IN THE SUPREME COURT OF FLORIDA

CASE NO. 71355
~~84-9397~~

WILLIAM RHODES,

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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PREFACE

T refers to the transcript of the proceedings below, the brief of the Appellee will be referred to by the letter B.

I.

THE TRIAL COURT DID REVERSIBLY ERR IN FAILING TO REQUIRE THE PROSECUTION TO EXPLAIN ITS REASONS EXERCISING PRE-EMPTORY CHALLENGES AGAINST A PARTICULAR RACE.

The State argues that the Defendants were incorrect by stating in their briefs that the "substantial likelihood" had been established that jurors were being excluded solely on the basis of race, requiring an inquiry under State vs. Neil, 457 So. 2nd 481, (Fla. 1984). The Neil court had drafted an opinion that answered the certified question of great public importance; "MAY A PARTY BE REQUIRED TO STATE THE BASIS FOR THE EXERCISE OF A PRE-EMPTORY CHALLENGE"?

The Court began its opinion by stating that:

> "Believing that it is time in Florida to hold that jurors should be selected on the basis of individual characteristics and that they should not be subject to being rejected solely because of the color of their skin, we answer the question with a qualified affirmative and quash the district court's decision.

"The Court discusses how to preserve the objection to the discriminatory use of pre-emptories at the trial level":

> "A party concerned about the other side's use of pre-emptory challenges must make a timely objection and demonstrate on the record that the challenged persons are members of a distinct racial group and that there is a strong likelihood that they have been challenged solely because of their race."

A careful review of the voir dire process demonstrates William Rhodes' attorney making timely objections and stating his concern at each and every discriminatory use of pre-emptory

challenges by the State below. (See TR 2554, 2565, 2594, 2654, 3034, 3389)

The State also argues that there is a significant doubt whether Rhodes has standing to raise the issue since the discriminatory use of the challenges was against blacks and Rhodes is a white Defendant.

In fact, the Defendant in Neil was black and the Supreme Court never had to reach that issue but, it is asserted by Appellant that the overall reasoning of the opinion in Neil demonstrates that the initial language, opening the opinion, (see above) is inclusive and that the logic behind the decision in State (Arizona) vs. Superior Court(Gardner), 43 Crim Law 1069, is compelling. Gardner states that:

> "The discriminatory exclusion of jurors of any cognizable group **necessarily** violates the right to a chance for a fair cross section no matter what the racial or ethnic characteristics of the Defendant, his lawyer, the judge, or any party to the action."

As in Gardner, Rhodes was a white man represented by a black attorney.

Finally, the Third District Court of Appeals in this State recently held that a Defendant of any race has standing to challenge the arbitrary exclusion of members of any race for grand or petit jury service. Rolando Del Sol vs. State, 14 FLW 336 (January 31, 1989). It is urged this Honorable Court make that holding the law of this State!

Appellant met the test of Neil and should have received a hearing on whether or not the state's persistent challenges to black jurors were based solely on racially motivated grounds.

Because the hearing was denied, reversible error was committed and the Appellant should receive a new trial.

II.

THE TRIAL COURT DID REVERSIBLY ERR IN FAILING TO REQUIRE THE PROSECUTION TO EXPLAIN ITS REASONS EXERCISING PRE-EMPTORY CHALLENGES AGAINST A PARTICULAR RACE.

Appellee would narrow the issue regarding severance of the Defendants to solely a Bruton problem (B-76). But a review of the Appellant's initial brief demonstrates a much more in depth prejudice then the mere entry into evidence of Bryant's uncrossexaminable redacted statement.

In reply to Appellee's statement that Appellant, "Rhodes has made no other complaint about Bryant's statement" (B-77) except that the jurors all knew who was who in the unsuccessful redaction - it was also "complained about" (although better language is that Rhodes was prejudiced to the extreme point of reversible error) that Bryant held the key to Rhodes' defense that Rhodes never murdered Arthur Venecia, as Bryant was the last person to enter the Venecia residence and may have been the murderer himself. Also, the granting of the state's Motion in Limine to prevent comment on Bryant's failure to testify prevented thorough closing argument by Rhodes' counsel, as he could not comment on that fact as much as it was key to the defense.

The state argues that redacting the confessions was a solution to the conflicting defenses because the confessions interlocked [relying on Richardson vs. Marsh, 95 L.Ed. 2d 176 (1987)]. Respectfully, a review of the logic this argument is based upon demonstrates it is faulty:

1. The Appellee basically admits, as did the Judge below (see quotes in initial brief) that the identities of the Defendants were revealed in the redacted statements ["although certainly arguably false", B-78].

