IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,361

ALBERTO FARINAS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

REPLY BRIEF OF APPELLANT

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REBUTTAL ARGUMENT

I.

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS THE FIREARM (PISTOL) WHICH WAS OBTAINED AS THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE.

Appellant's Initial Brief established, by the weight of authority that, in the case at bar, there was a warrantless search which was per se unreasonable without any credible exigency shown by the prosecution to except the search from the line of cases we quoted.

However, since Appellee quoted a number of cases, we feel constrained to dispatch their contention with a factual recitation of the cases. After all, facts are what affect the final opinion of a Court in its interpretation and application of the law. In that light we respectfully call the Court's attention to the facts in most of the cases cited by Appellee.

Shapiro v. State, 390 So. 2d 344, 346 (Fla. 1980), U. S. reh. den. 454 U. S. 1165:

Defendant was in an airport boarding area during an era when hijacking and bombing of airplanes was prevalent. He consented to a security search for explosives. None were present, but drugs were found. Opinion was predicated upon consent and Defendant's presence in an area where no expectation of privacy could be claimed given the pressure of the hijackings.

Williams v. State, 403 So. 2d 430, 431 (3d DCA 1981):

Police arrived 30 minutes after shooting and within 15 minutes after establishing probable cause. They were informed that Defendant was in the room, armed and dangerous and a strong likelihood existed that he would escape if they did not take immediate action. They broke the door down and entered the room to see the barrel of the gun in plain view.

Ziegler v. State, 402 So. 2d 365 (Fla. 1981):

Four searches upheld because:

1. The first was an emergency response on night of homicide;

2. The second was with the valid consent of Defendant;

3. The evidence was found in the store where homicide occurred (a crime scene usually open to the public);

4. Defendant had called police to come to the scene of the homicide (store) and killer may still have been present, hiding at the scene.

State v. Brooks, 281 So. 2d 66 (2nd DCA, 1973)

Police officers cruising in a high crime area heard a shot fired. Upon investigation found two males in the area from which shot seemed to emanate. They were sitting outside and told police they did not hear a shot. Officers stopped and frisked and found a weapon.

In summation, the facts in the cases cited do not comport in any manner with those in the case at bar, and do *not* justify a search which is per se unreasonable under the facts of this case.

II.

THE COURT COMMITTED FUNDAMENTAL ERROR IN ITS ABANDONMENT OF ITS DUTY TO SCRUPULOUSLY GUARD THE CONSTITUTIONAL RIGHTS OF THE DEFENDANT IN THAT:

A. IT ADMITTED INTO EVIDENCE STATE'S EXHIBIT 14, A PHOTOGRAPH OF THE BACK OF DECEASED'S HEAD, THE APPEARANCE OF WHICH HAD BEEN ALTERED BY THE STATE'S WITNESS WHICH RENDERED IT SO SHOCKING, INFLAMMATORY AND PREJUDICIAL THAT THE VALUE, IF ANY, OF ITS RELEVANCY WAS DEFEATED.

B. ITS PRONOUNCEMENT TO THE JURY IMMEDIATELY PRIOR TO THE PENALTY PHASE OF THE TRIAL, THAT THE COURT HAD ISSUED AN ARREST WARRANT FOR ONE OF ITS MEMBERS, WHO HAD DELIBERATED WITH THEM IN THE GUILT OR INNOCENCE PHASE OF THE TRIAL, CREATED A COERCIVE ATMOSPHERE PERMEATED WITH THE TACIT THREAT OF REPRISAL, THEREBY INVADING THE SANCTITY OF THE JURY ROOM ITSELF.

A.

While no objection was contemporaneously made with the introduction of State's Exhibit 14, the Court through pre-trial motions and again in post-trial motions was aware of the defense position on the photographs and made its position clear in its statement quoted by Appellee at page 66 of its Brief. Is defense counsel required to make an objection to introduction of evidence upon the admissibility of which the Court has already ruled? We think not, nor do any authorities so hold.

In the cases cited by Appellee, the photographs depicted that which was caused by the Defendant, such as a knife protruding from the victim's throat, placed there by Defendant, Booker v. State, 397 So. 2d 910 (Fla. 1981). This photograph had not been altered in any manner by a State's witness as was done in the case at bar.

Also, in Busch v. State, 461 So. 2d 936 (Fla. 1984), cited by Appellee, another case in which the photograph of the deceased was not in any manner "doctored" by the State's medical examiner.

