IN THE SUPREME COURT OF FLORIDA

CASE NO. 73, 437

FILED
SID J. WHITE
FEB 12 [illegible]
CLERK, SUPREME COURT
By ______
Deputy Clerk

MAURICIO BELTRAN-LOPEZ,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT
MAURICIO BELTRAN-LOPEZ

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Introduction

References to the State's brief will be indicated by "AB."

Argument

I. APPELLANT'S TRIAL SHOULD HAVE BEEN SEVERED FROM THAT OF THE CO-DEFENDANT TO PRESERVE HIS SPEEDY TRIAL RIGHTS AND TO AVOID UNDUE PREJUDICE, IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND UNDER ARTICLE 1 OF THE FLORIDA CONSTITUTION

Little need be added to the arguments made in the initial brief as to this point, because they were not met, except in the most general terms, in Appellee's brief.

Notably, the State limits its argument entirely to pre-trial motions for severance, never discussing the court's duty to sever during trial when, as here, it became necessary to do so. Appellee is, of course, simply wrong in stating that "no confusing or improper evidence [was] submitted to the jury" (AB 26), because the jury was hopelessly prejudiced by Espinosa's "testimony" about Mr. Beltran's background in the Nicaraguan army, and about his alleged marijuana dealing in Guatemala.

The court's erroneous rulings pitted both the State and the co-defendant against Mr. Beltran, resulting in reversible error.

The State discards Appellant's argument that speedy trial concerns also mandated severance, and require reversal, but spread across this record is ample evidence that Mr. Beltran was denied constitutional speedy trial under <u>Barker v.</u>

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Wingo, 407 US 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), and its progeny. Furthermore, Mr. Beltran's March 17, 1988, demand for speedy trial (T593) vitiated any earlier waiver of the speedy trial rule. Fla. R. Crim. P. 3.191. Clearly, no waiver of constitutional speedy trial ever took place. Trial counsel's repeated attempts to go to trial and his demand for speedy trial are sufficient to preserve this point for appellate review, even if, on this record, the error were not so obviously fundamental. That the trial court interpreted the demand as a ploy to obtain severance (T595 et seq.) can hardly excuse denial of both of these basic rights--speedy trial and fair trial--to Mr. Beltran, as the State would suggest.

II. THE TRIAL COURT ERRED WHEN IT CONDUCTED A MAJOR PORTION OF THE CHARGE CONFERENCE IN THE ABSENCE OF APPELLANT'S COUNSEL, IN VIOLATION OF APPELLANT'S RIGHT TO EFFENCTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE 1 OF THE FLORIDA CONSTITUTION

In its brief on this point the State ignored the substance of what went on at the charge conference in Mr. Casuso's absence. The charge conference did not "begin in earnest" (AB 28) upon Mr. Casuso's arrival; in fact, the critical argument as to the aggravating factor of heinous, atrocious and cruel and the applicability _vel non_ of _Maynard v. Cartwright_, 486 US 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), had already concluded before Mr. Casuso had an opportunity to participate on Mr. Beltran's behalf.

Burgess v. State, 369 So.2d 686 (Fla. 1st D.C.A. 1979), cited by the State in its brief, is inapposite. The _Burgess_ court dealt with an inadvertent commencement of proceedings in the absence of the defendant and his counsel. The trial court at bar noted _and commented upon_ counsel's absence, yet proceeded without him. (T2172) In _Burgess_ all that had passed was that a witness had given his name, job, length of employment, and was starting to describe other employment experience. That counsel did not object in _Burgess_ is totally irrelevant to the situation _sub judice_, where the defendant in a capital case was deprived of counsel at what was certainly a critical stage of the

proceedings. As was noted in the initial brief, Mr. Casuso had no meaningful opportunity to object because he had no meaningful information about what had transpired before he arrived.

The State argues that even if there had been error in proceeding without Mr. Casuso, the case of Smalley v. State, 546 So.2d 720 (Fla. 1989), decided in 1989, made reversible error committed in 1988 suddenly harmless. Smalley decided the applicability of Maynard v. Cartwright, suprea, to Florida's instructions on heinous, atrocious and cruel in capital cases, not whether it was erroneous to conduct charge conferences in the absence of defense counsel. The latter, not the former, is the basis for reversal in the instant case. It is true, however, that it cannot be known whether Mr. Casuso, if he had had an opportunity to do so, would have been able to persuade the trial court that the aggravating circumstance of heinous, atrocious and cruel ought not to be presented to the jury. He might have argued Maynard v. Cartwright, supra, to good effect, and he might have been able to remind the court, to his client's benefit, that the aggravating circumstance could not be based upon the experience of the living child Odanis Rodriguez but must be confined to the evidence as it applied to Teresa Rodriguez. Counsel's absence at such a crucial stage could not be harmless error under any circumstances, despite the State's bald assertion that this court should so find.

