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IN THE SUPREME COURT OF FLORIDA

CASE NO. **72,622**

JAMES CAMPBELL,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

INTRODUCTION

The Appellant, James Campbell, was the Defendant in the Trial Court, the Circuit Court of the Eleventh Judicial Circuit of Florida, In and For Dade County. The Appellee, the State of Florida, was the prosecution. In this brief, the Appellant will be referred to as the State. Both parties will also be referred to as they appear before this Court.

The symbol "R" will be used in this brief to designate the Record on Appeal. The symbol "T" will be used to refer to the court reporter's transcripts. The symbol "S" will be used to refer to the supplemental transcript of February 1, 1988 at 2:00 P.M. attached to Appellant's Motion to Supplement Record on Appeal.

ARGUMENT AND REBUTTAL

1.

THE TRIAL COURT ERRED BY ITS DENIAL OF APPELLANT'S MOTIONS TO SUPRESS PHYSICAL EVIDENCE, IDENTIFICATION AND STATEMENTS, THEREBY DEPRIVING APPELLANT OF A FAIR TRIAL.

The State contends that the juvenile pick-up orders were valid at the time of Appellant's arrest, yet on page 29 of Appellee's Brief the State contends, "Rather they became void at the time they were quashed." These pick-up orders were either void or they were not. The fact of the matter is, at the time of Appellant's arrest, the The Juvenile Court had no jurisdiction over the adult Appellant. Without jurisdiction, the pick-up orders were void. Whether a Court quashes them or not is irrelevant to their void status due to lack of jurisdiction.

By operation of law pursuant to Section 39.40(2) and 39.02 (4) Fla. Stat., the Juvenile Court automatically lost jurisdiction when Appellant attained 18 years of age in the dependency case and 19 years of age in the delinquency case. From that time forward, those pick-up orders were void.

The State argues that police do not have discretion in such matters. However, it is revealing that the police took Appellant to their homocide office and not the juvenile facility. They knew the Juvenile Court no longer had jurisdiction. There is no difference between this situation, (which in reality was the failure of the criminal justice system to remove no longer correct information from its computers), and Albo v. State, 477 So. 2d 1071, 1073, (Fla. 3d DCA, 1985).

The case of McCray v. State, **496 So.** 2d **919,** (Fla. 2d DCA, **1986)** cited by the State is distinguishable in that in McCray the court was not dealing with a situation where the very Court that issued the capias lost jurisdiction by Statute automatically. Juvenile cases are different since they are a creature of statute. It is apparent that McCray and Albo conflict and this Honorable Court has never addressed the issue of mistaken information in police computers. However, Martin v. State, 424 **So.** 2d **994,** (Fla. 2d DCA, 1983), stands for the proposition that a void warrant cannot be the basis for a valid arrest and that definately applies to the case at bar.

State v. A.N.F, **413 So.** 2d **146** (Fla. 5th DCA, **198)** does not stand for the proposition propounded by the State in its brief. Rather, the case holds that the juvenile court loses jurisdiction once a child attains 19 years of age and the adult cannot be prosecuted in the Juvenile Court but may be prosecuted under the general jurisdiction of the Circuit Court. The Fifth District Court of Appeal held at page **147:**

> The jurisdiction of the Juvenile Court is specially carved out of the general jurisdiction of the Circuit Court, and it is by special legislative grace and favor, that individuals are given special treatment and consideration under that system.

This Court has noted that there was no common law right to be specially treated as a juvenile offender. State v. Cain, **381 So.** 2d **1361** (Fla. **1980.** Nor is there a Federal Constitutional right for such treatment. id at **1363.**

Only by Article I, Sec. 15(b) does the Fla. Constitution permit a child" charged with a violation of law to be charged with an act of delinquency rather than a crime when authorized by law. id at 1363. This authority is only to the extent provided by our legislature. id at 1363. Therefore when the Juvenile Court loses jurisdiction by operation of law - it is gone. There is no jurisdiction except for the Statute, Chapter 39; and chapter 39 says that jurisdiction ends when a child is 18 or 19 depending on the type of case.

With regard to the coerced confession issue, the State on page 31-32 of its brief states "Defendant does not rely on the fact that he functions higher than his IQ score indicates." This has no citation to the record and counsel for Appellant has no knowledge of same from the record. The State does note in its Statement of the Facts (p.13) that Dr. Frumkin testified that Appellant could not intelligently waive his rights.

The State cites Nix v. Williams, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed 2d 377 (1984) for the proposition that Appellant's fingerprints and photograph would have been inevitably discovered and therefore were admissible in any event. In this regard, it should be noted that in Nix the Defendant made incriminating statements and told police where the body of a child he was thereafter charged with the murder of could be found. There was no question that the Defendant's statements to police in Nix were made in violation of his right to counsel. 104 S. Ct. at 2505. It should also be noted that in Nix the State did not offer those statements into evidence nor try to show that the Defendant directed police to the child's body. id at 2506. The record in

Nix disclosed that search parties were approaching the actual location of the body so would have located the body anyway.

