IN THE SUPREME COURT OF FLORIDA

EMANUEL JOHNSON, :

Appellant, :

vs. : Case No. 78,336

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SARASOTA COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Citing Rodriquez v. State, 502 So. 2d 18 (Fla. 3d DCA 1986), the State claims that Appellant has not "clearly, concisely, and separately" identified the "specific claims raised and arguments presented in support thereof" on which he relies in case number 78,337. Brief of Appellee at 1. Appellant thinks he has already done this, but, to make the record clear, he now states that he "clearly, concisely, and separately" relies in every possible respect on all of the "specific claims raised and arguments presented in support thereof" in case number 78,377.

ARGUMENT

ISSUE I

THE CONFESSIONS SHOULD HAVE BEEN SUPPRESSED.

B. The dilution of the Miranda warnings

The State fails to recognize that, although the police told Johnson his statements could be used against him in court, they simultaneously told him that the polygraph would not be used against him. This confusing and contradictory advice diluted the Miranda warnings and nullified their prophylactic effect. The officers never explained to him clearly what would and would not be used in court.

Further, the officers admitted that the interview was going nowhere and was effectively over. Consequently, they enticed Johnson into continuing the interview by taking the polygraph. At

that point, Johnson had agreed to waive his rights only with respect to taking the polygraph and nothing more. Consequently, when the polygraph and the effect of the prior waiver were over, the officers were required to obtain his permission to continue the interview and did not do so.

C. The requests to end the interrogation

The State claims that "even though Johnson stated that he was tired, he did so only as an effort to divert the direction of the interview." Brief of Appellee at 11. As Appellant argued in his Initial Brief, this is not a plausible interpretation of the events and perforce is not the only plausible interpretation. An expression of fatigue by its nature indicates a desire to cut off all topics of conversation and not only some of them. A person who at 3:30 a.m. says he is tired is saying he wants to go to bed. He is not saying he wants "to divert the direction of the interview" to some other subject for which he will somehow become magically refreshed.

In any event, **the State has confessed error by taking this position on appeal.** If the State's interpretation is correct, then Johnson was trying "to divert the direction of the interview" away from some subject he did not want to discuss. The police never clarified what subjects he did or did not want to discuss, and this was error, because defendants under interrogation have the right to control "the time at which the questioning occurs, the subject discussed, and the duration of the interrogation." Michigan v.

Mosley, 423 U.S. 96, 103-04 (1975); accord Owen v. State, 560 So. 2d 207 (Fla. 1990).

D. Voluntariness

The State finds comfort in Dr. Ofshe's conclusion that, if he disregarded Johnson's version of the interrogation, then he did not think the police interrogation techniques were excessive.[1] Brief of Appellee at 13. The legal validity of the interrogation techniques, however, is an issue for this Court, not an expert, to decide, although experts can certainly add their insights. As Dr. Ofshe himself said, "[W]hat I'm attempting to do is analyze what I think caused him to confess. The judgment as to whether or not that was proper . . . is someone else's judgment." (W1124A)

Furthermore, since the State apparently believes that Dr. Ofshe is a well-regarded expert whose judgments (given certain facts) should be accepted, then the State should accept all of his judgments on the facts and not conveniently overlook the opinions it does not like. In this case, when the prosecutor below asked for Ofshe's opinion on the police interrogation techniques, Ofshe responded that the police had erred by "not acceding to [Johnson's] request to stop because he was tired." (W1125) According to Ofshe, the police deliberately ignored Johnson's statements of fatigue, because the police did not want the interrogation to end. (W1116) The officers admitted that Johnson repeatedly said he was tired. Accordingly, if the State wants to accept Dr. Ofshe's expert

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[1] The State inaccurately cites pages 726-27 of the record for this proposition. The State may have meant pages 1125-26.

opinions on other facts, then it should also accept his opinion that the police acted improperly by ignoring these undisputed statements of fatigue.

The State's only argument on the voluntariness issue is that this Court should believe Dr. Ofshe, even though he expressly disclaimed the authority to make legal judgments. The State flatly ignores the Appellant's arguments, which established that Johnson was weeping and confessed involuntarily at 4 a.m. after several hours of interrogation without food or rest, deceptions about the evidence and arrest, six failed polygraph tests, insinuations of psychiatric illness, false sympathy, repeated accusations, and a final denunciation which simultaneously promised assistance for his sexual problems. Since these arguments are entirely unrebutted, this Court must find that the confessions were involuntary.

