IN THE SUPREME COURT OF FLORIDA

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MELVIN EUGENE DANIELS)
)
Petitioner,)
)
vs.) CASE NO. 67,357
)
STATE OF FLORIDA,)
)
Respondent.)
)

PETITIONER'S REPLY BRIEF ON THE MERITS

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Mr. Daniels was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit of Florida, in and for Broward County. In the brief the parties will be referred to by name.

The symbol "R" will denote the Record on Appeal and the symbol "SR" will denote the Supplemental Record [Videotape].

STATEMENT OF THE CASE AND FACTS

Mr. Daniels will rely on the statement of the case and facts in his initial brief on the merits.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN REFUSING TO GIVE MR. DANIELS CREDIT FOR TIME SERVED SINCE HIS ARREST FOR THE INSTANT CHARGES.

The State appears to concede that both equitable principles and prior decisions of this Court require that a prisoner be given credit for time served on each of his concurrent sentences.[1] The State seeks its main support for its argument, that the trial court did not err in denying Mr. Daniels credit for time served in the present case, from the fact that Mr. Daniels was, subsequent to his arrest for the attempted sexual battery - kidnapping charges, also arrested for violation of probation based on the same allegation. Apparently the State believes that once Mr. Daniels was held in custody on the probation violation charge, he was no longer subject to the $20,000 bond which had been set in the substantive case. Such argument defies fact and reason. Had the probation violation allegation been dismissed, Appellant would still have been in custody. That he was held on both the probation violation and

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[1] The State must concede that a prisoner is entitled to credit for time served prior to imposition of his prison sentence, where he has not otherwise been credited for that time. This is basic black letter law, based on statutory requirements well-recognized in this state. Thompson v. Wainwright, 477 So.2d 383 (Fla. 4th DCA 1984); Sapp v. State, 445 So.2d 1088 (Fla. 1st DCA 1984); Dickerson v. State, 427 So.2d 205 (Fla. 2d DCA 1983). Yet the State blithely ignores the fifteen days between Mr. Daniels' arrest on the substantive charges here at issue and his arrest 15 days later on the probation violation charge, on which alone he received credit for time served, but which did not include those "lost" 15 days. Clearly, on the State's own argument, Mr. Daniels is entitled to credit for those lost 15 days, if nothing else.

the attempted sexual battery-kidnapping charges cannot mean he was no less in custody on one or the other, any more than the fact that he was held on $15,000 bond on the sexual battery and $5,000 bond on the kidnapping means that the kidnapping "didn't count" as a reason for his pretrial incarceration. The fact that Mr. Daniels was later arrested for violating his probation cannot, therefore, serve to vitiate his status with respect to the substantive charges. It simply gave the State additional grounds to hold him, without dispensing with or otherwise altering the original, independently valid reasons for doing so.

Mr. Daniels is further somewhat at a loss to understand why whether or not he moved for a bond reduction has any bearing on his custody status. The State seems to concede by this argument that Mr. Daniels was unable to post the bond as set for the attempted sexual battery-kidnapping charges. This seems a valid concession, since Mr. Daniels did not, in fact, post bond in the fifteen days he had to do so before the additional charge of violating his probation was lodged against him, apparently with no bond set (See, R 18). It is not necessary, however, in order to receive credit for time served, for a detainee to move for bond reduction as the required predicate. Credit is given because the inmate has already served time in custody, whether that time has been served because he could not make bond or because he chose not to in order to get some free meals and a

place to stay or because he had other charges which prevented his release is irrelevant. The crucial point is that he was in custody, serving time, on the charges in question.[2]

On facts similar to the instant case, the First District Court of Appeal applied exactly this principle to afford the defendant credit for time served from his original arrest for burglary on his sentence for revocation of probation, since he was held for the entire time since his original arrest on the charge which resulted in revocation of his probation. Gordon v. State, 379 So.2d 1022 (Fla. 1st DCA 1980). The instant case presents an even clearer situation, since Mr. Daniels was unquestionably in custody for the attempted sexual battery and kidnapping charges from the date of his arrest therefor through the date of his sentencing, regardless of the additional execution of the warrant for violation of his probation. He is thus entitled to credit for that time on his sentence for those offenses.

