IN THE SUPREME COURT OF FLORIDA

LAWRENCE LEWIS,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT

Case No: 73,340

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Appellant rests on his Statement of the Case and Facts contained in his initial Brief and will not repeat those facts in this Brief. Similarly, appellant rests on his factual and legal arguments contained in his Initial Brief and merely adds the within reply to those points raised in the Initial Brief as Points I, IV and VII.

POINTS OF LAW INVOLVED

I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE IDENTIFICATION TESTIMONY OF JAMES MAYBERRY (APPELLANT'S INITIAL BRIEF, POINT I).

II.

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS APPELLANT'S STATEMENTS MADE AS A RESULT OF AN ILLEGAL ARREST (APPELLANT'S INITIAL BRIEF, POINT IV).

III.

THE CHARGE TO THE JURY IN THE PENALTY PHASE UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO THE APPELLANT (APPELLANT'S INITIAL BRIEF POINT VII).

SUMMARY OF ARGUMENT

The trial court erred in denying the motion to suppress the identification testimony because the photographic line-up was unduly suggestive. In addition, the totality of the circumstances does not provide sufficient indicia of reliability.

The trial court erred in denying the motion to suppress appellant's statements to the police because those statements were the result of an illegal arrest and were made by the appellant solely as a result of his attempt to learn the reason for his arrest.

The trial court's charge to the jury in the penalty phase unconstitutionally shifted the burden of proof to the appellant and impermissibly suggested to the jury that death was presumed to be the proper penalty.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE IDENTIFICATION TESTIMONY OF JAMES MAYBERRY (APPELLANT'S INITIAL BRIEF, POINT I).

As appellant established in his initial brief in this case, the State employed impermissibly suggestive procedures in obtaining both the out-of-court and in-court identifications of appellant which gave rise to a substantial likelihood of a mistaken identification.

Mayberry made no identification of appellant until several days after the events, after he previously identified David Ballard as the man in the truck with him, and, then, only after viewing a photo array in which appellant's picture was substantially different from all the others as to features, pose, size and clothing. Thus, the photo array was impermissibly suggestive.

To compound the error of the suggestive photo line-up, after Mayberry identified appellant's distinctive photo, Mayberry and appellant were placed in the same holding cell on hearing and trial dates of this case. On those opportunities Mayberry heard appellant called by name and saw him respond to his name. These improper show-ups irreparably tainted the in-court identification.

The cases cited by appellee to support its contention that the in-court identification was not tainted are inapposite.

In Grant v. State, 390 So.2d 341 (Fla. 1980), a rape victim had furnished a highly detailed description of her assaillant down to a tiny scar on his right cheek, before any arguably suggestive procedures were used. And in Rose v. State, 472 So.2d 1155 (Fla. 1985), several witnesses saw the defendant kill the victim in a well let area and the defendant confessed to several witnesses before any arguably suggestive procedure was used.

In these cases relied on by appellee, even if there was a suggestive identification procedure, the identification testimony was held to be untainted because of the detailed descriptions furnished before any suggestive identification procedure was used and because of the other evidence connecting the defendant identified to the crime. That factual basis for those holdings is absent in this case.

Here, Mayberry provided only the most general description of the man in the truck with him – a white man, medium build, five feet ten inches tall - which could properly describe any one of millions of men. That description, and an identification of someone other than appellant was all that was provided by Mayberry before the suggestive procedures resulted in his identification of appellant.

On the facts of this case, the State did not meet its burden of proving that Mayberry's identification was untainted and based on his independent observations at the time of the crime.

POINT 11.

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS APPELLANT'S STATEMENTS MADE AS A RESULT OF AN ILLEGAL ARREST (APPELLANT'S INITIAL BRIEF, POINT IV).

Appellee argues that notwithstanding the arresting officer's failure to inform appellant of the reason for his arrest as required by §901.17, F.S. (1987), the arrest of appellant was nevertheless lawful and the officer was not required to comply with §901.17.

Appellee has cited several cases, all for the proposition that a police officer need not advise an arrestee of the charges against him if to do so will imperil the arrest. However, that proposition of law is inapplicable in this case. In all the cases cited by the State - Kirksey V. State, 433 So.2d 1236 (Fla. 1st DCA 1983); Flowers V. State, 12 So.2d 772 (Fla. 1943); and City of Miami V. Nelson, 186 So.2d 535 (Fla. 3rd DCA) - the failure of the officer to immediately advise the arrestee of the charges against him was due solely to the fact that the arrestee fled from the scene of the crime to avoid the impending arrest.

In the instant case, appellant did not flee or attempt to flee from the scene of the arrest, and the arrest itself did not take place at the time of the crime, as in the cases relied upon by appellee. Here, contrary to the State's position, there was no

justification for the failure to advise appellant of the charges against him when he was arrested. The fact that the arrest was made in a dark, remote area late at night is no justification; the police selected the time and place of arrest. The fact that the police feared David Ballard would warn appellant and he would flee is likewise no justification for the police selection of an arrest scene. By merely keeping Ballard in custody for questioning while longer, the police could have eased their fears.

In short, appellant was arrested in the middle of the night, transported to a police station in handcuffs and interrogated, all without being advised – as the law requires – of the charges against him. It is hard to imagine a more coercive set of circumstances.

Appellant's statement made under these coercive circumstances and as a direct result of the police failure to advise him of the cause of his arrest immediately upon is arrest should have been suppressed.

POINT 111.

THE CHARGE TO THE JURY IN THE PENALTY PHASE UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF TO HE APPELLANT. (APPELLANT'S INITIAL BRIEF, POINT VII)

As appellant maintained in his initial brief, the penalty phase jury instruction given in this case unconstitutionally shifted the burden of proof from the State to the defendant to prove that mitigating circumstances outweigh aggravating circumstances before recommending life imprisonment.

In fact, in this case where mitigating evidence was not introduced this instruction is the equivalent of an instruction to the jury that it should presume death to be the appropriate penalty once an aggravating circumstance is established. That instruction was held to be unconstitutional in Adamson v. Ricketts, 865 F.2d 1011, 1041 (9th Cir. 1988) and Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988); cf., Bertolotti v. Dugger, 883 F. 2d 1503, 1525 (11th Cir. 1989).

Thus, where as here the burden of proof is shifted, and a defendant is obligated to prove mitigating circumstances, a presumption in favor of death arises that offends due process and the prohibition against cruel and unusual punishment by effectively mandating death.

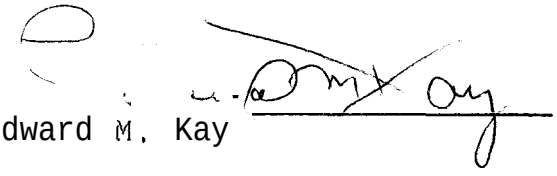
The deprivation of due process is notable particularly on the facts of this case where the defendant did not come forward with

any additional mitigation evidence beyond what may have been uncovered during the trial. Since no mitigating evidence was addressed to the jury in the penalty phase, it cannot be conclusively said that the penalty phase instructions did not lead this jury to believe that death was mandated in this case. For that reason, appellant is entitled to a new sentencing proceeding before a properly instructed jury.

CONCLUSION

For the reasons stated in appellant's initial brief, and in this reply brief, the judgment of the trial court should be reversed and a new trial ordered or, in the alternative, the sentence of death should be reversed and a sentence of life imposed or a new penalty trial ordered.

Respectfully submitted,

By: 
Edward M. Kay

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief was furnished by mail to Joan Fowler, Esquire, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, this 14th day of March, 1990.

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