IN THE SUPREME COURT OF FLORIDA

AVERY HIGHSMITH,

Petitioner,

v. CASE NO. 70,913

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER ON THE MERITS

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PAMELA D. PRESNELL
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR #0603708
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR PETITIONER

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STATUTES

Section 775.082, Florida Statutes 9

IN THE SUPREME COURT OF FLORIDA

AVERY HIGHSMITH,	:	
Petitioner,	:	
v.	:	CASE NO. 70,913
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner, Avery Highsmith, was the defendant in the Circuit Court of Duval County, Florida, and the appellant in the First District Court of Appeal. Respondent, the State of Florida, was the prosecuting authority and the appellee, respectfully. The parties will be referred to herein as "Highsmith" and "the state".

The record on appeal consists of three volumes and the presentence investigation report not contained in a bound volume. References to the record on appeal will be made by the symbol "R" followed by the appropriate page number. The transcript of Highsmith's May 21, 1986, pretrial hearings and June, 1986, trial and sentencing hearing will be referred to by the symbol "T" followed by the appropriate page number. References to the presentence investigation report will be made by the symbol "PSI" followed by the appropriate page number.

II STATEMENT OF THE CASE

An information was filed in the Circuit Court of Duval County charging Highsmith with burglary and grand theft (R-5).

The state filed a Notice of Intent to Seek an Enhanced Penalty (R-13).

Highsmith proceeded to jury trial on the charged offenses. At the charge conference, defense counsel requested a jury instruction on the defense of voluntary intoxication (T-246, R-44). The trial court granted the request (R-247-248), but in giving the instruction omitted certain language from the standard instruction (T-300-301). The jury found Highsmith guilty as charged (R-45-46, T-313-314).

At the sentencing hearing the trial court found Highsmith to be an habitual felony offender (T-339). The recommended guidelines sentence was 12 to 30 months incarceration (T-350, R-63), but the trial court departed from the guidelines and sentenced Highsmith to ten years in prison with 208 days credit for time served (T-352-353, R-60-61).

On appeal to the First District Court of Appeal, the Court affirmed Highsmith's convictions and sentences, citing Hester v. State, 503 So.2d 1346 (Fla. 1st DCA 1987), and certifying the question set out in Mitchell v. State, 12 FLW 1228 (Fla. 1st DCA May 22, 1987); Fryson v. State, 506 So.2d 1117 (Fla. 1st DCA 1987); and VanTassell v. State, 498 So.2d 649 (Fla. 1st DCA 1986) as one of great public importance. (See Exhibit A). The certified question is:

> Does a trial court's statement, made at the time of departure from the guidelines, that it would depart for any one of the reasons given, regardless of whether both valid and invalid reasons are found on review, satisfy the standard set forth in Albritton v. State?

Highsmith's timely motion for rehearing and/or clarification was denied by the First District Court of Appeal on July 16, 1987 (See Exhibit B).

Notice to invoke the discretionary jurisdiction of this Court was timely filed on July 22, 1987. This brief is filed pursuant to the Briefing Schedule issued on July 28, 1987.

III STATEMENT OF THE FACTS

The following is a summary of the relevant trial testimony:

At approximately 12:30 a.m. on November 28, 1985, Gary Calhoun, a cab driver, was parked in a shopping center parking lot approximately 30 feet away from the Crutchfield Electronics Store (T-48-49). He heard a sound like breaking glass and someone walking on it, coming from Crutchfield Electronics (T-49). Calhoun observed a yellow Cadillac backed into the front door of the electronic store, and movement inside the store (T-50). He saw a black male wearing a white wind breaker, with his hair in nine or ten pony tails, standing in front of the door (T-50-51). Calhoun identified Highsmith as this person (T-55). Calhoun called his dispatch and they called the police (T-55). Calhoun saw Highsmith run around to the passenger side of the car, and the car drove away (T-56). Calhoun followed the Cadillac. The Cadillac stopped on a bridge and Highsmith and the driver got out and started to run away (T-59).

