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IN THE SUPREME COURT OF APPEAL OF FLORIDA

CASE NO. 74,913

JOSE MAQUEIRA,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

AN APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The appellant, Jose Maqueira, was the defendant in the trial court. The appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they appear before this Court. The symbol "R" will be used to refer to the record on appeal and transcript of proceedings. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Appellant, Jose Maqueira, relies on and adopts herein the facts set forth in the Statement of the Case and Facts of the Initial Brief of Appellant. Appellant respectfully reserves the right to raise additional, pertinent facts, if necessary, in the argument portion of this brief.

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POINTS INVOLVED ON APPEAL

I

WHETHER THE TRIAL COURT ERRED
IN DENYING APPELLANT'S MOTION
TO SUPPRESS STATEMENTS?

II

WHETHER THE TRIAL COURT ERRED
IN DENYING APPELLANT'S MOTION
FOR MISTRIAL BASED UPON AN
IMPROPER PROSECUTORIAL
COMMENT?

III

WHETHER THE TRIAL COURT ERRED
IN DENYING APPELLANT'S MOTION
FOR JUDGMENT OF ACQUITTAL?

IV

WHETHER THE TRIAL COURT ERRED
IN SENTENCING APPELLANT TO
DEATH FOR THE MURDER OF RAQUEL
RODRIGUEZ?

SUMMARY OF THE ARGUMENT

I

The trial court committed reversible error in denying Appellant's motion to suppress statements, as the statements were involuntary as a result of or from inducements made by one Ramiro Gonzalez, an individual in the same jail where Appellant had been housed on unrelated charges. The attending circumstances of Appellant's alleged confession were calculated to delude Appellant as to his true position. Therefore, the denial of the motion to suppress statements constitutes reversible error.

II

The trial court committed reversible error by denying Appellant's motion for mistrial based upon improper prosecutorial comments made by the prosecution during re-direct examination of a prosecution witness. Appellee, The State of Florida, has conceded that the prosecutors questions were improper and violative of Appellant's Sixth Amendment right to counsel. The State's candor in acknowledging the constitutional error clearly indicates that a curative instruction would not be sufficient to dispel any prejudicial effect of the statements made by the prosecutor. The issue has clearly been preserved by virtue of defense counsel's timely, contemporaneous objection and motion for mistrial. Reversal should therefore result.

III

The trial court erred in denying Appellant's motion for judgment of acquittal. The State has conceded that its case rested solely on Appellant's statements which Appellant currently contends were illegally obtained and improperly admitted into evidence. Furthermore, even if the statements are taken into account, the evidence is legally insufficient to sustain Appellant's convictions for murder, attempted robbery and burglary. All convictions should therefore be vacated.

IV

The trial court erred in sentencing Appellant to death for the alleged murder of Raquel Rodriguez. Appellant submits that the only valid aggravating factor was that Appellant was previously convicted of another felony involving the use of threat or violence to a person and that the trial court should not have rejected the mitigating circumstance that Appellant acted under extreme duress or substantial domination of another person. Appellee has conceded that the trial court erred in finding that the murder of Raquel Rodriguez was heinous, atrocious or cruel. Appellant's sentences should be vacated and the instant case remanded for re-sentencing should this court uphold any or all of Appellant's convictions.

ARGUMENT

I

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

Contrary to Appellee's contentions, the totality of the circumstances surrounding Appellant's statements do in fact support his position that informant Ramiro Gonzalez induced Appellant to make the confession(s) to police detectives. Appellant clearly testified at the suppression hearing that he talked to Ramiro Gonzalez about his case because Gonzalez had told him that he had friends or relatives that were police officers that would help him resolve his case (R. 335-337). At all times, Gonzalez and the detectives deluded Appellant as to his true position concerning this case, which was and is a position of great jeopardy, as Appellant now finds himself sentenced to death by electrocution in the electric chair. On cross-examination, Detective Cadavid acknowledged that Detective Singleton told him that it was Ramiro Gonzalez's style to become friendly and establish a personal relationship with the people he ended up informing on and turning over to the State (R. 397-398). Due to the informant's cumulative assistance, the detective and the Metro Dade Police Department were able to solve unsolved murders that were regarded as "cold" cases (R. 399). The confessions should have been excluded in the instant case as

the attending circumstances were calculated to delude Appellant as to his true position or to exert improper or undue influence over his mind. Williams v. State, 441 So.2d 653, 655 Fla. 3d DCA (1983).

