IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 78,468

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DOUGLAS S. CONNOR
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER 350141

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33830
(813) 534-4200

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

Appellant will rely upon the Statement of the Case as presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

SUMMARY OF THE ARGUMENT

Contrary to Appellee's assertion, Bolin did not waive his husband/wife privilege. He did not personally disclose any marital communications. Nor did the deposition of Cheryl Coby amount to a consent to disclosure of marital communications because the deposition never became public record. Moreover, there is no authority for the State's position that a criminal defendant must elect between preserving his privilege and pursuing his right to discovery. In further argument that any error in admitting marital communications was harmless, the State utilized an erroneous standard for harmless error.

The trial court's failure to inquire of the defendant as well as his court-appointed counsel when ruling on Appellant' motion to discharge counsel was reversible error.

A case decided by this Court since Appellant's initial brief is directly on point in support of Appellant's argument that the trial court's failure to require the prosecutor to give a non-

racial reason for exercise of a peremptory strike against prospective juror Presley was reversible error.

Prospective juror Lopez should have been excluded for cause because neither the prosecutor nor the judge attempted to rehabilitate him after he stated that he would not consider the defendant's character and background in mitigation when recommending a sentence.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY RULING THAT APPELLANT WAIVED HIS SPOUSAL PRIVILEGE BY FAILING TO PREVENT HIS EX-WIFE, A STATE WITNESS, FROM REPEATING MARITAL COMMUNICATIONS DURING A DISCOVERY DEPOSITION. ADMISSION AT TRIAL OF THESE PRIVILEGED COMMUNICATIONS WAS REVERSIBLE ERROR.

The State has conceded that Cheryl Coby could not have testified at trial to the marital communications between her and Appellant unless Bolin took some action which amounted to a waiver. Brief of Appellee, p. 10. The State contends that such a waiver took place when Bolin chose to depose Coby and elicit marital communications at the deposition. Id., p.10. However, in order to waive the husband/wife privilege, the holder must either (a) make a voluntary disclosure; or (b) consent "to disclosure of any significant part of the matter or communication." §90.507, Florida Evidence Code.

At bar, Bolin never personally disclosed any marital communication. Therefore, there was no waiver by voluntary disclosure.

Accordingly, authorities cited by the State such as Tibado v. Brees, 212 So. 2d 61 (Fla. 2d DCA 1968); Fraser v. United States, 145 F.2d 139 (6th Cir. 1944); and Saenz v. Alexander, 584 So. 2d 1061 (Fla. 1st DCA 1991) are simply not on point. In all of them, the defendant personally disclosed privileged communications or made admissions which he knew would be conveyed to third persons.

The tougher question is whether Appellant consented to disclosure of the marital communications by deposing Cheryl Coby. If the deposition had become public record, Tucker v. State, 484 So. 2d 1299 (Fla. 4th DCA 1986) suggests that a voluntary waiver would have occurred. At bar, however, Coby's deposition never became public and remains a sealed portion of the appellate record (R545-6).[1]

Additionally, there is no authority for the State's position that a criminal defendant must elect between having discovery under Fla. R. Crim. P. 3.220 or protecting privileged communications. Rather, Rule 3.220(b)(1)(c) obligates the prosecutor to disclose:

> any written or recorded statements and the substance of any oral statements made by the accused, including a copy of any statements contained in police reports or report summaries, together with the name and address of each witness to the statements;

Following up the alleged oral statements made by the defendant by deposing the witness who claimed to hear the statements is a

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[1] Appellee's brief notes that the trial judge said at one point that he had not ordered the deposition sealed from public scrutiny (R1089). Brief of Appellee, p. 13. Appellant contends that the earlier protective order precluded making the deposition public record. In any case, Coby's deposition was never made public.

further substantial right granted to a defendant. Fla. R. Crim. P. 3.220(h). A waiver is not voluntary when the defendant is forced to either waive his privilege or relinquish a substantial right. See, Davis v. Wainwright, 342 F.Supp. 39 (M.D. Fla. 1971), affirmed, 464 F.2d 1405 (5th Cir. 1972). Compare, State v. DelGaudio, 445 So. 2d 605 (Fla. 3d DCA), rev.denied, 453 So. 2d 45 (Fla. 1984) (defendant not required to waive right to speedy trial in order to compel State to fulfill its discovery obligation).

Finally, the State argues that any error in admitting the marital communications is harmless because the remaining evidence was "sufficient to support the judgment and sentence." Brief of Appellee, p.17. This is not the correct standard of harmless error review. As the United States Supreme Court recently clarified in Sullivan v. Louisiana, 124 L. Ed. 2d 182 (1993), the question is not what effect the error might be expected to have on a hypothetical "reasonable jury," but its effect upon the guilty verdict in the instant case. The reviewing court must look "to the basis on which 'the jury actually rested its verdict.'" 124 L. Ed. 2d at 189, quoting from Yates v. Evatt, 114 L. Ed. 2d 432 at 449 (1991). At bar, the jury clearly rested its verdict of guilt to first degree murder on Coby's testimony that her ex-husband admitted killing "the manager of Church's Chicken" and describing how he did it. Without the marital communications, only a weak case of circumstantial evidence could have been presented. The error cannot be harmless.

