O/A 6-5-86

IN THE SUPREME COURT OF FLORIDA

ERINEO ACENSIO, :

Petitioner, :

vs. : Case No. 67,888

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS

STATEMENT OF THE CASE

The State filed an information in the Circuit Court for Polk County on April 19, 1984, charging the Petitioner, ERINEO ACENSIO, with the attempted first degree murder of Alec Carmichael by shooting him with a pistol on March 30, 1984. (R3, 4)

Defense counsel filed a motion to suppress Petitioner's statement to Investigator Yonce and Deputy Gonzalez on the ground that the statement was involuntary. (R5 - 7) The motion was heard by the Honorable Thomas M. Langston, Circuit Judge, on July 16, 1984. (R11 - 50) The court found that Petitioner's statements were freely and voluntarily made and denied the motion. (R52)

The State filed an amended information on August 14, 1984, changing the date of the alleged offense to March 31, 1984. (R53, 54)

Petitioner was tried by jury before Judge Langston on August 16 and 17, 1984. (R60, 62) The court denied defense counsel's renewed motion to suppress (R150 - 151) and admitted a tape recording of Petitioner's statement. (R172 - 175, 282 - 298) Defense counsel objected to the court's refusal to instruct on the lesser included offense of battery. (R219) The court instructed the jury on attempted first degree murder, attempted second degree murder, attempted manslaughter, and aggravated battery. (R244 - 249) The jury found Petitioner guilty of aggravated battery with a firearm. (R262, 266)

On September 20, 1984, the court adjudicated Petitioner guilty of aggravated battery with a firearm and sentenced him to a three year mandatory minimum term of imprisonment. (R269 - 272)

On appeal to the District Court of Appeal, Second District, Petitioner argued that the trial court erred by denying the motion to suppress his statement and by refusing to instruct the jury on battery. The District Court affirmed the judgment and sentence. Acensio v. State, 477 So.2d 38 (Fla. 2d DCA 1985). (Appendix)

Petitioner filed a timely notice invoking this Court's discretionary jurisdiction. This Court granted review.

STATEMENT OF THE FACTS

A. Hearing on Motion to Suppress

Polk County Sheriff's Department Investigator J.D. Yonce went to the scene of the shooting of Alec Carmichael. The shooting happened in a driveway by a residence in Alturas. The driveway led to some duplexes behind the residence. (R12 - 14) Yonce interviewed two witnesses, Melvin and Roger Harrell, and obtained a description of the suspects and a vehicle. (R14 - 16) They said they recognized one of the suspects as a Mexican male resident of one of the duplexes. They gave conflicting accounts. Yonce did not think they could identify any of the suspects. (R32, 35, 36) Yonce had not interviewed Carmichael, who was in the hospital. (R31)

A car matching the description was stopped at the intersection of Highway 60 and Rifle Range Road. It contained six Mexican males. Petitioner was one of the passengers. He matched the description of one of the suspects. All six men had been drinking, but only the owner of the car appeared to be intoxicated. All six were detained and taken to Bartow for questioning. (R15, 16, 22 - 27) Felipe Guerra, the owner of the car, was interviewed first. He said he was asleep most of the time and couldn't remember what happened. (R33, 34)

Petitioner was a twenty-one year old illegal immigrant with little formal education. He spoke little, if any, English. He had been drinking all day. (R28 - 30, 42, 43) Yonce interviewed him with the help of an interpreter, Deputy Jose Gonzalez. Gonzalez advised Petitioner of his Miranda rights in Spanish.

Petitioner said he understood and agreed to talk. He signed a waiver form with an "X." (R16 - 19, 27, 28, 37 - 40) No promises or threats were made. (R21, 41)

Yonce tape recorded the interview. (R18, 20) Petitioner initially denied any knowledge of the offense. (R20) Yonce was called out of the room. (R20, 41) Gonzalez told Petitioner that Spanish people have a macho way of being, and he should go ahead and confess and get it out of the way. (R41, 44 - 47) Yonce told Petitioner details of the shooting, but Petitioner still denied knowing about it. (R30, 31) Yonce falsely told Petitioner that witnesses had positively identified the people present at the scene. (R31, 32, 35) Yonce also told Gonzalez to tell Petitioner, "how about if one of his friends in there says he was there and that he did the shooting." (R32) At that time, Yonce had interviewed only Guerra, who had not said that. (R33, 34) Yonce told Petitioner that all he wanted to know was the truth, if necessary they would have the witnesses come in to identify everybody in the car, all they wanted to know was who did the shooting, and they were not trying to get everybody in trouble, they just wanted to know what happened. (R34) Petitioner then admitted that he was the one who did the shooting. (R34, 35) Petitioner said he shot Carmichael because Carmichael struck him for no reason. (R21)

