IN THE SUPREME COURT OF FLORIDA

ETHERIA VERDEL JACKSON, :

Appellant, :

v. : CASE NO. 69,197

STATE OF FLORIDA, :

Appellee. :

_____ :

16 pages

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA.

ANSWER BRIEF OF APPELLANT

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ANSWER BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

This brief is submitted in reply to Issues I, II, and IV of the answer brief of appellee. Appellant will rely on the arguments advanced in his initial brief as to the remaining issues.

Appellee's brief will be referred to herein as "AB". Other references will be as denoted in appellant's initial brief.

II ARGUMENT

ISSUE I

APPELLANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DUE TO THE COURT'S RESTRICTION OF DEFENSE COUNSEL'S CROSS-EXAMINATION OF A STATE WITNESS AND ADMISSION OF IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF APPELLANT'S BAD CHARACTER.

A. The Trial Court Erred in Restricting Defense Counsel's Cross-Examination of Linda Riley Regarding Her Bias.

Appellee contends in this issue that the proffered question on cross-examination of the state's main witness was totally irrelevant to the matters brought out on direct examination.

Evidence tending to show bias or motive is always relevant, even when it is not mentioned in direct examination. McDuffie v. State, 341 So. 840 (Fla. 2d DCA 1977). This is particularly so when the witness' testimony supplies all the essential elements of the offense. Pollard v. State, 444 So.2d 561 (Fla. 2d DCA 1984). As stated in McDuffie v. State, supra at 841:

> Bias or prejudice of a witness has an important bearing on his credibility and evidence showing such bias is relevant. Webb v. State, 336 So.2d 416 (Fla.App.2d DCA 1976). It is proper to elicit facts tending to show bias or prejudice of a witness in cross-examination of that witness. Davis v. Ivey, 93 Fla. 387, 112 So. 264 (1927). This becomes an important right to a defendant in a criminal case where the jury must know of any improper motives of a prosecuting witness in determining that witness' credibility. See Roberts v. State, 164 So.2d 817 (Fla.1964); Stewart v. State, 58 Fla. 97, 50 So. 642 (1909); Kirkland v. State, 185 So.2d 5 (Fla.App.2d DCA 1966); Stradtman v. State, 334 So.2d 100 (Fla.App.3d DCA 1976); Simmons v. Wainwright, 271 So.2d 464 (Fla.App.1st DCA 1973). It is a fundamental principle that matters tending to show bias or prejudice in a criminal prosecution may be inquired about even when they were not mentioned in direct examination. Wallace v. State, 41 Fla. 547, 26 So. 713 (1899). Cf. Gard, Florida Evidence, P. 747 (1967); 81 Am.Jur.2d, Witnesses, Section 548.

[Emphasis added]. Accord Brown v. State, 424 So.2d 950 (Fla. 1st DCA 1983).

That the defense is given latitude in questioning along one line of impeachment does not excuse restriction of cross-examination along another line of questioning. See, e.g., United States v. Davis, 639 F.2d 239 (5th Cir. 1981), where the court found reversible error in the exclusion of two witnesses to impeach the government's key witness' reputation for truth and veracity in the community, even though the appellants were allowed on cross-examination to impeach the witness regarding his prior convictions, motive for cooperating with the government and inconsistencies in his testimony. See also, Yolman v. State, 469 So.2d 842 (Fla. 2d DCA 1985) (error in limiting cross-examination of key witness concerning his bias or prejudice not made harmless by later testimony of another witness on the same subject).

The proffered cross-examination of Linda Riley was relevant and its exclusion was prejudicial. A new trial is mandated.

B. The Trial Court Erred in Allowing the State to Introduce Evidence that Appellant had been in Prison.

Linda Riley denied ever having an affair with Linton Moody. The additional evidence that she did not have an affair with him while appellant was in prison had no relevance whatsoever to any issue at trial. Appellee maintains, contrary to the state's position at trial, that the evidence was admissible to disprove appellant's defense by showing that the victim and Ms. Riley did not meet until after appellant got out of prison.

