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IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,333

HORACE BROWN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

Petitioner, Horace Brown, was the defendant in the trial court and the appellant in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, the parties will be referred to as they stood in the trial court. The symbols "R.", "Tr." and "ST." will be used to refer to portions of the record on appeal, transcripts of the trial court proceedings and supplemental transcript, respectively.

STATEMENT OF THE CASE

A jury found the defendant guilty of first degree murder and, on the defendant's motion, the trial judge ruled that the death penalty was inapplicable to this case and sentenced the defendant to life imprisonment. The defendant appealed his conviction to the Third District Court of Appeal and the prosecution cross-appealed from the trial court's finding that the death penalty was inapplicable. (A. 1). The District Court, in Brown v. State, 501 So.2d 1343 (Fla. 3d DCA 1987), affirmed the conviction but reversed the life sentence and directed the trial court to submit this case to a properly death - qualified jury for a determination of the penalty to be imposed. In so doing, the Court ruled as follows:

> After the jury returned its verdict of guilty as to first-degree murder, the trial court refused to submit the case to the jury for the penalty phase, holding that the death penalty was inapplicable due to the United State Supreme Court's decision in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). We agree with the state's contention that this case is not controlled by Enmund. In Enmund, the defendant was convicted of felony-murder. The United State Supreme Court held that the defendant could not be subjected to the death penalty since he neither took a life, intended to take a life, nor intended that lethal force be used. In the present case, the evidence demonstrates that Brown fully intended the use of deadly force in either ordering or committing the shooting of the victim. Therefore, the trial court should have submitted this case to the jury for the penalty phase for the trial following Brown's conviction for first-degree murder, pursuant to section 921.141, Florida Statutes (1985).

In this appeal, the defendant asks this Court to quash the

decision of the District Court on the ground that it conflicts with prior decisions of this Court and the United States Supreme Court. This Court entered its Order Accepting Jurisdiction on July 2, 1987.

STATEMENT OF THE FACTS

Vito Santangelo testified that on December 8, 1982, he was a police officer for the City of North Miami. At 10:25 p.m. he was dispatched to the scene of a shooting at N.W. 12th Avenue and 128th Terrace. He saw a large truck parked there. He also observed a white male on the ground with his left foot in the truck. He saw blood on the man's chest and called Fire Rescue. (Tr. 38).

Arthur Copeland, Associate Medical Examiner for Dade County, testified that on December 8, 1982 he went to the scene of the shooting after being called by Metro Dade Police. The deceased was a 30 year old white man with bullet wounds on the side of his chest and right arm. (Tr. 49). In his boot was found a plastic bag containing about one pound of a white, crystalline substance. (Tr. 50). Later, he performed an autopsy on the victim's body. In his opinion, the cause of Orlando Gomez's death was multiple gun shot wounds. (Tr. 81). The wounds were consistent with the decedent falling to the ground and being shot by a person standing over him. (Tr. 91).

Thomas Quirk, a firearms expert for Metro Dade Police, testified that the two projectiles taken from the victim's body were .38 special or .357 Magnum. (Tr. 100).

Vincent McBee, a criminalist with Metro Dade Police, testified that he examined the victim's shirt to determine the muzzle to target distance, and it was approximately three to four feet. (Tr. 125). He also examined the white powder found in the victim's boot and he found it to contain a little over four ounces of cocaine. (Tr. 127).

