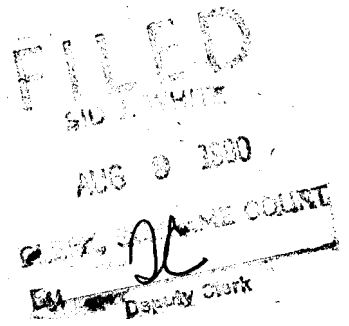
IN THE SUPREME COURT OF FLORIDA



DONNIE SENE CRAIG,

Appellant,

vs. CASE NO. 73,251

STATE OF FLORIDA,

Appel **lee.**

REPLY BRIEF OF APPELLANT
APPEAL FROM THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
HONORABLE JAMES T. CARLISLE, JUDGE

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POINT I

THE TRIAL COURT ERRED AND AEUSED ITS DISCRETION IN ALLOWING EVIDENCE OF OTHER CRIMES

Appellee justifies the evidence of the death of Mr Ellis and the buying. selling and use of cocaine as inseparable crime evidence or so inextricably intertwined with the crime charged that an intelligent account could not have been given without reference to the death of Mr. Ellis or the appellant's use of cocaine (Appellee Brief, p. 25). In reliance appellee cites Smith v. State. *365* So. 2d 704, 707 (Fla. 1978), cert. denied, *444* U.S. 885, 100 S. Ct. 177, 62 L.Ed. 2d 115, 1979, and Hall v. State, *403* So. 2d 1321, (Fla. 1981). Collateral crime testimony in Smith was relevant to establish the defendant in a car which was directly linked to the scene of the first murder. Smith, supra, p. 707. In addition the murder weapon in Smith was the same for the first and second murders. Other factors, which included evidence of the second murder in trial of the first, was that of the three men who committed the first murder one was the victim of the second murder and the other two were his killers. In Hall evidence of the second murder was allowed because the murder weapon of the first death was found under the body of the victim in the second murder. Appellant's case is distinguishable from Hall in that the death of Mr. Ellis was unnecessary and needlessly prejudicial to simply show appellant's possession of the firearm which was proved through the witnesses Nathaniel Brice and Laura

Mayo.

Smith, supra, is equally distinguishable by the fact that the testimony of the accomplice in Smith would have been drastically undermined since the second murder occurred as a result of an argument between the defendants over the division of the money taken in the first murder. Likewise in Austin v. State, 500 So. 2d 262, (1 DCA 1986), the testimony of prior assaultive act allowed in subsequent attempt murder and robbery charge would have diminished the credibility of accomplice if prevented from testifying why the accomplice and the defendant Austin were together when they discovered the victim in crime charged. Undermining accomplice testimony was also the reason for allowing evidence of prior smuggling trips in defendant Tumulty's trial on murder to show relationship between the drug supplier, the defendant Tumulty who was acting as a middleman, and the pilots one of whom was the victim in the case. Tumulty v. State, 49 So. 2d 150 (4 DCA 1986). There was no accomplice testimony in this case.

Appellant's prior and subsequent use of rock cocaine was not relevant to the death of Mr. Sisco. See for example Richardson v. State, 538 So. 2d 981 (1 DCA 1988) where on charges for possession and sale of cocaine evidence of metal matchbox containing cocaine residue which was found on defendant at time of his arrest was reversible error as said evidence was admitted solely to show propensity to possess

cocaine at an earlier time and not tied to charged crimes of controlled buys of cocaine made several hours before the arrest. Also, Lee v. State, 508 So. 2d 1300 (1 DCA 1987) where defendant on charges for kidnapping and sexual assault testimony concerning participation in a bank robbery should have not been admitted where there was no evidence connecting the stolen car to the bank robbery and no evidence that the gun used in the two crimes was the same. Also. Weitz v. State. 510 So. 2d 1050 (4 DCA 1987) where on prosecution for trafficking, testimony of defendant's prior airplane trips carrying false identification and failure to declare currency was inadmissible and not relevant as no connection to charged offense. Also, Wilson v. State, 497 So. 2d 1062 (5 DCA 1986) where on charge of delivery and possession of cocaine, evidence of another undercover drug purchase of cocaine from defendant at same address as narcotic transaction for which defendant was being tried was inadmissible to show defendant's knowledge of the nature of the controlled substance.

Therefore, evidence of appellant's use of rock cocaine before and near the time of the crime charged and the death of Mr. Ellis was offered for the sole purpose to show bad character or propensity and appellant's sentence in this matter should be vacated and a new trial granted.