Appellant sought to explain, at the suppression hearing, that he gave statements at the Dade County Jail, in particular his second "confession", based upon inducements by the officers indicating that "everything would be resolved" as the police were supposedly concerned with investigation or prosecution of one Carlos Villavicencio (R. 348). Appellant stated the reason that he gave a second tape recording was to correct supposed "mistakes" in the first statement. It is clear that he gave this statement as a result of acquiescence to and assurances by those in positions of authority. Appellant merely responded that he had not been made any promises, as he was told that the statements would then be of no use (R. 349). As noted in the initial brief, Ramiro Gonzalez intentionally created a situation likely to induce Appellant to make incriminating statements without the assistance of counsel, thus the police detectives, through their involvement in the use of Mr. Gonzalez, did indeed violate Appellant's Sixth Amendment right to counsel in a situation similar to the one presented in United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).

Appellee has sought to distinguish Rogers v. Richmond, 365 U.S. 534, 544 (1961). Appellant submits that the holding

and language of Rogers v. Richmond, as indeed applicable to the situation presented herein. In particular, the reference to Rogers, supra, in page 37 of Appellant's initial brief was in fact proper. The language relied on by Appellant in said case reads as follows:

From a fair reading of these expressions, we cannot but conclude that the question of whether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstances of probable truth and falsity (footnote omitted). And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State law enforcement officials was such as to overbear petitioners will to resist and bring about confessions not freely self-determined - a question to be answered with complete disregard of whether or not petitioner spoke the actual truth...

365 U.S. 543-544

Thus, Appellant's reliance on the language of Rogers v. Richmond, supra, was entirely appropriate.

Furthermore, contrary to Appellee's argument, even when the facts adduced at the suppression hearing are viewed in a light most favorable to the State, it is still clear that informant Ramiro Gonzalez was indeed an agent of the State on a continuing basis and had an active role in inducing Appellant to believe it would be in his best interest to give

statements to detectives. Gonzalez kept in constant contact with the detectives involved and seemed to be orchestrating the entire events. It follows logically that Appellant only discussed his personal matters with Gonzalez as a result of Gonzalez's active plan to befriend him and inform on Appellant for his own personal gain. In this case, it was clear that Gonzalez expected and received benefits from the detectives for his participation. In particular, favorable letters were written on his behalf to the parole commission (R. 431-432).

The detectives' actions in subjecting Appellant to the second "confession" supposedly to "correct mistakes" can clearly be viewed as a coercive activity referred to in Spivey v. State, 429 So.2d 1088, 1091, 1092 (Fla. 1988), citing Colorado v. Connelly, 479 U.S. 157 (1986), as a necessary predicate to a finding that a confession is involuntary, as asserted by Appellee at page 61 of its brief. It is also clear that Ramiro Gonzalez did become a state agent when he collaborated with detectives to procedurally secure more detailed incriminating information against Appellant.

In Michael v. State, 437 So.2d 138, 140 (Fla. 1983), one of the cases cited by Appellee, the Court did not find the confession involuntary because the inmates who had been used as informants during prison riots only dealt with a detective that had been assigned to the jail exclusively to investigate

crimes occurring wholly within the jail and to obtain intelligence on any possible riots or disturbances that might happen in the jail. In this case, Ramiro Gonzalez did act as a continuing informant to the detectives in particular concerning Dade County cases such as that of Appellant. Unlike the situation in Puccio v. State, 440 So.2d 419, 421 (Fla. 1st DCA 1983), the instant case does not involve a simple promise to speak to the prosecutor or judge but rather deals with deluding Appellant into believing that he was in a much better posture than was truly the case. Otherwise, why would Appellant directly implicate himself in a double homicide case and speak directly, as a result of scheduling assistance of the informant, with the detectives on a repeated basis?

In Bova v. State, 392 So.2d 950 (Fla. 4th DCA 1980), modified on other grounds, 410 So.2d 1343 (Fla. 1982), the concern of the defendant centered on police informing the judge or prosecutors that the defendant feared for his life if he were to be sent to Raiford as a result of having been a former police informant against other individuals who might be incarcerated in that location. In this case, Appellant was under the belief that the informant had assisted another inmate, Santiago, in cooperating with authorities and receiving sentencing benefits, or early release and was led to believe that he would receive immunity as the focus of the police investigation was on one Carlos Villavicencio. Thus,

the promises or inducements of the police detectives in the instant case far surpassed the permissible realms of the cases relied on by Appellee.

Appellant hereby reasserts all arguments and authorities stated as to this claim in Appellant's initial brief and submits that reversible error has been demonstrated as to this point.

II

THE TRIAL COURT ERRED IN
DENYING APPELLANT'S MOTION FOR
MISTRIAL BASED UPON AN
IMPROPER PROSECUTORIAL
COMMENT.

Appellee has conceded, at page 65 of its brief, that the prosecutor's questions were indeed improper and violative of Appellant's Sixth Amendment right to counsel. Since Appellee has no argument to present on the merits, it has sought to allege a procedural infirmity. The State contends that Appellant should have moved to strike or request a curative instruction when the trial court sustained his objection and that the failure to request a curative instruction precluded the granting of the motion for mistrial.