Appellee additionally cited Straight v. State, 397 So. 2d 903 (Fla. 1981), in which the victim's body was recovered from a river 20 days later in a decomposed condition, but still showing wounds. Once again, the act of Defendant and nature itself as a consequence of Defendant's actions altered the condition of the body photographed. In the present case, Defendant did not shave the head of deceased, the medical examiner for the State altered its appearance away from the scene for the purpose of this grisly exhibit.

The introduction of this State-made and posed photograph was fundamental error, denying the Defendant his constitutional right to a fair and impartial trial and due process.

The record was preserved on this point by pre-trial and post-trial motions and conversations on the record with the trial court.

If, however, any weight is to be given Appellee's argu-

ment about comtemporaneous objections, we wish to recall this Court's pronouncement in Ray v. State, 403 So. 2d 956 (Fla. 1981), at page 960:

> . . . This Court has indicated that for error to be so fundamental that it may be urged on appeal, though not properly presented below, the error must amount to a denial of due process. . . . Thus, we are really dealing with denial of due process. . . .
>
> . . . The doctrine of fundamental error thus is an exception to the contemporaneous objection rule as set out in Florida Rules of Criminal Procedure 3.390 (d) . . . .

Nor can this error in a capital case be deemed harmless. Harmless error presumes that the Defendant was accorded due process and had a fair and impartial trial.

On pages 66 and 67 of its Brief, Appellee cites the fact, which we conceded, that no contemporaneous objection was made, but clearly from Appellee's Brief at page 65 there was no need for a contemporaneous objection, for as stated by Appellee:

> The facts in the instant case reveal that the trial court carefully scrutinized the photographs submitted by the State and concluded that two of them did not need to be introduced. . . (Underlining ours).

Erroneously, State's Exhibit 14 was not one of the two.

B.

Appellant relies on its Initial Brief on this point, but wishes to call the Court's attention to the many cases cited therein which were answered by Appellee with the case of the sleeping

juror's dismissal, a rather innocuous dismissal in the light of the facts of this case where after deliberation and rendition of a guilty verdict and at the start of the penalty phase, the jury was told an arrest warrant for one of its members was issued by the trial court.

Clark v. State, 363 So. 2d 331 (Fla. 1978), cited by Appellee as authority for the State's contention that the lack of a contemporaneous objection was an "invited error," lends no support whatsoever to Appellee's position.

In the Clark case, it was held that a contemporaneous objection is necessary to preserve as a point on appeal an improper comment on a Defendant's exercise of his right to remain silent. This Court further noted that: "A defendant may not make or invite an improper comment and later seek reversal based on that comment."

In the case at bar, Defendant did not urge nor improperly comment on the Court's announcement. The action of the trial court was sua sponte. An objection by defense counsel would be useless and in our humble opinion a flirtation with contempt.

The rhetorical question in Appellee's Brief remains unanswered by the Appellee for the simple reason that no one can know if the juror for whom the warrant was issued was a holdout for a not guilty verdict. This was not harmless error, but was fundamental to Defendant's inviolate right to a fair and impartial trial by a jury of his peers, at a time when the jury was to decide whether Defendant would live or die.

111.

WHEN, AS IN THE CASE T B R, THE DEFENSE HAS ADMITTED ALL MATERIAL FACTS, BUT RELIES SOLELY ON THE DEFENSE OF INSANITY AT THE TIME OF COMMISSION OF THE CRIME, THE COURT COMMITTED FUNDAMENTAL ERROR AND ABUSED ITS DISCRETION IN ITS DENIAL OF DEFENDANT'S MOTION FOR A MISTRIAL WHEN THE PROSECUTION'S INTERROGATION OF THE KEY DEFENSE WITNESS, A PSYCHOLOGIST, ON CROSS EXAMINATION, UNFAIRLY AND IMPROPERLY DISCREDITED THE WITNESS AND THE DEFENDANT, AND MAY HAVE PREJUDICED THE JURY TO DEFENSE PLEAS FOR LIFE.

On page 91 of its Brief, Appellee represented that Defendant incorrectly stated that Dr. Rothenberg testified at the penalty phase of the trial. On page 110 of Appellant's Initial Brief, we placed the testimony of Dr. Rothenberg with other doctors in order to comment on similarities in the testimony of all of the doctors when it came to assessment by the jury and Court of the approriate sentence.

We did that on the basis of the Florida Standard Jury Instructions in Criminal Cases where at page 77 the instruction which was given by the Court provides that evidence in the penalty phase ". . . when considered with the evidence you have already heard . . ." shall be considered in arriving at penalty.

On page 64 of Appellant's Brief it is stated that: "In its case in chief the defense called Dr. David Rothenberg, a clinical psychologist who was accepted by the Court as an expert." We regret any confusion that Dr. Rothenberg's testimony placed in the

penalty phase may have occasioned.

