

IN THE SUPREME COURT OF FLORIDA

WALTER LEE BROWN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

CASE NO. 69,623

NOV 1967

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

REPLY BRIEF OF APPELLANT

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CASE NO. 69,623

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

This brief is submitted in reply to Issue III of the answer brief of appellee, which consolidates Issues III and V as set forth in appellant's initial brief. Appellant will rely on his initial brief as to the remaining issues.

Appellee's brief will be referred to herein as "AB." All other references will be as set forth in the initial brief.

II ARGUMENT

ISSUE III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SEVERANCE, AND THE SUBSEQUENT INTRODUCTION OF THE CODEFENDANT'S CONFESSION WITHOUT OPPORTUNITY FOR CROSS-EXAMINATION VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT OF CONFRONTATION.

A. Guilt Phase

In urging this Court to affirm appellant's conviction and sentence, appellee has taken great liberties with the law, misstating holdings and mistakenly relying on inapposite cases. As will be demonstrated below, appellee can find little support from its cited authorities.

Appellee initially relies on Richardson v. Marsh, 481 U.S. ____, 95 L.Ed.2d 176, 109 S.Ct. ____ (1987), for the general proposition that joint trials are permissible and preferable, and infers from this endorsement of joint trials that the codefendants' statements were properly admitted at the trial below.¹ Appellee's reliance on Richardson v. Marsh is, as applied to this case, totally misguided.

In Richardson, the high Court held that the confrontation clause of the Sixth Amendment is not violated by the admission,

¹Appellee states at page 18 of its brief: "Under Richardson, the trial court here properly admitted each co-defendant's statement. However, the court in Richardson also strongly endorses the states use of joint trials, regardless of whether Brown's statement was properly admitted here." Appellant did not challenge the admission of his statement at trial and can only assume that appellee intended to refer to codefendant Robert Roundtree's statement.

at a joint trial, of a nontestifying codefendant's confession, where the confession is redacted to eliminate any reference to the defendant. The Court distinguished the case from its prior holding in Bruton v. United States, 391 U.S. 123 (1968), on the grounds that in Bruton, the codefendant's confession expressly implicated the defendant as his accomplice and its introduction was powerfully incriminating, whereas in Richardson v. Marsh, the confession of the codefendant was not incriminating on its face. The Court reasoned that where the redacted confession makes no reference to the codefendant, the jury can be expected to follow the court's instructions to consider the confession only against the codefendant. Thus, the case did not present the overriding concern in Bruton that

(T)here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. . . .

Richardson v. Marsh, 95 L.Ed.2d at 186, quoting, Bruton v. United States, 391 U.S. at 135-136.

The instant case does not involve redacted confessions and Roundtree's confession did implicate appellant on its face. Thus, the rationale of Richardson is simply not tenable under the facts of this case. By relying on Richardson, appellee conveniently ignores the dictates of Bruton and Cruz v. New

York, 481 U.S. ____, 95 L.Ed.2d 162, 109 S.Ct. ____ (1987), decided the same day as Richardson, which clearly denounce the use of joint trials under the facts presented here.

Appellee's reliance on Damon v. State, 397 So.2d 1224 (Fla. 3rd DCA 1981), is also misplaced. Relying on Parker v. Randolph, 442 U.S. 62 (1979), the Damon court held that when codefendants make interlocking confessions, which are admitted at trial, no severance is required either because there is no Bruton violation or because the nontestifying codefendant's confession is harmless error. In finding that the admission of interlocking confessions does not violate the Sixth Amendment, Damon is at odds with the Supreme Court's more recent decision in Cruz v. New York, supra, and its holding is clearly suspect.

