D.A. 01-08-92 OCTW/app.

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

MAX FENELON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 77,765

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Appellant was the defendant and Appellee was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In the brief, the parties will be referred to by name.

The following symbol will be used:

"R" Record on Appeal

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AUTHORITIES CITED

STATEMENT OF THE CASE

Mr. Fenelon was indicted for first degree murder (Count I) and attempted robbery with a firearm (Count II) (R 735). He rejected a plea offer to twenty years imprisonment for second degree murder (R 14,88), and the case proceeded to jury trial (R 842). At its conclusion on March 6, 1989, the jury was instructed on flight (R 707), over Mr. Fenelon's objection (R 588-589,720). The jury thereafter found Mr. Fenelon guilty of each of the charges made against him (R 837,838). He was immediately adjudged guilty of those offenses, and, the prosecutor having waived the death penalty (R 726), sentenced to life in prison with a twenty-five year mandatory minimum sentence on Count I (R 840), with a concurrent twenty-five year sentence on Count II (R 841). Credit was given for 202 days served.

On appeal to the Fourth District Court of Appeal, the appellate court rejected Mr. Fenelon's contention that the trial court erred in instructing the jury on flight. See, Appendix. This Court accepted jurisdiction of this cause in an order dated September 10, 1991. This initial brief on the merits follows.

STATEMENT OF THE FACTS

Ulrick Daniel, the owner of D & D Caribbean Furniture store, testified for the State that he knew Lucette Oliver for a couple of years as a customer in his store (R 189). Both were Haitian (R 189). On August 16, 1988, she came to his shop at about 2:00 p.m. with a work order (R 192). She returned later, and Daniel noticed that another individual named Paul Jerome was sitting in the passenger seat of the brown Volvo Ms. Oliver was driving (R 196). Suddenly, Daniel heard a shot (R 197). Daniel said Ms. Oliver fell into his arms as he rushed out to see what happened (R 200). Daniel did not know Mr. Fenelon, although he had seen him before the shooting (R 200). Ms. Oliver died as a result of a contact gunshot wound to the neck (R 286).

Herard Martelus, the co-owner with another Haitian named Kenard of Wiler's Paint and Body Shop, which was located near D & D Furniture (R 215-216), said he saw Mr. Fenelon earlier that day at about 10:00 or 11:00 (R 218). Martelus had known Mr. Fenelon for about a year (R 213). According to Martelus, Mr. Fenelon said he was going to "jack" someone, which Martelus took to mean that he was going to commit a robbery (R 219). Martelus said Mr. Fenelon had a gun, the outline of which Martelus claimed to have seen beneath his shirt (R 220).

Betty George, 17, knew Mr. Fenelon through his cousin Ofin (R 306). She had had a bit of a crush on him and was hurt when Mr. Fenelon told a friend of hers that he did not want her because she was too fat (R 327). Another friend agreed that Ms. George did not like Mr. Fenelon very much at this time (R 350).

At 4:30 or 5:00 p.m. on August 16, 1988, George said she saw Mr. Fenelon running past Rally's Restaurant, where she was working (R 312). Ms. George said the handle of a black gun was protruding from his pocket (R 315). She admitted, however, that Mr. Fenelon sometimes carried a beeper and a Sony Walkman during this time period (R 322, see also, R 536). Earlier that day, she had seen Mr. Fenelon in conversation with Paul Jerome outside the restaurant, but she didn't hear what he said (R 309).

Ms. George said that later that evening, at about 6:30 when she was on break, Mr. Fenelon told her what happened (R 316). He said there had been an accident. Paul had told him that a lady had $5,000 in drug money hidden in her trunk. The men wanted to scare her and get the money. Mr. Fenelon, Paul, and Ira (Martelus) were around her (R 317) when the gun fired accidentally (R 319).

