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IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,550

DUANE EUGENE OWEN,

Appellant, Defendant,

v.

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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CONSTITUTION

PRELIMINARY STATEMENT

The symbol "R" will be used to designate the record on appeal and the symbol "SR" will be used to designate the supplemental record on appeal.

QUESTIONS PRESENTED

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE APPELLANT'S STATEMENT INTO EVIDENCE?

ARGUMENT

THE TRIAL COURT ERRED IN ALLOWING THE APPELLANT'S STATEMENTS INTO EVIDENCE

A. The police failed to cease interrogating once the Appellant indicated his desire to remain silent.

The Fifth Amendment requires the police to immediately cease an interrogation once a suspect indicates in any manner, at any time during questioning that he wishes to remain silent, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); reaffirmed in, Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). In the instant case, the Appellant's Fifth Amendment rights were grossly violated. At several points during the twenty-four hours of videotaped interrogations, the Appellant indicated that he wished to remain silent.

> Appellant: Hey, between me and you, it seems to me that I shouldn't have to make a confession even though I --- even if I did do it. You know what I mean.
> Officer Woods: You shouldn't have to?
> Appellant: No.
> Officer Woods: Why? (S.R. 137)
>
> * * *
>
> Officer McCoy: Okay. You don't want to talk about them?
> Appellant: About which ones?
> Officer McCoy: The one that you did that you didn't get caught for.
> Appellant: No reason to, no.
> Officer McCoy: Why?

Appellant: Why should I?
Officer McCoy: Because you want to, because you want to tell me about them. I don't know. (S.R. 364)

* * *

Appellant: You're up here and I ain't talking about it.
Officer McCoy: Are you going to?
Appellant: Nope.
Officer McCoy: Why not? Why not?
Appellant: I don't know.
Officer McCoy: Is it because you are afraid or you don't want to remember or what? What's the reason? Give me a reason?
Appellant: I've got to figure it out myself, you know.
Officer McCoy: Okay. Let me ask you something. We'll get off that for a while. Then we'll come back to it, o.k.? But we'll get off of it for a while... (S.R. 880)

* * *

Officer McCoy: What are we going to do with Georgiana Warden? What are we going to do about that?
Appellant: There ain't much to do about it, chief. (S.R. 921)

* * *

Officer McCoy: Do you want to talk anymore?
Appellant: No, because you've got to get back over there and I really ain't got nothing to say anymore. (S.R. 966)

* * *

Officer Lincoln: Were you looking at that particular house or just going through the neighborhood?
Appellant: I'd rather not talk about it.
Officer Woods: Why?
Officer Lincoln: Why? You don't have to tell me about the details if you

don't want to, if you don't feel comfortable about that. Was it just a random thing? (S.R. 1078)

* * *

Officer Lincoln: Now, where did you put it?
Appellant: I don't want to talk about it.
Officer Lincoln: Don't you think its necessary to talk about it, Duane? Two months have gone by already. (S.R. 1095)

As detailed above, the Appellant, several times, indicated his desire to discontinue the interrogation. These statements, considered in the totality of the circumstances, must be viewed as an unequivocal invocation of his right to remain silent. In U.S. v. Poole, 794 F.2d 462 (9th Cir. 1986), the Court held that the interrogation should have ceased after the suspect said that he had, "Nothing to talk about." In California v. Carey, 227 Cal.Rptr. 813, 183 Cal.App.3d 99 (2d Dist. 1986), cert denied, ____ U.S. ____, 107 S.Ct. 1297, 94 L.Ed.2d 153 (1987), the Court held that the suspect's statement, "I ain't got nothing to say", was an unequivocal invocation of his right to remain silent.

Once the Appellant did indicate his right to remain silent, the police not only ignored his request, but they also sought to wear down his resistence over the many hours of continued interrogation. The Supreme Court has held that following an invocation of the right to remain slient, the interrogators may not attempt to wear down the suspect's resistence and make him change his mind. Michigan v. Mosley, supra. at 105-06.

At one point when the Appellant stated that, "I ain't talking about it", (S.R.880) Officer McCoy stated that, "We'll get off that for a while, then we'll come back to it" (S.R. 880). The practice utilized by this officer violated the Moslev opinion which required more than a switch of subjects after an invocation of the right to remain silent, rather it mandated a total termination of the interrogation. Michigan v. Mosley, supra; Martin v. Wainwriaht, 770 F.2d 918, 924 (11th Cir. 1985). modified, 781 F.2d 185, cert denied, ____ U.S. ____ , 107 S.Ct. 307, 93 L.Ed.2d 281 (1986); and Anderson v. Smith, 751 F.2d 96, 103 (2nd Cir. 1984).