Assuming arguendo that the district court's opinion in Damon continues to have some validity with respect to the application of harmless error, that case is inapposite to the one at bar. The Damon court noted that the codefendant's statement was predictably more exculpatory concerning only immaterial details of the crime and thus its introduction at trial was not harmful to Damon's case. Here, in contrast, Roundtree's confession was more exculpatory concerning the most significant details of the crime and its admission was clearly harmful to appellant's case. In addition, the Damon court's holding, that the interlocking confession doctrine "has full vitality even when the defendant's admissions are themselves challenged at trial," 397 So.2d at 1226, was rejected by the Supreme Court in Cruz, which recognized the devastating

character of interlocking confessions where the defendant is seeking to avoid his confession:

In such circumstances a codefendant's confession that corroborates the defendant's confession significantly harms the defendant's case, . . .

95 L.Ed.2d at 171. Damon is not good law and cannot support appellee's position.

Presumably, appellee assumes that appellant's and Robert Roundtree's statements are interlocking, despite the crucial differences in the statements with respect to the codefendants' respective culpability in the kidnapping and murder of Francis Bowden. Here, as in Lee v. Illinois, 476 U.S. ___, 90 L.Ed.2d 514, 529, 106 S.Ct. ___ (1986), the subjects upon which these statements do not interlock cannot in any way be characterized as irrelevant or trivial. As the Court in Lee held, "[w]hen the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." 90 L.Ed.2d at 529. Appellant maintains that the statements here are not interlocking, and the introduction of Roundtree's confession at trial was error. See Holland v. Scully, 797 F.2d 57 (2d Cir. 1986); People v. Fort, 147 Ill.App.3d 14, 100 Ill. Dec. 438, 497 N.E.2d 416 (1986); State v. Bleyl, 435 A.2d 1349 (Me.1981).

Even if the statements here can be deemed interlocking, the introduction of Roundtree's statement at trial was error under the holding of Cruz v. New York, supra. Cruz rejected the plurality opinion in Parker and held that where a nontesti-

fying codefendants' confession facially incriminating the defendant is not directly admissible against the defendant, the confrontation clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant and even if the defendant's confession is admitted against him. Cruz instructs that the interlocking nature or factual similarities between the confessions increases the likelihood that the jury will find the defendant's confession credible and truthful. The likelihood of such corroboration also increases the danger that the jury will not be able to follow the court's instructions and thus precludes a finding of harmless error.

Appellee has misconstrued the holding of Cruz by stating that if both defendants' confessions demonstrate the requisite signs of truthfulness, the codefendant's statement is directly admissible at trial against the defendant and that there is no confrontation violation if the codefendant's statement bears sufficient indicia of reliability (AB 19). Appellee overlooks the hearsay nature of the codefendant's confession, as well as the essence of the Bruton rule. Appellee further reads Cruz as endorsing the Parker plurality's view, rather than overruling it. Cruz clearly states that

Where two or more defendants are tried jointly, . . . , the pretrial confession of one of them that implicates the others is not admissible against the others unless the confessing defendant waives his Fifth Amendment rights so as to permit cross-examination.

95 L.Ed.2d at 169. The Supreme Court went on to explain that the reliability of the codefendant's confession

may be relevant to whether the confession should (despite the lack of opportunity for cross-examination) be admitted as evidence against the defendant, see Lee v. Illinois, 476 US ___, 90 L Ed 2d 514, 106 S Ct 2056 (1986), but cannot conceivably be relevant to whether, assuming it cannot be admitted, the jury is likely to disregard it, or the jury's failure to obey is likely to be inconsequential.

Id., at 171 (Emphasis in original).

In other words, a codefendant's confession does not lose its hearsay status and become admissible as evidence against the defendant simply because it is reliable. The questions of reliability and trustworthiness of the codefendant's confession arise only if the statement is otherwise admissible against the defendant, such as falling within a recognized exception to the hearsay rule. See State v. Hoskinson, 48 Wash.App. 66, 737 P.2d 1041 (1987) (Reliability can be inferred where the evidence falls within a firmly rooted exception to the hearsay rule). A codefendant's confession which implicates the defendant is presumptively unreliable and is not rendered reliable because some facts interlock with the facts in the defendant's statement. Lee v. Illinois, supra. See also, State v. Martin, 357 S.E.2d 21 (S.C. 1987) (state could not establish reliability of the codefendant's statement where statements of the appellant and codefendant did not interlock significantly and differed with respect to material facts). Although Roundtree's confession was competent evidence against him, it was inadmissible hearsay

against appellant and its introduction at their joint trial violated appellant's right of confrontation.