The case at bar is very different. First, Appellant's illegal arrest led first to the photos of his cut hands being taken. (T.1857). Next, this illegal arrest led to a coerced confession made by an individual whom Dr. Frumkin testified could not intelligently waive his Miranda rights. (T. 1956,2402).

Prior to his written confession, Appellant signed a consent to search form which led to the discovery of other physical evidence taken from his Stepfather's house. (T. 1949-1950). Later, the Court ordered blood drawn and the Appellant fingerprinted. (T.1647, 1659).

To begin with, police would not have had a confession but for the illegal arrest and coercion. As for as the photographs of the appellant's hands, if, as the State assumes, police actually got to a point where they had cause to arrest appellant, his hands would probably have healed by then. In the case at bar, most if not all, of the physical evidence seized would not have been admissible and would not have been discovered. The State speculates much more than did the Court in Nix where a search party was quickly approaching the child's body. All police in the case at bar had was a hunch. Whether police would have completed a field card and turned it over to Detective Geller who would have run Appellant's name and then matched prints is very speculative at best.

United States V. Crews 445 V.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980) is also distinguishable. It is unclear from

the State's brief whether it is using Crews for the proposition the photo line-up would have been admissible or the in-Court identification would have been admissible or both.

In Crews the State conceded the photographic and line-up identifications were suppressible fruits of the Fourth Amendment violation. 100 S. Ct. at 1250. In the case at bar, these items were not suppressed although they should have been. Additionally, the Court in Crews permitted the in-Court identification because the identification met a three part test. First, the alleged victim was present to testify and identify. Secondly, she possessed knowledge of and the ability to reconstruct the occurrence and to identify the Defendant from her own observations at the time of the crime. Finally, the Defendant must be present in Court. In the Crews case, the court concluded that none of those elements "has been come at by exploitation" of the violation of Defendant's Fourth Amendment rights.

This is not so in the case at bar. Unlike the victim in Crews, who immediately called police and gave a full description of her assailant and the very next day viewed photos and assisted police and knew Defendant's identity long before Defendant's unlawful arrest, Sue Zann Bosler gave police a description of a black man, stocky with short hair and dark clothing. (T.2087). She gave the description to Detective Geller after she was taken to Jackson Memorial Hospital (T. 2106) and did not identify Appellant's photo until after the police misconduct (and arrest) of December 29, 1986. (The incident occurred on December 22,

1986 and the photo line-up identification occurred on January 13, 1987 (T. 2108). In the very least, the photo line-up and out-of-Court identification should have been suppressed. However, the in-Court identification should be suppressed as well since Sue Zann Bosler did not possess knowledge of and ability to reconstruct the occurrence and to identify Appellant from her own observations from the time of the occurrence.

People v. Horton, 364 NE 2d 551 (1st Dist, 1977) is inapplicable to the case at bar for the proposition that a blood sample would have been admissible. Horton deals with a file copy of Defendant's fingerprints from a past arrest. Appellant did not have his blood on file with police in the case at bar, and speculating in the manner the State does in its brief reminds one of a lesson in tort class in proximate cause and which act leads to the next.

People v. Hogan, 703 P. 29 634 (Colo. App. 1985), is inapplicable to the facts in the case at bar because the victim's identification in Hogan could have been obtained from an independent source as a photo of Defendant was published in the Denver Police Bulletin and police had a prior photo. The Court in Hogan concluded that since police already had *so* many leads, the victim would have identified the Defendant in the normal course of a lawful investigation. This is not the case in the instant case. Police had nothing but speculation. There was no information "in official hands" as the State asserts that Sue Zann Bosler's in-court identification "came from a picture in her mind," (p. 31 of Appellee's Brief) but this is not supported by a citation to the record, as it is unsupported by the record.

Finally, the State cites Kight v. State, 512 So. 2d 922 (Fla. 1987) for the proposition that a low IQ does not render a confession involuntarily. However, in Kight, this Court noted mental weakness is but one factor to consider in determining the voluntariness of a confession. Evidently Kight later asserted his Constitutional rights and this Court found that that assertion supported the conclusion that he had capacity to understand same. The case at bar is distinguishable factually. In the case at bar, the Appellant signed a written rights waiver form yet Dr. Frumkin's testimony disclosed his reading level was approximately on a third grade level.(T. 2400). One test, Appellant could not even complete because of his inability to read. (T. 2401). Expert testimony was that Appellant could not intelligently waive Miranda rights. (T. 2402). With Dr. Toomer, Appellant also was unable to complete a test. (T.2424). Appellant, in jail, was on psychotropic medications. (T. 2430).

