IN THE SUPREME COURT OF FLORIDA

EDDIE EUGENE ALVIN,

Defendant/Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

APPEAL DOCKET NO.: 71,637

ON APPEAL FROM THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NATHAN G. DINITZ, ESQUIRE
600 Silver Beach Avenue
Daytona Beach, Florida 32018
(904) 257-1158
ATTORNEY FOR EDDIE EUGENE ALVIN, APPELLANT.

Cr.4
.CS

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER AUTHORITIES

ARGUMENT

The Defendant/Appellant, EDDIE EUGENE ALVIN, submits this reply brief in response to the issues raised by the Appellee in their Answer Brief.

I. A. THE TRIAL COURT ERRED IN EXCUSING, AND IN ALLOWING THE STATE TO EXCUSE, EVERY BLACK POTENTIAL JUROR SEATED IN THIS ACTION.

The Defendant is a black male. Four blacks were excused as potential jurors in this action, and no blacks were permitted to sit on the jury notwithstanding the Defendant's repeated request to have at least one black seated. A black man was excused for medical reasons (R. 18-19), and the Defendant does not object to that action. The second juror, Mr. Gatie indicated he was personally familiar with many of the witnesses, and the Defendant did not object to his being excused (R. 568). It is the State's peremptory challenge to the remaining two black jurors, Ms. Gray and Ms. Tompkins, to which the Defendant objected at trial and objects to herein.

Ms. Grey was excused by the State after she indicated she had met one of the witnesses approximately seven or eight years earlier (R. 209), and recogonized her name from the list of potential jurors (R. 174-175). The State thereafter excused Ms. Grey peremptorily (R. 438-441). The trial court allowed the challenge, stating

> THE COURT: Based on the Neal [sic] decision I can't say that this is obviously racially motivated and that the reason given is not a sufficient reason because it's clear it doesn't have to be a reason that would otherwise be justified as a challenge for cause.
>
> So the Neal [sic] inquiry, I'll rule that the State can exercise its peremptory on that and excuse Ms. Gray.
>
> (R. 441)

The other black potential juror whom the State had excused was Ms. Tompkins. Both at the trial level and on appeal, the State argues that Ms. Tompkins was excused because she indicated she would automatically vote against the death penalty; see Answer Brief Of Appellee, p. 5. The grounds alleged by the State to support excusing Ms. Tompkins, as relied on in the trial court and as cited by the Appellee on p. 5 of its brief, are cited as occurring at "R. 590-591" of the trial transcript. The announcement that the State intended to excuse that juror occurred at "R. 572" of the trial transcript. The facially neutral grounds to support the State's actions occurred after the State announced its intention to exercise its peremptory challenge to excuse that juror. The State is trying to bootstrap itself into a neutral reason for challenging that juror, when none in fact existed at the time of their initial decision to exclude her.

The trial court erred in determining that it was the Defendant's burden to show that the State's actions were racially motivated.

Subsequent to the trial, this Honorable Court decided State v. Slappy 522 So.2d 18 (Fla. 1988). In Slappy this Court clarified the State's burden of proof to support peremptory challenge to blacks once the Defendant has made a prima facie showing that a likelihood of discrimination exists. This Court noted, as follows:

> Once a trial judge is satisfied that the complaining party's objection was proper and not frivolous, the burden of proof shifts. At this juncture, Neil imposes upon the other party an obligation to rebut the inference created when the defense met is initial burden of persuasion. This rebuttal must consist of a "clear and reasonably specific" racially neutral explanation of "legitimate reasons" for the state's use of its preemptory challenges... Part of the trial judge's role is to evaluate both the credibility of the person offering the

> explanation as well as the credibility of the asserted reasons. These must be weighed in light of the circumstances of the case and the total course of the voir dire in question, as reflected in the record.
>
> We agree with the district court below that a judge cannot merely accept the reasons proffered at face value, but must evaluate those reasons as he or she would weigh any disputed fact. In order to permit the questioned challenge, the trial judge must conclude that the proffered reasons are, first, neutral and reasonable and, second, not a pretext. These two requirements are necessary to demonstrate "clear and reasonably specific . . . legitimate reasons." Batson at 98 n20. Moreover, they serve the goal of demonstrating a "neutral explanation related to the particular case to be tried," id. at 98, and that "the questioned challenges were not exercised solely because of the prospective jurors race." Neil, 457 So.2d at 486-87 (Footnote omitted).
>
> These requirements lie at the heart of the nonexclusive list of five factors the Slappy court concluded would weigh against the legitimacy of a race-neutral explanation. 503 So.2d at 355. We agree that the presence of one or more of these factors will tend to show that the state's reasons are not actually supported by the record or are an impermissible pretext: (1) alleged group bias not shown to be shared by the juror in question, *(2)* failure to examine the juror or prefunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror who were not challenged.
>
> * * *
>
> Thus, where the total course of questioning of all jurors shows the presence of any of the five factors listed in Slappy and the state fails to offer convincing rebuttal, then the state's explanation must be deemed a pretext.