Mona Lisa Rolle, 14, a friend of Mr. Fenelon's (R 339), testified that she saw him at about 5:00 or 6:00 p.m. the day that Ms. Oliver was shot (R 343). He told her that he was in trouble and needed her help. A gun he was holding (R 353) had gone off accidentally and a lady was shot (R 343). He gave her a receipt for some photographs and asked her to pick them up for him from the store (R 345). But Ms. Rolle instead gave the receipt to the police (R 346).

Mr. Fenelon was arrested on August 17, 1988, at 7:30 p.m. (R 358). At the police station, he was advised of his rights (R 360-365) and at 10:35 p.m., gave his first statement, in which he said he ran away from the scene after seeing a man shoot a woman sitting in the driver's seat of a brown Volvo (R 367-368). When the police

told him that his story did not comport with information they had, Mr. Fenelon gave a second account, in which he stated that Paul Jerome asked him to help rob a lady about two weeks earlier, saying she had two million dollars hidden inside a hollow television set, the illicit gains from printing forged passports and visas (R 371-372). Mr. Fenelon said he went to the car in which the lady was sitting, but that he did not have a gun (R 370). Paul Jerome placed a bag over her head (R 373).

The police again expressed their dissatisfaction with this story (R 374). In Mr. Fenelon's third version, he admitted firing the gun at the D & D Furniture Store at about 1:00 p.m. the day Ms. Oliver was killed and holding the gun at the car when she was confronted (R 374). He said she grabbed the gun in his hand when Jerome put the bag over her head, causing it to discharge into her neck (R 374). Mr. Fenelon said he dropped the gun and ran away (R 374). Mr. Fenelon's last account was similar, except that he said the gunshot was caused when Paul hit his hand (R 377).

A tape recorded statement was taken from Mr. Fenelon at this time (R 378), and introduced into evidence at trial (R 379). In it, he reiterated the most recent explanation of what had happened (R 393-400). He also said he cut out and kept a newspaper article about the killing (R 405), which he gave to police.

The police never found a hollow television set or any money in Ms. Oliver's belongings (R 425). An empty change purse which had been cut open was found near her car (R 245). Very few blood stains were found inside the car itself (R 261), indicating that Ms. Oliver was not shot there (R 297-298).

Testifying in his own behalf, Mr. Fenelon denied participating in the robbery (R 494), which he had heard several Haitians, including Ulrick Daniel, Herard Martelus, and Paul Jerome planning on the day of the shooting (R 488-489,493-494). He was busy doing bench presses on some exercise equipment at the furniture store when he heard a shot (R 498). He did not shoot the woman (R 507). When he looked outside, he saw her bleeding from the mouth (R 498). Scared, he ran away,exclaiming, "My God, the nigger shot the lady." (R 548).[1]

Mr. Fenelon had confessed to the police because one of the interrogating officers, Detective Williams, hit him in the mouth, pushed his head against the table, and kicked him, threatening to kill him if he didn't give the statement the police wanted (R 508). A photograph taken by the public defender's investigator showed that Appellant showed bruises on August 23 (R 464). No bruises could be seen on Mr. Fenelon's booking pictures (R 431). Detective Williams testified in rebuttal that he did not hit Mr. Fenelon while questioning him (R 599,603), although at his deposition, Williams had stated that he was not even present at Appellant's interview (R 605).

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[1] Not called by the State at trial were Anthony Johnson and Patrick Ottey, employees at a tire store located next to D & D Furniture Store, who testified at the hearing on Appellant's motion to suppress his statements and identification that they saw a man they identified as Appellant running from the scene of the shooting saying, "Oh my God. He shot the lady," (R 118) or "The nigger shot the lady." (R 154).

SUMMARY OF THE ARGUMENT

A jury instruction on flight may only be given where the evidence supports a conclusion that the defendant has tried to escape prosecution for the offense being tried. Merely leaving the scene of the crime is insufficient to authorize a flight instruction, even if other evidence exists which may support a conclusion that the defendant is the perpetrator.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FLIGHT OVER APPELLANT'S OBJECTION WHERE THE EVIDENCE DID NOT SUPPORT SUCH AN INSTRUCTION.

