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IN THE

SUPREME COURT OF FLORIDA

Brief OK per EC

MAX FENELON,
Petitioner,

vs.

No. 77,765

4DCA No. 89-0881

STATE OF FLORIDA,
Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

Max Fenelon, #185136
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Punta Gorda, FL 33955
Petitioner, Pro se

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STATEMENT OF CASE

Petitioner was indicted by the Broward County Grand Jury for first degree murder (Count 1) and Attempted robbery with a firearm (Count 2). (R735) He rejected a plea offer of 20 years imprisonment for 2nd degree murder (R14,88) and demanded a trial by jury to assert his innocence. (R842) At its conclusion on March 6, 1989, the jury was instructed on flight (R707) over defense counsel's objection. (R588-89, 720) The jury returned a verdict of guilty of both counts as charged. The court immediately adjudged Petitioner guilty of those offenses and sentenced him to life imprisonment with a 25-years minimum mandatory term before eligible for parole for Count one (R840) and to 25 years of imprisonment for Count two and to run concurrently. Prosecutor had waived the death penalty. (R726) Petitioner was allowed 202 days CJT credits.

Petitioner's convictions were affirmed but Count two sentence was vacated. Timely motion for rehearing was denied March 26, 1991. Decision of Fourth District Court of Appeal is set forth in Appendix.

Notice of certiorari jurisdiction was filed April 12, 1991, and this "jurisdictional brief" is submitted in support of the invocation of the discretionary jurisdiction of this Court.

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ISSUE PRESENTED

Does Fenelon v. State, ___ So.2d ___ (Fla. 4th DCA No. 89-0881, 2/13/91) conflict with Merritt v. State, 523 So.2d 573 (Fla. 1988); Shively v. State, 474 So.2d 352 (Fla. 5th DCA 1985); Proffitt v. State, 315 So.2d 461 (Fla. 1975), under the facts of the case and similar point of law, to the detriment of Petitioner's right to a fair and reliable determination of his guilt or innocence under the laws and constitutions of Florida and the United States?

The jury was instructed, over objections, that FLIGHT. A person accused of a crime raises no presumption of guilt. But that is a circumstance that goes to the jury to be considered by you with all the other testimony. And the circumstances should be given such weight as you may determine it[is] entitled to. And the rule is when a suspected person in any manner endeavors to escape or by threatened prosecution attempts by flight or concealment such may [be] then one of[a] series of circumstances [from] which guilt may be inferred.

(R707-708)

Such a misinformed jury instruction deprived this Petitioner a fair and reliable determination of his guilt or innocence, requiring a quashing of the Fenelon v. State decision, under Merritt v. State, 523 So.2d 573 (Fla. 1988) as well as Shively v. State, 474 So.2d 352 (Fla. 5th DCA 1985) and Proffitt

v. State, 315 So.2d 461 (Fla. 1975).

This Court should grant certiorari and redefine the jury instruction on flight, since the currently used instruction misinforms a jury on its application.

Petitioner's entitled to a properly instructed jury As a constitutional right. Cf, Mathews v. United States, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988).

Analytically, "flight" is an admission by conduct and its probative value as circumstantial evidence of guilt depends on the degree of confidence which four inferences can be drawn: 1) from defendant's behavior to flight; 2) from flight to consciousness of guilt; 3) from consciousness of guilt to consciousness of guilt concerning the criminal offense charged; and 4) from consciousness of guilt concerning the criminal offense charged to actual guilt of the crime charged. A flight instruction is improper unless the evidence is sufficient to furnish reasonable support for all four of the necessary inferences.

In the trial at bar, the jury was not informed of these four inferences in giving weight to the circumstances of flight; therefore, the flight instruction invaded the fact finders' province by the presumption of guiltiness without question.—a serious constitutional violation in this case.

This Court should reconsider flight instruction and, perhaps, adopt the herein above four inferences or such other

1. United States v. Myers, 550 F.2d 1036 (5th Cir. 1977), appeal after remand, 572 F.2d 506, Cert. den., 439 U.S. 847, 99 S.Ct. 147, 58 L.Ed.2d 149.

modification of present flight instruction languages to assure criminal convictions are based upon competent evidence beyond a reasonable doubt rather than a mere presumption based upon conduct that does not have an "indicia of reliability." This court should limit the weight to be given such speculative evidence of flight as has been done in other jurisdictions. United States v. Myers, Supra; Commonwealth v. Mates, 476 N.E.2d 608 (Mass. 1985); State v. Wrenn, — Idaho Sup. Ct. —, 24 Cr.L. 2153 (1978)

The Mates court held it to be reversible error for the trial court to refuse to instruct the jury, once such evidence has been introduced, that since there are numerous reasons why an innocent person might flee, flight or similar conduct does not necessarily reflect feelings of guilt, and even where a person's flight does demonstrate feelings of guilt, it does not necessarily mean that the person is guilty, since feelings of guilt are sometimes present in innocent people as well.