Appellee contends that Roundtree's statement was reliable (and thus admissible as substantive evidence) as an admission of guilt (AB 19), but this argument overlooks the plain holding of Lee v. Illinois. In Lee, the Court rejected the state's argument that the codefendant's confession was reliable as a declaration against interest, finding that concept too broad "for meaningful Confrontation Clause analysis." 90 L.Ed.2d at 528 n.5. The Court noted that a nontestifying codefendant's confession is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally, and is traditionally viewed with special suspicion. The Court explicated that even if certain hearsay evidence does not fall within a firmly rooted hearsay exception and is thus presumptively unreliable and inadmissible for confrontation clause purposes, it may nonetheless meet confrontation clause reliability standards if it is supported by a showing of particularized guarantees of trustworthiness.² A codefendant's confession is not deemed

²In Ohio v. Roberts, 448 U.S. 56 (1980), the Court held that the defendant's rights under the confrontation clause were not violated by the introduction into evidence of the hearing testimony of a witness who was unavailable for trial. The Court determined that the testimony bore sufficient indicia of reliability because the witness had been subjected to cross-examination at the hearing, giving the trier of fact a satisfactory basis for evaluating the truth of the testimony.

In Lee v. Illinois, 90 L.Ed.2d 514 (1986), the Court spurned the state's suggestion that introduction of the

(Footnote Continued)

trustworthy, however, because it interlocks on some points with the defendant's statement.

Obviously, when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased. But a confession is not necessarily rendered reliable simply because some of the facts it contains 'interlock' with the facts in the defendant's statement. . . . The true danger inherent in this type of hearsay is, in fact, its selective reliability. **As** we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another. If those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted.

90 L.Ed.2d at 529.

(Footnote Continued)

codefendant's confession did not violate the confrontation clause since Lee had an opportunity to cross-examine the codefendant at the suppression hearing. The Court reasoned that Lee had no opportunity to cross-examine the codefendant with respect to the reliability of the statement and thus no opportunity for cross-examination sufficient to satisfy the confrontation clause. Similarly, here, the codefendant's confession was untested by any cross-examination and did not bear sufficient indicia of reliability or trustworthiness to satisfy the demands of the confrontation clause.

Robert Roundtree's statement incriminating appellant is presumptively unreliable, and the state did not rebut that presumption.³ Even if the reliability of the codefendant's confession could be established on this record, the statement would nonetheless be inadmissible since it is not supported by particularized guarantees of trustworthiness such as to meet confrontation clause reliability standards. As recently noted by one state court, confessions are not trustworthy where the declarant, although making a statement against penal interests, exculpates himself from responsibility for the actual killing. State v. Hoskinson, supra. Roundtree's statement does that.

The primary thrust of appellee's argument is that the introduction of a nontestifying codefendant's confession is harmless where the defendant's confession demonstrates guilt of the charged crime (AB 18, 19, 20, 21, 22, 23, 24). Appellee is basically urging this Court to apply a sufficiency of the evidence standard to find the error harmless, contrary to the dictates of Harrington v. California, 395 U.S. 250 (1969);

³It is noteworthy that the trial court never made a finding that Roundtree's confession possessed sufficient indicia of reliability to be directly admissible against appellant. In fact, the trial judge never made clear the basis for his ruling (T 260). Presumably, the court agreed with the state's argument that the statements were interlocking and severance was not required under Parker v. Randolph, 422 U.S. 62 (1979). The court implicitly ruled, however, that each statement was admissible only against the declarant and instructed the jury accordingly.

Chapman v. California, 386 U.S. 18 (1967), and State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Where, as here, there is a violation of the defendant's constitutional rights, it is incumbent upon the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error did not contribute to the verdict. Chapman v. California, supra. Application of the harmless error test requires not only a close examination of the permissible evidence on which the jury could have 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. State v. DiGuilio, supra.