Over defense objection (R 588-589, 720), the trial court instructed the jury that

> Flight. As 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.

(R 707-708).

An instruction on flight is an exception to the general rule prohibiting the trial court from commenting on the evidence. Whitfield v. State, 452 So.2d 549, 550 (Fla. 1984); see also, Haywood v. State, 466 So.2d 424 (Fla. 4th DCA 1985). Ordinarily,

> 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). But, flight alone will not support an instruction that such flight is evidence of the consciousness of guilt, since it is no more consistent with

guilt than with innocence. Whitfield, supra, at 550; Merritt, supra, at 574.[2]

Thus, the State was entitled to show the jury that a defendant being tried for murder escaped from jail while being held on that charge. When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to police, or otherwise, evidence thereof is relevant because of the consciousness of guilt which may be inferred therefrom. Harvey v. State, 529 So.2d 1083 (Fla. 1988). See also, Jordan v. State, 419 So.2d 363 (Fla. 1st DCA 1982) [when accosted by police, defendant jumped on back of car driven by wife, who inadvertently drove into ditch].

On the other hand, this Court has rejected the propriety of a flight instruction where the State failed to establish at the defendant's murder trial that he was fleeing prosecution for that offense when he was stopped by the highway patrol for speeding. Rhodes v. State, 547 So.2d 1201, 1203 (Fla. 1989). "From the evidence presented at trial the jury could not reasonably infer that Rhodes was fleeing to avoid prosecution." Id.

In Jackson v. State, 575 So.2d 181, 188-189 (Fla. 1991), this Court re-affirmed its commitment to the principle that "departure

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[2]Some jurisdictions go further in limiting the weight to be given evidence of flight. In Massachusetts, for instance, it is 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 persons as well. Commonwealth v. Matos, 476 N.E.2d 608 (Mass. 1985).

from the scene of a crime, albeit hastily done, is not the flight to which the jury instruction refers." More is required to support the giving of an instruction on flight. "Otherwise, the instruction would be given every time a perpetrator left the scene, and it would be omitted only in those cases where the perpetrator waited for the police to arrive." Id. In Jackson, the trial court was held to have erred in giving an instruction on flight based on evidence that two unidentified men ran from the store and a witness saw the defendant driving away from the general direction of the store, possibly in excess of the speed limit.

In the present case, Mr. Fenelon 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 Mr. Fenelon at trial, that he ran away out of fear and surprise at having just seen a murder committed.[3]

The instant case is thus similar factually to Barnes v. State, 348 So.2d 599 (Fla. 4th DCA 1977), in which the defendant's conviction was reversed for a new trial. One of the errors which required this result was the trial court's instruction on flight where the defendant walked home after fighting the victim, who later died from a brain hemorrhage. Even when the defendant was informed the police were looking for him, he stayed home, claiming that he acted in self defense. The appellate court found that the

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[3]Other witnesses who did not testify at trial supported this account of what happened (R 118, 154).

evidence in Barnes was insufficient to indicate that the defendant fled the scene or hid himself or did anything indicating that he intended to avoid detection.

Also instructive on this issue is Shively v. State, 474 So.2d 352 (Fla. 5th DCA 1982). There the defendant was confronted by nine others, one of whom he stabbed and one of whom chased him back to a wedding reception he had left earlier. This "evidence did not clearly establish that appellant's leaving the scene of the crime indicated an intent on his part to avoid detection or capture." Id., at 354. Rather it suggested that he left the scene because he was fearful of his life. As such, it did not support the giving of a flight instruction to the jury. See also, Meggison v. State, 540 So.2d 258 (Fla. 5th DCA 1989) [defendant tries to commit suicide after pleading guilty while awaiting sentencing "not probative of flight from a pending prosecution"]; Williams v. State, 378 So.2d 902 (Fla. 5th DCA 1980) [police chase automobile after seeing hitchhiker passenger call for help; hitchhiker ejected and vehicle keeps driving for another quarter of a mile before stopping].

