OA 9-4-90

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 75,161

FREDERICK ALDINE BAIRD, JR.,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STAIEMENT

Petitioner, the State of Florida, was the prosecution in the trial court and the appellee below. Respondent, Frederick Aldine Baird, Jr., was the defendant in the trial court and the appellant in the district court. Parties shall be referred to as "Petitioner" and "Respondent" respectively in this brief.

References to the record on appeal will be by use of the symbol "R" followed by the appropriate page numbers in parentheses. All emphasis shall be in the original unless otherwise noted.

SUMMARY OF ARGUMENT

Due to the brevity of our reply, no summary is offered.

ARGUMENT

ISSUE I

WHETHER THE DISTRICT COURT ERRED IN REVERSING THE TRIAL COURT'S DETERMINATION THAT REMARKS OF A WITNESS DID NOT CONSTITUTE HEARSAY GIVEN THE CONTEXT IN WHICH THE REMARKS WERE UTTERED.

The Respondent continues to confuse the true issue in this case. Never has the Petitioner suggested that it would be appropriate for a police officer to testify as to "what he heard" that caused him to arrest a person if that information were presented to the jury for the truth of the matter asserted. It is the clear rule in Florida that such testimony would be inappropriate. In this regard Respondent's citation to Postell v. State, 398 So.2d 851, 854 n.5 (Fla. 3rd DCA 1981), is appropriate.

However, the facts of this case are not the facts in Postell. In this case the only reason the prosecutor brought this information to light was to negate a direct and explicit defense challenge to the motivation and propriety behind Officer Griffin's actions. The trial court specifically recognized that fact when it overruled defense objection and indicated that the defense had opened the door to the inquiry. In this regard the trial court's ruling is consistent with accepted case law. (See Initial Brief).

By way of analogy, Petitioner would refer this Court to the Florida Evidence Code definition of hearsay and non-hearsay, Fla.Stat. §90.801. Specifically, §90.801(2)(b)

indicates that a statement is not hearsay if the declarant testifies at trial and is subject to cross examination concerning the statement and the statement is "consistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication." A variety of courts allow introduction of such testimony in the face of attacks on a witness' motivation. See United States v. Reed, 887 F.2d 1398, 1406 (11th Cir. 1989) (Court upheld admission of prior consistent statement offered to rebut an implied charge of recent fabrication in situation where defense counsel's opening statement declared "the defense would prove that Bobby Gene Chester is a con-man who concocted it all and made up these lies on Tom Reed."); United States v. Smith, 893 F.2d 1573, 1581-82 (9th Cir. 1990) (Trial court did not abuse its discretion in admitting prior consistent statements in government's case to refute defense contention that testimony of various government witnesses was fabricated to build a case against Smith as the leader of a conspiracy to distribute cocaine); and State v. Burgard, ____ N.W.2d ____ 1990 W.L. 90687 (N.D. July 3, 1990) (North Dakota Supreme Court held defense counsel's attack on credibility of child witness during opening statement and continued attack on cross examination provided state prosecutors with open door for rebuttal using prior consistent statements made by children in regard to assaults).

Petitioner contends that these cases, while not controlling, should be highly persuasive. As argued in our initial brief, a matter is not hearsay if, in the view of the trial court, it is presented for something other than the truth of the matter asserted. In this case the trial court made such a finding (TR 78) and his decision should have been accorded due deference. Rather than accord that deference, the First District Court of Appeal relied solely on an entrapment case. Bauer v. State, 528 So.2d 6 (Fla. 2d DCA 1988). Given the matter in which entrapment cases are litigated in this state, that case is less persuasive than the cases cited above. As noted in his dissent, Judge Campbell indicates the more logical approach to analysis of this issue is to focus on the balancing test for evidentiary admissions found in Fla.Stat. §90.403 (1987). Bauer at 14.