POINT II

THE APPELLANT WAS DENIED EQUAL PROTECTION RIGHTS PURSUANT TO ARTICLE I, SECTION II, FLORIDA CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED

STATES CONSTITUTION **BY** DENIAL OF MOTION TO DRAW JURY POOL FROM COUNTY WIDE JURY AND PALM BEACH ADMINISTRATIVE ORDER WHICH CREATED JURY DISTRICTS WHICH RESULTED IN THE UNCONSTITUTIONAL SYSTEMATIC EXCLUSION OF A SIGNIFICANT PORTION OF THE BLACK COMMUNITY FROM THE WEST PALM BEACH DISTRICT

The administrative order creating the jury districts resulted in an unconstitutional systematic exclusion of a significant portion of the popu1ation from the jury pool for West Palm Beach district. Further, the administrative order denied appellant equal protection pursuant to Article I, Section II, of the Florida Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution. An infringement of the right **of** trial by jury is fundamental error and may be raised even in post conviction relief. Nova v. State, ***439*** So. 2d 255 (3 DCA 1983). Further, it should be noted that in setting this matter for trial there was no cut-off time for pre-trial motions. Therefore. any motion prior to trial was timely. Other than the fact that the case may have been continued fcr approximately one week, there was no indication that the motion was not made in good faith or to obtain a delay or that real harm would have been done to the public such as an unreasonable delay **or** interruption in the administration of justice or inconvenience to the court. See Floyd v. State, 90 So. 2d 105, where court's failure to allow defendant to withdraw waiver of jury trial on day of trial was fundamental error and abuse of discretion. The trial court's statement on March *4*, 1988, that the trial was to be set **for** August 22 and was sealed in blood (R-4) shows the

court in denying appellant's motion did not even exercise its discretion in considering appellant's request. Contrary to appellee's brief, p. 31, appellant did offer statistics in his motion filed (R-2313, 2350). Appellee's suggestion that appellant's case is distinguished from Spencer v. State, 545 So. 2d 1352 (Fla. 1989), because of his color overlooks the appellant's absolute right of a fair cross-representation in the jury selection process. See Bass v. State, 368 So. 2d 447 (1 DCA 1979), where trial court in facing a shortage of prospective jurors ordered the sheriff to summon qualified persons to complete the panel resulting in a systematic exclusion cf identifiable segment of the populace. As a fundamental right any waiver by appellant would have to have been knowing and intelligent. See Griffith v. State, 548 So. 2d 244 (3 PCA 19891, where defendant's waiver of twelve man jury on capital case did not affirmatively appear on the record. Also, Williams v. State, 521 So. 2d 268 (2 DCA 1987). In addition, since the administrative order created the constitutional infirmities of, inter alia, denial of equal protection it was incumbent upon the court to advise appellant of his right to a jury pool from the entire West Palm/Glades district. In any case, appellant's motion for selection from the county wide district could have been taken as a challenge to the pane? pursuant to FRCrP 3.290 and as such was timely at any time before selection of the jury.

In conclusion, denial of appellant's motion for a county wide jury resulted in the denial of defendant's right

to a fair and impartial jury and equal protection pursuant to Article I, Section II, of the Florida Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution. Therefore, appellant's sentence should be vacated and the matter remanded for a new trial.

POINT III

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENT TO OKEECHOBEE POLICE DETECTIVE EUGENE O'NEILL

Despite pre-trial depositions and a motion to suppress it was only at the trial that Detective Eugene O'Neill admitted that he would go easy on appellant if he cooperated. Detective O'Neill's admission on this point (R-1354, L 16-25) coupled with the alteration of the rights waiver form established beyond a doubt that appellant's statements to Detective O'Neill were obtained through the promise of benefit and leniency.

In conclusion, the appellant's motion to suppress statement should be reversed and appellant's sentence vacated granting a new trial and suppressing appellant's statement to Detective O'Neill at any future trial or hearing.

POINT IV

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENT TO DEPUTY SHERIFF JOE SCHUMACHER

Appellant's lamenting over the death penalty he received in Okeechobee during the ride from Okeechobee to the

Pepartment of Corrections was not initiation of further communication Initiation of the communication in fact was begun by Serg ant Schumacher who elicited incriminating statements by the question "Now that it's all over, what really happened to Mr. Ellis?". The statements of Sergeant Schumacher and correctional officer Al Stone contained in the supplemental record was read and considered by the trial court in considering appellant's motion to suppress statements and as such were evidence of the involuntary nature of appellant's statement (R-90-100). Sergeant Schumacher's testimony that no questions were asked to get the appellant to talk (R-53) belies the rendition of the interview contained in the supplemental record by correctional officer Al Stone and Deputy Sheriff Sergeant Joe Schumacher who began questioning of appellant after appellant had quit talking (R-51). In addition, interrogation does not have to consist of a specific number of questions but an interrogation can be conducted with simply one question. In this case Sergeant Schumacher and correctional officer Stone violated appellant's right to counsel by questioning him after he had invoked his right to remain silent (R-189, appellant's Exhibit 2 in trial court).