However, the prosecutor could not establish when Ms. Riley met the victim and advised the court:

> [I]f the jury is to believe that Linda Riley committed this murder, they would have to believe, according to the defendant, that he did it because of an affair over a year earlier, and that he was messing with her over sex. And I don't want the Court to be anywhere misled that I do have proof to show when Linda Riley and the victim met, because I don't have that proof. I do have the proof, however, when he was released from prison, and I do have the proof of his statement while he was in prison they had an affair and, of course, I have the proof from Ms. Riley that there was no affair, and there was no sex.

(T 426-427). The prosecutor iterated this lack of proof when Ms. Riley's testimony was introduced:

> Like I told you, Judge, I don't know the answer to that, and I don't intend to introduce evidence on that testimony. . . . I don't know when she met Mr. Moody, but I intend to ask her if while he was in prison she had an affair with him.

(T 590-591).

Without knowing when the two met, the time frame was totally irrelevant. Even if the state could establish when Ms. Riley and the victim met, the fact that she did not have an affair with him in December, 1984, was irrelevant since she denied ever having any sort of sexual relationship or affair with Mr. Moody (T 588). The relevance of Linda's testimony was clearly articulated by the prosecutor:

> [W]hen the defendant was arrested he gave the defense that Linda Riley had the affair, and it was over sex, and that was the motivation for the murder. And we would like to present the evidence he was lying, that she didn't have that motivation, that it never occurred, . . .

(T 429). Certainly, this could have been accomplished without injecting the highly prejudicial evidence that appellant had previously been in prison.

Appellee further contends in this issue that any error in the admission of the evidence of appellant's prison stay was "corrected" or rendered harmless by the introduction of appellant's statement to Detective Warren which was admitted without objection (AB 23). Appellant filed a motion in limine seeking to prohibit the state from introducing any evidence relating to the fact that appellant was in prison (R 434). It was clear in the hearing on appellant's motion that Detective Warren's testimony was the subject of the motion in limine (T 159-165). The motion was denied (R 437). Appellant vigorously objected and unsuccessfully moved for a mistrial when the state elicited testimony from Linda Riley concerning when appellant got out of prison (R 589-591), and any further objections to Detective Warren's testimony would have been futile. See Brown v. State, 206 So.2d 377,384 (Fla. 1968).

Peak v. State, 363 So.2d 1166 (Fla. 1st DCA 1978), on which appellee relies, is totally inapposite from the instant case. Not only did Peak himself admit on cross-examination that he had a prior criminal record, but the court there found that the reference to his prior record was inadvertent. Here, in sharp contrast, the state, over appellant's objections, deliberately elicited evidence of appellant's prior incarceration, and the jury was thrice informed of his prison stay. Evidence of appellant's prior record was not otherwise admissible in this case as impeachment or substantive evidence. See

Gelabert v. State, 407 So.2d 1007 (Fla. 5th DCA 1981).

Since the fact that appellant had previously been in prison was not relevant to any issue, and even assuming any slight relevance, since the prejudicial effect of this testimony outweighed its probative value, Section 90.403, Florida Statutes, the erroneous admission of this prejudicial evidence requires a new trial.

C. The Trial Court Erred in Admitting Appellant's Statements to Detective Warren at the Hospital

The introduction of the improper and prejudicial evidence in this case requires reversal of appellant's conviction for a new trial. The admission of irrelevant evidence showing bad character or propensity to crime is presumed harmful error because of the inherent danger that a jury will take it as evidence of guilt of the crime charged. Straight v. State, 397 So.2d 903, 908 (Fla. 1981). In applying the harmless error test, this Court must focus not only on the permissible evidence presented to the jury, but also on the effect of the impermissible evidence on the jury. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). Appellee's contention that the evidence of guilt was overwhelming does not satisfy this test. Appellant is entitled to a new trial.

