IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
V.
SYLESTER EARL SMITH,
Respondent.

CASE NO. 70,261

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the Appellee in the District Court of Appeal, Fourth District, and the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit. The Respondent was the Appellant and Defendant, respectively, in the lower courts. In the brief, the parties will be referred to as they appeared in the trial court, i.e., "State" and "Defendant."

The symbol "R" will be used to refer to the Record on Appeal and the symbol "SR" to the Supplemental Record, which is lineup photographs.

STATEMENT OF THE CASE

The Defendant was charged by Information on March 28, 1983, with having committed the offense of armed robbery on February 28, 1983 (R 456). At his March 30, 1983, arraignment, he entered a plea of not guilty (R 456). The defense filed a motion to suppress the pretrial identification of Appellant which was made at a pre-information lineup, held March 24, 1983, on the ground that conducting the lineup without the presence of an attorney for the Defendant violated his Sixth and Fourteenth Amendment rights (R 457-458). The trial court denied the motion (R 460).

The case was tried before a jury and the Defendant was found guilty as charged in the Information (R 461). Judgment was entered (R 463-464), and on November 21, 1983, the Defendant was sentenced to a nine-year term of imprisonment (R 468-469). The Defendant took an appeal to the Fourth District Court of Appeal. His conviction was affirmed in a per curiam opinion. Smith v. State, 456 So.2d 1193 (Fla. 4th DCA 1984).

In October, 1985, the Defendant filed a Petition for Habeas Corpus in the Fourth District Court of Appeal, asserting that he did not receive the effective assistance of counsel on direct appeal. The Defendant's challenge was based on his original appellate counsel's failure to

raise as an issue on appeal the trial court's denial of the motion to suppress identification. The appellate court granted the Petition for Habeas Corpus and gave the Defendant a new direct appeal. Smith v. Wainwright, 484 So.2d 31 (Fla. 4th DCA 1986), discr. rev. denied, 492 So.2d 1336 (Fla. 1986).

In the second appeal, which is the case presently before this Court, the Fourth District reversed the judgment and sentence for a new trial, finding the motion to suppress the identification should have been granted on the authority of its earlier decision in Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984), discr. rev. denied, 469 So.2d 750 (Fla. 1985). Although the court denied the State's motion for rehearing, it stayed mandate and granted the State's motion to certify the following question to this Court:

> WHETHER, PRIOR TO THE INITIATION OF FORMAL ADVERSARY JUDICIAL PROCEEDINGS IN THE FORM OF AN INDICTMENT OR INFORMATION, AN ACCUSED HAS A CONSTITUTIONAL RIGHT TO COUNSEL AT A COMPELLED LINEUP?

(Copies of the opinion and order on rehearing are included in the appendix to this brief.)

STATEMENT OF THE FACTS

A. Motion to Suppress

The trial court conducted a pretrial hearing on the Defendant's motion to suppress identification. The victim of the robbery was named Seepersaud Shivecharan (R 456). However, throughout the proceedings below he was simply called by "Harry", his nickname (R 5). Harry testified he was robbed at the convenience store where he worked as a clerk on February 28, 1983, at about 1:10 a.m. (R 5). There were two men involved. The second man who entered the store held a gun and was inside the store for ten to fifteen minutes (R 6). Shortly after the robbery, Harry identified the first man to the police (R 8). Some time later, he picked out a photograph displayed in a photo lineup of someone he thought was the second man (R 8). On March 24, 1983, Harry viewed a live lineup and selected the man in position 2 (Defendant), whom at that time he was positive was the gunman (R 9). The selection was made because Harry recognized the individual as the person who robbed him (R 23).

Detective Carroll of the Wilton Manors Police Department testified that Harry picked the man in position 2, the Defendant, at the live lineup (R 26). Previously, in a photo lineup, Harry had selected a photograph of one Terry Lamar Green (R 26-27). Prior to the live lineup,

Detective Carroll told Harry that the person he had picked in the photos would not be in it.