In the present case the State peremptorily eliminated two otherwise qualified, black potential jurors. The trial court failed to require the State to present convincing rebuttal, and to demonstrate clear and reasonable specific

legitimate reasons for those preemptory challenges. This is particularly significant since at least one of the factors that would weigh against the legitimacy of a race neutral explanation were in fact present: When Ms. Tompkins was originally challenged (R. 572), it was for the same reasons that had not elicited a challenge from the State to Ms. Monnen, a white juror; and this occurred after the State had already excused the other black potential juror, Ms. Gray, merely because she had met one of the State's witnesses some eight or ten years earlier, and remembered her name.

Since at least one of the five factors listed in Slappy was present in this case, and since the State failed to offer convincing rebuttal, the State's explanation herein must be deemed to be pretextual; the trial court erred in not proceeding further on this issue, and the Defendant is therefore entitled to a new trial before an impartial and properly selected jury. This case should be remanded for a new trial.

II. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE PREJUDICIAL EVIDENCE AND TO IMPEACH ITS OWN WITNESS BY USING A PREVIOUSLY RECORDED UNSWORN STATEMENT OF THAT WITNESS, AND BY DENYING THE DEFENDANT'S SUBSEQUENT MOTION FOR MISTRIAL.

At trial and on appeal herein, the Defendant, EDDIE ALVIN, argued that the trial court committed prejudicial error by allowing the State to introduce the unsworn tape recorded statement at trial of the witness, Wesner Remy. Remy's statement was taken after he was arrested in West Palm Beach a couple of days after the homicide was committed in Daytona Beach and approximately twelve hours after he was taken into custody (R. 954). It was the Defendant's position

at trial and on appeal here n, that to the extent Remy's statement was consistent with his trial test mony, it was inadmissible as a prior consistent statement; to the extent the statement was inconsistent with his trial testimony, that statement was inadmissible as either substantive evidence or as impeachment.

At both trial and on appeal, the State first argues that Remy's statement was admissible as a prior consistent statement to rebut and express or imply charge against him of improper influence, motive or recent fabrication. However, as noted in Quiles v. State 523 So.2d 1261 (Fla. 2d DCA 1988), there is an additional element which need be present before Remy's statement would be admissible as a prior consistent statement -- the statement must have been made before the existence of a reason to falsify arose. In Quiles,

> Appellant argues on appeal that the trial court committed reversible error when it allowed the state to introduce into evidence the prior consistent statement of the complaining witness, Rudy Heim, thus improperly bolstering Heim's credibility.
>
> * * *
>
> Turning to appellant's first point on appeal, we agree with appellant and hold that Officer Chandler's in-court recitation of Heims' version of the events was inadmissible hearsay and was not admissible as an exception to the hearsay rule §§90.801(2)(b), 90.803(1), 90.803(2), Fla.Stat. (1985).
>
> The state relies on the proposition that any out-of-court statement offered for its truth is not hearsay if it is consistent with the declarant's other testimony and is "offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication" §90.801(2)(b). To be admissible, however, the statement must have been made before the existence of a reason to falsify arose. Preston v. State 470 So.2d 836, 837, (Fla. 2d DCA 1985). Here, Heim made the statements to Officer Chandler in the course of the police investigation of the incident. As in Lamb v. State 357 So.2d 437 (Fla. 2d DCA 1978, the statements were made to police after they arrived and in response to the declarant's telephone call. The events of the crime had long since

> occurred and had terminated, giving Heim time to reflect. Id. at 439. Heim's statements to Officer Chandler were not admissible as nonhearsay.

The facts in the present case are indistinguishable from Quiles. The Defendant would also again point out that it was the State, in their direct examination, that first elicited the testimony from Mr. Remy that he had been granted immunity in exchange for his trial testimony herein (R. 890-892).

