IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 24 1989
CLERK, SUPREME COURT
By
Deputy Clerk

BENOIT BALTHAZAR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO: 73,465

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the Fourth District Court of Appeal. The State of Florida shall be referred to as "respondent".

## STATEMENT OF THE CASE

Respondent agrees with petitioner's statement of the case with the following exceptions, clarifications, or additions:

Petitioner's memoranda in support of his motion to suppress asserted that the applicable standard of proof was the preponderance standard (R 2641, 2708). It does not appear that petitioner ever claimed that the trial court was applying the wrong standard of proof in finding the confession voluntary.

STATEMENT OF THE FACTS

Respondent accepts the Statement of the Facts of the Initial Brief of Petitioner as a generally correct statement of the testimonial evidence adduced below. Respondent would add the following additions, corrections, or clarifications:

Detective Hagan testified that petitioner was advised of his rights before the taped interview and that petitioner signed a rights waiver form (R 76). Detective Hagan testified that he was not aware of any promises made to petitioner before the interview (R 79-80). During the interview petitioner appeared to understand English and Detective Hagan testified that he understood what petitioner was saying most of the time (R 80). When Detective Hagan could not understand petitioner it was because petitioner was speaking English in a different way, not because he wasn't speaking English (R 81). Detective Hagan testified that he did not have a major language problem with petitioner and that if there had been a problem he would have requested an interpreter (R 140). Petitioner did not appear to be drowsy, under the influence of drugs, alcohol or medication during the interview (R 81).

During Detective Hagan's testimony, a tape of petitioner's statement was played for the trial court (R 83-124). On the tape, petitioner speaks in English without the aid of an interpreter. He indicated that he understood each of his rights (R 83-85).

Detective Shoemaker, who was present during petitioner's interview, testified that petitioner did not appear to be fatigued, under he the influence of drugs, alcohol or medication during the interview and was cooperative and alert (R **143, 144).** Although petitioner did have an accent, Detective Shoemaker understood what petitioner was saying (R **143).** At no time before or during the interview did Detective Shoemaker feel there was a need for an interpreter (R **143).** The Detective would have requested an interpreter if there was a language problem (R **144).** In fact, Detective Shoemaker testified that he felt petitioner understood the detectives better than they understood him (R **144).** At no time during the interview did petitioner request an attorney or make an effort to stop the interview (R **145).** Detective Shoemaker testified that no promises were made to petitioner before, during or after the interview **(R 145).** Detective Shoemaker also testified that:

> . . . everything that we asked he understood and answered very sharply, very quick, crystally and very quickly. He also conversed with a witness and victim, apparently in West Palm Beach when the vehicle was stolen. He understood everything that we asked him during the interview.
>
> There was no time that I felt that he needed an interpreter nor did I need an interpreter to understand him.

**(R 152).**

Beverly Bell was not declared an expert, although the trial judge agreed to hear her testimony (R 191).

Fritz Longchomb was not declared an expert, although the trial judge agreed to hear what he had to say (R 246-47, 254-55).

Toby Hobin testified that she was not aware that on two separate occasions appellant was advised of his rights regarding this offense (R 315). She was also not aware that appellant had not requested an interpreter at his previous trial or that his attorney had counseled him entirely in English (R 316). Hobin indicated that this information would affect her opinion of petitioner's understanding of English (R 316).

Petitioner testified on his own behalf at the hearing on his motion to suppress. Petitioner testified through an interpreter during his direct examination by defense counsel. He testified that he was 27 years old and came to the United States 11 years ago, in 1974, from Haiti (R 340). In the United States petitioner had gone to school to learn English at Operation Concern in Boynton Beach until 1982 (R 342). Petitioner admitted that in 1979 he was arrested and tried for murder in Belle Glade (R 343). He remembered that his rights were read to him at the interview conducted by Detectives Hagan and Shoemaker (R 343). He conceded that he did not ask for an interpreter during the interview (R 345). When petitioner testified that he could not understand every word on the rights card he stated it was because "at that time, my thoughts were not together" (R 344).

Pursuant to the State's request, petitioner testified on cross-examination without the aid of an interpreter (R 346-347). The prosecutor and petitioner both spoke in English. Petitioner testified in English that he understood English (R 347). He stated that he understood that what he said could be used against him (R 347). He admitted that he testified without an interpreter, in English, at his murder trial in 1979 (R 351). Petitioner was able to communicate with his English-speaking attorney during that trial (R 349). He also testified that his attorney in 1979 was court-appointed and that he did not have to pay for him (R 349). Petitioner testified that he went to night school to learn English three nights a week for three years (R 353). He understood every word the prosecutor said, and had a driver's license (R 352-353). Petitioner further testified that he had had an American wife and was married to her for three years until 1980 (R 353-354). Petitioner's American wife spoke only English (R 353). He also testified that he interpreted for other Haitians who did not speak English at his construction job (R 356). Petitioner testified that he interpreted for both the boss and the Haitians who did not speak English (R 356). This entire cross-examination was conducted without the aid of an interpreter and was entirely in English.

