Court of Appeals, Ninth Circuit agreed with that principle in United States v. Toomey, 764 F.2d 678 (9th Cir. 1985). There, the defense sought to have prospective jurors asked in an international narcotics case about their attitudes and potential prejudices about heroin, its precursors and narcotics generally, as well as to distinguish between international

operations and an operation to import into the United States. The Court of Appeals held that the court's refusal to ask the proferred questions was not an abuse of discretion. They opined that the court's inquiry as to whether they could be fair and impartial, while knowing the nature of the charges was adequate to reveal any potential biases or prejudice. Regarding the question concerning distinguishing between international operations and an operation to import, it was held that the defendant was not entitled to test the jurors on their capacity to accept his theory of the case. The court further stated that although the trial court did not ask the precise proferred question, it did question the jurors as to topics relevant to the defense. See also Reilly by Reilly v. Southeastern Pa. Transp., 484 A.2d 1390 (Pa. 1984)(holding that the trial court did not abuse its discretion by asking questions which were more general than the specific questions requested by the defendant). In United States v. Dion, 762 F.2d 675 (8th Cir. 1985), the Eighth Circuit Court of Appeals held that Dion's Sixth Amendment right to an impartial jury was not violated by the trial court's refusal to allow questions on voir dire designed to elicit bias of veniremen toward the defense of entrapment, where an otherwise extensive voir dire was permitted.

In the instant case the trial court did not prohibit general questions regarding intoxication and jurors' general bias and prejudices thereon.

the trial court did not abuse its discretion in its prohibition of one question. The court did permit questioning about intoxication and following the law in general. In Washington v. State, 371 So.2d 1108 (Fla. 4th DCA 1978) relied on by petitioner, that defendant was not allowed to mention insanity, in the context of a defense or otherwise. Such was not the case sub judice. The questions permitted would have exposed any potential prejudices or biases, the true rationale behind voir dire. Voir dire has never been permitted in Florida to provide parties with pretrial verdicts, which is the ultimate impact of a decision in petitioner's favor.

CONCLUSION

Based on the foregoing argument and citations of authority, Respondent would urge this Court to uphold the decision of the Third District Court of Appeal in Lavado v. State, 469 So.2d 917 (Fla. 3d DCA 1985).

Respectfully submitted,

JIM SMITH
Attorney General

RANDI KLAYMAN LAZARUS
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished by mail to HOWARD K. BLUMBERG, Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125 on this 28th day of February, 1986.

RANDI KLAYMAN LAZARUS
Assistant Attorney General

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