Erik Brown a/k/a Burgess, testified that he is the defendant's son. He came to live with the defendant in June of 1982. His sister Dee Dee was also living with them, as was Denny Haneline. In December of 1982, he and the defendant were arrested at the Miami International Airport for trafficking in cocaine. (Tr. 137). At the bond hearing, Gail Everett, the defendant's girlfriend, testified for Erik. After being released on bond, he agreed to cooperate with prosecutor Novick and Detective Singleton. The case against Erik was still pending. The victim in this case, Orlando Gomez, was his father's friend. He was in the drug business. On December 8, 1982, he saw the victim around 4:30 p.m. at his house. (Tr. 142). The defendant told Erik to tell the victim to come back later, he did so, and the victim Gomez left. The defendant later said "We need some money. We may have to rip Orlando off." (Tr. 144). The defendant and Denny Haneline left after the victim did. Gomez came back between 8:00 and 8:30 p.m. and said he had lost the defendant. Ten minutes later they left in separate cars. Denny Haneline was carrying a black gun in his waistband. (Tr. 147). Later, Denny came back and he had blood on his shirt. Erik left with Denny and the defendant. The defendant said Denny had just shot Orlando. (Tr. 149). They drove to the Holiday Inn by Calder Race Track and Denny signed in. Erik then went home. Later, the defendant called him and told him to take some of his and Denny's clothes and take then to Gail Everett. He did so. The defendant called him the next morning and told him to sell the Datsun which he did. (Tr. 153).

On cross-examination, Erik Brown admitted he had lied under oath many times in the past. The real reason he agreed to testify against his father was to avoid going to jail on the cocaine charge. (Tr. 161). He said the defendant never told him he was going to "rip off" Orlando. (Tr. 207).

Elaine First, an executive secretary at Holiday Inn Calder, identified a registration card dated December 8, 1982 at 10:58 p.m., and signed by a Samuel Marshal. (Tr. 224).

Gail Everett testified that she first met the defendant in May of 1982. She moved into his house in October of that year and left in early December. She owned at the time a .38 Smith and Wesson revolver. In December, the defendant and his son Erik were arrested on a narcotics charge. She appeared at their bond hearing and lied by saying she was engaged to the defendant in order to get Erik out of jail. (Tr. 230). Later at night on December 8, 1982 the defendant asked her to meet Erik at Hearn's store to pick up the defendant's clothes. She did so and then drove to the Cherry Bay area where she met the defendant and Denny Haneline. She drove them to the Holiday Inn at Calder. (Tr. 235). The defendant told her to say she had been with him that night from 8:00 p.m. to 3:00 a.m. (Tr. 236).

Harry Coleman, a criminalist for Metro Dade, testified as an expert document examiner. At that point, defense counsel stipulated that Denny Haneline was the person who signed the Holiday Inn registration receipt. (Tr. 290).

Alma Kelley testified that she met the defendant then known as Harvey Brown in May or June of 1982. They were lovers for a

couple of months. In December of 1982, she came to Miami to help the defendant get out of jail. While she was at the defendant's house, a bail bondsman came by and she signed a warranty deed with the signature of Sandra Nottage, who was the defendant's wife. She forged the name at the defendant's request. (Tr. 305). Orlando Gomez came to the defendant's house at 4:00 p.m. on December 8, 1982. The defendant's son told him to come back at 7:00 p.m. (Tr. 308). Gomez returned around 7:30 p.m. After a few minutes, the defendant, Denny Haneline and Gomez left the house. A few minutes later, Denny came back, got a gun and went outside. He got into the defendant's car and they drove off. Orlando Gomez returned fifteen minutes later and waited until the defendant and Denny returned. Then the three left, Orlando in his truck and Denny and the defendant in the defendant's car. (Tr. 312). About a 45 minutes later, the defendant and Denny drove up. Denny came into the house and told Erik to get rid of this shirt and to come with them. There appeared to be blood in the cuff of the shirt. Denny changed shirts and the three of them left. The defendant phoned her about an hour later and said he had to kill Orlando. He called again later and asked her to get some of his clothes (Tr. 315). and to take them to a shopping center. She and Erik drove over to Hearn's and met Gail Everett. Erik threw the clothes into the back seat of Gail's car. (Tr. 317). The defendant called the next day and told her and Erik to sell his car. They sold the car for $1500.00, and at the defendant's request, Erik delivered $700.00 of it to a man at a Winn Dixie store. (Tr. 319).

On cross-examination, Alma Kelley testified that Denny Haneline is a black male. (Tr. 320). When the defendant called her and said he had killed Orlando, the time was 9:35 or 9:40 p.m. She knew later that Orlando had been killed at 10:25 p.m. that night. (Tr. 364).