The Appellant's confession, which relates to the instant case, began at the end of the twenty-four hours of video taped interrogations. The invocation of the right to remain silent had been expressed several times over. Just prior to the statements relating to the instant homicide, the Appellant stated that, "I'd rather not talk about it". (S.R. 1077). Additionally, during the statements, the Appellant again stated that, "I don't want to talk about it". (S.R. 1095). An inquiry as to why the Appellant wished to remain silent was an impermissible interrogation as opposed to a lawful clarification. Anderson v. Smith, supra. at 103, 105.

Since the Appellant's right to cut off questioning was not scrupulously honored and the police continued their vigorous interrogations, the statements should have been suppressed from evidence, and the cause must be reversed and remanded with

directions for a new trial.

B. The police obtained the statements from the Appellant through the use of promises.

The U.S. Supreme Court has held confessions to be involuntary if obtained by any direct or implied promises, however slight. Bram v. U.S., 168 U.S. 532 (1897); reaffirmed in, Bradv v. U.S., 397 U.S. 742, 90 S.Ct. 1602 (1970). The Bradv Court held that Bram v. U.S., supra, was still valid and was applicable to the states, pointing out that in Bram:

> ... even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. Id

In Lynumm v. Illinois, 372 U.S. 528, 83 S.Ct. 917 (1963), the Supreme Court held that the confession was coerced when the accused was told that she would loose her welfare payments and the custody of her children as a consequence of her arrest, but if she cooperated with the police they would help her and recommend leniency. In Rouers v. Richmond, 365 U.S. 534, 81 S.Ct. 735 (1961), the Court ruled a confession to be the product of coercion when the police threatened to take the defendant's wife into custody if he did not ccoperate. In U.S. v. Tingle, 658 F.2d

1332 (9th Cir. 1981), a confession was coerced by the police when they stated that if the suspect did not cooperate she would receive a lengthy sentence and would not see her child for a long time. In Nebraska v. Smith, 277 N.W. 2d 441 (Neb. 1979), a confession was ruled involuntarily when the police offered to try and get a juvenile's case transferred to juvenile court.

In the instant case the police utilized the Appellant's brother as a bargaining position. The police coerced a confession from the Appellant through promises of bringing his brother to the jail to visit.

> Officer McCoy: Don't go away. Don't go away on me. Don't shut me out.
> Appellant: Would it be possible for me to see him again?
> Officer McCoy: After you tell me.
> Appellant: I mean like to shake hands.
> Officer McCoy: After you tell me. Yeah. I'll drive him up myself. I could arrange it where I could drive him up tomorrow morning. Okay? Yes, I'll do that for you. You know how I will, don't you?
> Appellant: Well, if you said you would, you will. **(S.R.** 545)
> * * *

> Officer McCoy: Tell me about that one, and I will hold up the other end of the bargain and bring your brother up tomorrow. Okay? That's the way its got to be. Okay? We've come a long way. Okay? Don't stop now. **(S.R.** 641)
> * * *

> Officer Woods: You wanted to talk to your brother first, right? Is that what you wanted? Is that what your deal was? **(S.R.** 854)
> * * *

> Officer McCoy: Your brother was up here and now we are here. So, you called those shots and here I am. Okay! And now its time for you to hold your end up of your bargain that you struck last night. (S.R. 863)
>
> * * *
>
> Officer McCoy: You made a deal yesterday. I kept myhalf of the bargain... And you didn't stick to your word. (S.R. 960)

In the instant case, the Appellant's confession began on June 21, 1984, tape thirteen, approximately S.R. 1077. As is obvious from the aforesaid dialogue between the Appellant and police, the deal was for the Appellant to confess to the homicide and in return the police would arrange for his brother to be brought to the county jail. It thus becomes clear that the confession which followed was coerced and not voluntary and taken in violation of the Fifth Amendment to the United States Constitution.

C. The police obtained a coerced statement by appealing to Appellant's sense of morality.

A confession must be deemed involuntary when the police appeal to an accused's sense of decency and morality. Miller v. Mississippi, 243 So.2d 558 (Miss. 1971). Use of psychiatrically-oriented techniques such as the "Christian Burial" technique must be considered tantamount to coercion. see generally, Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232 (1977). In the instant

case, the police repeatedly appealed to Appellant's sense of morality to obtain a confession,