This is not a case where Appellant complains of improper remarks of the prosecuting attorney. Appellee at page 72 refers to: "The State's improper impeachment of Dr. Rothenberg. . ." And again: ". . . to this unfortunate line of questioning. . ." but states in effect Appellant's argument that this was so prejudicial as to vitiate the entire trial, "laughs in the face of justice."

Until we read that last metaphor employed by Appellee, we were of the opinion that the statue of justice had a scale in one hand to weigh the evidence and a sword in the other to enforce her decrees. We were of the opinion she wore a blindfold to be blinded to color and it extended over her ears so she could not hear dialect, and therefore, would be deaf to ethnic origin.

When, however, as in the case at bar, the only witness as to the defense of insanity was maliciously and systematically maligned by, to quote Appellee, "improper impeachment" and an "unfortunate line of questioning;" if there is no reversal and execution of Defendant ensues, then our lady of Justice shall weep and her blindfold shall catch her tears, whilst her cheeks, whether of stone or metal, shall blush with shame. Then her tears shall drown out the torch of liberty held by her sister in New York harbor, and our democracy will give way to tyrannical expediency.

Objections and a motion for a mistrial were made as soon as was practicable and as is clear from the record, the Court had ample time to consider the objections and motion for a mistrial.

To justify the indefensible, Appellee quoted the following cases:

Arrango v. State, 437 So. 2d 1099 (Fla. 19831, which involved a petition for habeas corpus to stay execution and a petition for alleged Brady violations and an appeal of a post conviction proceeding. All that was involved was exculpatory evidence and possible ineffective assistance of counsel.

Spenkelink v. Wainwright, 372 So. 2d 927 (Fla. 1979), which involved a petition for habeas corpus for stay of execution. At issue was the process by which executions are carried out in Florida with claim that same was unconstitutional.

Jackson v. State, 421 So. 2d 15 (3rd DCA, 1982), which involved a prosecutor in final argument asking jury if they would buy a used car from defense counsel, referring to him as a "cheap shot artist." This case was reversed and remanded.

Cobb v. State, 376 So. 2d 230 (Fla. 19791, remarks of prosecutor were obviously so innocuous that they were not included in the opinion.

State v. Murray, 443 So. 2d 955, 956 (Fla. 1984), wherein the prosecutor argued about Defendant: "Here is a man who thinks he knows the law; thinks he can twist and bend the law to his own advantage and lie to you in court so that he is acquitted and not sent to prison as a result, or otherwise adjudicated in any fashion." In that case the Defendant took the stand, placing his credibility in jeopardy of attack on closing argument. The Court at page 956

stated in effect that if prosecutorial error involved is so basic to a fair trial that it can never be treated as harmless, then automatic reversal is the proper remedy.

In the case at bar, the Defendant did not take the stand and had only one witness in chief as to defense of insanity.

By that witness, Dr. Rothenberg, the State attacked improperly and over objection and motion for mistrial, the credibility of the Defendant who exercised his constitutional right not to testify.

With impugnity the following was made part of the record:

> Q. Doctor, would you be surprised if he talked to individuals over in the jail already about possible defenses in this case?
>
> A. No. I wouldn't be surprised.
>
> Q. You wouldn't be surprised that he had talked about possible defenses?
>
> (Objection, request for prosecutorial reprimand and for mistrial.) (R. 1246).

No relief was afforded Defendant.

Was this mere overzealousness on the part of the prosecutor? We would like to refer to his words in answer to that question. "First of all, Your Honor, Ms. Georgi is right. There is no basis for me asking those questions as to whether or not the Defendant conferred with anyone in the Dade County Jail. . ."

We submit, it will be of no comfort to stand at the grave of this Defendant and in the hope that he can hear us, tell him that this type of planned error resulted in disciplinary action

against the transgressor of the constitutional safeguards of the deceased Defendant.

Nor can the reasoning of the prosecutor in excuse for his blatant violation of constitutional rights that " . . . I think this jury can take their own common sense and base it and infer an opinion. . . " as to possible discussion of Defendant in jail as to possible defenses, totally dehors the record, excuse his prejudicial conduct, nor condemn this Defendant to death as the alleged recipient of a fair and impartial trial.

IV.

IT WAS FUNDAMENTAL ERROR FOR THE TRIAL COURT TO ENTER JUDGMENT ON THE VERDICTS ON COUNTS II AND III OF THE INDICTMENT AND TO SENTENCE DEFENDANT THEREON.