Officer Richard Casio of the Jacksonville Sheriff's Office had been dispatched to the area (T-79). He saw the Cadillac stalled on the bridge and two black males standing by the car (T-80). They began to run away and Casio stopped Highsmith (T-80). Gregory Ward was also apprehended (T-128). Several boxed video cassette recorders and a television set were found inside the Cadillac (T-87-88). Highsmith and Ward were taken

back to Crutchfield Electronics where Calhoun identified Highsmith (T-59).

Highsmith was placed under arrest (T-124).

There was evidence introduced at trial that Highsmith's palmprint was found on the side of one of the video cassette recorders (T-110).

Gregory Ward testified at trial that he had decided to commit a burglary on November 28, 1985 (T-160). He saw Highsmith, with whom he was slightly acquainted (T-154-156), sitting in a chair outside of a store (T-158). Ward asked Highsmith if he would like to go riding with Ward to get some drugs (T-160). Ward noticed that Highsmith had been drinking and he had a can of beer in his hand (T-161). Highsmith did not seem very aware of what was going on (T-161). Ward proceeded toward the electronics store and Highsmith was dozing in the front seat (T-163). Ward backed his car into the front of Crutchfield Electronics (T-165). Highsmith was asleep at this time (T-165). Ward finally woke Highsmith and asked him to keep a "watch" (T-168). Highsmith got out of the car but had to lean against the car (T-168-169). Ward threw a brick through the glass window and door of Crutchfield Electronics (T-169). Highsmith began shouting, "What are you doing" (T-169). Ward went into the store and grabbed some video cassette recorders (T-170-171) and put them in the back seat (T-171). Ward jumped in the car, told Highsmith to get in, and they drove away (T-172). Ward could not see out of the rear view mirror and so he told Highsmith to move the VCRs out of

his way (T-174). Highsmith was upset and almost crying at this time (T-174), but he turned around and moved the items in the back seat and cleared Ward's rear view vision (T-175).

IV SUMMARY OF ARGUMENT

The certified question herein was disposed of favorably to Highsmith by this Court in Griffis v. State, 12 FLW 424 (Fla. July 16, 1987), and, therefore, this cause should be disposed of accordingly. Moreover, none of the reasons given for departure are clear and convincing.

The trial court committed reversible error in not giving a complete instruction to the jury on the defense of voluntary intoxication. The trial court omitted part of the language of the standard jury instruction and, by so doing, effectively stripped Highsmith of this defense.

V ARGUMENT

ISSUE I

THE FIRST DISTRICT COMMITTED REVERSIBLE ERROR IN AFFIRMING HIGHSMITH'S SENTENCE WHICH WAS A DEPARTURE FROM THE GUIDELINES.

The trial court departed from the guidelines in sentencing Highsmith, giving three reasons for departure (R-65-66). The court included the following language at the end of its written order setting forth its reasons for departure:

> The court finds that any one of the reasons set forth constitutes clear and convincing reasons for exceeding the recommended guidelines sentence.

(R-66).

On appeal, the First District Court of Appeal affirmed the sentence on the basis of the "boiler-plate" language and certified the question as being one of great public importance. In Griffis v. State, 12 FLW 424 (Fla. July 16, 1987), this Court answered the certified question in the negative and held that the "boiler plate" language was insufficient to meet the "beyond a reasonable doubt" standard of Albritton v. State, 476 So.2d 158 (Fla. 1985). This case must, therefore, be remanded for resentencing.

The First District failed to state in its opinion which reason or reasons for departure were valid. Highsmith contends that all of the reasons are invalid.

The first reason for departure given by the trial court, that Highsmith was declared an habitual felony offender, is clearly not a valid reason for departure. Whitehead v. State,

498 So.2d 863 (Fla. 1986). Also, because under Whitehead, the habitual felony offender statute cannot be used to exceed the guidelines nor to exceed the statutory maximum allowable penalty for an offense, Highsmith must be resentenced because he was sentenced to ten years incarceration on each of his convictions of burglary and grand theft, both third-degree felonies. Section 775.082, Florida Statutes.