> Officer McCoy: So we don't have to sit here again. So I don't have to go to two little girls again, okay. Because I don't like doing that. (S.R. 1181)
>
> * * *
>
> Officer McCoy: Because you have a chance not to do it again, okay. Because there is kids out there that don't want to have to go through that again. (S.R. 135)
>
> * * *
>
> Officer McCoy: Until we stop it. Until it stops. At least for you it stops. You know, at least for you it stops. I can tell those children, you know, that the man that hurt their mom won't hurt somebody else. (S.R. 252)
>
> * * *
>
> Officer Livingston: They still know what the truth is and you're willing to put those children through it. You're willing to put your brother through it. You're willing to put other people that you know through it just to show how slick you are, just your evil, just for that bad side of you so they can sit back and enjoy it. (S.R. 418)
>
> * * *
>
> Officer Livingston: These women were murdered a couple of days ago. There is two kids running around without their mother today. And you're responsible. (S.R. 419)
>
> * * *
>
> Officer McCoy: Because I can go back to those children tonight and I can tell those children that the person, no name, whatever, the person responsible for hurting their mommy is not going to do it again. (S.R. 542)

* * *

Officer McCoy: I want to give them peace of mind... And now the only person that they loved, the other parent, now is gone, Yeah, you are right. That is a bummer. So I want to go back and ease their consciences, you know, their minds, okay, and assure them this guy is not going to --- he's sorry for what he did... And you can help me do that... We owe them that much... We owe them that much. Because I can explain things to them. Put their minds at rest a little bit. So their not dreaming and having nightmares. And make them rest a little bit easier tonight. **(S.R.** 544)

* * *

Officer Livingston: The question you asked me is why, why should you confess it. The only reason I can give is for the sake of those children that were in that residence, her two little girls. The little girl discovered her mother like that, for your brother, for this person right here. This is the most important reason right here, this picture. (S.R. 975)

* * *

Officer Lincoln: But I do think you do have a responsibility too that you can recognize to try to make things right for the people in Delray. (S.R. 1085)

* * *

Officer Lincoln: But you can sure make it easier on two parents that need to know.
Officer Woods: And a whole town full of babysitters that are afraid to go outside. That's how kids make all their money in the summer. **(S.R.** 1078)

* * *

As is evident from the above-quoted transcription, the Appellant's statements were not free and voluntary, but rather,

were the product of unlawful and unconstitutional police induced psychological coercion, violating the Fifth Amendment to the United States Constitution. Because the statements were coerced, this cause must be reversed and remanded for a new trial.

D. The police continued to interrogate the Appellant after he reauested an attorney.

The law in this country is well established that once a suspect makes a request for counsel the interrogation must cease. Edward v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981); Brewer v. Williams, supra; U.S. v. Johnson, 812 F.2d 1329 (11th Cir. 1986); State v. Deville, 12 F.L.W. 2435 (Fla. 1987); and, Kniaht v. State, 12 F.L.W. 357 (Fla. 1987). Any violation to this basic principle mandates the confession to be suppressed.

In the instant cause, the Appellant made several references to and requests to see counsel.

> Appellant: My lawyer is going to look at me and say that I am a ... nut ... You should have never talked to these dudes.. .
> Officer McCoy: You know better.
> Appellant: No.
> Officer McCoy: You know better.
> Appellant: No. (S.R. 130)

From the foregoing it is clear that the Appellant, from the

very beginning of the twenty-four hours of video taped interrogations, was concerned about his right to counsel; however, the police did not cease questioning nor did they provide counsel. Next the Appellant began making inquiries about the only attorney that he knew.

> Appellant: Who's this Paul Doyle character?
> Officer McCoy: Paul Moyle?
> Appellant: Yeah.
> Officer McCoy: He's the State Attorney. Well, the chief felony prosecutor in the State Attorney's office.
> Appellant: What ... is his job?
> Officer McCoy: He basically tries all major cases for the State, you know. **(S.R.** 169)
>
> * * *
>
> Appellant: Mark was talking to me about last time he was here about this here guy named Paul Doyle or Moyle.
> Officer McCoy: Oh, State Attorney?
> Appellant: Yeah... because he's the guy that can give guarantees and stuff, you know, or close to it anyway. **(S.R. 386)**

From the passages quoted above, it becomes evident that the Appellant was making an inquiry about a person whose name must have come up during one of the non-video taped interrogations. In any event, the questioning should have ceased at this point at least until the interrogators could establish from the Appellant if he was in fact making a request to speak with an attorney.

Since, in the instant case, the police continued with their interrogations of the Appellant rather than inquiring into the possible invocation of his right to counsel, the Fifth and Sixth Amendments mandates that this cause be reversed and remanded for a

new trial and the statements be suppressed.

CONCLUSION

For the reasons set forth above, the Appellant, Duane Eugene Owen, respectfully prays this Honorable Court to reverse the conviction entered by the Circuit Court of the Fifteenth Judicial Circuit, Palm Beach County, Florida.

Respectfully submitted,

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