The distinction made in Yohn v. State, 461 So.2d 263 (Fla. 2d DCA 1984), far from "approaching" a complete denial of credit on concurrent sentences, as suggested in the State's answer brief

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2 Had Mr. Daniels been able to pay the original bond or been released on his own recognizance on the substantive charges, the State would now be alleging the Mr. Daniels was not held because of those offenses, and the State would very likely be correct. See, Torres v. State, 436 So.2d 324 (Fla. 5th DCA 1983). Those are not the facts before this Court, however, nor can Mr. Daniels be accused of manipulating the system in this matter in the complete absence of even a suggestion on the State's part that the trial judge would have granted any motion for reduction of bond which Mr. Daniels might have made - a prospect that seems unlikely in the extreme considering the seriousness of the charges against him.

at page 22, reaffirms giving credit in the above-described situation. Only when a defendant commits a series of separate offenses for which he is arrested at different times will he be denied credit. This was what happened in Yohn, where the defendant was first arrested for violation of probation[3] and then, in a period from December 1983 through January 1984, separately charged in numerous informations with five counts of grand theft and two counts of obtaining property by worthless checks. This serial charging based on multiple criminal incidents is clearly not what occurred in the present case, where all the charges against Mr. Daniels were the result of acts which occurred during a single criminal episode. Consequently, under Yohn and the cases cited in Mr. Daniels' initial brief before this Court, he must be given credit for the time he served in jail prior to sentencing, which, correctly viewed, was served on each of the charges laid, since they all arose as a result of the same criminal eposide.

Finally, the State urges that Mr. Daniels' sentence for the probation revocation was not "concurrent" with his felony sentences because the offense for which he was put on probation occurred before the felonies were committed. This argument misperceives the the meaning of "concurrent", which does not apply to the date of the offenses for which sentence is imposed (one does not say, the crimes were committed "concurrently"), but

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3 It is unclear from the opinion in Yohn, supra, whether the violation of probation allegation arose from technical violations or from commission of one or more of the subsequently charged offenses.

rather to how the sentences will run. There is no inconsistency between requiring sentences imposed the same day to run concurrently to each other, regardless of when the crimes being punished occurred. The State's rather tortuous reasoning in this regard obfuscates without addressing the fundamental principle involved: that if a defendant has served time in jail on each of several charges, all of which occurred at the same time in the same episode and for which concurrent sentences are later imposed, the failure to credit him with the time served on each of those sentences results in his effectively being denied credit altogether. It is in order to give effect to this principle, as set forth in this Court's decision in Jenkins v. Wainwright, 285 So.2d 5 (Fla. 1973), that the Fourth District Court of Appeal correctly held that Mr. Daniels was entitled to credit for all the time he served on each of the concurrent sentences imposed in this case.

POINT II

THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE FUNDAMENTALLY DEFECTIVE INFORMATION AND PERMITTING THE STATE TO AMEND THE DEFECTIVE ATTEMPTED SEXUAL BATTERY CHARGE IN A MATERIAL WAY JUST PRIOR TO TRIAL.

The State argues that Mr. Daniels was not prejudiced by the "amendment" of the fatally defective information where he "was benefited by the reduction of the degree of the charge and was relieved of the burden of presenting a defense upon additional facts." Answer Brief at page 25. The State has apparently overlooked the fact that the information as originally filed made out no offense at all, and the new, "amended" information for the first time included the additional elements that Mr. Daniels "used physical force and violence not likely to cause serious personal injury," to which Mr. Daniels was expected to present a defense. This was an entirely different crime, not a lesser included offense, of the only offense referred to even peripherally in the original information (by virtue of nothing more than a statutory reference). And that Mr. Daniels was "benefited" by the "reduction" of a non-existent charge which the State could not prove, even as intimated by the statutory citation, to another, totally different crime seems a bit of an overstatement, to put it mildly.