ISSUE II

THE TRIAL COURT ERRED BY FAILING TO CONDUCT A SUFFICIENT INQUIRY INTO APPELLANT'S PRO SE MOTION TO DISCHARGE COUNSEL.

The State misapprehends Appellant's argument by asserting that Bolin did not prove his counsel was ineffective at the pretrial hearing. This is not the issue. Rather, Appellant's complaint concerns procedural due process because he was not allowed to present his reasons for requesting that counsel be discharged before the trial court denied his motion.

Before a trial judge can rule on a claim of ineffectiveness, he must examine both court-appointed counsel and the defendant. Perkins v. State, 585 So. 2d 390 (Fla. 1st DCA 1991); Davenport v. State, 596 So. 2d 92 (Fla. 1st DCA 1992). The court's failure to do so at bar mandates reversal for a new trial.

ISSUE III

THE TRIAL JUDGE ERRED BY FAILING TO REQUIRE THE PROSECUTOR TO GIVE HIS REASONS FOR EXERCISING PEREMPTORY STRIKES AGAINST AFRICAN-AMERICAN PROSPECTIVE JURORS.

Since Appellant filed his initial brief, this Court has decided Valentine v. State, 616 So. 2d 971 (Fla. 1993), Valentine is directly on point here; even the trial judge is the same.

The State evidently agrees that "nothing objectionable appears in the record about [prospective juror] Presley." Brief of Appellee, p.28. Neither did the trial judge put any observation about

this excluded juror on the record which would rebut the defense contention that the excusal was racially motivated. In Valentine, this Court said

> unless a court can cite specific circumstances in the record that eliminate all question of discrimination, it must conduct an inquiry.

616 So. 2d at 974. Accord, State v. Slappy, 522 So. 2d 18 (Fla.), cert.denied, 487 U.S. 1219 (1988). The trial court's failure at bar either to inquire about the prosecutor's reason for striking prospective juror Presley or to express a non-racial reason for the excusal on the record requires reversal for a new trial.

Appellee argues that "the trial judge was in a much better position to determine whether the challenge was racially motivated." Brief of Appellee, p.28. No doubt this is true. However, without anything on the record to suggest why the State exercised a peremptory strike on prospective juror Presley, there is nothing for an appellate court to review. And this Court has emphasized from the start in State v. Neil, 457 So. 2d 481 (Fla. 1984) that appellate review is part of the process in ensuring non-discriminatory exercise of peremptory strikes.

Accordingly, Bolin's convictions and sentences should be vacated and a new trial ordered.

ISSUE IV

THE TRIAL COURT ERRED BY GIVING THE STATE'S SPECIALLY REQUESTED JURY INSTRUCTION ON THE LAW OF ACCESSORY AFTER THE FACT BECAUSE IT DID NOT PROPERLY RELATE TO THE EVIDENCE AND COULD BE CONSTRUED BY THE JURY AS A COMMENT ON THE CREDIBILITY OF THE STATE'S KEY WITNESS.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE V

THE TRIAL COURT ERRED BY DENYING APPELLANT'S CHALLENGE FOR CAUSE TO PROSPECTIVE JUROR LOPEZ.

The State contends in its brief that this issue is controlled by Penn v. State, 574 So. 2d 1079 (Fla. 1991). Brief of Appellee, p.33. However, Penn presented a much different factual scenario because the prospective jurors

> ultimately demonstrated their competency by stating that they would base their decisions on the evidence and instructions.

574 So. 2d at 1081. At bar, prospective juror Lopez said that he wouldn't consider the defendant's background as a factor in recommending a sentence (R454-5). Lopez was never asked if he could follow the court's instruction if told that he should weigh character evidence in mitigation.

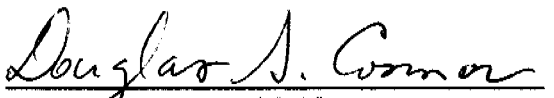
A simple inquiry by either the trial judge or the prosecutor could have clarified whether prospective juror Lopez could be rehabilitated. Because prospective juror Lopez was never asked the question, we are left with his assertion that he wouldn't consider

the defendant's background in recommending an appropriate sentence. Consequently, the case at bar is controlled by this Court's decision in Bryant v. State, 601 So. 2d 529 (Fla. 1992) where this Court held it was not "defense counsel's obligation to rehabilitate a juror who has responded to questions in a manner that would sustain a challenge for cause." 601 So. 2d at 532. This burden belongs to the prosecutor or judge "to make sure the prospective juror can be an impartial member of the jury." 601 So. 2d at 532. Because prospective juror Lopez was never rehabilitated, the case at bar must be reversed, like Bryant, for a new penalty trial.

CONCLUSION

Appellant will rely upon his conclusion as presented in his initial brief.

Respectfully submitted,



DOUGLAS S. CONNOR
Assistant Public Defender
Florida Bar Number 350141
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 4th day of October, 1993.

Respectfully submitted,

Douglas A. Connor

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

DOUGLAS S. CONNOR
Assistant Public Defender
Florida Bar Number 350141
P. O. Box 9000 - Drawer PD
Bartow, FL 33830

DSC/ddv