The Motions to Suppress should have been granted.

II.

THE TRIAL COURT ERRED BY REPEATING CERTAIN OF THE MURDER JURY INSTRUCTIONS ADDING UNDUE EMPHASIS TO THE GUILT ASPECT AND COMMENTS INADVERTENTLY IMPLYING THE COURT BELIEVED THE APPELLANT WAS GUILTY.

The State contends at page 33 of its Brief that in Beckham v. State, 209 So. 2d 687 (Fla. 2a DCA, 1968) the repetition of the instruction was harmful because it was an incorrect statement of the law, so that Beckham does not apply to the case at bar. This is not accurate.

Beckham was a two part decision in its rationale. First, the trial court was held to have implied by its comments that the defendant was guilty. James Campbell has argued that herein. Pursuant to Robinson v. State, 161 So. 2d 578, 579 (Fla. 3d DCA, 1964) cited at page 688 of Beckham:

> Where there is simply a doubt, as here, that an accused has been prejudiced by a remark of the Court, we must grant him a new trial.

In the case at bar, the Court's statements did imply the Court believed the Appellant to be guilty, but that it was up to the jury to decide of what Appellant was guilty.

The second part of Beckham was the repetition of the manslaughter charge four times. The second District Court of Appeal, contrary to the State's contention did not find the trial court's statement of the law to be erroneous. The Court held at page 688-689:

> The defendant had also complained on appeal of the trial judge's repetition of the manslaughter charge in his instructions to the jury. It appears from the record that the trial judge, while instructing the jury, experienced some difficulty. As a result of this the manslaughter charge was given three times and it was given once again when the jury returned and expressed confusion as to the instructions. We believe that this repetition, although inadvertent, was harmfully prejudicial to defendent's case and that it constitutes additional grounds for reversal.

With regard to the remaining points herein, the Appellant would respectfully stand by his brief.

III.

THE TRIAL COURT ERRED BY PERMITTING AN EXPERT IN SEROLOGY TO TESTIFY ABOUT KNIFE SLIPPAGE OUTSIDE OF HIS AREA OF EXPERTISE OVER DEFENSE OBJECTION.

The Appellant would respectfully stand by his Initial Brief on this point without waiving same.

IV.

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH FIRST DEGREE MURDER WHERE THE IDENTITY OF THE DECEASED WAS NOT PROPERLY ESTABLISHED.

The Appellant would respectfully stand by his Initial Brief on this point without waiving same.

V.

THE TRIAL COURT ERRED BY FINDING FIVE AGGRAVATING FACTORS, NO STATUTORY MITIGATING FACTORS, ONLY ONE NON-STATUTORY MITIGATING FACTOR, AND IMPOSING THE DEATH PENALTY.

The State asserts there was no doubling of aggravating factors with using the burglary and robbery convictions as the "burglary and robbery were charged as two seperate offenses and the victims were different." (Brief and Appellee p. 41). This is not totally accurate. Count III Charges Appellant with burglary of a dwelling, the property of Billy Bosler and/or Sue Zann Bosler, with intent to commit a robbery therein. (R.2). Count IV charges robbery of Sue Zann Bosler. (R.3). The crime of burglary was charged with alternative victims and we do not know whether the jury found Appellant guilty of "either/or" with regard to the alleged victims. Sue Zann Bosler was the same victim in any event and the felony intended in the burglary charge was robbery.

With regard to the remaining points herein, the Appellant would respectfully stand by his Initial Brief.

VI.

THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 17, OF THE CONSTITUTION OF FLORIDA.

The Appellant would respectfully stand by his Initial Brief on this point without waiving same.

VII.

THE DEFENDANT DID NOT RECEIVE A FAIR AND IMPARTIAL TRIAL DUE TO THE CUMULATIVE PREJUDICIAL EFFECT OF THE TOTALITY OF ERRORS COMPLAINED OF HEREIN.

The Appellant would respectfully stand by his Initial Brief on this point without waiving same.

CONCLUSION

Based upon the foregoing reasons and authorities, the Judgment and Sentence should be vacated and the cause remanded for a New Trial. In the very least, the Sentence of death should be vacated and the cause remanded for a resentencing.

Respectfully submitted,

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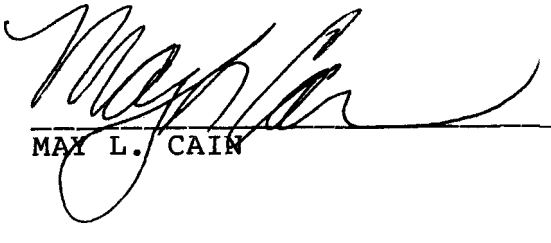
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was mailed to Michel Neimand, Esquire, the Office of the Attorney General, 401 N.W. 2nd Avenue, Suite N921 Miami, Florida 33128 this 25 day of April, 1989.



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