IN THE SUPREME COURT OF FLORIDA

DWAYNE IRVIN PARKER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 76,172

REPLY BRIEF OF APPELLANT

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit

GARY CALDWELL
Assistant Public Defender
Attorney for Dwayne Parker
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600
Florida Bar No. 256919

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. JURY SELECTION

A. DENIAL OF CAUSE CHALLENGES

1. The state's brief nowhere disputes that it was error to deny cause challenges to jurors Geair, Herzog, Reno, Nehiley, Silverman, Weisberg, Linares, Scheril, Bonvicin, Diggs, Koeffler, and Mindich. Hence, the state does not deny that the defense was illegally denied of the peremptory challenges that it had to exercise to remove them from the panel. Since the state has waived any argument regarding the denial of cause challenges to these jurors, reversal is required. Because the cause challenges pertained to both guilt and penalty issues, a new trial is required under Singer v. State, 109 So.2d 7 (Fla. 1959).

2. The state's argument is limited to jurors Gorman, Miller, Anderson, and Bogle. It claims in a footnote that, under Hernandez v. State, 18 Fla. L. Weekly S306 (Fla. May 5, 1993), this Court should at most order resentencing. In Hernandez the court dismissed jurors without letting the defense question them regarding the death penalty. Here, the court let prejudiced jurors sit in judgment of Mr. Parker's guilt. Hence a new trial is required.

Lusk v. State, 446 So. 2d 1038,1041 (Fla.), cert. denied 469 U.S. 873 (1984), on which the state relies, is expressly based on Singer. Under Singer (and thus under Lusk), doubts regarding jurors' impartiality must be resolved against their sitting; Singer disapproves the sort of "rehabilitation" practiced here. Hitchcock v. State, 578 So. 2d 685 (Fla. 1990) does not say that it is

"solely" in the trial court's discretion to determine cause challenges. It has been the law of this state since at least 1911 that doubts must be resolved against letting such jurors sit. Walsingham v. State, 61 Fla. 67, 56 So. 195,198 (1911).

a. As to jurors Miller and Gorman, the state concedes that neither the prosecutor nor the judge questioned them individually about their position that they would vote for death in a case of premeditated murder. Exhortations and questions posed to the panel as a group are no substitute for individualized questioning. Cf. Morgan v. Illinois, 112 S. Ct. 2222 (1992) ("follow the law" questioning insufficient). Although the panel as a group concurred with vague exhortations and questioning about following the law, Miller's and Gorman's individual answers to questioning directed at them were that they would automatically vote for death in premeditated murder cases. R 632-33. The state questioned them no further, and the court merely urged the panel to follow the law and base their verdicts on the law and the evidence. R 635-36. Thus, under Brown v. State, 565 So. 2d 304,307 (Fla. 1992) ("When any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial recommendation to punishment, the juror must be excused for cause."), on which the state relies, it was error to deny the cause challenges.

b. As for juror Anderson, the last questions posed to her were by the state. Referring to earlier questioning regarding premeditated murder, she told the prosecutor that she would automatically vote for death as she "interpreted the law". R 748-49; answer brief, page 28. Then, in response to a leading question

from the prosecutor, she agreed that she would not vote for death for "every murder." Id. While it is good to know that she would not vote for death for third-degree murder, the state did nothing to cast doubt on her response that she would automatically vote for death for premeditated murder.

B. METHOD OF HEARING PEREMPTORY CHALLENGES

The state does not dispute that the trial court violated Ter Keurst v. Miami Elevator Co., 486 So. 2d 547 (Fla. 1986). It simply argues that the error was harmless because, in its view, "the ultimate panel was fair and impartial." This is an interesting but irrelevant proposition: the defense was impaired in its exercise of challenges, so that reversal is required.

II. DISCOVERY VIOLATIONS

2. The state does not deny that the trial court denied a continuance without inquiring into the state's discovery violation regarding witnesses Nicholson and McKnight. Given the state's failure to refute this, reversal is required for the court's failure to inform itself regarding the circumstances, before denying the continuance. See U.S. v. Simtob, 901 F.2d 799,804 (9th Cir. 1990) (defense sought to re-open evidence to introduce tape; trial court erred by denying motion without hearing tape: "The trial judge, in effect, declined to exercise his discretion at all; his determination of the tape's cumulative nature, or, alternatively, of its value to the defense, was therefore made without a proper 'consideration of relevant factors,' and constituted an abuse of discretion.").

