IN THE SUPREME COURT
STATE OF FLORIDA

CIRCUIT CASE #88-028-CF
APPELLATE #74,352

RICHARD EARL SHERE, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR HERNANDO COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT-I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL AS TO INFERENCES BY THE STATE OF OTHER, UNRELATED CRIMINAL CHARGES AGAINST THE DEFENDANT.

The state contends that this issue was not preserved at the trial level because there was no motion to strike and no request for a curative instruction.

In this particular case, there had been pretrial motions directed toward preventing any mention of the Defendant, Shere, being at the courthouse at the time Sgt. Alan Arick of the Hernando County Sheriff's Office first confronted him. It is clear from the record, as stated in our Initial Brief, that the pretrial ruling had been that there should not be questions designed to let the jury know that the Defendant was first confronted while at the courthouse (R. 399). Defense counsel made reference to that and the prosecutor did not dispute same. (R. 399)

Yet, in the face of the trial court's ruling, the prosecutor appeared determine to get that information before the jury.

The state, in their brief referred to this as a "fleeting remark". (Answer Brief, Page 8) To the contrary, the state did not allow it to be a "fleeting remark", but again presented it to the jury, even after the court had sustained the objection.

The state attempts to analogize this to a situation where a defendant is being tried a second time for the same offense and the jury becomes aware of the first trial. We submit that that is not a valid analogy in that here, the clear inference was that this

Defendant had additional criminal charges, rather than just the one set of charges.

Again, this must be considered in light of the state not being allowed to use any Williams Rule evidence in this case. (R. 1180, 244).

The significance and the impact on the jury of this type of inferential evidence is shown by the insistence of the prosecutor in making sure that it came before the jury in spite of rulings that it should not.

A defense motion for mistrial should have been granted.

ARGUMENT-II

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE PHOTOGRAPHS OF THE VICTIM'S BODY.

The state contends that the photograph admitted was relevant and was properly allowed into evidence (Brief of Appellee, Page 11). However, the state says further that the photograph was used to identify the victim and "was used by the medical examiner to illustrate the condition of the victim's body." (Brief of Appellee, Page 11). The rule is not that any photograph of a victim is relevant simply because it is a photograph of the victim. As was stated in Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988), the test is whether or not the photograph is relevant to some issue in the case. The condition of the victim's body was not an issue in this case, and the state contends that was the purpose of the admission. (Brief of Appellee, Page 11). Again, the prosecutor gave no reason for offering the photograph when the defense counsel objected, and the trial court required no reason.

The defense submits that the sole purpose of submitting the photograph was to inflame; that the photograph had no relevance to any issue in the case in accordance with Kingery, supra, and the conviction should be reversed because of this improper inflammation.

ARGUMENT - III

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR APPOINTMENT OF PRIVATE COUNSEL.

It is submitted that the Defendant was not in a position to present a more detailed allegation in accordance with Ventura v. State, 15 F.L.W. 190 (Fla. April 5, 1990), but in a case wherein the state is seeking a death penalty, there should be more latitude in that regard.

ARGUMENT-IV

THE FLORIDA DEATH PENALTY STATUTES VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, IN THAT THE STATUTORY AGGRAVATING AND MITIGATING CIRCUMSTANCES, AS APPLIED, DO NOT ADEQUATELY LIMIT THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY AND THUS RENDER THE DEATH PENALTY SUSCEPTIBLE TO UNDUE ARBITRARY AND CAPRICIOUS APPLICATION.

Defense would add nothing to the argument of the Initial Brief.

ARGUMENT-V

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

The state, in arguing that the Defendant's statement was voluntarily given, examines the details of the statement and cites case law in support of some of those details (Brief of Appellee, Page 15-18), but as was pointed out in the Defendant's Initial Brief, the test is the totality of the circumstances and the circumstances that existed at the time of the Defendant's statement in this case were as outlined on Page 14 of our Initial Brief. Those circumstances destroyed the voluntariness of the statement because of the cumulative affect, as outlined in State v. Charon, 482 So.2d 392 (Fla. 3rd DCA 1985), Brewer v. State, 386 So.2d 232 (Fla. 1980), and Frazier v. State, 107 So.2d 16,21, (Fla. 1958).

Because of the existing circumstances, the state did not and could not meet its burden to show that the statement was voluntary, and the statements of the Defendant should have been suppressed.

ARGUMENT-VI

THE TRIAL COURT ERRED IN CALLING HEIDI GREULICH AS A COURT WITNESS.

The state quotes from the Judge's comment made after Heidi Greulich testified (Brief of Appellee, Page 19, quoting from the Record at Pages 778-779), but the significance of that is that those remarks were placed in the record subsequent to the testimony of Heidi Greulich. She had been allowed to testify as a court witness without such a finding being placed of record.

The Defendant's position is that absent a determination before the testimony was allowed in front of the jury, it was improper to have Heidi Gruelich called as a court witness.

The state relies upon Freeman v. State, 547 So.2d 125 (Fla. 1989), but an examination of that case shows that there was testimony by the stepbrother contrary to statements that the stepbrother had given earlier and then the stepbrother was declared hostile to the state, thus allowing the state to lead the witness. In fact, it was not until redirect examination by the state that the hostility was determined and the stepbrother declared a hostile witness. In a discussion of that, the Court said:

> . . . On redirect examination, the state brought out the fact that the stepbrother had given four sworn statements. In a proffer outside the presence of the jury, the stepbrother stated that his statements were made under pressure:
>
> > THE WITNESS: I wasn't going to sit there and tell you y'all was threatening me. And I believe that would have gave you a good chance to get me with something, if I sat there and telling you: you're threatening me.