To the extent the State now admits that Remy's testimony contained information inconsistent with his trial testimony, the State argues that the additional or inconsistent testimony would be admissible because Remy thereby became an "adverse witness". However, there are two reasons that the State's attempt to justify the use of this unsworn inconsistent statement must fail. First, that argument was never presented to the trial court for its consideration. More importantly, however, is the fact that Wesner Remy was simply not an adverse witness to the State. The mere failure of the State's witness to testify as he was expected to do, without his giving evidence that is at all prejudicial to the State, is not sufficient grounds to declare that witness "adverse". The witness must not only fail to give the beneficial evidence expected of him, but he must become adverse by giving evidence that is prejudicial to the cause of the party producing him. Jackson v. State 451 So.2d 458, 461-462 (Fla. 1984). Further, as noted in Austin v. State 461 So.2d 1380 (Fla. 1st DCA 1984):

> Under the Florida Evidence Code, there are limited circumstances under which a prior inconsistent Statement may be admissible as substantive evidence, i.e., for purposes of establishing the truth of the content of such prior statement. Under Section 90.801(2)9a), Florida Statutes (1983), a prior inconsistent statement may be

> received as substative evidence if the person who gave the statement testifies and is subject to cross-examination concerning the statement and such statement had been given under oath in a proceeding in which he could be subjected to the penalty of perjury. Mincey's prior statement does not qualify because it was not made under oath.
>
> Nor would the state have been justified in eliciting Mincey's prior inconsistent statement under Section 90.608, Florida Statutes, which allows a party calling a witness, who proves adverse, to introduce a prior inconsistent statement. Of course, the purpose for which the statement would be elicited would be only for impeachment purposes. But even there, the witness must be shown to be adverse. The fact that a witness may be hostile or unwilling does not mean that he is adverse. See Ehrhardt, Florida Evidence §608.2, p. 299 (2d Ed.1984). In order to be regarded as adverse under this section, the witness must give testimony prejudicial to the cause of the party calling him. The fact that he simply fails to give the testimony expected of him and that the testimony was not as beneficial as a prior statement is not sufficient. Ibid. Mincey's testimony that he did not recall whether he and the defendant were together at Jacksonville Beach on May 15 certainly cannot be regarded as prejudicial to the state under the above well-recogonized criteria for adverseness ... (citations omitted)
>
> Id 1383.

In short, to the extent the unsworn tape recorded statement of Remy was consistent with his trial testimony, the statement was inadmissible to rebut any inference of improper or fabrication because it was given after Remy was in police custody for approximately twelve hours, and already a suspect in this homicide. He therefore had an existing motive to fabricate his statement to exculpate himself, and the statement would therefore be inadmissible to enhance his credibility at trial. Alternatively, to the extent the statement contained inconsistent testimony, that statement would likewise be inadmissible as hearsay, and would constitute improper impeachment by the State of its own witness.

Since Remy's testimony was the only evidence of premeditation to support

the charges herein, and since Remy was a crucial witness as to identification, it is respectfully submitted that the trial court's error in admitting that tape recorded statement was highly prejudicial. Accordingly, it is urged that this matter be remanded for a new trial.

V. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND ADMITTING ILLEGALLY SEIZED EVIDENCE AT TRIAL.

The vehicle in which Eddie Alvin was riding as a passenger was stopped in West Palm Beach because it had an improper tag. The driver, Wesner Remy was arrested because he was driving with a suspended license. he front seat passenger was then arrested for carrying a concealed weapon Eddie Alvin, who was a passenger in the back seat of the vehicle, was then 1 kewise handcuffed, and transported to the West Palm Beach Police Station, where he was placed in a holding cell. The police thereafter conducted a search of the motor vehicle, and located evidence relevant to this homicide. Mr. Alvin was arrested, photographed, fingerprinted, and questioned by the Daytona Beach Police.

The Defendant objected in the lower court that the evidence seized from him resulted from his illegal detention and arrest, and should be inadmissible at trial. The trial court ruled in its Order that the evidence seized from the motor vehicle would be admissible against Mr. Alvin because he had no standing to object; further, that any evidence obtained from Mr. Alvin after his initial detention and transportation to the West Palm Beach Police Station would be inadmissible, until the point and time when he was rearrested at the police station; but that the statements, fingerprints, and photographs taken sub-

sequent to his rearrest were admissible at trial.

On appeal, the State again argues that Edd e Alvin did not have standing to contest the search and seizure herein. As the State candidly admits in their brief (p. 29), State v. Jones 483 So.2d 433 Fla. 1986), stands for the proposition that "unquestionably, stopping an automobile and detaining its occupant constitutes a seizure within the meaning of the Fourth Amendment to the UNITED STATES CONSTITUTION". And as noted in State v. Montano So. 2d , 13 FLW 1523 (Fla. 3d. DCA, June 28, 1988):