E. Violation of right to counsel

In Traylor v. State, 596 So. 2d 957 (Fla. 1992), this Court held that the police cannot obtain a valid waiver of a defendant's section 16 right to counsel under the Florida Constitution without complying with Florida Rule of Criminal Procedure 3.111(d). Rule 3.111(d) requires, among other things a "thorough inquiry . . . into both the accused's comprehension of that offer [of counsel] and the accused's capacity to make an intelligent and understanding waiver." The rule further requires that out-of-court waivers of the right to counsel "shall be in writing with not less than 2 attesting witnesses" who "shall attest the voluntary execution

thereof." Cf. Traylor, 596 So. 2d at 973 ("the waiver was in writing, signed by two attesting witnesses").

In this case, the officers made no inquiry into Johnson's comprehension of the offer of counsel under Miranda and no inquiry into his capacity to make an intelligent and understanding waiver. According to the State's own brief on appeal, the officers testified at the hearing only that Johnson "appeared" to understand the Miranda warnings were read to him. Brief of Appellee at 16. This observation of Johnson's appearance was not an inquiry of any sort, much less the "thorough" inquiry required by the rule.

Further, Johnson made no written waiver of rights. Only one witness signed the notification of rights document which Johnson did sign (which was not a waiver of rights), and the line for the second witness is conspicuously blank. (W6766) This document did not contain the written attestations of voluntariness which the rule required, and, even if oral attestations after-the-fact would be sufficient, nobody at the suppression hearing years later attested orally that the waiver was voluntary. Accordingly, contrary to the State's views, the record establishes complete noncompliance with Rule 3.111(d).

In addition, as explained in Johnson's initial brief, the police never advised him that the judge had forbidden his release and that he would remain in jail no matter what he said. They also never told him that, as part of the first appearance procedure, a lawyer would be available to speak to him within a few hours. Since his right to counsel had attached, he was entitled to know

these consequences of the beginning of judicial process. Certainly, knowledge of these facts would dramatically have affected his perception of his true situation and his willingness to speak to the police. Consequently, the mere Miranda waiver was insufficient absent knowledge of these matters, because the waiver was not knowing, intelligent and voluntary within the meaning of the Sixth Amendment, section 16, and rule 3.111(d).

The State argues in the alternative that Johnson's Sixth Amendment right to counsel had not attached at the time of the interrogation. Brief of Appellee at 18. The State here ignores Johnson's argument, based on Traylor, that his section 16 right to counsel under the Florida Constitution had attached because the officers could have booked him immediately by taking him to the jail across the street. Having failed to address this argument, the State must be deemed to have conceded it.

The State relies on Peoples v. State, 576 So. 2d 783 (Fla. 5th DCA 1991), Brief of Appellee at 18, but discloses neither that this Court reviewed this decision nor that this Court affirmed only because the error was harmless. This Court expressly disapproved the lower court's analysis on which the State now relies. Peoples v. State, 612 So. 2d 555 (Fla. 1992). This reliance on a disapproved case is especially striking because Appellant cited this Court's decision in Peoples in his initial brief in this case.

The State also cites United States v. Langley, 848 F.2d 152 (11th Cir. 1988), but this decision is distinguishable, because it relied on two binding Fifth Circuit decisions--Lomax v. Alabama,

629 F.2d 113 (5th Cir. 1980), and McGee v. Estelle, 625 F.2d 1206 (5th Cir. 1980). Both Lomax and McGee turned on the prosecutor's non-involvement in obtaining the warrant (Lomax) and the lineup (McGee). For example, in Lomax, the court found that

> nothing . . . indicates any involvement of the state's prosecutorial forces at the time the warrant was issued: there is no evidence of a commitment to pursue prosecution or an awareness of petitioner's impending arrest. . . . Absent proof of significant prosecutorial involvement in procuring an arrest warrant, the arrest must be characterized as purely investigatory--the forces of the state have not yet solidified in a position adverse to that of the accused. Thus, petitioner's formalistic proposition must be rejected, although we do not intimate whether the same result would follow in a case in which the prosecution was involved in the warrant procedure.