The trial court thus erred in denying the motion to dismiss and allowing the State to amend the information to allege a completely new crime.

POINT III

THE TRIAL COURT ERRED IN ALLOWING LILLIE MAE RUNYONS TO GIVE EVIDENCE AT TRIAL WHEN THE WITNESS WAS NOT COMPETENT TO TESTIFY.

The State argues that an appellate court can not accurately determine what happened at trial in a videotape of a witness's testimony. This position has been implicitly rejected by the Fourth District Court of Appeal in this very case, notwithstanding its ruling in Kaelin v. State, 410 So.2d 1355 (Fla. 4th DCA 1982), since the Court did supplement the record with and review the videotape sub judice. Moreover, the written record cannot completely reflect and is not adequate to show the continuous hesitations, contradictory shakings and noddings of the head and other manifestations of the inability of Ms. Runyons to narrate intelligibly and accurately what happened to her. Finally, the State's blanket rejection of the sufficiency of videotapes to accurately record and preserve a witness's evidence will no doubt come as a surprise to both law enforcement and the legislature, which condone, indeed advance, the use of videotapes to record confessions, intoxication tests, and even testimony of young child abuse victims. Surely the State does not intend to blow hot and cold in this issue, depending on whose ox is being gored?

POINT IV

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR DISCHARGE AND GRANTING EXTENSIONS OF SPEEDY TRIAL TIME WHERE IT WAS NEVER SHOWN THAT THE INCOMPETENT WITNESS, LILLIE MAE RUNYONS, WOULD TESTIFY INTELLIGENTLY AND ACCURATELY.

Mr. Daniels will rely on his petitioner's brief on the merits for this point.

POINT V

THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHERE A POLICE WITNESS STATED ON DIRECT EXAMINATION THAT AFTER BEING ARRESTED, MR. DANIELS SAID HE DIDN'T WISH TO MAKE A STATEMENT.

Mr. Daniels respectfully refers this Court to its decision in State v. Rowell, 476 So.2d 149 (Fla. 1985), which may have some bearing on the issue subsumed within this point.

POINT VI

THE TRIAL COURT ERRED IN EXCLUDING THE EXCULPATORY PORTION OF MR. DANIELS' STATEMENT TO POLICE AFTER THE STATE HAD INTRODUCED THE INCULPATORY PORTION OF THAT STATEMENT.

The State's suggestion that Mr. Daniels could have introduced the officer's testimony, which was improperly excluded during his cross-examination in the State's case, as evidence during his own case misses the mark. By doing so, Mr. Daniels would have lost the right to the opening and concluding closing argument to the jury, since he was otherwise the only defense witness. It is well recognized in this State that an error in restricting a defendant's cross examination of a State witness cannot be cured by offering him the opportunity to call that witness in his own case. Alternative methods of proof or theories of defense are exclusively within the province of defense counsel through direct or cross examination. Jones v. State, 399 So.2d 67 (Fla. 3d DCA 1981) [defendant should have been allowed to cross examine State witness about nature of "ruckus" which resulted in shooting, even though defendant or other witnesses could have testified for defense.] Reversible error results where the defendant is forced, by the erroneous limitation of his right to cross examination, to choose between calling additional defense witnesses and retaining the right to concluding closing argument. Yolman v. State, 469 So.2d 842 (Fla. 2d DCA 1985); Brown v. State, 424 So.2d 950 (Fla. 1st DCA 1983).

CONCLUSION

Based upon the foregoing Argument and the authorities cited therein, Mr. Daniels respectfully requests this Honorable Court to reverse the judgment and sentence of the trial court and remand this cause for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to ROBERT S. JAEGERS, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 17th day of January, 1986.

Of Counsel