In the present case, there was likewise nothing in addition to the mere fact of leaving the scene of the offense upon which to base an opinion that Mr. Fenelon was fleeing a pending prosecution. The scene of a murder, yes. The sound of gunfire, yes. The police, no. As stated in Profitt v. State, 315 So.2d 461 (Fla. 1975):

> The general rule in Florida ... is to the effect that the defendant's leaving at a time which could have been after the crime, although at an unusual hour, is, when standing

> alone, no more consistent with guilt than with innocence.

The giving of the flight instruction was thus error.

In its decision in the present case, the Fourth District Court of Appeal nevertheless held that the evidence at trial below was sufficient to support the jury instruction on flight, citing the following testimony:

> At trial one witness testified that on the morning of the shooting, appellant, whom he had known for approximately one year, told him that 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 the gun he had been holding had discharged and that a lady was shot.

See, Appendix.

But this evidence, relied on by the district court of appeal, is patently not additional evidence of circumstances surrounding the fleeing itself which satisfactorily indicate that the flight was from a pending prosecution. Rather, it is additional evidence which might, if so viewed, support Appellant's conviction. Apparently, the district court reasoned that if Mr. Fenelon committed the robbery and/or the shooting, he must have fled the scene to avoid prosecution, because this is what any self-respecting criminal would do. Thus, the district court's decision in the present case appears to hold that, so long as the evidence

convinces a reviewing court that the defendant is guilty, an instruction on flight is authorized. But that evidence sufficient to support conviction is not alone the test for whether a flight instruction is given is demonstrated in Jackson, itself, where this Court held that it was error to give the flight instruction because the evidence surrounding the fleeing showed only that the defendant hastily left the scene of the crime, but nevertheless upheld his conviction because, based on the substantial other evidence of guilt, the error was harmless beyond a reasonable doubt. Id.

The reasoning announced by the Fourth District Court of Appeal below puts the cart before the horse. It was the jury's obligation to determine whether or not Mr. Fenelon was guilty of participating in the robbery and shooting. In determining whether the testimony of the State's witnesses should be believed, and if believed, what effect it should be given, the jury was permitted to draw reasonable inferences from the circumstantial and other evidence presented at trial. One of those circumstances may, in a proper case, be flight, if that flight is independently proven. But if the evidence establishes no more than that the defendant left the scene of the crime, as even innocent persons may do where a violent crime is being or has been committed, then "flight" within the meaning of the jury instruction has not been proven, may not be considered a circumstance in the case, and the inference of guilt which is drawn from flight may not be indulged. Hence, the jury instruction to the contrary cannot be warranted. Jackson v. State, supra, 575 So.2d at 189.

In the present case, Mr. Fenelon agreed that he ran from the scene of the robbery/shooting. As in Jackson, supra, however, there were no additional facts to indicate that he was fleeing out of fear of prosecution, rather than simply putting himself out of harm's way after hearing shots being fired. Absent additional circumstances indicating that the Mr. Fenelon's flight was from a pending prosecution, so that his consciousness of guilt could with some validity be inferred, the trial court reversibly erred in instructing the jury on flight over Mr. Fenelon's objection.

CONCLUSION

Based on the foregoing authority and the authority cited, Mr. Fenelon requests that this Court reverse the judgment and sentence below and remand this cause with directions that he be granted a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JAMES J. CARNEY, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 3rd day of OCTOBER, 1991.

Of Counsel

IN THE SUPREME COURT OF FLORIDA

MAX FENELON,

Petitioner,

vs. CASE NO. 77,765

STATE OF FLORIDA,

Respondent.
_____/

P E T I T I O N E R ' S A P P E N D I X

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

MAX FENELON,

Appellant,

v. CASE NO. 89-0881.

STATE OF FLORIDA,

Appellee.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioner's Appendix has been furnished to JAMES J. CARNEY, ESQ., Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 3rd day of OCTOBER, 1991.

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