The Wrenn court held that "because of the debatable significance of flight as evidence of guilt, an instruction on flight should not ordinarily be given. It should be left to argument to the jury, by the parties, unless the trial judge because of the peculiar facts in the particular case feels it is essential to the jury's deliberations. *** For departure to take on the legal significance of flight, there must be other circumstances present and unexplained which, together with the departure, reasonably justify an inference that it was done with a consciousness of guilt and in an

effort to avoid apprehension or prosecution based on that guilt."

In the present case, Petitioner admitted that he ran away from the scene of the shooting. But there was no other evidence indicating that this action was the result of his fear of prosecution or consciousness of guilt. To the contrary, the evidence at trial was just as consistent with the explanation given by Petitioner at trial, that he ran away out of fear and surprise at having just seen a murder committed. (Other witnesses who did not testify at trial supported this Haitian's account of what happened.) Fearful of his own life, the Petitioner ran down the street, shouting, "the nigger shot the lady"... certainly belies a guilt state of mind — particularly when other witnesses' testimony did not refute these series of events following the "pop of the gun."

This Court should disapprove the Fenelon decision and remand with directions to vacate convictions and sentences, having shown that the jury instruction did not meet constitutional muster under the Due Process Clause of the 14th Amendment and conflicts with decisions of this Court and other District Courts of Appeals.

CONCLUSION

For the foregoing reasons, the Court should grant discretionary writ of certiorari review and disapprove the Fenelon v. State decision and set forth proper

guidelines as to when, if, flight instruction should be given by a trial judge, lest the constitutional rights of defendants be trammeled by deficient instruction on flight.

Respectfully submitted,

/s/ Max Fenelon

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CERTIFICATE OF SERVICE.

I HEREBY CERTIFY A true and correct copy of "jurisdictional Brief" has been mailed to OFFICE OF ATTORNEY GENERAL, 111 Georgia Avenue, West Palm Beach, FL 33401, this ___ day of April, 1991.

/s/ Max Fenelon

MAX FENELON, PETITIONER

SWORN AND SUBSCRIBED before me
this 16th day of April, 1991.
Donald E. Chadwick
Notary Public at Large.

Notary Public, State of Florida
My Commission Expires Oct. 21, 1991
Bonded Thru Troy Fain - Insurance Inc.

APPENDIX - DECISION

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1991

MAX FENELON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 89-0881.

Opinion filed February 13, 1991

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Appeal from the Circuit Court for Broward County; Mark A. Speiser, Judge.

Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Max Fenelon appeals from a judgment and sentence for charges of first degree murder and attempted robbery with a firearm. We affirm in part and reverse in part.

Appellant raises two points in this appeal. First, he contends the trial court erred when it instructed the jury, over his objection, on flight from the crime scene. Appellant argues that evidence of flight, standing alone, is insufficient to support giving such an instruction. The state argues, and we agree, that the record contains sufficient evidence to support the jury instruction on flight. At trial one witness testified that on the morning of the shooting, appellant, whom he had known for approximately one year, told him he was going to "jack"

someone. The witness interpreted this as a statement that appellant intended to commit a robbery. A second witness who knew appellant testified that she saw appellant running past Rally's Restaurant, where she was working, at approximately 4:30 or 5:00 p.m. on the date of the shooting. This witness also testified that she saw what appeared to be the handle of a black gun protruding from appellant's pocket. Another friend of appellant's testified that she saw appellant the evening of the shooting and appellant told her that a gun he had been holding had discharged and that a lady was shot.

> Flight evidence is admissible as relevant to the defendant's consciousness of guilt where there is sufficient evidence that the defendant fled to avoid prosecution of the charged offense.

Merritt v. State, 523 So.2d 573, 574 (Fla. 1988)(citations omitted) Thus, we affirm on this point.

Appellant next contends that because the sentencing guidelines applied to appellant's conviction for attempted robbery, the trial court erred in sentencing him to a term of twenty-five (25) years in prison without reference to a guideline scoresheet. Appellant maintains that the sentence is illegal because attempted armed robbery is a second degree felony punishable by no more than fifteen (15) years in prison. The state concedes that the the trial court should have prepared a scoresheet for Count II, see Lamb v. State, 532 So.2d 1051, 1054-1055 (Fla. 1988), and further concedes that the maximum statutory penalty for this crime is fifteen (15) years. The state argues, however, that since the trial court did not realize it

exceeded the sentencing guidelines, that on remand it should be permitted to depart from the guidelines. We agree. See State v. Vanhorn, 561 So.2d 584 (Fla. 1990).

Accordingly, we vacate the sentence and remand for re-sentencing with leave to depart from the guidelines provided the court submits at least one valid written reason for its departure.

AFFIRMED IN PART; REVERSED IN PART and REMANDED.

LETTS, DELL, JJ., and WALDEN, JAMES H. (Retired), Associate Judge, concur.