On re-direct, she testified that she told the Detroit police one month after the killing that the defendant's phone call of admission came at 11:00 p.m. (Tr. 394).

Michael Kreitman testified that on December 8, 1982 at about 10:30 p.m. he saw a man shooting another man. The shooter appeared to be a white man with black hair. (Tr. 4030. He was five foot ten at the most.

QUESTIONS PRESENTED

I

WHETHER THE DOUBLE JEOPARDY CLAUSE PROHIBITS THE STATE OF FLORIDA FROM SENTENCING THE DEFENDANT TO DEATH AFTER THE LIFE SENTENCE HE HAD INITIALLY RECEIVED WAS SET ASIDE ON APPEAL DUE TO AN ERRONEOUS INTERPRETATION OF LAW BY THE TRIAL COURT?

II

WHETHER THE DISTRICT COURT ERRED IN FINDING THAT THE TRIAL COURT'S FAILURE TO CHARGE THE JURY ON THE ELEMENTS OF THE UNDERLYING FELONY OF TRAFFICKING IN COCAINE WAS HARMLESS ERROR BECAUSE THERE WAS AMPLE EVIDENCE TO SUPPORT THE CONVICTION BASED UPON PREMEDITATED MURDER?

SUMMARY OF ARGUMENT

I

In reversing the defendant's life sentence and in remanding this case to the trial court for the possible imposition of a death penalty, the District Court has in effect pronounced the following rule of law:

> Where a defendant has been given a lawful life sentence and it is reversed, a trial court on remand can lawfully increase the sentence to death.

This rule directly conflicts with two decisions of this Court which hold that once a defendant has been sentenced, jeopardy attaches and a court may not thereafter on remand increase the severity of the sentence.

II

The trial court's failure to instruct the jury on the elements of the underlying felony of trafficking in cocaine in a felony-murder case was harmful error because there is a reasonable possibility that it affected the verdict.

ARGUMENT

I

THE DOUBLE JEOPARDY CLAUSE PROHIBITS THE STATE OF FLORIDA FROM SENTENCING THE DEFENDANT TO DEATH AFTER THE LIFE SENTENCE HE HAD INITIALLY RECEIVED WAS SET ASIDE ON APPEAL DUE TO AN ERRONEOUS INTERPRETATION OF LAW BY THE TRIAL COURT.

In the case at bar, after the jury returned its verdict of guilty as to first degree murder, the trial court refused to submit the case to the jury for the penalty phase, holding that the death penalty was inapplicable due to the Supreme Court's decision in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). On appeal, the District Court held that the trial court had erroneously construed Edmund and ordered the trial court to submit this case to a jury for a penalty phase. That holding by the District Court was erroneous and in violation of the Double Jeopardy Clause of the United States and Florida Constitutions.

The precise issue here was resolved by the United States Supreme Court in Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). An Arizona jury found Rumsey guilty of first degree murder. The trial court, with no jury, then conducted a separate sentencing hearing to determine, according to the statutory scheme for considering aggravating and mitigating circumstances, whether death was the appropriate sentence. The trial judge found that no aggravating or mitigating circumstances were present and imposed a life sentence on Rumsey. On appeal, the Supreme Court of Arizona held that the trial court had

committed an error of law in interpreting the pecuniary gain aggravating circumstance to apply only to contract killings. The State Supreme Court set aside the life sentence and remanded for "redetermination of aggravating and mitigating circumstances and resentencing." State v. Rumsey, Ariz., 636 P.2d 1309. On remand the trial court held a new sentencing hearing. The court found no mitigating and one aggravating circumstance and sentenced Rumsey to death. On appeal, the Arizona Supreme Court held that the death sentence violated the constitutional prohibition on double jeopardy and ordered the sentence be reduced to life imprisonment.

On certiorari, the United States Supreme Court affirmed the State Supreme Court and held that

> "Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), squarely controls the disposition of this case. Under the interpretation of the Double Jeopardy Clause adopted in that decision, imposition of the death penalty on respondent would be unconstitutional."