In addition to our argument on this point in our Initial Brief, we wish to reiterate that the Indictment charged Defendant with the following crimes: Count I, First Degree Murder; Count 11, Kidnapping with a Firearm, a pistol; and Count 111, Armed Burglary. (R. 1899-1900). A copy of the Indictment is included herein for convenience of the Court and s marked by a tab at the end of this Reply Brief.

The Court instructed the jury as to the element of a firearm when it referred to Counts II and 111. The jury returned verdicts of guilty as to Counts II and III, finding Defendant was armed.

We can find no corpus delecti case exactly in point, but note that being armed enhances the degree of the underlying felony.

We have found analogous authority in the enhancement section of the statute.

In Florida v. Pilcher, 443 So. 2d 366 (5th DCA, 1983), the State appealed the trial court's refusal to impose a mandatory minimum sentence of 3 years and the trial court was affirmed.

The appellate court cited Section 775.087(2) of the Florida Statutes that provided in part: "Any person who is convicted of. . . burglary . . . and who had in his possession a firearm. . ."

and stated at page 367, "In order to fall within the mandatory minimum statute the defendant must have had the gun in his possession when he committed the burglary."

Of course, Section 810.02(b) raises burglary to a first degree felony if in the course of committing the offense the offender ". . . is armed. . ."

In Whitehead v. State, 446 So. 2d 194 (4th DCA, 1984), rev. den. 462 So, 2d 1108, no witness observed defendant in possession of a firearm; held to be fundamental error to enhance penalty. Citing Streeter v. State, 416 So. 2d 1203 (3rd DCA, 1982); Lawson v. State, 400 So. 2d 1053, 1055 (2nd DCA, 1981); Reynolds v. State, 429 So. 2d 1331, 1333 (5th DCA, 1983). The result of lack of such proof is an illegal sentence which is fundamental error.

In Sanders v. State, 352 So. 2d 1187 (1st DCA, 1977), an Information charged burglary while armed and jury found defendant guilty of that charge, but there was no evidence in that regard so the appellate court reversed.

To the same effect as to an armed robbery charge is Brown v. State, 397 So. 2d 320 (2nd DCA, 1981).

In the case at bar, Defendant did not take the stand. No witness at the commission of the armed kidnapping and armed burglary testified that Defendant had a gun. Only his confessions contained that information.

Being armed was an essential element of the charges in Counts II and 111. It was not proved independently of the con-

fessions. Not only did the illegal sentence enhance the penalty for these two crimes, but the findings were considered by the Court in aggravation of penalty for Count I, first degree murder.

The shooting and subsequent death of deceased was a separate crime. Without the confessions, there is no prima facie evidence that Defendant was armed when he placed part of his body in the automobile of deceased's father to take the key, nor when deceased left that car to enter Defendant's automobile.

V.

THE COURT ERRED IN ITS DENIAL OF DEFENSE MOTIONS TO:

A. BAR EVIDENCE, ARGUMENT AND INSTRUCTION THAT A CIRCUMSTANCE OF AGGRAVATION IN THIS CASE WAS THAT THE MURDER WAS HEINOUS, ATROCIOUS AND CRUEL, AND,

B. THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED, WITHOUT JUSTIFICATION.

The Initial Brief of Appellant with the numerous cases cited, coupled with the testimony of the medical experts, requires no reply to Appellee's Brief.

VI

THE COURT ERRED IN ITS IMPOSITION OF THE EXTREME PENALTY IN LIGHT OF TESTIMONY OF MEDICAL EXPERTS AND ITS FINDINGS IN MITIGATION.

The Initial Brief of Appellant adequately covered the law governing this point and we respectfully submit no reply is necessary.

VII.

THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

We recognize the existence of the case cited by Appellee, but as a person born six years after World War I and having lived through World War 11, we must persist in our belief that a government which espouses human rights and executes its own citizens flirts with lack of credibility among the world powers and loss of respect from within.

CONCLUSION

For the fundamental errors and other errors cited in our Initial Brief and in Reply, after examination and comparison of Appellee's authorities, justice requires that the judgment and sentences be reversed and the cause remanded for a new trial. At the very least, the sentence of death should be reversed and the cause remanded for resentencing.

Respectfully submitted,

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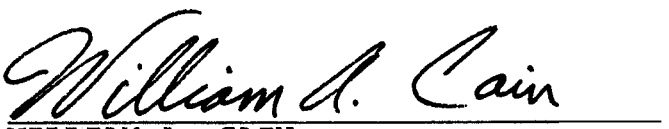
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief of Appellant was mailed to: MARK S. DUNN, ESQUIRE, Assistant Attorney General, Office of the Attorney General of Florida, 401 N. W. 2nd Avenue, Suite 820, Miami, Florida 33128, this 20 day of January, 1988.



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