Petitioner stipulated that he was the person at Gary's when the victim was shot (R 1767, 1859).

Mr. Abbott testified that petitioner pointed a pistol at him and stated, "I am taking your car", before the victim was shot. (R 1850, 1872).

Deputy Charles Russell of the Lake County Sheriff's Office testified that he arrested petitioner for operating the stolen car (R 1973-74). He could understand petitioner and petitioner could understand him (R 1976). The documents in petitioner's wallet were printed in English (R 1983).

At trial, Detective Hagan testified that he tries to be sure a suspect understands English prior to interviewing the person (R 2091-92).

On voir dire examination Hagan stated that he had no problem communicating with petitioner on an adult level (R 2095-96). Petitioner was not talking to him as a six-year-old (R 2096).

## SUMMARY OF THE ARGUMENT

The correct standard of proof to apply in determining the voluntariness of a confession is the preponderance of the evidence standard. In the present case the trial court found no coercive tactics on the part of the police and correctly applied the preponderance standard. This determination should not be disturbed on appeal.

Absent police coercion it makes no sense to apply a stricter standard of proof. The purpose of excluding such evidence is not because it is unreliable, but to prevent police coercion. There was no police coercion in this case.

## ARGUMENT

### ISSUE INVOLVED (Restated)

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS.

Petitioner essentially complains that the trial court erred in denying his motion to suppress because it should have applied the "clear and convincing" standard rather than the "preponderance of the evidence" standard in determining whether petitioner waived his constitutional rights and voluntarily gave a statement to police.

Respondent would point out however, that petitioner is precluded from challenging the trial court's denial of the motion to suppress on this ground where at all times petitioner argued below that the "preponderance of the evidence" standard applied (R 2641, 2708). Specifically, both of petitioner's memoranda state, "The prosecution also carries the burden of showing that a Defendant's statement was freely and voluntarily made and it must prove voluntariness by a preponderance of the evidence. Brewer v. State, 386 So.2d 232 (Fla. 1980); Williams v. State, 441 So.2d 653, 655 (Fla. 3rd DCA 1983)" (R 2641, 2708). Following issuance of the pre-trial order applying the preponderance standard, petitioner never argued that the trial court was applying an improper standard and that the clear and convincing

standard was the proper standard of proof. Appellate counsel may not now argue that the trial court should have applied the "clear and convincing" standard when this argument was never raised below. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). Assuming arguendo that that court applied the wrong standard, any error was invited. See Pope v. State, 441 So.2d 1073, 1076 (Fla. 1963) (a party may not invite error and then be heard to complain of that error on appeal).

In any event, respondent maintains that the ruling of a trial court on a motion to suppress comes to the appellate court clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. McNamara v. State, 357 So.2d 411 (Fla. 1978). A trial court's determination upon questions of fact at a motion to suppress hearing should not be reversed unless clearly shown to be without basis in the evidence or predicated upon an incorrect application of the law. State v. Riocabo, 372 So.2d 126 (Fla. 3d DCA), dismissed, 378 So.2d 348 (Fla. 1979). Respondent submits that contrary to petitioner's assertions, the trial court correctly denied motion to suppress.

In Colorado v. Connelly, 479 U.S. 157, , 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), the United States Supreme Court reaffirmed its holding that the preponderance of evidence is the correct standard to use in determining whether there has been a

waiver of Miranda rights. 479 U.S. at 168-69, 93 L.Ed.2d at 485. The court noted that while it had stated in passing that the state bears a heavy burden in proving waiver, it has never held that the clear and convincing standard is the appropriate one 478 U.S. at 167-68, 93 L.Ed.2d at 484-85. See also, Hudson v. State, 538 So.2d 829, 830 (Fla. 1989), n.4, pet. for cert. filed (May 18, 1989) (coercive police conduct is a predicate for finding a confession involuntary, citing Connelly); Spivey v. State, 529 So.2d 1088, 1091-92 (same). Florida employs the same standard. To be admissible under Florida law, the State must establish the voluntariness of a confession by a preponderance of the evidence. Brewer v. State, 386 So.2d 232, 235-36 (Fla. 1980)(standard by which voluntariness of confession is to be determined is the same which applies to federal prosecutions - preponderance); DeConingh v. State, 433 So.2d 501, 503 (Fla. 1983), cert. denied, 465 U.S. 1005 104 S.Ct. 995, 79 L.Ed.2d 228 (1984). Voluntariness, in turn, must be determined from the totality of the circumstances.' Brewer. The circumstances which should be considered include such factors as the age, education, intelligence and knowledge of the defendant. Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983), rev. denied, 446 So.2d 100 (Fla. 1984), disapproved on other grounds, Chao v. State, 478 So.2d 30 (Fla. 1985). Of course, when the defendant does not readily speak and understand English, the State's burden to show a waiver of rights is heavier. Id. at 1262.

