O/A 5-6-86

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
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The defendant respectfully adopts the introduction set forth in his initial brief on the merits.

STATEMENT OF THE CASE AND FACTS

The defendant respectfully adopts the statement of the case and the statement of the facts set forth in his initial brief on the merits, which the state has accepted as an accurate account of the relevant proceedings.

SUMMARY OF ARGUMENT

The state's argument in its brief on the merits totally misconceives the nature of the questioning sought by defense counsel and prohibited by the trial judge. This misconception is a result of the state's failure to recognize the distinction previously drawn by this Court between hypothetical questions having correct reference to the law of the case and hypothetical questions designed to disclose a juror's opinion or decision under certain facts. The questioning prohibited by the trial judge in this case clearly falls within the former category of voir dire examination, which has been approved by this Court.

The state's brief does not address the leading decisions cited in the initial brief from both this Court and other jurisdictions on the issue in this case. Furthermore, the major cases from other jurisdictions cited by the state are all distinguishable from the instant case based on the facts of the particular case and/or the law of the particular jurisdiction involved. The overwhelming weight of well-reasoned authority establishes that the trial judge erroneously restricted defense counsel's questioning of prospective jurors.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S REQUEST TO INQUIRE OF PROSPECTIVE JURORS CONCERNING THEIR WILLINGNESS AND ABILITY TO ACCEPT THE DEFENSE OF VOLUNTARY INTOXICATION, THEREBY DENYING THE DEFENDANT HIS RIGHT TO A FAIR AND IMPARTIAL JURY GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

In its brief on the merits in this case, the state seeks to uphold the restrictions on voir dire examination imposed by the trial judge based on the principle of law which prohibits propounding questions to potential jurors "where the answer would have the effect of ascertaining a verdict in advance of trial." Brief of Respondent on the Merits at p. 5. The state's argument totally misconceives the nature of the questioning sought by defense counsel and prohibited by the judge in this case.

The fundamental distinction which the state fails to recognize is the difference between hypothetical questions having correct reference to the law of the case and hypothetical questions designed to disclose a juror's opinion or decision under certain facts. This distinction has been expressly drawn by this Court on two occasions. In Pope v. State, 84 Fla. 428, 94 So. 865 (1922),[1] the prospective jurors were asked the following question on voir dire:

> "Q. In the event you are taken and accepted as a juror in this case, and the court instructs you that, where several persons combine together to commit an unlawful act, each is criminally responsible for the

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[1] The state does not address Pope in its brief on the merits.

> act of his associates committed in the furtherance or prosecution of the common design, and if several persons combine to do an unlawful act, and in the prosecution of the common object a culpable homicide results, all are alike criminally responsible for the probable consequences that may arise from the perpetration of the unlawful act they set out to accomplish, the immediate injury from which death ensues is considered as proceeding from all who are present and abetting the injury done, and the actual perpetrator is considered as the agent of his associates, his act is their act, as well as his own, and all are equally criminal: Would you render a verdict of guilty in this case, which would carry with it the death penalty, if you believe from the evidence in this case, to the exclusion of and beyond every reasonable doubt, that the defendant John H. Pope had combined with one Frank Rawlins, the co-defendant in this case, to commit a robbery, and that in the prosecution of that robbery a culpable homicide occurred, and that Mr. Pope was either actually or constructively present, aiding and abetting in the commission of that homicide?

94 So. at 868. This Court held that this hypothetical question was proper:

> Hypothetical questions <u>having correct reference to the law of the case</u> that aid in determining whether challenges for cause or peremptory are proper, may, in the sound and reasonable discretion of the trial court, be propounded to veniremen on voir dire examination.
>
> The proposition of law stated in the hypothetical question ... is in principle applicable to this case, and the latter part of the question accords with law in that it aids in determining whether the jury may properly be challenged. The question was designed to ascertain if the venire had conscientious scruples against enforcing the law stated in the question, which rule of law had been announced by the court as being applicable to the case under the indictment.

94. So. at 869. As further support for holding the question to be proper, this Court expressly rejected the "prejudgment"

argument made by the state in the present case:

> The question was not misleading or confusing, and did not call for a prejudgment of the case or of any supposed case on the facts. The nature and purpose of the question in this case are quite different from the one propounded by the defendant and excluded by the trial court in the Dicks Case infra.

Ibid.

In Dicks v. State, 83 Fla. 717, 93 So. 137 (1922), the case distinguished in Pope v. State, supra, and relied on by the state in the present case, the following question was propounded to the prospective jurors:

> "If, in this case, the defendant claims that the homicide was committed by him in self defense, then a material fact for you to determine from the evidence adduced at this trial would be who was the aggressor in the fatal difficulty. Then after you have heard all the evidence in this case, and the charge of the court, there was a reasonable doubt in your mind as to who was the aggressor in the fatal difficulty, would you then give the defendant the benefit of that reasonable doubt and vote to acquit him?"