Lomax, 629 F.2d at 416. Similarly, in McGee,

> [o]nly the police were involved in the lineup; the prosecution had no involvement. Moreover, the prosecution did not even know that the lineup was taking place. We hold that an adversary criminal proceeding has not begun in a case where the prosecution officers are unaware of either the charges or the arrest.

625 F.2d at 1208.[2]

By contrast to Langley, Lomax and McGee, a prosecutor in this case assisted detective Sutton in preparing the probable cause affidavit and arrest warrant and with other matters during the afternoon and evening. (W511, 572-74) The formal affidavit prepared with the prosecutor's assistance and approval and sworn to

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[2] McGee also decided that the Sixth Amendment right to counsel had not attached even though the defendant had appeared before a magistrate for statutory warnings under Texas law (albeit with no prosecutorial involvement). Because, contrary to McGee, this Court in Owen v. State, 596 So. 2d 985 (Fla. 1992), found that the first appearance hearing is an adversarial proceeding, Langley's reliance on McGee makes Langley's holding and analysis suspect with respect to Florida law.

Judge Silvertooth by Sutton said that "based upon positive fingerprint identification of Emanuel Johnson probable cause exists for Johnson's arrest." (W6452) Accordingly, it is incontestable that the government had "committed itself to prosecute" and that Johnson found "himself faced with the prosecutorial forces of organized society." Kirby v. Illinois, 406 U.S. 682, 689 (1972).

Because a prosecutor was significantly involved in obtaining the warrant, the State's reliance on Langley and its predecessors is misplaced. In any event, federal law is not dispositive of the issue, because Johnson's Section 16 rights had attached even if his Sixth Amendment rights had not. Johnson's confessions must be suppressed because his right to counsel had attached and the police failed to obtain an effective waiver.

ISSUE II

THE POLICE SEIZED CLOTHING WITHOUT PROVIDING PROBABLE CAUSE THAT EVIDENCE WOULD BE FOUND AND WITHOUT DESCRIBING WITH PARTICULARITY THE ITEMS TO BE SEIZED.

The State claims that Johnson signed a consent form for the search of his apartment and therefore waived any right to contest the seizure of the fibers from the shirts in his apartment. While the State admits that the prosecutor did not present this argument to the judge, it deviously neglects to mention the reasons why the argument was not presented.

In the first place, although the police claimed that Johnson had signed the consent form, they were not able to find it for the hearing on the motion to suppress confession.

> THE COURT: Well, will the prosecutor represent to me that this document can't be found?
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> MR. DENNEY: Judge, I will represent that we've been looking for it and they have not found it. If it is found I will present it in court and put testimony on with the document. But at this time we do not have that document or we would present it to the Court.

(W742-43) Not surprisingly, the prosecutor chose not to rely on this non-existent consent form at the pretrial search suppression hearing on May 30, 1990, or at the second hearing during trial on May 20, 1991, although he certainly had plenty of opportunity to do so. The attorney general should do likewise and not disinter this argument which the prosecutor waived.

In any event, even assuming arguendo that Johnson did sign a consent form, the police may already have seized his apartment by the time he signed it. Detectives Kimball and Korich secured Johnson's apartment at 10:15 p.m. (W1223, 6834) After Judge Dakan signed the search warrant based on a sworn affidavit some two hours later at 12:02 a.m., Sergeant Lacertosa took the warrant to Johnson's apartment. (W1203, 6836) The State now falsely alleges that the search of the apartment occurred at 2:20 a.m. Brief of Appellee at 20. Detective Korich, however, testified that the search warrant was executed at 12:30 a.m. and the search ended at 2:15 a.m., while Sergeant Lacertosa testified it was executed at 12:35 a.m. and the search ended at 2:10 a.m. (W1206-07, 1224-25)

Although the State selectively cites detective Sutton's testimony that Johnson signed the form at the station at 12:20 a.m., it neglects to mention detective Sullivan's testimony that it was signed at approximately 12:30 a.m., just before the interview

with Sergeant Stanton which began at 12:35 a.m. (W743, 6843) Thus, detective Korich testified that the search of the apartment began at 12:30 a.m.. On the other hand, Detective Sullivan testified that the consent form was signed at the station at "approximately" 12:30 a.m., which is just to say that it might have been signed a few minutes later, after the search had started.