Appellee submits that although the State's burden in proving voluntariness naturally is heavier in cases where a defendant is non-English speaking, the standard of proof does not change. The State still must prove by a preponderance of the evidence that a statement is voluntary, however, it becomes harder to meet that standard. The same preponderance standard is applicable in determining the voluntariness of a consent to search. See e.g. State v. Edwards, 536 So.2d 288 (Fla. 1st DCA 1988) and United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Only when there is antecedent police misconduct may the State be required to prove a defendant's waiver of his rights by "clear and convincing" evidence. Elsleger v. State, 503 So.2d 1367 (Fla. 4th DCA), dismissed, 511 So.2d 298 (Fla. 1987). Since no police misconduct occurred here, and the trial court found none, it correctly applied a preponderance of the evidence standard in deciding the motion to suppress.

Absent oppressive police conduct causally related to the confession, there is no basis for concluding that any state action has deprived a defendant of due process Connelly, 479 U.S. at 164, 93 L.Ed.2d at 482. The sole concern in this area is governmental misconduct or coercion. 479 U.S. at 170, 93 L.Ed.2d at 486. "Miranda protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that" 479 U.S. at 170, 93 L.Ed.2d at 487.

While there are Florida cases holding that the State's burden of proof is heavier when it is shown the defendant is non-English speaking, none of those cases change the standard of proof. In Restrepo v. State, 438 So.2d 76 (Fla. 3d DCA 1983), the court erroneously held that the normal standard of proof in a consent to search situation is the clear and convincing standard[1] The court noted that the burden is heavier when the defendant is non-English speaking. However, the court did not raise the standard of proof in conducting its analysis 438 So.2d at 78. Rosell v. State, 433 So.2d 1260 (Fla. 1st DCA 1983), rev. denied, 446 So.2d 100 (Fla. 1984), disapproved on other grounds, Chao v. State, 470 So.2d 30 (Fla. 1985), also involved the voluntariness of a consent to search. It was uncontroverted that the defendant did not speak English. The court noted that the government's burden is heavier in the case of a foreign who does not readily understand English. However, the court did not state that the standard of proof escalated from a preponderance, to clear and convincing.

Palacios v. State, 434 So.2d 1031 (Fla. 1st DCA 1983), is a subsequent first district case involving the same issue. In response to a request to open the defendant's truck's cargo, he replied "No English". In reversing the trial court's denial of the motion to suppress, the court adopted the reasoning of Rosell specifically applying the preponderance standard. 434 So.2d at

[1] The third district subsequently corrected the error in State v. Fuksman, 468 So.2d 1067 (Fla. 3d DCA 1985).

1032. Other courts have applied the same standard in situations similar to the present one. See United States v. Kikumura, 698 F. Supp. 546, 560 (N.J. D.C. 1988) (government proved by preponderance of evidence that defendant freely and voluntarily gave consent to search notwithstanding his assertion that he was unfamiliar with English and American procedural protections and was not aware he had the right to refuse); Commonwealth v. Sanabria, 478 Pa. 22, 385 A.2d 1292, 1294-95 (1978) (government proved by preponderance of the evidence that defendant's waiver of Miranda rights was knowing voluntary and intelligent despite his claimed inability to comprehend the English language). **See also Brewer**, 386 So.2d at 285-86 (standard by which voluntariness of confession is sameas applies to federal prosecutions - preponderance).

Even if this Court were to conclude that the clear and convincing standard is applicable where a suspect is shown to not understand English, such a holding is not applicable to this case. The trial judge, as fact finder, obviously determined that petitioner had an adequate understanding of English to voluntarily waive his rights. Certainly the mere assertion of illiteracy could not be sufficient to change the burden of proof. If that were so, every arrestee would claim to be illiterate.