> After this exchange, the state successfully moved to have the stepbrother declared a hostile witness, and the stepbrother was led to reaffirm previous statements he made that Freeman possessed the victim's property on the day the victim died. (547 So.2d at 126-127)

This procedure was not followed in the case at hand, and the trial court abused its discretion in allowing Heidi Gruelich to be called as a court witness.

ARGUMENT-VII

THE TRIAL COURT ERRED IN GIVING THE SHORT-FORM "EXCUSABLE HOMICIDE" INSTRUCTION.

The state contends that since there was a conviction for first degree murder it would be merely harmless error to have given the short-form "excusable homicide" instruction, especially in view of the fact that Defendant's contention was that Demo committed the crime rather than that the murder was excusable or justifiable (Brief of Appellee, Page 22).

However, as pointed out in our Initial Brief, given the theory of defense, the jury could have considered manslaughter simply because of the presence of the Defendant at the time of the act, and had that consideration been given, they would have been misled by the short-form instruction. The improper instruction seems to preclude the possibility of the jury exercising the "inherent pardon power" discussed in Smith v. State, 539 So.2d 514, 518 (Fla. 2nd DCA 1989).

ARGUMENT-VIII

THE TRIAL COURT ERRED IN GIVING THE PRINCIPAL INSTRUCTION UNDER THE FACTS OF THIS CASE.

The defense still contends that the primary theory of the state was that Shere acted alone in shooting the victim, and the giving of the principal instruction was inconsistent with that theory and was improper under the facts of the case and the evidence presented to the jury.

ARGUMENT-IX

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL.

The state seeks to discount the affidavit from Frank DeMotte by indicating at one point that the Defendant "did not sustain his burden of demonstrating that this evidence could not have been discovered with reasonable diligence and produced during trial." (Brief of Appellee, Page 25) That seems to suppose somehow that the defense should have been aware that DeMotte would have given such an affidavit at a time during the trial or before the trial.

The state further points out that DeMotte's statement would have been subject to "considerable impeachment". (Brief of Appellee, Page 25), and this somehow justifies something. Surely, such a statement by DeMotte would be subject to impeachment, but the point is that a jury needed to evaluate that statement and such impeachment, if any. The Motion for New Trial should have been granted.

ARGUMENT-X

THE TRIAL COURT ERRED IN DENYING THE MOTION TO INTERVIEW JURORS.

The state contends as to this point that there was no abuse of discretion in the trial court's denial of the Motion to Interview Jurors.

It should be kept in mind that as was pointed out in the Initial Brief, the advisory verdict in favor of death was by 7 to 5 so that a change of one vote would have resulted in a life recommendation by the jury.

With that in mind, the trial court was presented with a letter, anonymous, that indicates that one person who remained on the jury did not advise during voir dire that that juror had a relative who was a victim of a murder.

The issue here is not whether or not the unsigned anonymous letter was from a person who sat on the jury, but whether or not this raised enough question to allow some type of interview of the jurors to determine if there was a factual basis. This is a procedure that could have been done painlessly, but the court refused to allow it.

The state points out at Page 28 of its Brief that "the defense did not present an affidavit from the alleged jurors in question to properly place this issue before the court." As the state must know, the attorney is prohibited from communicating with the jurors except as provided in Rule 4-3.6, Rules Regulating the Florida Bar. Trial counsel sought to follow the provisions of the law and of the

Rules Regulating the Florida Bar by filing the Motion to Interview that was denied.

If one of the jurors did not advise the court or the trial counsel during voir dire about such a material fact as having a family member who was a victim of a murder, then that would surely be a basis for a new trial and would not be any matter that "inhered in the verdict". The defense would stand on the case of Sconyers v. State, 513 So.2d 1113 (Fla. 2nd DCA 1987), as setting forth the basis for an interview with the jurors under this particular factual situation, and the state does not discredit Sconyers. It is submitted that there should have been an interview of the jurors in this case to determine juror misconduct and since that was not allowed, the Defendant should be entitled to a new trial, or there should now be allowed a jury interview to make the necessary determination.

ARGUMENT - XI

THE TRIAL COURT'S SENTENCING FINDINGS ARE IMPROPER AND MAKE IMPROPER USE OF STATUTORY AGGRAVATING CIRCUMSTANCES AND THE TRIAL COURT ERRED IN INSTRUCTING THE JURY DURING THE PENALTY PHASE AS TO THOSE PARTICULAR AGGRAVATING CIRCUMSTANCES.

The finding of the aggravating factors by the trial court was not based on evidence, but was based on speculation. Reference is again made to the memorandum submitted by the defense pertaining to the mitigating factors (R. 1443-1444) and to the argument by the defense at the trial level regarding the jury instruction pertaining to the murder being committed to disrupt or hinder the lawful exercise of governmental function or the enforcement of laws (R. 858-859).

It is submitted that nothing in the state's Brief counters the assertions of the Initial Brief of the Defendant herein as to the basis for the aggravating factors determined by the trial court or as to the lack of clarity in the trial court's findings.

The penalty phase jury should not have been instructed as to the aggravating factors discussed in the Initial Brief.

CONCLUSION

The conviction of the Defendant herein should be reversed and the case remanded for a new trial or, at the very least, there should be a vacation of the death penalty and a remand for a new penalty proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to BELLE B. TURNER, Assistant Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 19th day of June, 1990.

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