B. Regarding its use of photographs and prints not disclosed

in discovery, the state claims in its brief that it was unaware of the "switched-bullet" defense until after opening statements. This is a surprising claim: before trial, the prosecutor called the pathologist to discuss the defense with the result that the doctor retreated from his deposition testimony regarding the color of the bullet. R 1645-46. To this day, the state has offerred no legitimate reason for its failure to disclose the photographs and prints in discovery. The judge's denial of the defense objection when the state sought to place photographs into evidence was completely unreasoned: made aware of the discovery violation, he said that the defense objection went "to the weight and not the admissibility." R 1610-12.

Regarding the Besant-Matthews photographs, the judge ruled, and the state now argues, that there was no prejudice because they were photographs of the fatal bullet, and the defense already knew about the fatal bullet. But of couse that is the problem: either the photograph disclosed in discovery or the new photograph literally presented the fatal bullet in a false light. Because of the state's mid-trial discovery violation, the defense was unable to present testimony showing that it was the new photographs which painted a false picture. The new photographs directly countered the pathologist's deposition and contemporaneous report about the color of the bullet. Thus the defense was prejudiced.

III. FAILURE TO INQUIRE ABOUT COUNSEL

Completely ignoring (and thus apparently not disputing) the authorities set out in the initial brief, the state relies principally relies on Kott v. State, 518 So. 2d 957 (Fla. 1st DCA

1988), which was decided before Hardwick v. State, 521 So. 2d 1071 (Fla. 1988). In Kott, two members of the panel[1] held in effect that the defendant waived his complaints about counsel by proceeding to trial with that attorney, at least where the record did not show deficient conduct by counsel. This remarkable reasoning was effectively overruled by Hardwick. Further, the state forgets that its brief is full of argument that defense counsel was incompetent (the state argues throughout its brief that counsel incompetently failed to preserve many issues for appeal) and that it argued defense counsel's incompetence in the trial court: opposing the defense motion to continue the sentencing, the prosecutor argued that defense counsel had incompetently failed to obtain photographic evidence and failed to cross-examine witnesses. R 2335-36.

IV. JURY INSTRUCTIONS AND ARGUMENT TO JURY

A. JURY INSTRUCTIONS

1. Excusable homicide.

Quoting a portion of the defense argument out of context, the state ignores the fact that defense counsel specifically argued Hoffert v. State, 559 So. 2d 1246 (Fla. 4th DCA 1990) to the trial court. R 1860. The judge replied that he would "take my chances with that." 2. Instruction on theory of guilt.

Mr. Parker relies on the argument in his initial brief.

3. Reasonable doubt instruction.

Florida did not apply its procedural default rule consistently

---

[1] The third agreed with the result but not with the reasoning.

during the time of Mr. Parker's trial,[2] so that it would be improper to apply it here. Ford v. Georgia, 111 S.Ct. 850 (1991), James v. Kentucky, 466 U.S. 341 (1984), Smith v. Black, 970 F.2d 1383 (5th Cir. 1992), Wilcher v. Hargett, 978 F.2d 872 (5th Cir. 1992).

B. PROSECUTION ARGUMENT TO JURY

In arguing that this issue is not preserved for appeal, the state ignores that it argued only the merits in the trial court, and did not assert that the objection was untimely. Further, since the trial court ruled that the argument was improper, there was no need for defense counsel to request further relief. Brown v. State, 206 So. 2d 377, 384 (Fla. 1968), Whitted v. State, 362 So. 2d 668,672 (Fla. 1978), Hunt v. State, 613 So. 2d 893,898, n.2 (Fla. 1992), Spurlock v. State, 420 So. 2d 875 (Fla. 1982), Simpson v. State, 418 So. 2d 984 (Fla. 1982), Thomas v. State, 419 So. 2d 634 (Fla. 1982). Since the trial court and the prosecutor addressed only the merits, the purposes of the contemporaneous objection rule were served: the court had no interest in correcting an argument that it considered proper.

V. EX PARTE PROCEEDING

Mr. Parker relies on the argument in his initial brief.

VI. FIRST DEGREE MURDER DURING FLIGHT FROM A FELONY

---

[2] E.g. Occhicone v. State, 618 So.2d 730 (Fla.1993) ("We could have, and probably should have, also said [in the 1990 direct appeal decision] that the claim was procedurally barred because of no objection at the trial court level."); Hodges v. State, 619 So. 2d 272, 273 (Fla.1993) ("We summarily found the issue meritless [in the original opinion], but we should have held it procedurally barred because Hodges did not preserve it for review by objecting at trial.").

Mr. Parker relies on the argument in his initial brief.