2. The confessions allegedly interlock (Appellant's position is that they don't interlock. They are directly conflicting) which means they clearly demonstrate the involvement of each Defendant as to crucial facts such as time, location, felonious activity and awareness of the overall plan or scheme. (B. 79 from Parker, id.) (emphasis added)

3. The State then reasons that because the statements were interlocking and the court could assume each Defendant's statement incriminated the other Defendants (B. 80) (only through other extrinsic evidence) that a redaction process as used in Marsh, id. cleansed any Bruton violation because the Defendants later testified.

Fortunately for Appellant the cases cited by the Appellee stand for a position opposite of that which is outlined above: To begin with, the redactions in the Marsh case redacted out the existence of the co-defendant. Impossible to do in the instant case and reason number one to sever. Marsh, distinguishes Bruton vs. United States, 391 U.S. 123 (1968) because in Bruton "the co-defendant's confession expressly implicat[ed]" the Defendant as his accomplice.

THUS, AT THE TIME THAT CONFESSION WAS INTRODUCED THERE WAS NOT THE THE SLIGHTEST DOUBT THAT IT WOULD PROVE 'POWERFULLY INCRIMINATING".

A quick review of portions of the redacted statements of co-defendants Rhodes and Irvine reveal how powerfully incriminating segments were at the time of their introduction:

Michael Irvine:

"I stayed in the kitchen. That was the front room, the front part of the trailer. The lady sat down and was eating supper and someone [obviously Rhodes] came back, had like a woman's pair of pantyhose or hose and the next thing I know someone put it around the lady's neck and etc. I turned my back to it for a couple minutes and walked outside". [T 7164]

Rhodes states just the opposite, that he was in the kitchen, the woman was eating and he saw someone, [obviously Irvine] with his hands around the lady's head choking her. (T 71071

A question that begs the answer yes is "Were not these statements powerfully incriminating at the time they were introduced without any future extrisic evidence?" If yes, then should not severance have been granted after the failed attempts to disguise identities? The Marsh court distinguishes its case from Bruton in that the incrimination did not appear on the confession's face, but when linked to the defendant's own testimony - not the Defendant's own redacted statement. Timing is the essence of this argument for severance. Because Irvine later became subject to cross-examination should not cleanse the error here. Attorneys for Irvine and Rhodes should not have been forced to sacrifice 5th amendment rights because of the failure to sever.

A trial lawyer's duty is to zealously defend his client, not guess at appellate outcome by theorizing; "that if the

Defendant doesn't testify we preserve Bruton error" due to the entry of the powerfully incriminating statements entered during the State's case in chief. As the Marsh court stated about Bruton (which is equally applicable here): "....AT THE TIME THE CONFESSION WAS INTRODUCED THERE WAS NOT THE SLIGHTEST DOUBT IT WOULD PROVE POWERFULLY INCRIMINATING", Id. at 135, 20 L.Ed 2d 476, 88 S.t. 1620 [Marsh, at 1861

Finally, many cases cited by Appellee, such as Marsh are Federal cases, and as Marsh are Federal drug conspiracy cases. Appellee asserts that all the appellants have urged this court to adopt a policy of "when in any doubt sever". This is simply incorrect, but not far from the mark, since this appellant would urge the court to adopt the policy of "when in doubt that the Defendant suffer severe prejudice to his right to a fair trial - sever". It is interesting to note that again the State cites Marsh as its a reasoning that this court adopt the above policy. Marsh is quoted at length [B91-92] but that reasoning actually only applies to those drug conspiracy cases cited:

"Many joint trials for examples, those involving large conspiracies to import and distribute illegal drugs - involve a dozen or more co-defendants." Id. at 187.

This is a case where the final sentence calls for the death of the appellant, William Rhodes. This was not a Federal case, a drug case, or a conspiracy of dozens. It was a case where substantial prejudice was suffered due to the failure to sever which calls for reversal.

III.

THE COURT ERRED IN FAILING TO SEVER OFFENSES.

The State has argued that there is "a connection" (B.97) between the two murders. Although the murders were two months apart and occurred at different residences, the State recites the factors it considers relevant to joinder in its brief at pages 96-97:

a. Mrs. Fisher, victim number two, was the mother of victim number one.

b. Two Defendants, accused, of both murders, were present at the scene of each murder.

c. The bodies were found in the same pit.

d. Fisher and Venecia owned stock which Bryant liquated (which is not a joinder factor regarding Rhodes.)

The most relevant factor in support of the state's position (that Casteel testified that Bryant ordered Fisher killed because she was asking too many questions about Venecia's disappearance) will be discussed in issue number IV.