The second reason for departure is actually comprised of several different parts:

(a) Highsmith is a career criminal and is nonrehabilitative.

Because the primary focus of this reason is Highsmith's prior criminal record it is an improper basis for departure. Hendrix v. State, 475 So.2d 1218 (Fla. 1985); Bailey v. State, 492 So.2d 738 (Fla. 1st DCA 1986); Nichols v. State, 504 So.2d 414 (Fla. 1st DCA 1987) (on motion for rehearing and en banc).

(b) Highsmith's presentence investigation report (PSI) indicates an escalated pattern of criminal conduct.

Appellant is aware that under this Court's decision in Keys v. State, 500 So.2d 134 (Fla. 1986), an escalation in the seriousness of the crimes committed can be a valid reason for departure. However, this reason must fail in this case because it is not supported by the record. Highsmith's PSI indicates that he has four prior third-degree felony convictions (PSI 3a-3c). With the exception of the aggravated assault in 1972, these felony convictions have all been burglaries and theft offenses. Highsmith's present convictions are for burglary and

grand theft. This certainly does not evince an escalating pattern of more serious offenses. Nichols, supra.

If the "escalated pattern" language refers to an escalation in the number of crimes committed, this too is not supported by the record. The PSI indicates that Highsmith's felony convictions were spread out over a period from 1972 to the present offenses allegedly committed in 1985. This does not evince an escalation in the number of crimes committed.

(c) The defendant is currently 31 years old, which indicates prior criminal activity since age 14 and continues through the current offenses by which he stands convicted.

This reason is based solely on Highsmith's prior record which has already been scored and factored in arriving at the presumptive guidelines sentence and is, therefore, an invalid reason for departure. Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

The third reason given for departure, that the recommended sentence of 12-30 months is not sufficient for retribution, rehabilitation, or deterrence, merely reflects the trial judge's disagreement with the Sentencing Guidelines Commission and is not a proper reason for departure. Scurry v. State, 489 So.2d 25 (Fla. 1986); Baker v. State, 493 So.2d 515 (Fla. 1st DCA 1986).

Because all of the reasons for departure are invalid, this case should be remanded for resentencing within the guidelines even in the event the convictions are affirmed.

ISSUE II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO GIVE A COMPLETE INSTRUCTION ON THE DEFENSE OF VOLUNTARY INTOXICATION.

A charge conference was held at the close of the presentation of evidence in Highsmith's trial. At this time defense counsel requested a jury instruction on the defense of voluntary intoxication (T-246, R-44). The state had no objection and the court granted the request (T-247-248).

There is no question but that Highsmith was entitled to have the jury instructed on the defense of voluntary intoxication. Voluntary intoxication has long been recognized by our courts as a defense to specific intent crimes, Linehan v. State, 476 So.2d 1262 (Fla. 1985), and burglary and grand theft are crimes requiring proof of a specific intent. Presley v. State, 388 So.2d 1385 (Fla. 2d DCA 1980); Link v. State, 429 So.2d 836 (Fla. 3d DCA 1983).

Moreover, there was ample evidence introduced to support Highsmith's contention that he was impaired from the use of alcohol at the time the incident occurred.[1] "[I]t is axiomatic that a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is

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[1]See Gregory Ward's testimony (T-153-224), which easily distinguishes this case from Hester v. State, 503 So.2d 1342 (Fla. 1st DCA 1987), where the Court held that the defendant was not entitled to an instruction on voluntary intoxication because there was no evidence that he was intoxicated or even that he had actually consumed alcoholic beverages or drugs.

any evidence to support such an instruction, and the trial court may not weigh the evidence in determining whether the instruction is appropriate." Pope v. State, 458 So.2d 327, 329 (Fla. 1st DCA 1984); Ambrister v. State, 462 So.2d 43 (Fla. 1st DCA 1984); Rodriguez v. State, 396 So.2d 798, 799 (Fla. 3d DCA 1981) ("It is of course incumbent upon the court to charge the jury on every defense which is recognized by the law and sustained by a version of the testimony which the jury has a right to accept.")