The Defendant initially refused to stand in the lineup so Detective Carroll obtained a court order requiring him to do so (R 31-32, 478). Detective Carroll tried to get an attorney to be present for the Defendant but the Public Defender's Office informed him the Defendant had his own lawyer (R 33).[1] Detective Carroll asked the Defendant who his attorney was and he did not know (R 33). Photographs were taken of the lineup (SR).

The trial court found that none of the Defendant's constitutional rights were violated and accordingly, denied the motion to suppress (R 53).

B. Trial

Harry testified he was working at a Majik Market store on February 28, 1983 (R 179). At 1:00 a.m. a man entered, bought candy, and then left (R 179-180). The man went to a cream or white large car (R 180). A few minutes later, the same man re-entered the store, looked around, and said "all clear'' as a second man entered (R 181). The second man approached the counter with a gun and ordered Harry to open the register (R 183-184). After

[1]The first appearance form, dated March 15, 1983, states that the Defendant "has or will retain private counsel." (R 477)

removing the money, the man obtained a bag and proceeded to take cigarettes and lighters (R 185). The man directed Harry to open the safe but Harry told him he did not have a key (R 185). The man then ordered Harry to make out four money orders (R 186). He then stole beer from the cooler and left the premises (R 187). The robbery took between ten and thirteen minutes to complete (R 188).

The police were called, and a while later they took Harry to a nearby apartment building where he identified the person who had been the first man (not the Defendant) in the store (R 189). He also identified a car there which looked like the one he had seen by the store (R 190). About three weeks after the robbery, Harry identified the second man (the Defendant) in a live lineup; the man was standing in position 2 (R 193, 196). Copies of the lineup photos were introduced in evidence (R 228; SR). Harry confirmed his identification in court and stated he was positive the Defendant was the man who robbed him (R 199-200). The Defendant was directed to roll up his sleeve and Harry pointed out a scar on his arm that he had seen at the time of the robbery (R 203).

Police officer Coder testified that on the night of the robbery, he saw a tan Oldsmobile and two men walking away from it at an apartment building near the location of the crime (R 241). He called to them to stop; they took off

in two different directions (R *242).* The officer apprehended one man and the victim was brought to the scene and identified him (R *243-244).* This person, who was arrested, was the Defendant's brother, Sylvester Smith (R *245).*

Sylvester Smith testified as a State witness, having entered into a plea agreement (R 271-272). He stated he and his brother, the Defendant, originally went to the store to get beer (R *253).* However, after Sylvester had made a purchase, Sylester told him to leave (R 253-*254).* Sylvester drove away and when he returned a few minutes later, Sylester was waiting for him in some bushes (R *257).* Sylvester knew at that point that Sylester was hiding because he had robbed the store (R *259).*

Detective Carroll testified consistently with his testimony at the motion to suppress concerning the fact that Harry had identified the Defendant in a live lineup (R *283-288).*

The State rested (R *314).*

The defense introduced for its case the pictures that were used in the photographic lineup from which Harry selected Mr. Green's picture (R *317).*

POINT INVOLVED

WHETHER, PRIOR TO THE INITIATION OF FORMAL ADVERSARY JUDICIAL PROCEEDINGS IN THE FORM OF AN INDICTMENT OR INFORMATION, AN ACCUSED HAS A CONSTITUTIONAL RIGHT TO COUNSEL AT A COMPELLED LINEUP?

SUMMARY OF THE ARGUMENT

The Federal and Florida Constitutions provide an accused has the right to counsel. This right attaches at the commencement of adversary judicial proceedings in the form of an indictment or information. The lineup which occurred in this case took place four days prior to the filing of the information and therefore the Defendant was not entitled to counsel at that time. The court below therefore erred in concluding that the lineup was illegal.

Moreover, the Defendant has not established he was prejudiced because the lineup was photographed and thus available to his counsel at trial. Further, the victim's testimony clearly established the identification in court was based on his observations during the crime itself.

ARGUMENT

PRIOR TO THE INITIATION OF FORMAL ADVERSARY JUDICIAL PROCEEDINGS BY INDICTMENT OR INFORMATION, AN ACCUSED IS NOT CONSTITUTIONALLY ENTITLED TO COUNSEL AT A COMPELLED LINEUP.

