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IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,419

THE STATE OF FLORIDA,

Petitioner,

-vs-

MARIO DELGADO-SANTOS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

The petitioner was the prosecution in the trial court and the appellee in the District Court. The respondent was the defendant in the trial court and the appellant in the District Court. The parties will be referred to as they stand before this Court.

References to the record on appeal will be by the letter "R". References to the trial court transcripts will be by the letter "T". References to petitioner's appendix will be by the letters "PA" and appropriate page number. References to respondent's appendix will be by the letters "RA" and appropriate page number. All emphasis is added unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The respondent accepts petitioner's statement of the case and facts as substantially true and correct but reserves the right to argue the facts of this case both in this brief and at oral argument.

QUESTIONS PRESENTED

I

WHETHER THE PRIOR INCONSISTENT STATEMENT OF A STATE WITNESS MADE DURING A POLICE INTERROGATION, WAS PROPERLY ADMITTED INTO EVIDENCE AS SUBSTANTIVE EVIDENCE?

II

WHETHER THE ADMISSION OF THIS STATEMENT WAS HARMLESS ERROR?

ARGUMENT

I

THE PRIOR INCONSISTENT STATEMENT OF A STATE WITNESS MADE DURING A POLICE INTERROGATION, WAS IMPROPERLY ADMITTED INTO EVIDENCE AS SUBSTANTIVE EVIDENCE.

The petitioner is incorrect in that §90.801(2)(a), Florida Statutes, provides no definition of "other proceeding."

The petitioner would have this Court believe that police investigations are "official proceedings" under the perjury statutes, and, so are "other proceedings within the meaning of §90.801(2)(a)." (See, p. 20, Petitioner's Brief). Case decisions uniformly reject this argument.

In the case of McCoy v. State, 338 So.2d 52 (Fla. 4th DCA 1976), the Court held that police interrogation was not an "official proceeding" within the meaning of §837.021, Florida Statutes. McCoy was followed by Schramm v. State, 374 So.2d 1043 (Fla. 3d DCA 1979) wherein a defendant was again charged with a violation of §837.02 for giving false statements during a police investigation. Reversing the defendant's conviction, the Court stated:

> Schramm gave his false statements to the police at the police station pursuant to a homicide investigation. An interrogation which is conducted solely at the hands of the police at the police station is simply not an official proceeding within the definition of the statute.

(P. 1045).

Only recently, in Sevin v. State, 478 So.2d 521 (Fla. 2d DCA 1985), the Court affirmed its agreement with Schramm,

reversing a defendant's §837.02 conviction, as it stated:

> We do not perceive it to have been the legislative intent to elevate all such criminal investigations to an "official proceeding" as defined in section 837.011(1), Florida Statutes (1983) when the investigation is conducted under oath by a law enforcement officer who also happens to be a notary public.

(P. 523).

No Florida decision has elevated police investigation to the status of "other proceedings" or "official proceedings". And, for good reason. In the instant case, Ortiz's statement, when he was 16 years old, was taken after he was transported to the police station in handcuffs, detained for hours and subjected to a long "pre-statement interrogation" before he gave the instant statement. Delgado-Santos v. State, 471 So.2d 74 (Fla. 3d DCA 1985) at p. 75. It strains the imagination to plausibly put such actions within the §90.801(2)(a) term "proceeing" with the term "hearing" on one side and "deposition" on the other.

The District Court, in its opinion in this case, gives three reasons for its ruling:

> 1. The congressional history of the term "other proceeding". This reason has not been attacked by the petitioner. It has been adopted by the Court in Sevin, supra.
>
> (P. 76).
>
> 2. Application of the rule of yusdem generis in construing the meaning of "other proceeding" in relation to the words around it, "trial" and "hearing", within §90.801(2)(a). The application of this rule of construction and how it was applied in the instant case (an "other proceeding" must be no less formal than a deposition and no more so than a hearing) have not been challanged by the petitioner.
>
> (p. 77).

3. Whether police investigation qualifies as a "proceeding" wiithin the meaning of §90.801(2)(a).

In reaching the conclusion that it did not, the Court stated:

> Investigative interrogation is neither regulated nor regularized, it contains none of the safeguards involved in an appearance before a grand jury and does not otherwise even remotely resemble that process; and it has no quality of formality and convention which could arguably raise the interrogation to a dignity akin to that of a hearing or trial.
>
> (P. 78).

The petitioner does not challange this reason by arguing that police investigations are governed by formality and convention and are regulated and regularized.

Each of these reasons, and certainly all together, support the District Court's finding and respondent's contention that a police investigation is not a "proceeding" within the meaning of §90.801(2)(a). See, also, Arner v. State, 459 So.2d 1136 (Fla. 4th DCA 1984).

As to the procedure used in this police investigation, respondent can only share the District Court's concern (p. 75 of opinion) and disargrees that this procedure was "as protective of the declarent's rights as could be expected by any Assistant State Attorney" (p. 23 of petitioner's brief).

Relying upon the above authorities, and cases cited therein, the respondent submits that a police investigation, and especially this police investigation, was not an "other proceeding" within the meaning of §90.801(2)(a) and that the instant statement was improperly admitted into evidence.

II

THE ADMISSION OF THIS STATEMENT WAS NOT HARMLESS ERROR.

At trial, Ortiz testified that he did not give the statement freely and voluntarily (T. 479) and the statement was a lie. (T. 481).

If the requirements of §90.801(2)(a) are met, a prior statement may be admitted as substantive evidence.

Black's Law Dictionary defines substantive evidence as:

> That adduced for the purpose of proving a fact in issue, as opposed to evidence given for the purpose of discrediting a witness (i.e. showing that he is unworthy of belief), or of corroborating his testimony.

To be admitted to "prove a fact in issue" (respondent's guilt), Ortiz's prior statement must have met the requirements of §90.801(2)(a). It did not. See, Point I.

The statement admitted into evidence was not unquestioned. Ortiz, its maker, said it was a lie, false, untruthful. No other evidence was as damaging. No other evidence showed the respondent's direct participation in the alleged crimes. The only person to implicate the respondent in the robbery-murder was Ortiz. The testimony of the only witness to see the respondent with Ortiz, in incriminating circumstances, was Santos, who was soundly impeached. (T. 396, 404-407, 411-412). Even taking Santos' testimony at its best, it only placed the respondent in the vicinity of the gas station. No one saw the respondent go into the gas station or wield a knife.

The maker of the statement called it a lie. It was unquestionably the most damaging piece of evidence against the respondent. It was improperly admitted as substantive evidence, to prove the respondent's guilt, See, Point I. It's admission could not have been more harmful to the respondent. Reversible error was committed.

CONCLUSION

Based on the foregoing facts, arguments, and authorities, the respondent respectfully requests this Court to affirm the decision of the Third District Court of Appeals and remand this cause for a new trial.

Respectfully submitted,

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SUMMARY OF THE ARGUMENT

The prior statement of the state witness ORTIZ which was according to his trial testimony, a lie/untruth, was made during a police investigation. It was improperly admitted into evidence as substantive evidence of the Defendant/Respondent's guilt. This prior statement was the only evidence showing the Defendant/Respondent's direct participation in the crimes. It was the most damaging evidence against the Defendant/Respondent. Its admission was not, nor could it have been, harmless error.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida, this 9 day of April, 1986.