Petitioner's attempt to paint himself as non-English speaking or understanding is belied by his own testimony and conduct. Petitioner testified on his own behalf at the hearing on his motion to suppress. Petitioner testified through an

interpreter during his direct examination by defense counsel. He indicated that he was 27 years old and came to the United States 11 years ago, in 1974, from Haiti (R 340). In the United States petitioner had gone to school to learn English at Operation Concern in Boynton Beach until 1982 (R 342). Petitioner admitted that in 1979 he was arrested and tried for murder in Belle Glade (R 343). He remembered that his rights were read to him at the interview conducted by Detectives Hagan and Shoemaker (R 343). He conceded that he did not ask for an interpreter during the interview (R 345).

Pursuant to the State's request, petitioner testified on cross-examination without the aid of an interpreter (R 346-347). The prosecutor and petitioner both spoke in English. Petitioner testified that he understood English (R 347). He stated that he testified without an interpreter, in English, at his murder trial in 1979 (R 351). Petitioner was able to communicate with his English speaking attorney during that trial (R 349). He also testified that his attorney in 1979 was court-appointed and that he did not have to pay for him (R 349). Petitioner testified that he went to night school to learn English, understood every word the prosecutor said, and that he had a driver's license (R 352-353). Petitioner stated that he had had an American wife and was married to her for three years until 1980 (R 353-354). Petitioner's American wife spoke only English (R 353). He had interpreted for other Haitians who did not speak English at his construction job (R 345). Petitioner

testified that he interpreted for both the boss and the Haitians who did not speak English **(R 356).** This entire cross-examination was conducted without the aid of an interpreter and was entirely in English. It is further important to note that petitioner's testimony on cross-examination was not limited to "yes" and "no" answers. The record reveals lengthy narratives by petitioner's throughout the course of his cross-examination **(R 347-359).** Clearly, petitioner spoke and understood English.

Respondent thus maintains that where petitioner spoke and understood English, was advised of his rights, indicated that he understood those rights and signed a rights waiver form( R **76),** petitioner's statement to police was freely and voluntarily made under the totality of the circumstances. Brewer. Under *any* standard, petitioner's statement was voluntarily made and properly admissible.

Assuming arquendo that petitioner's testimony were considered credible, the result would not change. Petitioner's testimony did not indicate any police coercion. Petitioner testified that he didn't understand some of his rights because "at that time, my, my thoughts were not together. This is why I could not understand every word he was telling me from this card." (R **344).** He also stated, "Well some words he was saying I understood and some words I could not understand very well, because at that time, my mind was under the voice operation, you know, what I am talking about, because I had just got into trouble, you know" (R **349).** The fact that petitioner may have

been under some self-induced stress because he had just committed a murder should not serve to increase the standard of proof. See Connelly, 479 U.S. at 170, 93 L.Ed.2d at 486 ("Indeed, the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than officer coercion.' The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching not on 'free choice' in any broader sense of the word" (citations omitted). To raise the standard of proof in this case would serve no deterrent purpose.

Respondent would point out that even if the respondent's statement should have been suppressed, its admission at trial was purely harmless. Petitioner stipulated that he was the person at the scene of the murder (R 1767, 1859). George Abbot testified that he saw petitioner shoot the victim after he pointed the gun at Abbott and said he was taking the car (R 1835, 1850, 1872). Further, petitioner's statement for the most part was exculpatory and did not amount to a confession where he never admitted shooting the victim. Respondent thus submits that any error in admitting petitioner's statement was harmless where petitioner's guilt was clearly established independent of his statement to police.

Respondent maintains that the trial court properly denied Appellant's motion to suppress. Appellant's conviction and sentence must be affirmed.

## CONCLUSION

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Appellee respectfully requests that the judgment and sentence of the trial court be AFFIRMED.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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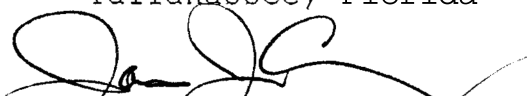

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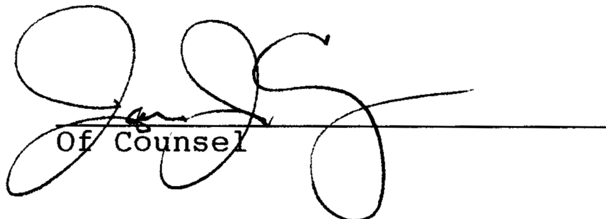
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to Louis G. Carres, Assistant Public Defender, 9th Floor, Governmental Center, 301 N. Olive Avenue, West Palm Beach, Florida 33401, this 21st day of July, 1989.



Of Counsel