Appellant submits that the State's contention that Constitutional error has occurred clearly indicates that a curative instruction would not be sufficient to dispel any prejudicial effect of the statements made by the prosecutor. The issue has clearly been preserved by virtue of defense counsel's timely, contemporaneous objection, and motion for mistrial.

The situation presented herein is distinguishable from those presented in the bulk of the cases relied on by the State. This case deals with improper prosecutorial comment of a fundamental nature, as opposed to unsolicited responses by a witness such as occurred in Staten v. State, 500 So.2d

297, 299 (Fla. 2d DCA 1986). In Buenoano v. State, 527 So.2d 194, 198 (Fla. 1988), the statement in question was a gratuitous comment of a lay witness. Although the Court found the comment to be improper, the defense had accepted the curative instruction offered to be given by the trial judge.

In another case cited by Appellee, Farinas v. State, ___ So.2d ___, 15 F.L.W. S.555, 556 (Oct. 11, 1980), the motion for mistrial was properly denied due to the fact that unlike in the instant case, no contemporaneous objection was made. Furthermore, the discussion at 15 F.L.W. S.557, n. 7 refers in particular to a situation where a defendant does not avail himself or herself of a trial judge's offer to give a curative instruction.

For the reasons noted above and in the initial brief, Appellant submits that reversible error has clearly been demonstrated. This is especially apparent due to the State's concession that Appellant is correct as to the merits of this issue. Furthermore, the State's concession that absent Appellant's alleged confessions, the State would have no case. Thus, it would be inappropriate to treat this serious error as harmless.

III

THE TRIAL COURT ERRED IN
DENYING APPELLANT'S MOTION FOR
JUDGMENT OF ACQUITTAL.

Appellee, The State of Florida, has conceded at page 49 of its Answer Brief, that without Appellant's statements, the State had no case at all. In response, Appellant hereby reasserts the argument noted in pages 48 and 49 of Appellant's Initial Brief, namely, that the evidence was legally insufficient to sustain Appellant's convictions even when the statements are taken into account. Detective Cadavid's testimony at trial (see; R. 1083-1084) relating Appellant's alleged statements or "confessions" does not sustain a conclusion that Appellant possessed the requisite intent necessary to sustain the multiple convictions for murder, attempted robbery and burglary. Rachel Rodriguez, the daughter of the deceased individuals, Raquel and Michael Rodriguez, stated that she never saw Appellant inside the house, or inside an area depicted by a sketch presented to her on direct examination (R. 921). She could not identify Appellant as either an individual she allegedly saw standing by a light pole by her house (R. 922), nor did she identify Appellant as the second person she saw running outside the house. (R. 923). Thus, it is clear that the evidence adduced at trial, is legally insufficient to sustain Appellant's convictions. Reversal should result.

IV

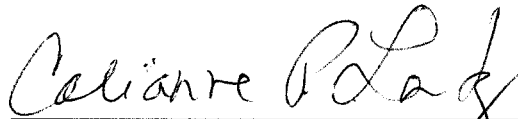
THE TRIAL COURT ERRED IN
SENTENCING APPELLANT TO DEATH
FOR THE MURDER OF RAQUEL
RODRIGUEZ.

Appellant hereby re-asserts the arguments raised as to this issue in the initial brief of Appellant. Appellant further notes that the State has reluctantly confessed error as to the trial court's incorrect finding that the murder of Raquel Rodriguez was heinous, atrocious or cruel. Appellant therefore submits that the only valid aggravating factor was that Appellant was previously convicted of another felony involving the use of threat or violence to a person and that the trial court should not have rejected the mitigating circumstance that Appellant did act under extreme duress or substantial domination of another person. Thus, even if Appellant's convictions are not vacated, the instant case should be remanded for re-sentencing.

CONCLUSION

Based upon the foregoing reasons and citations of authority set forth in this brief, along with those set forth in the Initial Brief of Appellant, Appellant, Jose Maqueira, respectfully submits that the convictions and sentences imposed by the trial court be reversed and vacated and the case remanded to the trial court for new proceedings.

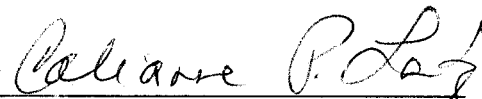
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant was served by mail this 4th day of January, 1991 to The Honorable Robert Butterworth, Attorney General, 401 N. W. 2nd Avenue, Suite N-921, Miami, Florida 33128 and Mr. Jose Maqueira, #402041, Florida State Prison, S-1-S-5, P.O. Box 747, Starke, FL 32091.

By: 
Calianne P. Lantz, Esq.