It is further submitted that the following reasoning of the Supreme Court in Rumsey is clearly controlling in the case at bar:

> The double jeopardy principle relevant to respondent's case is the same as that invoked in Bullington; an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars retrial on the same charge. Application of the Bullington principle renders respondent's death sentence a violation of the Double Jeopardy Clause because respondent's initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding - whether death was the appropriate punishment for respondent's offense. The trial court entered findings denying the existence of each of the

> seven statutory aggravating circumstances, and as required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to acquittal on the merits and, as such, bars retrial of the appropriateness of the death penalty.
>
> In making its findings, the trial court relied on a misconstruction of the statute defining the pecuniary gain aggravating circumstance. Reliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. "[T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' . . . affects the accuracy of that determination but it does not alter its essential character." United States v. Scott, 437 U.S. 82, 98, 98S.Ct. 2187, 2197, 57 L.Ed.2d 65 (1978) (quoting id., at 106, 98 S.Ct. at 2201 (BRENNAN, J., dissenting)). Thus, this Court's cases hold that an acquittal on the merits bars retrial even if based on legal error.

In the case at bar, the Third District Court erroneously reversed the defendant's life sentence because of the trial court's erroneous interpretation of Enmund v. Florida, supra, and remanded for a new death penalty phase. It is submitted that this holding was not only contrary to Rumsey, but was in direct conflict with prior decisions of this Court in Fasenmyer v. State, 457 So.2d 1361 (Fla. 1984) and Troupe v. Rowe, 283 So.2d 857 (Fla. 1973). In both of those cases, this Court held, consistent with Rumsey, that jeopardy attaches once a sentence has been imposed, and the sentence cannot thereafter be increased because that would constitute a violation of the constitutional right not to be twice placed in jeopardy.

It is also the defendant's contention that the decision under review is in conflict with this Court's opinion in State v. Carr, 336 So.2d 358 (Fla. 1976). Section 921.141(1), Florida Statutes (1985), contemplates the possibility of the waiver of a jury trial during the sentencing procedure. The record below reflects extensive argument of defense counsel to persuade the trial court not to submit the case to the jury for consideration of the penalty. (ST. 10-15). It is submitted that this argument, made in the presence of the defendant, was sufficient to constitute a waiver. To hold otherwise would conflict with the following ruling of this Court in Carr:

> "We find that the trial judge, upon a finding of a voluntary and intelligent waiver, may in his or her discretion either require an advisory jury recommendation, or may proceed to sentence the defendant without such advisory jury recommendation."

Based on the conflicts above, it is submitted that that portion of the District Court's opinion vacating the life sentence and remanding for a sentencing phase before a jury should be reversed.

II

THE DISTRICT COURT ERRED IN FINDING THAT THE TRIAL COURT'S FAILURE TO CHARGE THE JURY ON THE ELEMENTS OF THE UNDERLYING FELONY OF TRAFFICKING IN COCAINE WAS HARMLESS ERROR BECAUSE THERE WAS AMPLE EVIDENCE TO SUPPORT THE CONVICTION BASED UPON PREMEDITATED MURDER.

The facts presented to this point are set out in the opinion under review as follows:

> "The defendant in this case was charged with first degree murder by premeditation or during the commission of a robbery or trafficking in cocaine. In instructing the jury, the trial court failed to give the necessary instructions on the underlying crimes of robbery and trafficking. The jury returned a verdict of guilty to the first degree murder charge without specifying upon which theory it had relied."

The District Court went on to accurately state:

> "Because the trial court failed to give the jury an instruction on the supporting felony of trafficking, Brown's conviction may be upheld only if it affirmatively appears from the record that the jury's verdict is supported, beyond a reasonable doubt, by evidence which establishes murder by premeditation so that the error was made harmless."

The District Court then, it is submitted, erroneously ruled as follows:

> "Based upon the record, we find that there is sufficient evidence to support Brown's conviction under the theory of premeditation and because the state relied heavily upon this theory to obtain a conviction, we hold that the trial court's error in failing to give the required instructions did not prejudice Brown. Consequently, this was harmless error."