In conclusion appellant's statements to Schumacher and Stone were taken after his invocation of right to counsel and without a fresh Miranda warning. Therefore, the trial court's order denying appellant's motion to suppress statements should be reversed with appellant's sentence

vacated and the matter remanded for a new trial.

POINT VI

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR STATEMENT OF PARTICULARS

Appellant agrees that his brief is incorrect when it states that the State proved the date to be April 1, 1990. In actuality the State proved that the death of Mr. Sisco took place some time after 11:10 p.m. on March 30, 1997, when Mr. Sisco was last seen at a local men's club in West Palm Beach by the witness Mark Bennett (R-1203), and the early morning hours of March 31, 1987. when the police responded to the home of Mr. Sisco. The witnesses Laura May and Nathaniel Brice testified that appellant arrived at the Pembroke Pines apartment in the late evening hours of March 30 where he remained until 1:15 a.m. March 31, 1987, the time when the call was made to Delores Andrews. It should be noted that the medical examiner testified that his findings were consistent with a time of death of Mr. Sisco as subsequent to 12:30 a.m. to 2:00 a.m. (R-1628-1629). The defendant therefore did have an alibi as to the time of the offense which the trial court correctly instructed the jury. The appellant was prejudiced by the denial of the statement of particulars specifying a time, date and place of the offense since the jury was allowed to convict the appellant for an offense charged on some date other than the date charged in the indictment. *See* Jackson v. State, 350 So. 2d 808 (2 DCA 1977). In addition,

the trial court abused its discretion in denying appellant's motion for statement of particulars stating FRCrP 3.140(n) was an anachronism in light of discovery (R-137). The exercise of judicial discretion does imply a conscientious judgment not arbitrary action, the essence of which is an exercise of judgment directed by reason as opposed to arbitrary action. In deciding that the rule regarding statement of particulars was an anachronism in view of discovery and thereby denying appellant's motion was in effect the trial court's refusal to exercise its discretion and as such was an abuse of discretion. See Glosson v. Solomon, 490 So. 2d 94, where trial judge policy of never setting bail on probation violation was in derogation of discretionary provision regarding bail.

In conclusion, appellant was prejudiced by the State's failure to furnish a statement of particulars and the trial court did abuse its discretion in denying appellant's motion for the reason that Rule 3.140(n) was an anachronism. Therefore, appellant's conviction should be vacated and this cause remanded for a new trial.

POINT VII

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ALLOWING PHOTOGRAPHS WHICH WERE NOT DISCLOSED TO APPELLANT

The trial court erred and abused its discretion in allowing photographs which were not disclosed to appellant and allowing the witness Dale Carter to testify as an

additional witness fcr the State when Dale Carter had been appointed as appellant's expert. Crucial to the State's case was proving the Raven .25 caliber automatic was in fact the weapon used in the death of Mr. Sisco. The photographs in question, State's Exhibits 173 and 174, were never disclosed to appellant until appellant's cross-examination of Gerald Styers on August 29, 1988. In fact it is clear that the photographs had not been made until August 12, 1988 (R-1283). To disprove the testimony of the State's ballistic expert Gerald Styers appellant was relying on the lack of corroborating evidence to support Gerald Styers conclusion as to the firearm identification. Whether or not appellee will admit to knowledge of these photographs is of no consequence. However, clearly the State was in possession of these exhibits subsequent to August 12, 1988. The State has a continuing duty to disclose. FRCrP 3.220(f). Accepting appellee's argument that the State prosecutor had no knowledge of the Exhibits 173 and 174 until Cross-examination of Gerald Styers on August. 29, 1988, allows the State to obtain further evidence through experts or other witnesses on the eve of trial and then allow admission of these exhibits under the guise that the State prosecutor did not have knowledge *of* the exhibits or witnesses. This is really ridiculous because it was only at the State's direction that the expert performed the tests and made the photographs in the first place. Appellant was never furnished with any supplementary lab report regarding these tests %hat were

allegedly conducted on August 12, 1988, nor is it known if such a lab report even exists. In any case the lab report and the photographs were in possession of the State and not disclosed to the appellant. Even accepting appellee's argument that the disclosure was made through the expert appointed by the court, that would not have been until August 23, 1988, one day after trial had begun and thus was too late for appellant to adequately prepare for Exhibits 173 and 174 which were the sole corroborating evidence of Gerald Styers' opinions and conclusions regarding the firearm identification. Plus, using the court appointed expert as a witness for the State left appellant with no witness of his own.

In conclusion, the trial court's allowing the admission of the photographs, State's Exhibits 173 and 174, and the use of appellant's court appointed expert which was appellant's work product should be reversed and the case remanded for a new trial.