The problem in this case is not that the trial court refused to give an instruction on voluntary intoxication, rather the reversible error occurred when the trial court gave an incomplete instruction on this defense.[2]

Highsmith's requested instruction stated:

> (c) INTOXICATION
>
> Voluntary drunkenness or intoxication (impairment of the mental faculties by the use of narcotics or other drugs) does not excuse nor justify the commission of crime, but intoxication (impairment of the mental faculties by the use of narcotics or other drugs) may exist to such an extent that an individual is incapable of forming an intent to commit a crime, thereby rendering such person incapable of committing a crime of which a specific intent is an essential element. When the evidence tends to establish intoxication (impairment of the mental faculties by the use of narcotics or

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[2]Defense counsel objected to the court's version of the voluntary intoxication instruction at the first opportunity (T-311-312), and renewed the issue in his motion for new trial (T-47), and thus this issue is preserved for appeal.

> other drugs) to this degree, the burden is upon the state to establish beyond a reasonable doubt that the defendant did, in fact, have sufficient use of his normal faculties to be able to form and entertain the intent which is an essential element of the crime.
>
> Drunkenness (impairment of the mental faculties by the use of narcotics or other drugs) which does not go to the extent of making a person incapable of forming the intent, which is an essential element of a crime, does not in any degree reduce the gravity of the offense. Drunkenness (impairment of the mental faculties by the use of narcotics of other drugs) arising after the formation of the intent which is an essential element of a crime and voluntarily induced for the purpose of nerving the offender to commit a crime already planned does not excuse nor reduce the degree of the crime.
>
> Partial intoxication (impairment of the mental faculties by the use of narcotics or other drugs) which merely arouses the passions or reduces the power of the conscience neither mitigates nor lessens the degree of guilt if the offender still knew right from wrong, the probable consequences of his act, and was capable of forming a specific intent to commit the crime.

(R-44).

In instructing the jury, the trial court omitted from the instruction the phrase within the parenthesis, "impairment of the mental faculties by the use of narcotics or other drugs" (T-300-301). When defense counsel objected to this omission (T-311), the trial court stated that it did not consider alcohol to be a drug for purposes of the instruction, that "drug" referred to illegal drugs (T-311-312). This was

incorrect. The phrases in parentheses are to clarify or expand the instruction. Refusing to give a complete instruction was reversible error.

Because Highsmith admitted his presence at the scene of the crime his sole defense was that the drug, alcohol, had impaired his faculties to the extent that he was incapable of forming the specific intent necessary for a conviction of burglary and grand theft. Highsmith's theory of defense was not that he was "falling-down" drunk,[3] but that he was impaired to the extent of not having sufficient use of his faculties to be able to form the necessary intent (T-259, 269).

Throughout his closing argument, defense counsel repeatedly stressed this theory. At the very beginning of his argument, he stated:

> The prosecutor would have you think that he [Highsmith] was a drunk or we are trying to prove that he was a drunken slob, he couldn't move, he couldn't do anything, he was staggering all over the place. We're not saying that. We're saying that his faculties were impaired to the extent that he didn't know what was going on until it was too late.

(T-265).

This line of argument continued:

> He was still drinking, asleep, intoxicated or impaired. I don't want to make it sound like he was drunk because he wasn't drunk. He was impaired. He was affected by the drug alcohol to the

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[3]In fact, defense counsel repeatedly stressed that this was not the case (T-265, 269, 270).

> extent that he, at that time of the night was falling asleep in a nice cushioned seat of an automobile.

(T-269). Defense counsel went on to argue:

> He [Highsmith] wasn't drunk, but he was impaired at this time of night by the drug alcohol. . . .

(T-270).

He closed this portion of argument with:

> . . . the state has not proved beyond and to the exclusion of every reasonable doubt that its unreasonable that Mr. Highsmith was impaired. . . .

(T-273).