The court below, relying on its prior decision in Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984), discr. rev. denied, 469 So.2d 750 (Fla. 1985), reversed the Defendant's conviction, finding that the motion to suppress identification was erroneously denied by the trial judge. In Sobczak, the court stated the entry of an order by a trial judge requiring an accused to stand in a lineup marked the commencement of adversary judicial proceedings for purposes of the Sixth and Fourteenth Amendment right to counsel. The court then held that pursuant to Article I, Section 16 of the Florida Constitution and Fla. R. Crim. P. 3.130, an accused's right to counsel attaches upon his first appearance before a magistrate so any lineup held after that time without counsel is illegal.

The Sobczak decision is contrary to a long line of federal and Florida precedent. The Third District has specifically stated that Sobczak is, at best, "no longer good law." State v. Hoch, 500 So.2d 597, 599 (Fla. 3rd DCA 1986). It has long been established that the right to counsel attaches only after formal adversary proceedings have commenced by the filing of an indictment

or Information.[2] In Kirby v. Illinois, *406* U.S. *682* (1972), the United States Supreme Court held that the right to counsel does not apply to a pre-indictment lineup; scrutiny of a lineup at that point in time is limited to the due process issue of whether the lineup was unnecessarily suggestive. In Kirby, the court noted at *406* U.S. *687,* n. *5,* that the Florida Supreme Court had held in Perkins v. State, *228* So.2d *382* (Fla. 1969), that the Sixth Amendment right to counsel applies only to post-indictment lineups.

In the present case, the record clearly establishes the lineup occurred before the Defendant was formally charged by Information. The Defendant's first appearance was March *15, 1983* (R *477).* The order requiring him to stand in a lineup was entered March *24, 1983,* and the lineup was held on that date (R *478).* The Information was filed four days later, on March *28, 1983,* and the arraignment was held March *30, 1983* (R *456).*

The fact that the Defendant's lineup occurred prior to the filing of the Information conclusively establishes that there was no violation of his Sixth and Fourteenth Amendment right to counsel. Kirby v. Illinois, supra, is directly on point, and since it was decided in *1972,* the Supreme Court has continued to hold that the filing

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[2] See, United States v. Wade, *388* U.S. *218* (1967) and Gilbert v. California, *388* U.S. *263* (1967).

of formal charges commences a criminal prosecution for purposes of the Sixth Amendment. In United States v. Gouveia, 467 U.S. 180 (1984), the court observed it had never held that the right to counsel begins at the time of arrest, but rather, it attaches only at or after the initiation of adversary judicial proceedings.

Just last year, in Moran v. Burbine, ___ U.S. ___, 89 L.Ed.2d 410 (1986), the court again reaffirmed this view of the Sixth Amendment. In Burbine, the court held the Sixth Amendment right to counsel had not attached after the accused's arrest but before formal charges were filed, so statements he made to the police were legally obtained. The court's opinion states, "As Gouveia made clear, until such time as the 'government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified' the Sixth Amendment right to counsel does not attach." Moran v. Burbine, 89 L.Ed.2d at 428.

The entry of an order by the court directing the Defendant to appear in the lineup did not amount to the initiation of adversary judicial proceedings. As this Court recognized in Anderson v. State, 420 So.2d 574 (Fla. 1982), adversary proceedings commence at the time of indictment. The order itself made this clear: "The Defendant [ ] is ordered to stand in a live lineup . . . as part of an