First of all, the state did not rely strongly on a theory of premeditation. In fact, in his closing argument to the jury, the prosecution made no mention of premeditated murder. He did,

however, strongly argue the murder robbery theory, as evidenced by the following statements gleaned from that argument:

> "[The victim is] going to be ripped off and killed by Horace Brown." (Tr. 451).
>
> "He's going to take his drugs or take something. He's going to rip him off." (Tr. 452).
>
> "[They ripped off Orlando] to get money to take care of this problem at the airport." (Tr. 514).

Contrary to the District Court's holding, it is submitted that the evidence of premeditation in this case was far from legally sufficient to support the jury's verdict. The evidence as set forth in the preceding Statement of the Facts shows that the actual killer in this case was Denny Haneline, not the defendant. As a matter of fact, the only damaging evidence was Alma Kelley's testimony that the defendant called her and said he had to kill Orlando. (Tr. 315). Such a statement is hardly sufficient to establish premeditation beyond a reasonable doubt. The latter is particularly true because Kelley later testified that the defendant made the foregoing statement at 9:35 or 9:40 p.m., even though the murder was committed at 10:25 p.m. that same evening. (Tr. 364).

In an attempt to rehabilitate her testimony on re-direct examination, the prosecution introduced Kelley's prior inconsistent statement to the Detroit police that the defendant's phone call of admission came at 11 p.m. on the night of the homicide. (Tr. 394). The latter was insufficient to prove premeditation because the law is clear in Florida that

> ". . . in a criminal prosecution a prior inconsistent statement standing alone is insufficient to prove guilt beyond a reasonable doubt." State v. Moore, 485 So.2d 1279 (Fla. 1986).

The defendant would concede that the circumstantial evidence in this case was sufficient to support in the minds of the jurors a suspicion of guilt. However, in Ricard v. State, 181 So.2d 677 (Fla. 3d DCA 1966) the District Court ruled as follows:

> "A conviction may be had upon circumstantial evidence that is sufficient to support an inference of guilt. But such evidence must be inconsistent with any reasonable hypothesis of innocence, and it is insufficient if it produces nothing stronger than a suspicion of guilt."

In finding the trial court's failure to give an instruction on trafficking in cocaine was harmless error, it is submitted that the District Court failed to consider the following pronouncements of this Court in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986):

> "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."

It is submitted that there is more than a reasonable possibility that the error in question affected the verdict because of the following: the defendant in this case was prejudiced by the trial court's failure to define the elements of cocaine trafficking because the jury heard evidence and argument about cocaine trafficking which, in the absence of a proper instruction, could have led the jury to wrongfully find the defendant

guilty of murder while trafficking in cocaine. For example, the jury heard testimony that Erik Brown and the defendant had been arrested at the airport for trafficking in cocaine (Tr. 137); that the victim was in the drug business and had sold drugs to the defendant in the past (Tr. 142); and that when the victim was killed there was a quantity of cocaine hidden in his boot. (Tr. 50, 127). Moreover, in his closing argument, the prosecutor stated that the defendant was going to "rip the victim off" to take his drugs (Tr. 452) and to "get money" to take care of the trafficking in drugs charge at the airport. (Tr. 514).

The following reasoning of this Court in Franklin v. State, 403 So.2d 975 (Fla. 1981), is clearly applicable here:

> "The primary thrust of the state's case was felony murder. In closing argument felony murder was the dominant theme, and, indeed, the facts demonstrate felony murder more clearly than premeditation. It is as least as likely that the jury based its verdict on felony murder. The failure to instruct on the underlying felony cannot be considered harmless error in this case."

CONCLUSION

Based on the foregoing argument and authorities cited, the decision of the District Court should be quashed and this cause should be remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 23rd day of July, 1987.

N. Joseph Durant, Jr.

N. JOSEPH DURANT, JR.
Assistant Public Defender