Defense counsel tailored his argument and theory of defense to fit the facts and the language of the requested standard jury instruction.[4] By omitting from the instruction the language "impairment of the mental faculties by the use of narcotics or other drugs," the trial court effectively stripped Highsmith of his defense. This omission coupled with the language given, of "drunkenness," had the effect of placing defense counsel in the position of arguing against Highsmith's defense. This was reversible error. See Blitch v. State, 427 So.2d 785 (Fla. 2d DCA 1983).

In Blitch, supra, the defendant was charged and convicted of second degree murder with use of a shotgun. The evidence

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[4]The requested jury instruction is from the Florida Standard Jury Instructions in Criminal Cases, 1st Edition (T-247).

was in conflict as to whether Blitch intentionally or accidentally shot the victim and as to Blitch's state of mind when he pulled the trigger. In giving the jury instruction on the defense of excusable homicide, the trial court did not give the standard jury instruction as agreed upon, but rather chose to "summarize" the instruction leaving out portions that would have illustrated and clarified the defense for the jury. In reversing, the Second District Court of Appeal found that the jury instruction could have been misleading because it seemed to inaccurately suggest that a killing was never excusable if committed with a dangerous weapon and therefore the jury could have improperly concluded that the defense of excusable homicide was not available to Blitch because he killed the victim with a shotgun. As the court stated, "In light of the sobering observation that, 'particularly in a criminal trial, the judge's last word is apt to be the decisive word,' a judge's instruction on a theory of defense should not be equivocal, incomplete or confusing." 427 So.2d at 787 (citations omitted).

Similarly, in the present case, by the court omitting the "impairment" language from the jury instructions, and only using the terms "drunkenness" or "intoxication," the jury could have been misled into believing that the defense of voluntary intoxication was not available to Highsmith because his attorney argued that Highsmith was not drunk, but, instead, was impaired by the use of the drug, alcohol, to the extent that he did not know what was going on (T-269). The trial judge's

instruction on Highsmith's theory of defense was incomplete and confusing and cannot be harmless error. Blitch, supra.

This Court relied on the reasoning of Blitch, supra, in Clark v. State, 461 So.2d 131 (Fla. 1st DCA 1984). There the jury instruction given on excusable homicide was found to be defective because it did not include a portion of the standard instruction which was applicable to the facts of the case and because the exclusion of another phrase of the instruction "changed the meaning of the excusable homicide instruction to the point that the instruction became 'equivocal, incomplete or confusing'." 461 So.2d at 133. Because the full standard jury instruction was omitted, the jury may have been misled or confused as to the defendant's available defense, and, therefore, the error was harmful and required that Clark be granted a new trial.

In Highsmith's case the omission of part of the instruction changed the meaning of the voluntary intoxication instruction to the point that the instruction became confusing, especially when coupled with defense counsel's argument. This omission may have also had the effect of misleading the jury as to its availability of Highsmith's case particularly when viewed in combination with his argument that he was not drunk but was, instead, impaired. This error cannot be said to be harmless. Clark, supra; see also Brown v. State, 462 So.2d 840, 843 (Fla. 1st DCA 1985) (where "the evidence is conflicting, confusing, and susceptible to interpretations favorable as well as adverse to the accused, depending entirely on the

jury's evaluation of its legal effect, the giving of confusing and misleading instructions is harmful, not harmless error.")

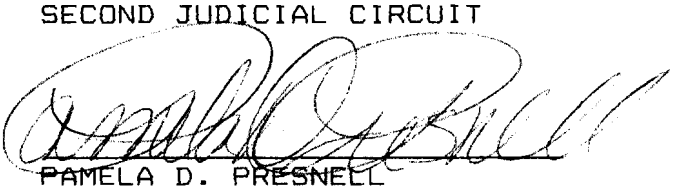
This case should be remanded for a new trial.

VI CONCLUSION

Based on the argument and citations of authority presented herein, Avery Highsmith asks this Honorable Court to reverse his convictions and remand this case for a new trial or, in the event the convictions are affirmed, to answer the certified question in the negative and remand this case for resentencing.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



PAMELA D. PRESNELL
Assistant Public Defender
Florida Bar #0603708
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Petitioner