Defense counsel argued that Petitioner's statement should be suppressed because the officers' statements to him in combination with his drinking and lack of sophistication and education were calculated to delude him as to his true position or

to exert an improper influence over him. (R47, 48) The prosecutor argued that there was no coercion. (R48, 49)

B. Trial Testimony

Alec Carmichael testified that he was at his father-in-law's house in Babson Park on the evening of March 31, 1984, preparing for a family barbecue with this father-in-law and his wife's uncle. (R62, 63, 69) Carmichael and the others had been drinking beer. (R64, 69) Four Mexican men who lived directly behind his father-in-law's house pulled their car into the yard or driveway. (R64, 69 - 70) His father-in-law asked them to leave. They swore at him and moved the car further into the yard. Carmichael also asked them to leave. (R64, 72, 73)

Petitioner got out of the car and ran toward Carmichael. Carmichael hit him. Petitioner fell to the ground. (R64, 65, 74, 75) Another man got out of the car with a gun in his hand. Carmichael put his hands up and said, "Don't shoot me." (R64, 76, 77) Carmichael did not see Petitioner pull out a gun, but he heard a gunshot which hit him in the stomach. He turned and ran. Both Petitioner and the other man were shooting at him. Carmichael was shot in the arm three times. (R64, 65, 67, 68, 77, 78) He returned to the house and asked to be taken to the hospital. Petitioner was holding a small black .25 pistol. The other man was holding a nickel-plated gun. (R65, 66, 68, 76, 81, 82)

Carmichael denied telling Yonce that the second man was the one who shot him. (R80) He denied that his father-in-law or

uncle had a weapon. (R79) Carmichael had one prior felony conviction. (R69)

Roger Harrell, Carmichael's wife's uncle, generally corroborated Carmichael's testimony about the shooting. (R84 - 88, 91 - 98) However, Harrell said Petitioner took a swing at Carmichael, Carmichael hit him twice and knocked him down, then Petitioner got up and pulled out a nickel-plated gun. (R86, 94, 95) Harrell rode his motorcycle to the store and called the police. A female officer arrived an hour and a half later. (R89, 98) Harrell told her what happened and described the car. (R90) He denied telling her or Yonce that it was the second man to get out of the car who shot Carmichael. (R101, 102) Harrell had five prior felony convictions. (R91)

Melvin Harrell, Carmichael's father-in-law, also corroborated Carmichael's testimony. (R103 - 116) Melvin Harrell had a prior misdemeanor conviction for which he served a state prison sentence in Georgia. (R108)

Deputy Deborah Hamilton was dispatched to the store in Alturas at 6:06 p.m. and arrived at 6:15 p.m. (R117, 118, 122) Roger Harrell told her Carmichael fought with one man from the car, then a second man shot him. (R123, 124) Harrell gave her a description of the suspects and their car. (R117, 118) She and Sgt. Tebo stopped a car matching the description at 8:39. They arrested the driver for driving without a license. No one in the car had a license, and the owner couldn't prove his ownership of the car, so the officers impounded it. (R118, 119) Petitioner was one of the passengers. (R121) Upon conducting an inventory

search, Hamilton found two handguns, a Raven .25 and a blue steel 9mm. (R119)

Crime scene technician Nona Dyess took photographs of the scene of the shooting. (R126 - 128, 131, 138) She found a beer can and four .25 caliber spent shell casings. (R127 - 132, 139, 140) She then went to the scene of the stop and took photographs of the car. (R133, 136) A Raven .25 caliber automatic and a blue steel Smith and Wesson automatic were found in the car, along with automatic clips, a spent casing, and some live rounds. (R133 - 137)

Bailiff Lynn Dombrowsky helped to inventory the car. She found beer cans and bottles, ammunition, and a black Bersa .22 automatic. (R141 - 146)

Investigator Yonce went to the scene of the shooting to interview the witnesses. (R155 - 157) Both Melvin and Roger Harrell told him that Carmichael fought with the first man who got out of the car and was shot by the second man who got out of the car. (R178 - 180) Yonce then went to the scene of the stop where the car was impounded and two guns were recovered, the .25 automatic and the 9mm automatic. (R157 - 159)