> The defendant-appellee Montano was a passenger in a car which, the prosectuion stipulated below, was unlawfully, pretextually stopped by the police (citation omitted). In the ensuing search of the vehicle, the police discovered cocaine which Montano successfully moved to suppress. The state argued below and reiterates here only the contention that, although the stop and search were both constitutionally unjustified, Montano, as a mere passenger, did not have a reasonable expectation of privacy in the car which would give him "standing" to assert the claim. We reject this position.
>
> It is well-settled that since the passenger's liberty interest in proceeding on his way in the vehicle was improperly interfered with by the lawless act of stopping the car, he has the requisite interest to assert the impropriety both of that stop and of the search which was based upon it. 4 W. LaFave, Search and Seizure §11.13 (2d ed. 1987). and cases cited at n.200 ("If either the stopping of the car or the passenger's removal from it are unreasonable in Fourth Amendment sense, then surely the passenger has standing to object to those constitutional violations and to have suppressed any evidence found in the car which is their fruit.")

Accord, Adams v. State 523 So.2d 190 (Fla. 1st DCA 1988). Clearly, the Defendant, Eddie Alvin, had standing to object to the illegally seized evidence being used against him at trial.

The evidence should have been suppressed at trial as the result of an

illegal seizure. Alvin's argument herein concern ng the relationship between his unlawful detention, unlawful transport to the West Palm Beach Police Station, subsequent arrest, and the evidence subsequently obtained from him, and admitted at trial, it is analogous to the situation in Antela v. State So.2d _____, 12 FLW 2516 (Fla. 3d DCA 1987).

> According to the Police officer's testimony at the supression hearing. Antela and others were observed standing in front of a convenience store at which several robberies had recently occurred. When Antela noticed the officer in a marked police car, he left on his bicycle. The officer stopped Antela approximately two blocks from the store. After ascertaining that there was a warrant for Antela's arrest, the police officer arrested him, conducted a search, and found cocaine in Antela's pocket.
>
> The described circumstances "were clearly insufficient to give rise to anything more than a bare suspicion" of criminal behavior. Mullins v. State 366 So.2d 1162, 1163, (Fla. 1978); see Cobb v. State 12 FLW 2033 (Fla. 3d DCA August 19, 1987); Parker v. State 363 So.2d 383 (Fla. 3d DCA 1978); Vollmer v. State 337 So.2d 1024 (Fla. 2d DCA 1976), cert dismissed, 347 So.2d 432 (Fla. 1977.) Thus, the officer lacked sufficient grounds to stop Antela, and the trial court erred in denying the motion to suppress.
>
> Reversed.

In the present case and in Antela, the police illegally detained a citizen, used that illegal detention to procure evidence to support a subsequent arrest of the suspect for cause, and then seized additional evidence from the suspect to support additional charges. In Antela the evidence seized after the illegal detention was properly suppressed. It is respectfully urged that the evidence seized in this case be likewise suppressed.

The State also argues that the evidence complained of herein would be admissible under the inevitable discovery theory. However, no evidence was presented in the lower court to support inevitable discovery, the trial court did

not rule on the sufficiency to support the inevitable discovery of the evidence complained of herein, and that matter is therefore not ripe for consideration on appeal.

VI. B. WHETHER THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY INSTRUCT DEFENDANT'S JURY ON MANSLAUGHTER AND JUSTIFIABLE HOMICIDE.

The Appellant would note on the issue of the sufficiency of instructions on manslaughter and justifiable homicide, that this Court ruled contrary to Appellant's position in the recent case of Banda v. State So.2d ____, 13 FLW 451 (Fla. July 14, 1988).

VII. A. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AGGRAVATING CIRCUMSTANCES, AND IN FINDING AGGRAVATING CIRCUMSTANCES SUFFICIENT TO IMPOSE THE DEATH PENALTY HEREIN.

The trial court found two aggravating circumstances to support the death penatly: that the Defendant knowingly created a great risk of death *to* many persons; and that the homicide was committed while the Defendant was engaged in an attempt to commit the crime of robbery and/or the crime of kidnapping. Although the Defendant argued extensively in his initial brief herein that the trial court erred in finding the aggravating factor of knowingly creating a great risk of death to many persons, the State is incorrect in asserting that the Defendant did not object to the improper finding that the death occurred while he was ingaged in an attempt to commit the crime of robbery and/or kidnapping. In fact, section IV of the initial brief argued that the Defendant was

wrongfully convicted of robbery. Obviously, reversal of the robbery conviction would necessarily affect the finding of robbery as an aggravating circumstance, without the necessity of the Defendant repeating his argument in this section of his brief.

Additionally, although the trial court found that in addition to Willie Grimes and Willie Powell, there were two women proven to be in the immediate area at the time of the shooting (R. 2152), it is respectfully submitted that there is no evidence of a second women in the vicinity at the time of the shooting. Nor has the State cited to any such evidence in the record. Further, the balance of the evidence to support this aggravating circumstance is mere speculation.