ISSUE II

THE TRIAL COURT ERRED IN EXCLUDING THE PROFFERED TESTIMONY OF HARRY DODD THAT A LIFE SENTENCE IS REGARDED BY THE PAROLE COMMISSION AS A LIFE SENTENCE WITHOUT POSSIBILITY OF PAROLE, THEREBY EXCLUDING RELEVANT MITIGATING EVIDENCE FROM THE JURY'S CONSIDERATION IN VIOLATION OF THE EIGHTH

AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The thrust of appellee's argument in Issue II is that the opinion of the Parole Commission is inaccurate and consequently inadmissible. Appellee's argument misconceives both the import of the Parole Commission's position and the purpose of the proffered testimony.

Appellee acknowledges that Harry Dodd's affidavit was based upon the conclusion reached by the Attorney General in its opinion rendered January 20, 1984. See Appendix A. In response to an inquiry of the Chairman of the Florida Parole and Probation Commission whether a person who is not sentenced under sentencing guidelines is eligible for parole,[1] the Attorney General wrote:

> Your second question concerns the parole eligibility of a person (not sentenced under the guidelines) who was convicted of misdemeanors for which sentences totaling 12 months or more were imposed and who was otherwise eligible for parole under Ch. 947, F.S. This question should be answered in the negative.
>
> Subsection (8) of Ch. 83-87, F.S., makes it clear that "[t]he provisions of chapter 947

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[1]The question as stated in the Attorney General's Opinion reads:

> IS A PERSON WHO HAS BEEN CONVICTED OF ONE OR MORE MISDEMEANORS, AND THEREFORE WAS NOT SENTENCED UNDER SENTENCING GUIDELINES, ELIGIBLE FOR PAROLE UNDER §947.16(1), F.S., ASSUMING SUCH PERSON'S SENTENCES OR CUMULATIVE SENTENCES TOTAL 12 MONTHS OR MORE AND HE IS OTHERWISE ELIGIBLE FOR PAROLE?

AGO 84-5.

> shall not be applied to" persons convicted of crimes committed after October 1, 1983. A misdemeanor is a crime. See §775.08(4), F.S. In reaching this conclusion, I am aware of the statement of intent on House Bill 1325 (Senate Bill 1140) which seems to make the guidelines applicable to "felonies." Journal of the House of Representatives, p. 781 (May 30, 1983). However, thereafter, the Legislature explicitly used the term "crimes" when Ch. 83-87 was enacted, and since this later expression by the Legislature "is clear and unequivocal, ... legislative intent may be gleaned from the words used without applying incidental rules of construction." Reino v. State, 352 So.2d 853,860 (Fla. 1977).
>
> Therefore, it is my opinion that misdemeanants convicted of crimes committed after October 1, 1983, are not eligible for parole consideration.

1984 Op. Att'y Gen. Fla. 084-5 (January 20, 1984).

The Attorney General went on to find that persons sentenced under the Mentally Disordered Sex Offender Act, Drug Rehabilitation Program and Youthful Offender Act were likewise not eligible for parole, reasoning that the Legislature mandated that Chapter 947 was no longer applicable to persons convicted of crimes after the effective date of the guidelines and "[n]o exceptions were included by the Legislature in the statute." Id. The Attorney General concluded:

> I am of the opinion that Ch. 83-87 makes it clear that the Legislature intended that parole be precluded for all persons convicted of crimes committed after October 1, 1983, as well as for persons sentences under the guidelines, regardless of when their crimes occurred.

Id.

Based on this conclusion, the Parole Commission has adopted the policy that persons sentenced to life imprisonment

for capital offenses committed after October 1, 1983, are not eligible for parole in 25 years. Appellee contends that the Parole Commission's position is merely an opinion and carries no weight. In so arguing, appellee ignores the force and effect of the Attorney General's Opinion.

In Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985), the Parole Commission adopted AGO 85-11, stating that a prisoner serving consecutive sentences is not eligible for parole if he is under a sentence he has not yet begun to serve, as its own policy, thereby denying the petitioner release on his effective parole release date pursuant to a written Mutual Participation Agreement. Petitioner sought mandamus to enforce the terms of the agreement. In upholding the commission's action, this Court held:

> We note that the Department of Legal Affairs is the commission's legal advisor as designated by statute. §947.11, Fla.Stat. (1983). The effect of AGO 84-11 [sic] was to put the commission on notice that, in the opinion of the Attorney General, its established parole procedures for prisoners serving the first of consecutive sentenced were in violation of state law. Recognizing the great weight to be accorded an Attorney General's Opinion, Beverly v. Division of Beverage of Department of Business Regulation, 282 So.2d 657 (Fla. 1st DCA 1973), and recognizing that the Attorney General has authority to bring an action to challenge the legality of a parole decision, State ex rel. Boyles v. Florida Parole and Probation Commission, 436 So.2d 207 (Fla. 1st DCA 1983), the commission acted in good faith in rescinding the effective parole release date.

473 So.2d at 1249 [Emphasis added].

While the Parole Commission does not promulgate the law, it is charged with implementing it in accordance with the

opinion of its legal advisor, the Attorney General. The Commission, based upon the opinion of the Attorney General, has deemed persons sentenced to life ineligible for parole. Having given its opinion, the Attorney General is now estopped from denying its legal effect. See Vaprin v. State, 437 So.2d 177, 178 n. 2 (Fla. 3rd DCA 1983).

The purpose of this evidence cannot be disputed. In Skipper v. South Carolina, 476 U.S. ___, 90 L.Ed.2d 1 (1986), the Supreme Court held that evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Evidence that a defendant may never be eligible for parole if sentenced to life imprisonment must be considered potentially mitigating. Appellee argues that parole eligibility does not pertain to any aspect of the defendant's character or record and is therefore not mitigating evidence as contemplated under Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). Appellee's view of mitigation is far too restrictive. In a capital case, mitigation must be viewed within the broadest bounds of relevance. A jury which has just learned that the defendant committed murder while on parole will undoubtedly be concerned about the prospects of the defendant being paroled again. Certainly evidence that the defendant may never be eligible for parole is a relevant sentencing concern. By instructing the jury that a defendant sentenced to life in prison will be eligible for parole in 25 years, the jury is misled into believing that the defendant may someday get out of prison, when in fact he may never be eligible for parole. This is the

very type of mitigation contemplated by Lockett and its progeny.

California v. Ramos, 463 U.S. 992 (1983) recognizes that a defendant's probable future behavior is a relevant sentencing consideration. Appellee attempts to distinguish Ramos on the frivolous basis that the issue there involved a jury instruction rather than proffered evidence, and that California law does in fact provide for a life sentence without the possibility of parole. This totally misses the point. First, Ramos allows the states to decide whether to instruct capital sentencing juries on the governor's power to commute a sentence, but the constitution requires that capital sentencing juries be allowed to hear evidence in mitigation. Second, Ramos holds that the mere possibility that a capital defendant might be pardoned by the governor at some undefined time after receiving a life sentence is a legitimate sentencing concern because of the issue of future dangerousness. Given that future dangerousness after the remote possibility of a pardon or parole is relevant to aggravation, certainly evidence that the defendant may not be paroled must be considered relevant to mitigation. Finally, it is noteworthy that Ramos deals with the governor's pardon power, not a particular characteristic of the defendant. Appellee would preclude the evidence here because it does not, in a literal sense, pertain to the characteristics of appellant, but as Ramos suggests, the powers of third parties are nonetheless valid sentencing considerations.

Whereas defendants in the penalty phase of a capital trial have no federal right to prevent jury consideration of the

possibility that they will be paroled if sentenced to life imprisonment, see Ramos v. California, supra, and Tucker v. Zant, 724 F.2d 882, 892 (11th Cir. 1984), there is a constitutional right to permit jury consideration of any relevant evidence that the defendant proffers as a basis for a sentence less than death. The exclusion of such evidence runs afoul of the Eighth and Fourteenth Amendments.

Appellant maintains that his death sentence must be reversed and the cause remanded for a new penalty proceeding.

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CROSS-EXAMINE APPELLANT ABOUT PRIOR CONVICTIONS IN THE PENALTY PHASE, SINCE APPELLANT'S CREDIBILITY WAS NOT IN ISSUE AND THE EVIDENCE OF APPELLANT'S PRIOR CRIMINAL RECORD CONSTITUTED IMPERMISSIBLE NON-STATUTORY AGGRAVATION.