93 So. at 137. This Court disapproved the foregoing question on the following grounds:

> [I]t is not proper to propound hypothetical questions purporting to embody testimony that is intended to be submitted, covering all or any aspects of the case, for the purpose of ascertaining from the juror how he will vote on such a state of testimony....
>
> To propound to a juror a question purporting to contain an epitome of the testimony subsequently to be introduced, and ask whether he would acquit or convict upon such testimony, would have the effect of ascertaining his verdict in advance of his hearing the sworn testimony of the witnesses.
>
> * * *
>
> Whether or not a prospective juror is

> impartial and has the necessary qualifications for jury duty, which is the sole purpose of the examination of talesmen on their voir dire, cannot be determined by propounding hypothetical questions containing what purports to be the testimony subsequently to be introduced and eliciting from him a reply as to whether he would acquit or convict on such testimony.

93 So. at 137-138.

In Saulsberry v. State, 398 So.2d 1017 (Fla. 5th DCA 1981), another case relied on by the state in the present case, a hypothetical question propounded to prospective jurors was found to be improper on the authority of Dicks v. State, supra:

> The prosecutor during voir dire of the jury set forth for the jurors a hypothetical question which essentially embodied the facts of the case against the accused, thus attempting to, and probably succeeding in, obtaining at least a tacit commitment from the jurors to convict. This is wrong and the trial judge should have granted the timely motion for mistrial. Dicks v. State, 83 Fla. 717, 93 So. 137 (1922).

398 So.2d at 1018.

Sixty years after the decisions in Pope and Dicks, this Court again had occasion to draw the distinction which the state fails to grasp in this case. In Moody v. State, 418 So.2d 989 (Fla. 1982), cert. denied 459 U.S. 1214, 103 S.Ct. 1213, 75 L.Ed.2d 451 (1983)[2], prospective jurors were asked "whether they would never return a verdict of guilty under any circumstances where the evidence presented was from a witness who was present at the scene of the crime and who was granted immunity by the

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[2] The state does not address Moody in its brief on the merits.

State." 418 So.2d at 993. This Court approved this question, and rejected the contention that the question sought a prejudgment from the jury as to the credibility of a witness:

> The prosecutor's question is unlike the question asked by the prosecutor during the voir dire proceeding in Smith v. State, 253 So.2d 465 (Fla. 1st DCA 1971), which decision is relied upon by Moody to establish reversible error in the present case. We find that the trial court did not commit reversible error in overruling Moody's objection to this question propounded to the venire by the prosecutor. The question did not call for a prejudgment of the case and did not amount to asking the venire to prejudge the credibility of a witness, but rather it was asked to determine the possible bias of any member of the jury venire which might affect the fairness of the trial.

Ibid.

In Smith v. State, 253 So.2d 465 (Fla. 1st DCA 1971), the decision distinguished by this Court in Moody, the prosecutor questioned prospective jurors "as to whether or not said jurors would convict on the testimony of a person who has been granted immunity if the State proves this case beyond a reasonable doubt." 253 So.2d at 470 (emphasis in original). The Court held this question to be improper and gave an example of a related type of question which would not have been objectionable:

> Neither counsel for the State nor defendant should question prospective jurors as to the kind of verdict they would render under any given state of facts or circumstances, and the trial court should not permit such questioning .... We think it would have been proper for the question to have been put to the prospective juror as to whether or not such juror would follow the instructions of the court as to weight or credibility of the respective witnesses to be used. In the case sub judice, the State Attorney directed his question to said juror as to whether or not

> said juror would convict the defendant.
>
> We think it is improper for the State Attorney, or for that matter the defense attorney, to propose a question which causes the juror to predecide his vote for a conviction or acquittal.

253 So.2d at 470-71.

The foregoing cases establish a clearly-drawn distinction between questions having correct reference to the law of the case, which are properly asked of prospective jurors because they seek to uncover bias and prejudice of those jurors, and hypothetical questions purporting to embody the expected testimony in the case, which are not properly asked of prospective jurors because they call for a prejudgment of the case. Just as clear is the fact that the questioning prohibited by the trial judge in this case falls within the former category of voir dire examination. Defense counsel in this case never sought to propound hypothetical questions purporting to embody the testimony that was going to be submitted at the trial, and never sought to ask the jurors whether they would acquit or convict upon that testimony. This being the case, no claim can be made that defense counsel was seeking to obtain any tacit commitments or prejudgments from the prospective jurors.