Federal authorities concur with Petitioner's arguments regarding the "background of the case" may sometimes be admissible evidence. Since the defense had come out in opening statement with claims of selective prosecution it was only appropriate for state prosecutors to attempt to give the jury the full picture of what occurred below. In this vein, United States v. Pedroza, 750 F.2d 187 (2d Cir. 1984), provides guidance:

> The government argues that the hearsay statements were properly admitted as "background." There is no such exception to the hearsay rule. When statements by an out-of-court declarant are admitted as background, they are

> properly so admitted not as proof of the truth of the matters asserted but rather to show the circumstances surrounding the events, providing explanation for such matters as the understanding or intent with which certain acts were performed. See, e.g. United States v. Luberano, 529 F.2d 633, 637 (2d Cir. 1975), cert. denied, 429 U.S. 818, 97 S.Ct. 61, 50 L.Ed.2d 78 (1976); United States v. Manfredonia, 414 F.2d 760, 765 (2d Cir. 1969).

Id. at 200. See also United States v. Love, 767 F.2d 1052, 1063-64 (4th Cir. 1984):

> Federal Rule of Evidence 801(c) finds an out-of-court statement as hearsay if it is "offered in evidence to prove the truth of the matter asserted." However, an out-of-court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken. United States v. Scott, 678 F.2d 606, 612 (5th Cir.), cert. denied, 459 U.S. 972, 103 S.Ct. 304, 74 L.Ed.2d 285 (1982).

Id. at 1063.

The Fourth Circuit went on to note that the testimony of a DEA agent concerning information he received from a fellow agent about a proposed landing site for a drug transaction was admissible because it explained why the officers and agents made the preparations they did in anticipation of the appellant's arrest. The court cited United States v. Mancillas, 580 F.2d 1301 (7th Cir.), cert. denied, 439 U.S. 958 (1978), in support of its position. Id.

This case is not comparable to Harris v. State, 544 So.2d 322 (Fla. 4th DCA 1989) (en banc). Indeed, the Harris

court admits "There is a fine line that must be drawn between a statement merely justifying or explaining such presence or activity and one that includes incriminating (and usually unessential) detail." The Harris court went on to adopt McCormick's view on hearsay which is the view that Petitioner presented this Court in its initial brief.

Plainly stated, this is a case in which the fine line was appropriately drawn by the trial court and inappropriately erased by the district court. Without hesitation Petitioner asserts that had not defense counsel opened the door by his attack on the motivation and selectiveness of law enforcement officers the State would have been barred by the hearsay rule from eliciting the final comment from Officer Griffin. However, because of what the defense attorney did in opening statement it was entirely appropriate and within the trial court's discretion to allow the State to ask and the officer to answer the question. It was also appropriate for the jury to hear the truth about the case and not be misled by rhetoric from counsel. That is particularly true in a criminal case where the State bears the burden of proving guilt beyond a reasonable doubt.

ISSUE II

WHETHER, ASSUMING THE TRIAL COURT DID ERR IN ITS RULING, THE DISTRICT COURT OF APPEAL PROPERLY APPLIED THE HARMLESS ERROR STANDARD SET FORTH BY THIS COURT IN STATE V. DIGUILIO, 491 SO.2D 1129 (FLA. 1986), AND CICCARELLI V. STATE, 531 SO.2D 129 (FLA. 1988).

Officer Griffin's brief remark indicating that Baird was a major gambling figure was simply cumulative of the rest of the State's case. As such, it should have been deemed harmless under Ciccarelli v. State, 531 So.2d 129 (Fla. 1988), and Torres-Arboledo v. State, 524 So.2d 403, 409 (Fla. 1988). Accord Darden v. Wainwright, 477 U.S. 168 (1986).

CONCLUSION

Based on the foregoing argument and citations of authority, this Court should reverse the district court's ruling below and remand with instructions to reaffirm the judgment and sentence.

Respectfully submitted,

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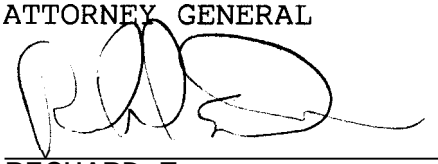

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been furnished by U.S. Mail to Laura E. Keene, Esquire, Beroset & Keene, 417 East Zaragoza Street, Pensacola, Florida 32501, this 17th day of July, 1990.

Richard E. Doran
Assistant Attorney General