Yonce and Deputy Gonzalez tape recorded the interview with Petitioner around 11:30 or 12:00 that night. Gonzalez advised Petitioner of his rights in Spanish. Petitioner said he understood, agreed to talk, and signed a waiver form with an "X." (R147 - 150, 160 - 162, 166 - 171) Petitioner had been drinking but did not appear to be drunk. (R152)

During the interview, Petitioner initially denied having gone to Alturas that night. (R284) When Yonce told him about the shooting, Petitioner denied any knowledge of it. (R287) After Yonce told him that people at the scene could positively identify the ones who where there (R288) and asked what if one of his friends said he did the shooting, Petitioner admitted he was the right one. (R289) After Yonce said all he wanted to know was the truth, if necessary they would get the people down here to make an identification, and they were not trying to get everybody in trouble (R290), Petitioner admitted that he shot the man to defend himself because the man knocked him down and kicked him. (R291 - 294, 296 - 298) The people got mad at him for no reason. (R298)

Yonce again admitted it was not true that witnesses could positively identify Petitioner. Nor had one of Petitioner's friends said he did it. (R180, 181) Petitioner was arrested after the interview. (R181)

Yonce later interviewed Carmichael at the hospital. Carmichael said he knocked down the first man who got out of the car. A second man got out and shot him. (R180)

Joseph Hall, a firearms examiner at Tampa Reginal Crime Laboratory, examined the firearms and shell casings recovered by the officers. He determined that the casings were fired from the Raven .25 automatic. (R183 - 192)

Petitioner testified through an interpreter that he had been drinking with his friends all day on March 31. He asked the driver to stop the car at the house in Alturas because he was going to the house of some friends. (R197, 198) Petitioner lived

in an apartment behind the house. (R202, 207) An older man approached and yelled at him in English. He did not understand what the man was saying. He got out of the car and walked toward his friends' house. A younger man approached and hit him. (R199, 208) When Petitioner was on the ground, he saw the older man with a knife. He was afraid, so he took out his pistol and fired. He did not remember how many shots he fired. He did not realize that the man was shot. (R200, 208 - 210)

Alfonso Acensio, Petitioner's brother, testified that he was approaching the car from a nearby trailer and saw what happened. Petitioner was getting out of the car when the man hit him and knocked him down. The older man was trying to hit Petitioner with a knife. Petitioner took out a gun and shot the man who hit him. (R211 - 217)

SUMMARY OF ARGUMENT

ISSUE I.

The trial court was required to instruct the jury on the lesser included offense of battery because the elements of battery were both alleged and proven by the state. Battery was the next immediate, completed lesser offense to aggravated battery, the crime for which Petitioner was convicted, so refusal to instruct on battery was per se reversible error.

ISSUE II.

The Fifth and Fourteenth Amendments prohibit the use of involuntary statements by the accused. Petitioner's statement to the police was the involuntary product of psychological coercion, false statements by the police, and an implied promise not to prosecute in combination with Petitioner's drinking, lack of education, and inability to understand English. Denial of Petitioner's motion to suppress not only violated the constitution, it was harmful to the defense because the taped statement was inconsistent with Petitioner's trial testimony and weakened his claim of self-defense.

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY UPON THE LESSER INCLUDED OFFENSE OF BATTERY.

The trial court should instruct the jury upon lesser offenses which may or may not be included in the offense charged where the lesser offense is included in the allegations of the charging document and is proven at trial. State v. Terry, 336 So.2d 65, 68 (Fla. 1976); Brown v. State, 206 So.2d 377, 383 (Fla. 1968).

Petitioner was charged with attempted first degree murder. (R3, 4, 53, 54) The allegations included premeditation, intent to kill, and shooting Alec Carmichael with a pistol. (R3, 53) The evidence at trial established that Petitioner intentionally shot Carmichael, although Petitioner said he did so in self-defense. (R64 - 68, 74 - 78, 86 - 89, 94 - 97, 105 - 112, 200, 208 - 210, 214 - 217, 291 - 294, 296 - 298) Thus, both the allegations and the evidence established all of the elements of a battery, i.e., Petitioner intentionally caused bodily harm to another individual. §784.03,(1)(b), Fla. Stat. (1983).