The State has the burden of proof to establish a valid consent. It clearly cannot establish here that the consent occurred before the search. "[W]hen consent is obtained after illegal police activity such as an illegal search, the subsequent consent is presumptively tainted." West v. State, 588 So. 2d 248, 250 (Fla. 4th DCA 1991). Consequently, if the seizure and search in this case was illegal, then the supposed consent in this case was presumptively tainted because the State cannot show that it occurred before this illegal search.

Finally on this point, the officers who obtained the search warrant and searched the apartment had no knowledge of the alleged consent, which the interrogating officers obtained independently of the other officers. As Appellant discussed at greater length in his initial brief in case number 78,337, the fellow officer doctrine requires the arresting officer to have some communication with the officer with probable cause. Although no specific "magic words" are necessary, "there must be some chain of communication between the arresting officer and the officer who has probable cause to arrest." Carroll v. State, 497 So. 2d 253, 260 (Fla. 3d DCA 1985). "The arresting officer must be possessed of information

prior to the arrest which would constitute the required probable cause to justify the arrest being made." D'Agostino v. State, 310 So. 2d 12, 15 (Fla. 1975).

A similar conclusion applies here. The searching officers had no knowledge of the alleged consent and in fact were relying on the warrant they had just received from Judge Dakan. Absent some knowledge and channel of communication between the interrogating officers and the searching officers, the alleged consent cannot justify the search.

This Court must affirm the trial court's decision if it is correct, even if it is correct for the wrong reason. This principle, however, only applies to questions of law. This Court is not a fact-finder of fact, and affirming the trial court on the basis of the alleged consent would require numerous factual determinations not made below. Clearly, the officers' credibility was at issue, because they alleged the existence of a consent form which later could not be found. Further, the record contains no evidence about the scope of the supposed consent, and, as explained above, the timing of the consent and the search is unclear. In addition, some other reason may exist why the prosecutor chose not to argue this point. This Court may not resolve these factual matters for the first time on appeal. The prosecutor waived this argument by not making a sufficient testimonial record.

In addition to Appellant's discussion in his initial brief of the good faith exception, he adds that State v. Bamber, 19 Fla. L. Weekly S47 (Fla. Jan. 20, 1994), found that the legislature could

properly supplement the Fourth Amendment through the knock-and-announce statute. A similar conclusion applies to section 933.05, Florida Statutes (1993). This statute does not have a good faith exception, and this Court may not read one into it without rewriting it, particularly since rewriting it in this instance would broaden rather than narrow its scope. See State v. Stalder, 19 Fla. L. Weekly S57 (Fla. Jan. 27, 1994).

On the merits, the rule is that "nothing should be left to the discretion of the executing officer." State v. Nelson, 542 So. 2d 1043, 1045 (Fla. 5th DCA 1989); Stanford v. Texas, 379 U.S. 476, 437 (1965). The warrant in this case does not even come close to meeting this standard. In addition to the cases cited in Appellant's initial brief, he adds State v. Maycan, 458 So. 2d 63 (Fla. 4th DCA 1984) (warrant's specification of items to be seized as "violation of law relating to narcotics or drug abuse being violated therein" was too general); State v. Nuckolls, 617 So. 2d 724 (Fla. 5th DCA 1993) (warrant for "documents tending to establish the identity of person(s) involved in the commission of odometer fraud, title fraud, forgery and notary fraud" was too broad); United States v. LeBron, 729 F.2d 533 (8th Cir. 1984) (warrant for "property believed to be stolen" was conclusory and non-descriptive).

Recognizing that the warrant as written is too broad, the State now wants to rewrite it to specify "those items that have potential forensic comparison value such as clothing or items that could have been at the scene of the crime." Brief of Appellee at

24. Unfortunately for the State, the warrant simply does not say this and instead allows the seizure of any item of comparison value, whether it was at the scene or not. Certainly, the police--through their general, exploratory rummaging for several hours of the entire apartment and their seizure of business cards, watches, guns, jewelry boxes, video tapes, etc.--did not interpret the warrant this way.