The State has raised an interest point concerning evidence of mitigating factors for sentencing. The State is incorrect in its assertion (p. 39), that no mitigating circumstances were found by the Court. The State presented no evidence at the penalty phase. The Defendant presented substantial testimony about his family background and personal history. Mr. Alvin's girlfriend, Carol Bess, testified that he was a friendly, loving person, never a trouble-maker (R. 1929). Oscar Jones, the Defendant's counsin, testified as to Mr. Alvin's childhood and church activities, and that he was easily led by others (R. 1930-1935). Johnnie Mae Alvin testifed that she was Mr. Alvin's adoptive mother, that he was a devoted son, and had been working and supporting his children prior to his arrest herein (R. 1943-1946). These factors are all relevant in mitigation, see, Brown v. State ____ So. 2d ____, 13 FLW 313 (Fla. May 12, 1988); McCampbell v. State 421 So.2d 1072 (Fla. 1982). Additionally, co-defendant Willie Simmons was subsequently tried, convicted of first degree

murder and other lesser crimes, and sentenced to life imprisonment. The fact that both of Mr. Alvin's co-defendants were sentenced to life imprisonment constitutes an additional mitigating factor. McCampbell v. State 421 So.2d 1072 (Fla. 1982), supra.

The trial court first ruled in its written Order that "the mitigating circumstance argued by the Defendant, EDDIE EUGENE ALVIN, regarding any other aspect of the Defendant's character or record, and any other circumstances of the offense, does not outweigh the aggravating circumstances listed above which this Court has found to exist beyond a reasonable doubt"; and then proceeded to note that "in conclusion this Court finds there are two aggravating circumstances as listed above which have been proven above and to the exclusion of a reasonable doubt and there are no mitigating circumstances." (R. 2153).

The trial court's Finding Of Fact is therefore contradictory. The trial court could have found that the aggravating circumstances outweighed the mitigating circumstances; or it may have improperly concluded that the above factors did not constitute valid mitigatory circumstances, and thereby failed to properly consider them. However, this is a matter that can be cleared up upon remand.

VII. C. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AT THE PENALTY PHASE THAT ITS DECISION MUST BE BY VOTE OF A MAJORITY OF THE JURY.

At the conclusion of the trial, the jury recommended, by a seven to five vote, that the Defendant be sentenced to death. The Defendant argued herein that he was prejudiced by the trial court instructing the jury that it

should make its penalty recommendation by majority vote of the jurors. In its response, the State argued that the Defendant was not prejudiced by the trial court's instructions.

On or about August 17, 1988, the Defendant filed in this Court, an Affidavit Of Daniel J. Schafer, Esquire, indicating actual prejudice to the Defendant from the trial court's instructions herein. In light of the unique nature and finality of the death penalty, it is respectfully urged that the Affidavit Of Daniel J. Schafer, Esquire, be considered, and this cause thereafter remanded to the trial court for hearings to determine whether the Defendant suffered actual prejudice from the trial court's jury instructions; and for the appropriate proceedings thereafter.

CONCLUSION

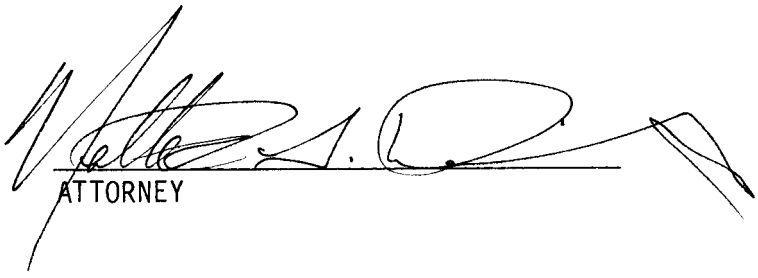
For the reasons set forth in the initial Brief Of Appellant, and for the reasons argued herein, it is again respectfully urged that this matter be remanded for a new trial; alternatively, that it be remanded for the imposition of a sentence of life imprisonment without the possibility of parole for twenty five years, or for a new sentencing hearing.

Respectfully submitted,

NATHAN G. DINITZ, ESQUIRE
600 Silver Beach Avenue
Daytona Beach, Florida 32018
(904) 257-1158
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail delivery this 19th day of September, 1988, to Belle Turner, Asistant Attorney General, 125 North Ridgewood Avenue, 4th floor, Daytona Beach, Florida 32014; and to Eddie Eugene Alvin, #067231, Post Office Box 747-P-2-N-4, Starke, Florida 32091.



ATTORNEY