Despite the presence of both allegations and proof of a battery, the trial court refused to instruct on battery, and defense counsel objected to his refusal. (R219) The court instructed the jury on attempted first degree murder, attempted second degree murder, attempted manslaughter, and aggravated battery. (R244 - 249) The jury found Petitioner guilty of aggravated battery. (R262, 266)

In an analagous case, this Court found that refusal to instruct on assault and battery was prejudicial error. State v. Terry. Terry was charged with assault with intent to commit murder by shooting the victim and convicted of aggravated assault upon her testimony that she shot the victim with a pistol in self-defense. The court instructed the jury on assault with intent to commit first degree murder, assault with intent to commit second degree murder, assault with intent to commit manslaughter, aggravated battery, and aggravated assault. The court refused to instruct on assault and battery and bare assault. This Court quashed the decision of the First District Court of Appeal which had affirmed the refusal to instruct and remanded for further proceedings.

Just as the trial court committed prejudicial error by refusing to instruct on assault and battery in Terry, the trial court committed prejudicial error when it refused to instruct on battery in the present case.

> [I]t is the jury's prerogative to resolve questions of fact as to the degree of offense committed. The authority of a jury includes its ability to find a defendant guilty of the lesser included offense even where the evidence might warrant a verdict of guilt on the greater offense charged. The trial court should not usurp the jury's role by failing to give instructions on lesser included offenses.

State v. Thomas, 362 So.2d 1348, 1349 - 1350 (Fla. 1978) (footnote omitted).

Generally, the failure to instruct on a lesser included offense which is but one step removed from the offense for which the defendant was convicted is per se reversible error, Reddick v.

State, 394 So.2d 417, 418 (Fla. 1981); Jackson v. State, 449 So.2d 411 (Fla. 2d DCA 1984), while failure to instruct on a lesser included offense two steps removed from the offense for which the defendant is convicted may be regarded as harmless error. State v. Abreau, 363 So.2d 1063 (Fla. 1978).

In this case, battery was the next completed offense below aggravated battery, the offense for which Petitioner was convicted. However, the court gave an instruction on one intervening offense, attempted manslaughter. Aggravated battery is a felony of the second degree. §784.045(2), Fla. Stat. (1983). Attempted manslaughter is a felony of the third degree. §§777.04 (4)(c) and 782.07, Fla. Stat. (1983). Battery is a misdemeanor of the first degree. §784.03(2), Fla. Stat. (1983).

The two steps removed doctrine of Abreau does not apply where the only intervening offense upon which the court instructs is an attempt:

> The application of the Abreau 'step' analysis should only be made in cases where both the instruction that was given and the omitted instruction relate to a lesser-included offense. An attempt instruction does not provide a 'step' within the meaning of Abreau.

State v. Bruns, 429 So.2d 307, 309 (Fla. 1983). Bruns was charged with and convicted of robbery. The trial court instructed on attempted robbery, but refused to instruct on petit larceny. The Fourth District Court of Appeal found this refusal to be prejudicial error and reversed. This Court rejected the State's harmless error argument, approved the decision of the District Court, and remanded for a new trial.

Just as the intervening attempt instruction in Bruns did not render the failure to instruct on a lesser included offense harmless, the intervening attempted manslaughter instruction in this case did not render the failure to instruct on battery harmless. Battery was the next immediate lesser included offense to aggravated battery, the offense for which Petitioner was convicted, and failure the instruct on battery was per se reversible error. Foster v. State, 448 So.2d 1239 (Fla. 5th DCA 1984). The judgment and sentence must be reversed and the cause remanded for a new trial on the offense of aggravated battery. See Jackson v. State.

ISSUE II.

THE TRIAL COURT VIOLATED THE FIFTH AMENDMENT BY ADMITTING EVIDENCE OF THE UNEDUCATED PETITIONER'S STATEMENT TO THE POLICE MADE WHILE UNDER THE INFLUENCE OF ALCOHOL AND IN RESPONSE TO PSYCHOLOGICAL COERCION, UNTRUTHFUL STATEMENTS BY THE OFFICER REGARDING THE EVIDENCE AGAINST HIM, AND AN IMPLIED PROMISE NOT TO PROSECUTE.

The Fifth and Fourteenth Amendments to the United States Constitution prohibit the prosecution from using an involuntary statement against the accused. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964); Brooks v. Florida, 389 U.S. 413, 88 S.Ct. 541, 19 L.Ed.2d 643 (1967). The test for determining whether a confession was voluntary is whether it was extracted by any sort of threats or violence, obtained by any direct or implied promises, however slight, or obtained by the exertion of any improper influence. Hutto v. Ross, 429 U.S. 28, 30, 97 S.Ct. 202, 50 L.Ed.2d 194, 197 (1976); Bram v. United States, 168 U.S. 532, 542 - 543, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897); Brewer v. State, 386 So.2d 232, 235 (Fla. 1980).