III. APPELLANT'S INVOLUNTARY UNWAIVED ABSENCES AT PRE-TRIAL CONFERENCES, THE CHARGE CONFERENCE, AND POSSIBLY AT POINTS DURING THE TRIAL DENIED HIM DUE PROCESS OF LAW, HIS RIGHT TO BE PRESENT, AND HIS RIGHT TO A FUNDAMENTALLY FAIR TRIAL GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND UNDER ARTICLE 1 OF THE FLORIDA CONSTITUTION

The State may misapprehend this court's prior rulings in Garcia v. States, 492 So.2d 360 (Fla. 1986), and Roberts v. State, 510 So.2d 885 (Fla. 1987), cert. denied ___ US___, 108 S.Ct. 1123, 99 L.Ed.2d 284 (1987). Neither of those cases can be read as dismissing the defendant's right to be present at stages of his trial where fundamental fairness might be thwarted by his absence. Francis v. State, 413 So.2d 1175 (Fla. 1982).

Most of the absences complained about in Garcia were, upon examination, clearly waived by the defendant. In Roberts, nearly every presence and absence was carefully put on the record by the prosecutor or the court, and defense counsel was specifically asked to note his waivers for the record. Id.

This record, however, reflects none of the scrupulousness that marked Roberts, and is virtually devoid of waivers of the defendant's presence, in contrast to Garcia. It is the State's duty to protect its record, not the defendant's. The federal case that the State cites in support of its argument contra, United States v. Bokine, 523 F.2d 767 (5th Cir. 1975), deals with the absence of the defendant at the answering of a jury question, which is per se reversible error under Florida law. Ivory v. State, 351 So.2d 26 (Fla.1977), Williams v. State,

488 So.2d 62 (Fla.1986). Bokine would thus appear to be inapposite.

Mr. Beltran was deprived of opportunities that fairness decrees he should have had to be present when important matters were decided. Because he was absent it is entirely likely that he was not even told what had occurred (a change in lawyers, a denial of severance, to name just two important examples). He is therefore entitled to a new and fair trial on this ground.

VI. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH, THEREBY DENYING HIM DUE PROCESS OF LAW AND EQUAL PROTECTION, WHILE IMPOSING A CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

While the State correctly notes (as Appellant did in his initial brief) that petechial hemorrhaging indicated that Teresa Rodriguez was alive when a pillow was placed over her face, it overlooks Dr. Mittelman's testimony that even if Teresa Rodriguez was conscious at that point, she was conscious (and thus feeling any pain) for no more than a few seconds (T2555) Since the State based its claim that this was a heinous, atrocious and cruel homicide, one that required the death penalty, largely on the pillow being placed over Teresa's face, the question of whether she was capable of feeling any pain should have been the subject of considerable study by the court in deciding whether to instruct as to this aggravating circumstance. It was not.

The State is unable to cite to any portion of this record to support its conclusion that this homicide, although tragic, was different from the ordinary homicide. Notably, no record reference accompanies its recitation (AB 39) that the evidence established that Mr. Beltran placed a bleeding hand on a pillow and pressed down. None of Mr. Beltran's blood was found in Teresa's room. (T1794)

There can be little doubt that the jury could have been

influenced by the tragic injuries, _not_ inflicted by Mr. Beltran, suffered by young Odanis Rodriguez. More care than was evidenced here would be required to assure that the jury reached its verdict based solely on Teresa's death.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was forwarded to Michael Neimand, Assistant Attorney General, Suite N921, 401 N.W. 2d Ave., Miami, Florida 33128; to Sheryl J. Lowenthal, Esq., Attorney for Henry Espinosa, Suite 206, 2550 Douglas Road, Coral Gables, Florida 33134; and to Mauricio Beltran-Lopez, no. 113995, Florida State Prison, P.O. Box 747, R-1-N-7, Starke, Florida 32091, this 8th day of February, 1990.

Respectfully submitted,

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