The statements here formed a major portion of the state's case. It is unlikely that the jury below could distinguish the evidence relating to each defendant's acts and statements and apply the law intelligently and without confusion to determine each one's guilt or innocence, despite the trial court's limiting instructions. See McCray v. State, 416 So.2d 804 (Fla. 1982). Thus, the error in denying appellant's motion to sever cannot be deemed harmless.⁴

⁴Interestingly, during jury selection, at least four prospective jurors expressed concerns about following the trial judge's instructions to disregard the co-defendant's statement (T 497-499, 747-748, 927-928, 929).

In McCray v. State, supra, this Court ruled that when co-defendants are tried together, a fair determination as to each person's guilt or innocence may only be achieved

when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements, and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence.

416 So.2d at 806. The Court noted that under Florida Rule of Criminal Procedure **3.152(b)(1)**, severance is proper

when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants. A type of evidence that can cause confusion is the confession of a defendant which, by implication, affects a codefendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

Id. (Emphasis added). Thus, under McCray, a Bruton violation such as occurred here can never constitute harmless error. See also, Delli Paoli v. United States, 352 U.S. 232, 248 (1957) (Frankfurter, J., dissenting) ("The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds."). Accord, Hall v. State, 381 So.2d 683, 689 (Fla. 1979).

Appellee's reliance on this Court's opinion in Puiatti v. State, 495 So.2d 128, 131 (Fla. 1986), for the proposition that admission of the codefendant's confession is not harmful where

the defendant's own confession "clearly shows him guilty of the crime with which he is charge" (AB 22-23), is utterly baffling. As appellant noted in his initial brief at page 40, the United States Supreme Court vacated this Court's opinion in Puiatti v. State for reconsideration in light of Cruz v. New York on the question of harmless error. Puiatti v. Florida, ___ U.S. ___, 95 L.Ed.2d 523 (1987). The outcome of Puiatti v. State, Case No. 65,321, is still pending and unless counsel for the state has clairvoyant powers, that unreported decision cannot support a finding of harmless error here.

Appellant would note, however, that this case is not analogous to the facts of Puiatti. There, unlike here, the defendants each gave individual confessions which contained only slight inconsistencies; both defendants admitted shooting the victim, and the defendants gave a joint confession which was admitted without objection. Here, appellant's statement was not corroborated by a joint confession; appellant did not admit shooting the victim, and the codefendants' statements did not contain only slight inconsistencies.

Appellee's harmless error argument must fail. The rights of confrontation and cross-examination may not be dispensed with merely because the evidence of guilt seems overwhelming, as appellee urges. Appellant's conviction must be reversed.

B. Penalty Phase

Contrary to appellee's suggestion, the prejudice resulting from the admission of Robert Roundtree's confession inundated the penalty phase. While the state did not reintroduce the confession in the penalty phase, that statement could have had a profound impact upon the jury's sentencing recommendation.

Roundtree claimed that it was appellant's idea to go back for the victim, that appellant drove the car with the victim in the trunk, and that appellant fired the four fatal shots. This statement contradicted appellant's on the major issues of who formulated the idea to kidnap Bowden and who was responsible for his actual death. The jury's death recommendations for both defendants most likely resulted from the jurors' inability to resolve these issues and determine the respective degrees of culpability attributable to each, due to the contradictions in their statements.

Under these circumstances, it cannot be said beyond a reasonable doubt that the denial of appellant's motion for severance at the penalty phase did not influence the jury's advisory recommendation or the court's imposition of the death sentence. Chapman v. California, 386 U.S. 18 (1967); Gardner v. State, 480 So.2d 91 (Fla. 1985). Appellant's death sentence must be reversed and the cause remanded for a new penalty 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 renews his prayer for the relief requested in his initial brief.

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 Bradford L. Thomas, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, and by U.S. mail to Walter Lee Brown, #285825, Post Office Box 747, Starke, Florida 32091, this 16th day of November, 1987.

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