Coercion can be mental as well as physical. Miranda v. Arizona, 384 U.S. 436, 448, 86 S.Ct. 1602, 16 L.Ed.2d 694, 709 (1966); Gaspard v. State, 387 So.2d 1016, 1021 (Fla. 1st DCA 1980). Any evidence that the accused was threatened, tricked, or cajoled into a waiver of his right to remain silent will show that his waiver was not voluntary. Miranda v. Arizona, 384 U.S. at 476, 16 L.Ed.2d at 725.

> The confession should be excluded if the attending circumstances, or the declarations

> of those present at the making of the confession, are calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind.

Frazier v. State, 107 So.2d 16, 21 (Fla. 1958). Accord Brewer v. State, 386 So.2d at 235 - 236; Williams v. State, 441 So.2d 653, 655 (Fla. 3d DCA 1983), pet.for rev.den., 450 So.2d 489 (Fla. 1984).

Petitioner's statement to Investigator Yonce and Deputy Gonzalez that he shot Alec Carmichael in self-defense because Carmichael hit and kicked him for no reason (R2, 134, 135, 291 - 294, 296 - 298) was involuntary because of a combination of circumstances. First, Petitioner was an uneducated twenty-one year old illegal immigrant who spoke little or no English. (R28, 29, 42, 43) Second, Petitioner had been drinking all day. (R30) Third, Gonzalez used psychological coercion while Yonce was out of the room by appealing to Petitioner's Spanish heritage and sense of manhood. (R41, 44 - 47) Fourth, Yonce made false statements about the evidence against Petitioner when he told him witnesses had positively identified the people present at the scene (R31, 32, 35, 288) and asked what if one of his friends said he did the shooting. (R32 - 34, 289) Fifth, Yonce implied that Petitioner would not be prosecuted if he confessed when he said, "Tell him that all I want to know now is the truth; OK?... We don't want to--we're not trying to get everybody in trouble, we just want to know what happened." (R34, 290)

The State had the burden of proving the voluntariness of Petitioner's statement by a preponderance of the evidence. Brewer v. State, 386 So.2d at 236; Williams v. State, 441 So.2d at 655.

The totality of the circumstances in this case plainly demonstrate that the State failed to meet this burden. Yonce's implied promise not to prosecute was sufficient by itself to render the confession involuntary. Bram v. United States; Henthorne v. State, 409 So.2d 1081 (Fla. 2d DCA 1982). Yonce's false statements about the evidence against Petitioner were equally improper and calculated to unduly influence Petitioner by deluding him as to his true position. Brewer v. State; Williams v. State. Gonzalez's tactic of appealing to Petitioner's Spanish heritage and sense of manhood also violated the Bram rule against exertion of improper influence. See Ware v. State, 307 So.2d 255 (Fla. 4th DCA 1975) (use of family approach, indicating defendant would not be away from family for as long if he confessed, violated Bram rule). Such police misconduct in combination with Petitioner's drinking, lack of education, and inability to understand English overcame Petitioner's will to resist his interrogators and resulted in a statement which was the product of psychological coercion, not the free and voluntary choice required by the constitution.

Under the circumstances, the trial court violated the Fifth and Fourteenth Amendments when it denied Petitioner's motion to suppress (R5 - 7, 150 - 151) and admitted the tape recording of Petitioner's statement into evidence. (R172 - 175, 282 - 298) This error was prejudicial to the defense because Petitioner's recorded statement was inconsistent with his trial testimony. In the taped statement, Petitioner initially denied any knowledge of the shooting (R284), then admitted the shooting in response to being hit and kicked, but without mention of any weapon used by

his assailants. (R291 - 294, 296 - 298) At trial, Petitioner freely admitted the shooting, but claimed self-defense because the younger man struck him and the older man came at him with a knife. (R199, 200, 208 - 210) These inconsistencies reduced the credibility of Petitioner's testimony and weakened his claim of self-defense.

Because of the prejudicial impact of the inconsistencies between the taped statement and Petitioner's trial testimony, the court's constitutional violation cannot be held harmless beyond a reasonable doubt as required by Chapman v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). The judgment and sentence must be reversed and the cause remanded for a new trial.

CONCLUSION

Petitioner respectfully requests this Honorable Court to reverse the decision of the District Court of Appeal, Second District and remand with instructions to reverse the judgment and sentence and remand this case for a new trial.

Respectfully submitted,

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