Appellee makes a futile attempt to distinguish the instant case from Maggard v. State, 399 So.2d 973 (Fla. 1981), on the ground that the prosecutor's objectionable question to appellant on cross-examination was not directed to any waived mitigating circumstance but rather was intended to impeach appellant's statement that he would be a good influence on his children. Appellee does not dispute that evidence of appellant's additional convictions was inadmissible as aggravation or to rebut a waived mitigating factor, but insists that the illicit evidence was nonetheless admissible because "it went directly to the truth of the mitigating factor" that appellant would try to be a positive influence in his children's lives (AB40). This argument is legally and logically without merit.

The fact that appellant had three prior felony convictions had absolutely no bearing on the truth of appellant's statement that he loved his children and would do his best to be a positive influence in their lives. More importantly, the evidence of appellant's prior record was inadmissible unless to prove that appellant was under sentence of imprisonment or had previously been convicted of a felony involving the use or threat of violence, and the state could not introduce for one purpose evidence which was inadmissible for another.

Robinson v. State, 487 So.2d 1040 (Fla. 1986), is on point. During the penalty phase, the prosecutor was allowed to ask several defense witnesses questions concerning crimes that Robinson had allegedly committed subsequent to the murder, even though Robinson had not been charged with or convicted of those crimes. The state argued that the questions would undermine the credibility of the defense witnesses who testified that Robinson was a good worker and good-hearted person, although the state acknowledged its inability to rely on those offenses in aggravation. In reversing Robinson's sentence of death, this Court held:

> Arguing that giving such information to the jury by attacking a witness' credibility is permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

487 So.2d at 1042.

More recently, in Keen v. State, 12 FLW 138 (Fla. March 19,1987), the Court, relying on Robinson v. State, found that a prosecutor's improper cross-examination of the defendant in the guilt phase of a capital trial could not be harmless. There, the state filed a pretrial notice of intent to rely on evidence of an attempted murder of Keen's sister-in-law eight years before the murder for which Keen was on trial. The trial court excluded the state's proffered Williams Rule evidence. Keen testified on his own behalf and on direct examination admitted to a prior felony conviction. On cross-examination the prosecutor asked Keen whether he and his brother tried to beat his brother's wife to death with a rock in 1973. Keen's motion for mistrial was denied, but this Court reversed Keen's conviction for the first degree murder of his wife because the prosecutor's question was so inflammatory and prejudicial that it destroyed Keen's right to a fair trial. The Court rejected the state's argument on appeal that the error in asking this single question was harmless, reasoning:

> While an improper question by a prosecutor may, in light of the overwhelming evidence of guilt and the nature of the question, be considered harmless error, see e.g., Straight, 397 So.2d at 909, the focus of harmless error analysis must be the effect of the error on the trier of fact:
>
> > Application of the [harmless error] test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. . . . The question is whether there is a reasonable possibility that the error affected the

> verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.
>
> State v. DiGuilio, 491 So.2d 1129, 1138-1139 (Fla. 1986).

12 FLW at 141. The Court went on to hold that the state had not met its burden of showing that evidence of the collateral incident, albeit under the guise of a question, had no impact on the verdict.

As noted by the Court in Keen, the improper questions at issue in Robinson were asked during the penalty phase, wherein a character analysis of the defendant is contemplated and the rules of evidence are relaxed. Nonetheless, the improper cross-examination compromised the fairness of the proceeding. The instant case in indistinguishable from Keen and Robinson. Appellant is thus entitled to a new sentencing proceeding before a new jury.

III CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, as well as that in the initial brief, appellant respectfully requests this Court grant the following relief:

Reverse his conviction and sentence of death and remand for a new trial under Issue I;

Reverse his death sentence and remand the cause for a new sentencing hearing under Issues II, III, IV, V and VI.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Assistant Attorney General, Kurt L. Barch, The Capitol, Tallahassee, FL, 32399-1050, this 11th day of May, 1987.

Paula S. Saunders
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