POINT VIII

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT INSTRUCTING THE JURY REGARDING EVIDENCE OF OTHER CRIMES

Appellee argues that the statement "The jury is not being instructed?" (R-1346) was not a request for an instruction but a question related to appellant's motion for mistrial. This is incorrect as appellant's counsel was requesting, however inartfully, for an instruction pursuant

to Section 90.404 (2)(2), Fla. Stat. Granted the request could have been better stated. However, considering the pre-trial motions and repetitive objections to the collateral crime evidence, this statement did adequately alert the trial judge to instruct the jury pursuant to Section 90.404 (2)(2). In any case, review of the trial court's instructions (R-2568-2568AA) and the trial transcript of the instructions contained at R-1872 through *1907* reveals that the "Williams Rule" instruction was not given to the jury at the close of the evidence. Section 90.404 (2)(2) states in part

> "...After the close the evidence, the **Bury** shall be instructed en the limited purpose for which the evidence was received and that the defendant cannot **be** convicted for a charge not included in the indictment or information."

The collateral crime evidence offered in this trial involving the death *of* Mr. Ellis and the appellant's use of crack cocaine became a feature of this trial. Failure to give the "Williams Rule" instruction was prejudicial to the appellant. The introduction *of* the collateral crime evidence as a feature of the trial obliterated the jury's decision making process and also portrayed the appellant in such a wicked and evil manner as to totally destroy his credibility before he even took the stand. The language of Section *90.404* (2)(2) is mandatory. Compounding the omission of the "Williams Rule" instruction was the court's failure to give standard jury instruction 2.08(a) on single defendant multiple counts. Failure to give these instructions was reversible error. This point was covered in appellant's motion for new trial as

Point **VI** (R-2573 and 2574). Therefore, appellant's sentence should be vacated and the cause remanded for a new trial.

POINT IX

THE TRIAL COURT ERRED **AND** ABUSED ITS DISCRETION IN ALLOWING HEARSAY EVIDENCE OF TELEPHONE NUMBER

Appellee states that the testimony of Detective Sergeant Guillermo E. Perez as to the telephone number was based on his personal perception of the phone number and therefore he can testify as to its identity. It is submitted that the telephone number identification was not a result of Detective Sergeant Guillermo E. Perez' personal observation but was rather based on the blest Palm Beach police department's investigation. Referring to the transcript (R-1560)

> "Q: And did you check the phone number on this particular pay phone?
>
> A: *Yes* ma'am, we did
>
> Q: Can you tell us what the number was?
>
> Objection. Hearsay. Calling for hearsay No exception.
>
> The Court: Overruled."

Appellant's, objection at this point should have been sustained since there was no foundation or testimony from Sergeant Perez that he himself had checked the identity of this particular phone number. In fact, his answer that "We did." indicates that it was not his perception but based on the investigation. Without clear testimony that Sergeant

Perez had himself identifi'ed the telephone number his answer was in fact hearsay and the court should have sustained appellant's objection to this question. After appellant's objection to hearsay was overruled the State asked Detective Perez the following question:

> "Q: Can you tell us the number that you observed on that phone?
>
> A: Yes. *655-9843."*

This question included facts not in evidence, that is that Perez had personally observed the telephone number. Unless Detective Sergeant Guillermo E. Perez had actually viewed the telephone for the identity of the telephone number his answer was hearsay. Since the original question as to the identity of the phone number never established Perez' personal observation his answer as to the identity of the telephone number was hearsay and appellant's objection should have been sustained.

POINT XII

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

Appellee argues that the spent shell found by Laura Mayo on the floor **of** the car in %he front indicates that appellant test fired the gun in Ellis' car while he was driving to West Palm Beach. This conclusion is totally speculative and even the court at sentencing was unsure **as** to how the cartridge may have been discharged.

"The Court: We never developed what window he fired it out of but it depends how the automatic ejects shells, if it ejects to the right and you point it out the right hand window it would have gone to the back seat but if it was left handed it went to the front.

The Court: I am not sure what is the most apt way to fire it but in any case I assume it is - - - ." (R-2154)

Further, appellee's statement that appellant had ample time to reflect upon his actions is also speculative and the statement that when appellant arrived at Sisco's residence he forced his way through the door is without any basis since there were no signs of forced entry.

POINT XIII

THAT THE COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO PROHIBIT DEATH AS POSSIBLE PUNISHMENT DUE TO DEFENDANT'S RETARDATION

None of appellee's points with respect to the appellant's retardation contradict the testimony of Katherine Hendrickson. Even a seven year old would state that he could function in society, make his own decisions, think for himself, show concern for siblings, state that they know right from wrong.

The evidence of appellant's mental retardation was an uncontradicted mitigating circumstance which would outweigh any of the trial court's findings and any of the aggravating circumstances in this case. Therefore, appellant's sentence of death should be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to Carol Asbury, Esq., Dept. of Legal Affairs, 111 Georgia Ave., Room 204, West Palm Beach. FL 33401, this 6th day of August, 1990.

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