Defense counsel in this case sought only to question prospective jurors concerning "their ability to entertain or accept the premise of voluntary intoxication as a defense." (TR. 5). As there was no question that voluntary intoxication was a defense to the robbery charge against the defendant, and as there was no question that voluntary intoxication was going to be the defense at trial, the questioning sought by defense counsel had

correct reference to the law of the case and therefore should have been permitted. The questioning was directed specifically toward the legal doctrine of voluntary intoxication as a defense to a specific intent crime and was designed to ascertain if any of the prospective jurors had a bias or prejudice toward the application of that legal doctrine which would render them subject to either a challenge for cause or the exercise of a peremptory challenge. Accordingly, the questioning was proper under the authority of Pope and Moody, and the decisions in Dicks, Saulsberry, and Smith have no application to this case.[3]

The major decisions from other jurisdictions relied on by the state in its brief on the merits are all distinguishable from the instant case based on the facts of the particular case and/or the law of the particular jurisdiction involved. In Ervin v. State, 399 So.2d 894 (Ala.Cr.App. 1978), the trial court's refusal to allow defense counsel to ask the following question was held not to be an abuse of discretion:

> "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?"

399 So.2d at 897. The Court found this question to border on

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3 The decisions relied on by the state from other jurisdictions disapproving questioning of prospective jurors which seeks to obtain prejudgments from such jurors, Commonwealth v. Everett, 262 Pa.Super. 61, 396 A.2d 645 (1978); State v. Norton, 681 S.W.2d 497 (Mo.App. 1984); and Smalls v. State, 174 Ga.App. 698, 331 S.E.2d 40 (1985), are similarly inapplicable to the instant case.

argument, and certainly the use of the phrase "[d]o any of you have difficulty with the proposition" is vague and not directed specifically toward uncovering bias which would render the prospective juror unfit to serve in the case. In addition, the question makes reference to evidence concerning alcohol addiction over a number of years and mental deterioration, rather than stating the applicable legal principle and asking the jurors if they could apply that principle. Most importantly, at the time this question was asked, defense counsel had already asked the prospective jurors several questions concerning the issue of insanity.

In the present case, defense counsel was not allowed to ask any questions concerning the defense of voluntary intoxication. Furthermore, defense counsel's proposed questioning in this case was directed specifically at uncovering bias toward that defense and did not make reference to any evidence in the case. Accordingly, the Ervin case cannot be said to sanction the type of restrictions imposed on voir dire examination in this case.

In Commonwealth v. Biebighauser, 450 Pa. 336, 300 A.2d 70 (1973), the Court upheld the trial judge's refusal to allow defense counsel to ask prospective jurors two questions concerning the proposed defense of insanity. Both questions, however, were framed in terms of the expected testimony in the case, which led the appellate court to express its concern about prejudgments:

> 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 when the case [should] be fairly submitted to them for their decision."

300 A.2d at 75 (citation omitted).

As previously noted, defense counsel in the instant case never sought to propound questions to the prospective jurors concerning the testimony that was going to be submitted at the trial, and therefore no claim can be made that defense counsel was seeking to obtain any tacit commitments or prejudgments from the prospective jurors. This being the case, Biebighauser is inapposite.[4]

In United States v. Toomey, 764 F.2d 678 (9th Cir. 1985), the Court upheld the trial judge's refusal to allow defense counsel to ask the following question of prospective jurors:

> It is the belief of the defense that the evidence will tend to show that Defendant PAUL T. TOOMEY may have agreed to become involved in international monetary transactions, stemming, at least in part, from international drug sale funds and other sources of cash, belonging to others and unrelated to the defendants. Would this fact alone so

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4 It should also be noted that Pennsylvania law on voir dire questioning is more restrictive than the law in Florida. In Pennsylvania, "[i]t is not the purpose of voir dire to provide counsel a better understanding upon which to base his peremptory challenges." Commonwealth v. Biebighauser, supra, 300 A.2d at 75. In Florida, on the other hand, "[h]ypothetical questions having correct reference to the law of the case that aid in determining whether challenges for cause or peremptory are proper, may, in the sound and reasonable discretion of the trial court, be propounded to veniremen on voir dire examination." Pope v. State, supra, 94 So. at 869.

> influence your evaluation of the case that you would be unable to objectively consider the critical issues of whether PAUL T. TOOMEY agreed that the drugs would be brought to the United States and that he knew the drugs would be brought to the United States?

764 F.2d at 683. The Court found this question to be argumentative, and noted that "a defendant is not necessarily entitled to test the jurors on their capacity to accept his theory of the case." Ibid. The Court also pointed out that the trial judge "did question the jurors as to topics relevant to Toomey's defense." Ibid.