Furthermore, even if the warrant had been written in this manner, it would still be too broad, conclusory, and nondescriptive. Many items which the police seized "might" have been at the scene and have been of forensic comparison value. Conceivably, for example, the jewelry box "might" have been the victim's and had her fingerprint on it. Moreover, we can safely say that one of the T-shirts seized was not at the scene, since Johnson was not wearing both of them. Nevertheless, the warrant in the State's view permitted the officers to seize both T-shirts. Most of the items in the apartment "might" have been at the scene. Consequently, permitting the officers to decide which items "might" have been at the scene would again afford them the discretion which the law forbids.

The affidavit and warrant in any event failed to establish that any forensic evidence existed to be compared to items seized from the apartment. Specifically, the affidavit did not state that any fibers were collected at the crime scene. Unlike cases in which the police need a warrant to collect evidence at the crime

scene,[3] the police in this case were supposedly searching for fibers and other forensic evidence not at the crime scene but at the defendant's apartment a week after the crime. Their request to search for fibers would only be justifiable if they already had fibers to compare. Consequently, an **elementary** prerequisite for their warrant request was a showing that fibers had already been collected. On this point, the affidavit was totally silent.

The police certainly had the capability of being specific and giving an exact description of what they supposedly already had. Accordingly, the sworn affidavit was insufficient to establish that the seized fibers would provide evidence of the crime and did not justify the general warrant issued and executed below.

ISSUE III

THE TRIAL COURT SHOULD HAVE EXCUSED FOR CAUSE A JUROR WHO WOULD VOTE FOR DEATH AS THE PROPER PUNISHMENT FOR ALL FIRST DEGREE MURDERS AND WOULD NOT CONSIDER MITIGATING FACTORS.

The cases cited by the State are distinguishable. Unlike the prospective jurors in Penn v. State, 574 So. 2d 1079 (Fla. 1991), and Valdez v. State, 18 Fla. L. Weekly S481 (Fla. Sept. 9, 1993), juror Lahiff in this case never expressly said she could set aside her opinions and follow the law as instructed. The record as a whole revealed that she would have great difficulty in following the law and created at least a reasonable doubt of her ability to

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[3] This point clearly distinguishes State v. Moorman, 744 P.2d 689 (Ariz. 1987), cited by the State, in which the motel room searched was the crime scene and the officers saw blood spots and a wet floor and noticed a medicinal smell in the room before they obtained the warrant to search the room.

follow the law. Moreover, unlike the jurors in Penn and Valdez, she specifically said she could not give proper weight to mitigating circumstances. See Thomas v. State, 403 So. 2d 371 (Fla. 1981).

Hall v. State, 614 So. 2d 473 (Fla. 1993), cited by the State, is likewise not pertinent, because Hall involved only a refusal to grant a peremptory challenge rather than a refusal to grant a cause challenge. Although this Court in the context of cause challenges has recently announced a new rule requiring defense counsel to identify whom they would have peremptorily challenged had their requests for more peremptory challenges been granted, this Court has never combed the record to second-guess these defense identifications of objectionable jurors or required counsel to prove that these jurors were objectionable beyond the fact that counsel objected to them.

Requiring such a proof would be antithetical to the nature of the peremptory challenge, which generally permits challenges for any reason or no reason at all. Counsel might have had numerous reasons not apparent in the record for not wanting the juror on the panel. Surely, this Court does not want a hearing in the style of Neil and Batson at trial and on appeal in which the defense and the State would argue about whether the juror was objectionable, on the off-chance that this Court might find the denial of the cause challenge to be error.

Even if arguendo the record must support the "objectionability" of the prospective juror, this Court should shift the burden to

the State to establish that the juror is not objectionable, after the defense identifies which juror would be struck if more peremptories were granted. Here, the prosecutor made no objection. Moreover, the State on appeal has not even bothered to identify the relevant record pages and has simply said that "a review of the [the jurors'] responses does not support such a claim." Brief of Appellee at 28. This is not enough to satisfy its burden, and Appellant declines to do the State's job for it. In any event, as Appellant stated in his initial brief, the defense would have struck juror Seymour, and she had been the victim of a burglary (W4127, 4164), which was absolutely a valid reason for exclusion in this burglary case.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance M. Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 7th day of February, 1994.

Respectfully submitted,

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