

IN THE SUPREME COURT OF FLORIDA

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HAROLD LEE HARVEY,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 69,101

APPELLANT'S SUPPLEMENTARY BRIEF

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County, Florida. In this brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will designate the appropriate portions of the record:

"R" Record on Appeal

"ASB" Appellant's Supplemental Brief.

STATEMENT OF THE CASE AND FACTS

Appellee hereby adopts the Statement of the Case and the Statement of the Facts as set forth in Appellant's answer brief.

POINT ON APPEAL

WHETHER THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS BECAUSE THE CONDUCT OF THE LAW ENFORCEMENT AUTHORITIES IN EXCLUDING THE PUBLIC DEFENDER WAS NOT EGREGIOUS AND APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED?

SUMMARY OF THE ISSUE

The trial judge correctly denied Appellant's Motion to Suppress his confessions because the police conduct was not egregious and no attorney was retained either by Appellant or his family at the time Mr. Killer made his request to see Appellant. Since Appellant validly waived his right to counsel, no police deception or omission affected the voluntariness of Appellant's waiver.

ARGUMENT

THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION TO SUPPRESS BECAUSE THE CONDUCT OF THE LAW ENFORCEMENT AUTHORITIES IN EXCLUDING THE PUBLIC DEFENDER WAS NOT EGREGIOUS AND APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED.
(restated).

Initially, Appellee takes issue with Appellant's statement that the trial court found as fact that Appellant's attorney was precluded from having access with Appellant (ASB 1). The trial judge specifically found that an attorney was excluded from access to the defendant (R 727). This distinction is crucial because unlike the situation in Haliburton v. State, 12 F.L.W. 506 (Florida Supreme Court, October 1, 1987), Public Defender Clyde Killer was not retained on Appellant's behalf by his family. The instant record shows facts distinct and separate from those in Haliburton or Moran v. Burbine, 89 L.Ed.2d 410 (1986).

To begin with, Mr. Killer was not contacted by a member of Appellant's family and asked to represent him, rather he was informed that Appellant was being questioned in regards to the double murder by Detective Don Fisher at 9:00 A.M. that morning (R 517). Later on that day, Mr. Killer was informed that Judge Connor "expected to have a hearing in the afternoon." Mr. Killer further stated that, "up to that point I hadn't heard any names mentioned of any potential defendants..."(R 518). Far from being the attorney retained by Appellant or a member of his family, Mr. Killer testified that since [he] was the only felony attorney assigned to Okeechobee County, that total lack of knowledge that [he] had about what, up to that point, was prob-

ably the biggest case going down in Okeechobee County was interesting to [him]. So [he] hadn't really been informed as to who [his] clients were going to be (R 518-519). Clearly, Mr. Killer was only guessing that he might, at some future point in time, be appointed to represent Appellant.

At approximately 2:25 P.M., Mr. Killer arrived at the jail and requested to speak with Appellant (R 519, 520). The tape of Appellant's confession began almost at the exact same time (R 650). Mr. Killer did not spend all this time at the jail waiting only to speak to Appellant. He spoke with other prisoners while in the jail (R 521), then saw a third prisoner (R 522), then Killer spoke to the co-defendant who said that Appellant was still speaking with the police (R 523). Officer Charlie Andrews told Killer that detectives were still talking with Appellant but that Killer could wait till the detectives were finished (R 524). Mr. Killer stated that his thoughts at the time were whether to pursue his request and attempt to see Appellant or at least notify him during the interim that he [Killer] was available to counsel Appellant if he needed it (R 524). At sometime on or about 4:40 in the afternoon, Clyde Killer had telephone conversations with the prosecutor, Mr. Miller, who did not allow Killer to see Appellant because Mr. Miller indicated that Appellant had stated that he did not need nor wish to speak to an attorney (R 525). Appellant himself admitted that he did not ask for an attorney (R 557) and he further admitted that he understood his right to an attorney before making a statement (R 586-587).

In Haliburton v. State, 476 So.2d 192, 194 (Fla. 1985), this

Court stated:

Our holding turns on the fact that the attorney retained by Appellant's sister on his behalf was in the station house requesting to speak with Appellant. The failure of the police to convey this information to Appellant violated his otherwise valid waiver.

In the remand of Haliburton, this Court noted that the police refused access even in the face of a circuit court judge's telephonic order that the attorney be allowed to see the suspect. 12 F.L.W. at 507. Appellee submits that the facts in the case at bar differ markedly from those in Haliburton in that there was no police misconduct and there was no retention of an attorney on Appellant's behalf at the time he made his confessions. Therefore, Appellee would further submit that the Haliburton holding of this Court is not applicable to the facts in this case and to apply the Haliburton doctrine herein, would simply not be reasonable.

As the United States Supreme Court stated in Moran v. Burbine, 89 L.Ed.2d, at 424-425:

[A] rule requiring the police to inform the suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt.

In the instant case, were this Court to hold that Appellant's due process rights were violated, it would essentially be reasoning that any public defendant requesting to see any person, must be afforded that right, even if the request comes at a crucial point in time when a con-

fession is being given. Surely, the function of the Sixth and Fourteenth Amendments is not to completely inhibit the ability of the police to do an investigation.

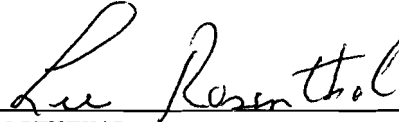
Appellee would also point out to this Court that in the case of Haliburton v. State, Case No. 64,510, the State has submitted a motion for rehearing, arguing that there is no justifiable basis for holding that the due process clause of the Florida Constitution should be interpreted more broadly than the due process clause of the United States Constitution. Even if the Haliburton decision remains unchanged, Appellee still believes that the instant case should be decided differently and that the trial court's decision not to suppress the confessions, should be affirmed.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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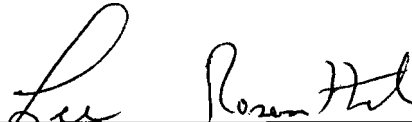


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Supplementary Brief has been mailed to ROBERT G. UDELL, ESQUIRE, Attorney for Appellant, 3601 S.E. Ocean Blvd., Suite 205, Stuart, Florida 33494, on this 4th day of November, 1987.



Of Counsel