Again, because the question in Toomey was framed in terms of what was "the belief of the defense that the evidence will tend to show," that question was subject to attack on grounds not present in this case where defense counsel never sought to propound questions to the prospective jurors concerning the testimony that was going to be submitted at the trial. Furthermore, whereas the trial judge in Toomey herself questioned the prospective jurors as to topics relevant to the defense in the case, the trial judge in this case would not permit any questions concerning the defense of voluntary intoxication. Therefore it cannot be said that Toomey sanctions the restrictions imposed by the trial judge in this case.

In the final major case from another jurisdiction relied on by the state, United States v. Dion, 762 F.2d 674 (8th Cir. 1985), the Court rejected the defendant's contention that the trial judge had violated his right to an impartial jury by refusing to allow questions on voir dire designed to elicit bias of prospective jurors toward the offenses charged or the defense

of entrapment. This ruling was based on the extensive questioning of prospective jurors which was conducted in the case:

> The trial court allowed extensive voir dire in this case. The court's questioning covers eighteen pages of the trial transcript, the government's questioning covers twelve pages, and the defendant's questioning covers 71 pages. Having reviewed these pages of transcript and the arguments of the parties, we find that the court allowed adequate voir dire.

762 F.2d at 694. As the specific nature of the questions allowed and disallowed by the trial judge is not set forth in the Court's opinion in Dion, there is no way to tell if that case supports the state's position in this case.

Consistent with its complete failure to address the leading cases from this Court on the subject of voir dire examination of prospective jurors concerning their ability to apply legal principles pertinent to the case,[5] the state also completely ignores the decisions from other jurisdictions cited in appellant's initial brief on the merits which support his position that the trial judge erroneously restricted defense counsel's questioning of prospective jurors. Particularly glaring is the state's failure to address the decision in People v. Balderas, ____ Cal.3d ____, 222 Cal.Rptr. 184, 711 P.2d 480 (1985). In that case, the California Supreme Court addresses the very issue before this Court in the instant case, a trial judge's refusal to allow defense counsel to question prospective jurors

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[5] See notes 1 and 2, supra.

concerning their attitudes toward the defense of voluntary intoxication, and determines that defense counsel has the right to conduct such questioning:

> [T]his court has never ruled on ... whether reasonable inquiry into specific legal prejudices must be permitted as the basis for a challenge for cause. We now conclude that reasonable questions of this kind should have been permitted under the prior rule. Persons who harbor legal prejudices pertinent to the trial display "actual bias," since they are unable to act with the "entire impartiality" required of jurors.
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> * * *
>
> Here, defendant claims that the court wrongly barred questions about jurors' willingness to apply instructions on circumstantial evidence and diminished capacity. Any limitation on "circumstantial evidence" questions was not an abuse of discretion, we think, since an average juror would probably not disagree with the court's instructions. On the other hand, it is well known that a substantial segment of the public looks with disfavor on the controversial doctrine of diminished capacity. The court was aware that diminished capacity principles were likely to play a major role in the trial; indeed, diminished capacity was the sole defense offered at the guilt phase. At the time of the court's ruling, one prospective juror had already volunteered that he could not "go along" with the notion that drug or alcohol use absolves someone of responsibility for criminal acts. Thus, the court would have erred had it unduly restricted counsel from probing jurors' attitudes toward that doctrine.

711 P.2d at 501, 502 (emphasis in original).

The well-reasoned decision in People v. Balderas, as well as the decisions in Le Vasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983), cert. denied, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984), Bernal v. State, 647 S.W.2d 699 (Tex.Ct.App.

1982), People v. Williams, 29 Cal.3d 392, 174 Cal.Rptr. 317, 628 P.2d 869 (1981), State v. Brown, 547 S.W.2d 797 (Mo. 1977), and People v. Stack, 128 Ill.App.3d 611, 83 Ill.Dec. 832, 470 N.E.2d 1252 (1984) all support the petitioner's contention that the trial judge erroneously restricted defense counsel's questioning of prospective jurors in this case, and none of these cases is distinguished in the state's brief on the merits. These decisions from other jurisdictions are consistent with the broad scope of voir dire inquiry established by this Court in Moody v. State, supra, Lewis v. State, 377 So.2d 640 (Fla. 1979), Pait v. State, 112 So.2d 380 (Fla. 1959); Pope v. State, supra, and Pinder v. State, 27 Fla. 370, 8 So. 837 (1891). Based on what the dissenting judge in the district court of appeal in this case aptly described as "the overwhelming weight of well-reasoned authority", Lavado v. State, 469 So.2d 917, 921 (Fla. 3d DCA 1985) (Daniel S. Pearson, J., dissenting), it is clear that the trial judge in this case erroneously restricted defense counsel's questioning of prospective jurors.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and direct that Court to reverse petitioner's judgment of conviction and sentence.

Respectfully submitted,

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By: _____
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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 19th day of March, 1986.

_____
HOWARD K. BLUMBERG
Assistant Public Defender