Based on the holding of Paul v. State, 365 So. 2d 1063, factors a,b, and c were insufficient to join the two offenses since the prejudice to Defendants of being convicted of one murder on the basis of the other outweighed the need to economize by trying both murders together.

IV.
PROSECUTORIAL MISCONDUCT DID CONSTITUTE REVERSIBLE ERROR IN THIS CASE.

Appellant relies on issues II, III, and IV of his initial brief regarding prosecutorial misconduct.

It should be noted that the prosecutor of the case below was the same prosecutor in the case of Molina vs. State, 406 S2 57 (3rd DCA, 1981) and Molina vs. State, 447 S2 253 (3rd DCA, 1983).

The Honorable Judges of the 3rd DCA had these comments to make regarding the misconduct of this prosecutor in Molina II (at 255):

"We will not elaborate further on the prosecutor's behavior in the present case other than to state that.....we direct the Florida Bar Grievance Committee's attention to this matter,"

"It quite clearly appears from this record that the prosecutor deliberatly set about to circumvent our holdings in Molina vs. State....."

The issues and evidence of prosecutorial misconduct set forth in the initial brief set forth reasons for reversal of the conviction and sentence. This prosecutor had not changed colors for this trial.

V.

(XI) THE CUMULATIVE EFFECT OF ERRORS PREVENTED THE DEFENDANT FROM RECEIVING A FAIR TRIAL.

The totality of error is demonstrated by Appellee's own brief. In order to coherently present the case against Rhodes piesces of each Appellant's statements are pieced together.

The "severence of counts" issue is attacked by making reference to a statement made by Dee Casteel quoting James Allen Bryant (B.96) Bryant could never be cross examined regarding its underlying truth or falsity.

To demonstrate that Rhodes had a sharp object and murdered Venecia with it, Appellee is forced to cite to the uncrossexaminable statement of Bryant again! (B.151)

Appellant notes that the Appellee states (B.154) that this court is certainly capable of applying the proper standard in regards to whether the numerous errors recited are harmless or not. Appellant agrees and would remind the Court that in Molina II, id, the 3rd DCA appeared to use the Chapman vs. California, 386 U.S. 18 (1967) test,

"....on closer examination we are not satisfied beyond a reasonable doubt that the error did not contribute to a conviction."

It is urged this Court apply this standard here. This cause should be reversed and remanded for a new trial.

ANSWER OF CROSS-APPELLEE! WILLIAM RHODES, TO BRIEF OF CROSS-APPELLANT

I.

THE ISSUE OF THE TRIAL COURT HAVING ERRED BY NOT FINDING THE MURDER OF ARTHUR VENECIA AS NOT ESPECIALLY HEINOUS! ATROCIOUS OR CRUEL IS INAPPLICABLE TO CROSS-APPELLEE RHODES AND INCAPABLE OF REMEDY AT LAW.

William Rhodes was found guilty of the murder of Arthur Venecia and then sentenced to death by the trial judge. Whether or not the crime was heinous or not could not be more irrelevant to Rhodes as he was sentenced to die due to his conviction of that murder.

Even if the Judge was not correct in not rendering the heinous, atrocious and cruel finding - the only relief requested by cross-appellant is if this court grants a new trial. Since no one knows what evidence will be entered in a new trial in the cases in chief or at a penalty stage, if there ever would be one, the Court could never make a finding on how a trial judge should rule prior to his hearing the facts and weighing the evidence that might appear at a new trial.

Finally, based upon the numerous arguments made by cross-appellees in their initial brief regarding the testimony of Dr. Rao during the death phase, which was so at odds with her prior testimony to seem perjurious, it was well within the trial judge's province as ultimate decision making trier of fact, that he could and should have rejected Dr. Rao's testimony of suffering at death, which was the only basis that the court could have made the heinous! atrocious finding.

There is no reason to disturb the trial judge's finding below.

CONCLUSION

WHEREFORE, based upon the arguments and authorities set forth herein and in Appellant William Rhodes' initial brief the conviction and sentence below should be reversed and remanded for a new trial due to the extreme prejudice suffered by apellant and in order that he receive a fair trial or, in the alternative to vacate the sentence of death.

Respectfully Submitted,

GARY W. POLLACK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant, William Rhodes, was mailed this 26th day of April, 1989, to: Charles Fahlbusch, Assistant Attorney General, 401 N.W. Second Avenue, Suite N921, Miami, Florida 33136, Sheryl Lowenthal, Suite 304, 2550 Douglas Road, Coral Gables, Florida 33134, Geofrey C. Fleck, Esq., Suite 106, Sunset Station Plaza, 5975 Sunset Drive, South Miami, Florida 33143, and to Lee Weissenborn, Esq., 235 N.E. 26 Street, Miami, Florida 33136.

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