investigation conducted by the Wilton Manors Police Department." (R 478). The order was entered for investigative purposes, not as part of an adversary proceeding. The Defendant was required to exhibit his person, which is non-testimonial in nature. The order was no different in effect than if the police had simply conducted the lineup, a situation where Florida courts have held that there is no right to counsel prior to formal charges being filed. See, Perkins v. State, supra; Robinson v. State, 351 So.2d 1100 (Fla. 3rd DCA 1977); Robinson v. State, 237 So.2d 268, 270 (Fla. 4th DCA 1970). Specifically, in Chaney v. State, 267 So.2d 65 (Fla. 1972), Ashford v. State, 274 So.2d 517 (Fla. 1973), Sweet v. State, 377 So.2d 48 (Fla. 1st DCA 1979), Russell v. State, 269 So.2d 437 (Fla. 2nd DCA 1972) and Bank v. State, 231 So.2d 39 (Fla. 3rd DCA 1970), the courts have held an accused is not entitled to counsel at a pre-indictment lineup. Therefore, the State maintains there was no violation of the Defendant's Sixth and Fourteenth Amendment right to counsel under the United States Constitution.

The State further maintains there was no violation of the Defendant's rights under Florida law. As is obvious from the list of authorities cited in the preceding paragraph, the Florida courts have not interpreted Florida law as providing any further rights to counsel than what is required by the Sixth Amendment. In Anderson v. State,

420 So.2d 574, 576 (Fla. 1982), this Court interpreted the defendant's right to counsel in the same way under the state and federal constitutions. In Keen v. State, 12 FLW 140 (Fla. op. filed March 19, 1987), this Court followed Moran v. Burbine, supra, and held that an accused's right to counsel did not attach until formal charges were filed.

While it is true that Fla. R. Crim. P. 3.130(c) provides for counsel to be appointed at first appearance, this does not mean that the right to counsel attaches for all purposes thereafter. Section (c)(1) of the rule makes this clear, for it states, "If necessary, counsel may be appointed for the limited purpose of representing the defendant only at first appearance . . ." At the Defendant's first appearance in this case, counsel was not appointed. The record indicates this was because the Defendant informed the court he either had or would retain a private attorney (R 477). Furthermore, the Rules of Criminal Procedure require that at arraignment, counsel be formally appointed, retained, or waived. Fla. R. Crim. P. 3.160(e). Thereafter, formal discovery proceedings may be had pursuant to Fla. R. Crim. P. 3.220, and a defendant may be required to appear in a lineup, Fla. R. Crim. P. 3.220(b)(1)(i), and notice to his counsel is required. Fla. R. Crim. P. 3.220(b)(2). Thus, when

read in pari materia, it is evident the Florida Rules of Criminal Procedure do not require that counsel be present at a lineup held prior to the filing of formal charges.

The State therefore urges this Court to hold, in accordance with the Third District's decision in State v. Hoch, 500 So.2d 597 (Fla. 3rd DCA 1986), that the Fourth District's decision in State v. Sobczak, supra, and its application in this case, were erroneous. There was no violation of the Defendant's federal and Florida constitutional rights.

Moreover, the State would point out that the Defendant has failed to establish any prejudice. Photographs were taken of the lineup and they were introduced in evidence (R 228, SR). Defense counsel at trial had the opportunity to argue whatever he chose to regarding the lineup, since it was preserved by the photographs.

Finally, even if this Court does find the failure to have counsel at the lineup rendered it illegal and inadmissible, the question remains whether, considering all the circumstances, did this procedure give rise to a likelihood of irreparable misidentification? Grant v. State, 390 So.2d 341 (Fla. 1980); Lauramore v. State, 422 So.2d 896 (Fla. 1st DCA 1982). In the instant case, Harry, the victim of the robbery, had ample opportunity to observe the robber

during the ten to thirteen minutes it took to commit the crime (R 188). Harry pointed out in court a scar on the Defendant's arm which he recognized from the robbery (R 203). He testified he had no doubt that the Defendant was the man who robbed him (R 199). The lineup itself was fair (SR). Therefore, even if the lineup was inadmissible, the State maintains the in-court identification was admissible because it was based on the view at the time of the crime, and the conviction should be affirmed.

CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the State respectfully requests that the decision of the Fourth District Court of Appeal be reversed and remanded with directions that the judgment and sentence entered by the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits has been mailed to Bruce D. Lincoln, Esquire, Sunrise Bay Building, Suite 212, 2701 East Sunrise Boulevard, Fort Lauderdale, FL 33304, this 12th day of May, 1987.

Of Counsel