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10/2/88

IN THE SUPREME COURT OF FLORIDA

CASE NO: 72,947

OLGA ROMANI, M.D.

Petitioner,

vs.

THE STATE OF FLORIDA, By

Respondent.

FILED

SID J. WHITE

SEP 21 1988

CLERK, SUPREME COURT

Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The Petitioner, **Olga Romani**, M.D., was the Appellant in the District Court of Appeal, Third District and the defendant at trial. The Respondent, **the State of Florida**, was the Appellee in the Third District and the prosecutor at trial. The parties will be referred to in this brief as they stand before this Court. The symbol "A" will be utilized to designate the Appendix to this Brief.

STATEMENT OF THE CASE AND FACTS

The Petitioner was convicted of conspiracy to commit first degree murder and first degree murder. (A.2). In deciding said opinion the Third District construed the co-conspirator exception to the hearsay rule in consonance with the United States Supreme Court's decision of Bourjaily v. United States, 483 U.S. _____ 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). (A.6-9). The Third District then affirmed the judgments and convictions. (A.9).

POINTS INVOLVED ON APPEAL

I.

WHETHER THE DISTRICT'S COURT HOLDING INTERPRETING THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE IN ACCORDANCE WITH THE UNITED STATES SUPREME COURT'S INTERPRETATION IS CORRECT UNDER FLORIDA LAW.

II.

WHETHER THE DISTRICT COURT'S OPINION CREATES CONFLICT CONCERNING THE APPROPRIATE QUANTUM OF PROOF REQUIRED FOR THE ADMISSION OF CO-CONSPIRATOR HEARSAY, WHERE SAID DECISION WAS CORRECT IN LIGHT OF MOORE V. STATE, 452 SO.2D 559 (FLA. 1984).

III.

WHETHER THE THIRD DISTRICT EXPRESSLY AND DIRECTLY FOLLOWED THIS COURT'S HOLDING IN ECHOLS V. STATE, 484 SO.2D 568 (FLA. 1985) WHEN IT ADMITTED, PURSUANT TO THE CO-CONSPIRATOR EXCEPTION, STATEMENTS MADE AFTER THE DEATH OF THE VICTIM.

IV.

WHETHER THE THIRD DISTRICT'S OPINION SPECIFICALLY CONSTRUES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

SUMMARY OF THE ARGUMENT

In the instant case, the Third District interpreted the co-conspirator exception to the hearsay rule in accordance with a new interpretation made by the United States Supreme Court. Since the State's rule is patterned after the federal rule, such interpretation was required. This Court should deny jurisdiction and by so doing effectively overrule contrary decisions.

ARGUMENT

I.

THE DISTRICT COURT'S HOLDING
INTERPRETING THE CO-CONSPIRATOR
EXCEPTION TO THE HEARSAY RULE IN
ACCORDANCE WITH THE UNITED STATES
SUPREME COURT'S INTERPRETATION IS
CORRECT UNDER FLORIDA LAW.

In the instant case, the Third District interpreted the co-conspirator exception to the hearsay rule in consonance with the recent interpretation by the United States Supreme Court in Bourjaily v. United States, 483 U.S. _____, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). Although the instant decision conflicts with prior Florida Law on the subject, the Third District's decision was eminently correct. The reason therefore is that in construing a section of Florida's evidence code which is patterned after a federal rule of evidence, this Court construes the State rule in accordance with federal court's decisions interpreting the federal rule. Moore v. State, 452 So.2d 559 (Fla. 1984). In the instant case, this Court need only deny jurisdiction to make the necessary ruling and by so doing would overrule all previous law on the subject.

II.

THE DISTRICT'S COURT OPINION CREATES CONFLICT CONCERNING THE APPROPRIATE QUANTUM OF PROOF, REQUIRED FOR THE ADMISSION OF CO-CONSPIRATOR HEARSAY, BUT THE DECISION WAS CORRECT IN LIGHT OF HEARSAY MOORE V. STATE, 452 So.2d 559 (FLA. 1984).

As in point I, supra, the Third District's opinion created conflict. However, Moore v. State, supra, required the court's action and this Court should therefore deny jurisdiction.

III.

THE THIRD DISTRICT EXPRESSLY AND DIRECTLY FOLLOWED THIS COURT'S HOLDING ON ECHOLS V. STATE, 484 SO.2D (FLA. 1985), WHERE IT ADMITTED, PURSUANT TO THE CO-CONSPIRATOR EXCEPTION, STATEMENTS MADE AFTER THE DEATH OF THE VICTIM.

Petitioner contends that the instant decision creates conflict within the districts since it allowed, pursuant to the co-conspirator exception, admission of statement made after the victim was murdered. He claims that upon death the conspiracy was completed and therefore post death statements are inadmissible. This position does not take into account the specific nature of the conspiracy involved. In Echols v. State, 484 So.2d 568 (Fla. 1985), this Court allowed post death statements into evidence under the co-conspirator exception based on the nature of the conspiracy involved. In the instant case the conspiracy was not complete until payments were made for the murder. Statements made during the payoff, although after death, were in furtherance of the conspiracy since the statements established the successful completion of the conspiracy. Since this decision applies Echols no conflict exists.

IV.

THE COURT'S OPINION DOES NOT
SPECIFICALLY CONSTRUE THE
CONFRONTATION CLAUSE OF THE SIXTH
AMENDMENT TO THE UNITED STATES
CONSTITUTION.

The Third District did not expressly construe the confrontation clause of the Sixth Amendment to the United States Constitution. Rather, the Court followed its inescapable duty to abide by the United States Supreme Court decision in Bourjaily v. United States, supra, when it held that the confrontation clause is not violated by the admission of statements made by nontestifying co-conspirators. State ex-rel Hawkins v. Board of Control, 83 So.2d 20 (Fla. 1955). Since the Bourjaily decision is binding upon Florida courts, the District Court correctly applied said law to the case.

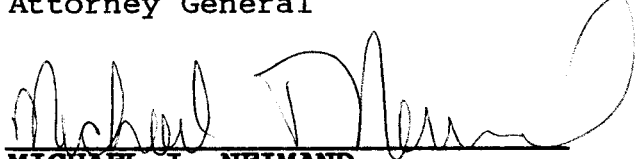
Petitioner also contends the decision's in conflict with Nelson v. State, 490 So.2d 32 (Fla. 1986). There is no conflict since Nelson held that a taped confession of a co-defendant could not be introduced in evidence without violating the confrontation clause absent from hearsay exception. In the instant the hearsay was properly admitted as co-conspirator hearsay and no confrontation clause violation occurred

CONCLUSION

Based upon the foregoing, the instant petition is insufficient to confer jurisdiction on this Court and review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF JURISDICTION was furnished by mail to BRADLEY R. STARK, Attorney for Petitioner, Executive Plaza, Suite 700, 3050 Biscayne Blvd., Miami, Florida 33137 on this 14 day of September, 1988.



MICHAEL J. NEIMAND
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