VII. MOTION FOR NEW TRIAL

As the state notes in its brief, the court is to assess the credibility of a witness only where the motion for new trial presents a claim of recanted testimony. Stone v. State, 616 So. 2d 1041 (Fla. 4th DCA 1993); Glendening v. State, 604 So. 2d 839 (Fla. 2d DCA), rev. denied 613 So. 2d 4 (Fla. 1992). Hence the trial court erred in making its own assessment of the witness's credibility. The state's argument that the eyewitness testimony was not material and was cumulative is silly: it bore directly on the issue of who fired the fatal shot, and, far from being cumulative, it directly contradicted the state's theory of the case.

VIII. JURY PENALTY PROCEEDINGS

A. PROPOSED DEFENSE PENALTY INSTRUCTIONS

Mr. Parker relies on the argument in his initial brief.

B. INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES

Notwithstanding the state's argument that the objections raised here were not preserved for appeal, Florida did not apply its procedural default rule consistently during the time of Mr. Parker's trial,[3] so that it would be improper to apply it here. Ford v. Georgia, 111 S. Ct. 850 (1991), James v. Kentucky, 466 U.S. 341 (1984), Smith v. Black, 970 F.2d 1383 (5th Cir. 1992), Wilcher v. Hargett, 978 F.2d 872 (5th Cir. 1992).

Significantly, the state's brief does not dispute that the standard instructions used here fail to inform the jury of the elements of the circumstances. An instruction removing an element from the jury's consideration can never be harmless. U.S. v. Gaudin, 986 F.2d 1267 (9th Cir. 1993). See also Sullivan v. Louisiana, 113 S.Ct. 2078 (1993).

C. SUA SPONTE INSTRUCTION ON SENTENCING ROLE OF JURY

Mr. Parker relies on the argument in his initial brief.

D. THE STATE'S PENALTY ARGUMENT TO THE JURY

Mr. Parker relies on the argument in his initial brief.

IX. CIRCUMSTANCES FOUND BY THE TRIAL COURT

A. RELIANCE ON NON-STATUTORY CIRCUMSTANCES

Regarding the court's statement that he considered in aggravation the fact that Mr. Nicholson was left lying in the road,

---

[3] See discussion at footnote 2 above.

the state asserts that the court was simply relying on the "great risk" circumstance. The state does not suggest how this fact was relevant to that circumstance. In any event, the court stated that its reliance on the non-statutory fact of Mr. Nicholson's condition was central to the sentencing decision:

> ...What happened then I think was proved beyond a reasonable doubt, although there are reasons for it may never be known, too.
>
> The Defendant shot him in the stomach, abandoned him and left him lying on the street alone in the dark with blood gushing from a bullet hole until he bled to death, despite the heroic effort of the people that came to try to save him.
>
> I think the jury correctly found that and reflected that in their verdict; that aggravating factor was proved beyond a reasonable doubt. That's probably the one significance that I have been considering.

R 2388. Insofar as the court placed principal reliance on this fact in determining the "great risk" circumstance, then its use of the circumstance was flawed: there is no logical relationship between leaving a person lying in an empty street and the "great risk" circumstance.

B. AVOID ARREST CIRCUMSTANCE

As noted by the state, the court said in the sentencing order that Mr. Parker "shot and killed an innocent bystander while fleeing the police." R 2891; answer brief, page 64. Apparently aware that this doubles the felony murder circumstance and shows no motive for the murder, the state makes up its own facts: "For whatever reason, the victim was chasing Appellant down the street after Appellant had robbed the Pizza Hut. In order to effectuate

his escape, Appellant shot and killed his pursuer. His only reason for doing so was to avoid his imminent arrest." Answer brief, page 64. The record does not show that Mr. Nicholson was actually chasing Mr. Parker or that Mr. Parker deliberately "shot and killed his pursuer" to "effectuate his escape."[4] The record does not show that there was any motive for the murder. Speculation may not substitute for lack of proof. Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993). The state makes no argument, and the court did not find that that there was any intent to eliminate a witness. Any attempt to expand the circumstance beyond the range of witness elimination murders would violate the Ex Post Facto Clause.

C. GREAT RISK CIRCUMSTANCE

The state has made no argument (and has therefore waived any such argument) as to why Hallman v. State, 560 So. 2d 223 (Fla. 1990) does not require striking of this circumstance. Instead the state sets up Suarez v. State, 481 So. 2d 1201 (Fla. 1985) as a straw man and proceeds to punch it vigorously. Answer brief, pages 64-66. Suarez, which struck the circumstance, does nothing to help the state's case. In Rivera v. State, 545 So. 2d 864 (Fla. 1989), to which the state makes a passing reference, Mr. Rivera's appellate counsel did not challenge the circumstance, and this Court did not discuss it.

C1. HARMLESS ERROR

Regarding the avoid arrest and great risk circumstances, the

---

[4] The state later concedes that it did not prove this motive or any motive: "For reasons unknown, Appellant thereafter shot an innocent bystander in the stomach and tried to hide in the bushes of a nearby house." Answer brief, page 70.

state makes a brief claim that the use of these circumstances was harmless. As the beneficiary of error, the state must show beyond reasonable doubt that it did not contribute to the sentencing decision. When the sentencer in a capital case has improperly used an aggravating circumstance, reversal is required unless the state appellate court either determines that the error was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967). Clemons v. Mississippi, 494 U.S. 738 (1990).

"Harmless-error review looks, we have said, to the basis on which 'the jury actually rested its verdict.' Yates v. Evatt, 500 U.S. --, --, 111 S. Ct. 1884,1893, 114 L. Ed. 2d 432 (1991)(emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v. Louisiana, 113 S. Ct. 2078,2081-82 (1993) (emphasis in original). Thus the state must show "beyond a reasonable doubt that the error complained of did not contribute to the [result] obtained." Id. 2081 (quoting Chapman). "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials". Yates v. Evatt, 111 S. Ct. 1884, 1898 (1991) (Scalia, J., concurring) (quoting Bollenbach v. United States, 326 U.S. 607, 614 (1946)). "An appellate court's bald assertion that an error of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion." Sochor v. Florida, 112 S. Ct. 2114, at

2123 (1992) (O'Connor, J., concurring).

The state has not seriously tried to meet this test. Since the judge specifically relied on the avoid arrest and great risk circumstance, it cannot be said that they did not contribute to the sentencing decision. The remaining two circumstances are not particularly aggravating. The record does not show that Mr. Parker's culpability was substantially different from that of anyone guilty of felony murder. See Jackson v. State, 575 So. 2d 181 (Fla. 1991). Given the lack of proof of premeditation (the record simply does not support the proposition that Mr. Parker shot Mr. Nicholson with a deliberate intent to kill), the state is hard pressed to overcome a showing of mitigation. See Breedlove v. Singletary, 595 So. 2d 8,12 (Fla. 1992) ("A strong presentation of mitigating evidence is more likely to tip the scales in a case where the killing was not premeditated.").

Although the state argues at page 66 of its brief that there was "nothing in mitigation," it argues at page 68 that the court found mitigation but that it did not outweigh the aggravating circumstances.[5] The fact is that the defense presented substantial mitigation and, without the improper aggravating circumstances, a life sentence would be proper. The error was not harmless.

D. CONSTITUTIONALITY OF FELONY MURDER CIRCUMSTANCE

Mr. Parker relies on the argument in his initial brief.

X. FAILURE TO CONSIDER OR WEIGH MITIGATION

The judge said there were no mitigating circumstances: "No

[5] It switches its tune again at page 70 of its brief: "... the trial court found ... nothing in mitigation."

mitigating circumstances, statutory or otherwise, apply to the Defendant." R 2891. Aware that this treatment of mitigation is unconstitutional, the state substitutes its own view, asserting that the judge considered mitigation and found it insufficient to outweigh the aggravating circumstances. This is an interesting gloss, but it is contrary to what the judge said. Reversal is required.

XI. PROPORTIONALITY

The state relies on three cases in its brief: In Rivera v. State, 545 So. 2d 864 (Fla. 1989), the defendant shot an officer three times as the officer knelt with his arms upraised. In Carter v. State, 576 So. 2d 1291 (Fla. 1991), the defendant murdered two people while on parole. In Hill v. State, 515 So. 2d 176 (Fla. 1987) the defendant shot two officers in the back while they were arresting his fellow robber. These cases of deliberate murder do not support the state's argument.

XII. CONSTITUTIONALITY OF SECTION 921.141

Mr. Parker relies on the argument in his initial brief.

CONCLUSION

This Court should grant the relief requested.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit

GARY CALDWELL
Assistant Public Defender
Attorney for Dwayne Irvin Parker
Criminal Justice Building
421 Third Street, 6th Floor
West Palm Beach, Florida 33401
(407) 355-7600
Florida Bar No. 256919

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to SARA D. BAGGETT, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, December 2, 1993.

GARY CALDWELL
Assistant Public Defender