DA.1-4-93 047

IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS CONLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 79,278

REPLY BRIEF OF PETITIONER ON THE MERITS

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING, OVER OBJECTIONS, HEARSAY TESTIMONY OF A POLICE DISPATCH.

Respondent asserts that the hearsay contained in the officer's testimony was offered not for the truth of its contents but to establish the reason for his actions. (AB6)[1] This contention leaves unanswered the question how the officer's motivations were relevant, or more precisely, how any negligible relevance in his motivations compared to the potential for prejudice or confusion of issues. As stated in the initial brief, a number of appellate courts, among them the same court that issued Johnson v. State, 456 So.2d 529 (Fla. 4th DCA 1984), have held the need for testimony explaining an officer's actions or presence slight, and the potential for prejudice in such testimony great. (IB14-15) Here, that potential was realized.

[1]Herein, references to the answer brief and initial brief appear as (AB[page number]) and (IB[page number]). Record citations are as in the initial brief.

The hearsay tended to bolster the alleged victim's testimony that the crimes were committed with a firearm, a disputed issue at trial.

Respondent apparently perceives the reference to the use made of the hearsay in closing argument as an independent claim of error. (AB7) Petitioner discussed the remarks in closing argument to demonstrate harm, nothing more. The lack of an objection presents no bar to consideration of the manner in which the testimony was used as a measure of prejudice.

II. HEARSAY STATEMENTS BY THE ALLEGED VICTIM TO A DOCTOR WHO EXAMINED HER AS PART OF THE SEXUAL ASSAULT INVESTIGATION WERE INADMISSIBLE.

Respondent's argument that the issue is not preserved betrays a fondness for the discarded formality of taking exceptions to the rulings of a trial court. Trial counsel's hearsay objection was obviously an assertion that the testimony constituted inadmissible hearsay -- else, why object? Moreover, trial counsel's concern over the potential use of the testimony was borne out when the physician testified that M.M. said she was held at gunpoint, a circumstance wholly irrelevant to diagnosis or treatment for forced intercourse.

In its lengthy opinion, the district court found no preservation problem. None exists. This Court should likewise reach the merits of this issue.

Respondent offers no argument on the most harmful and most clearly inadmissible portion of the hearsay statement, the reference to the gun. See Judge Ervin's dissent below. 592 So.2d at 733.

III. THE TRIAL COURT ERRED IN PERMITTING TESTIMONY THAT PETITIONER GAVE A FALSE NAME AFTER HIS ARREST.

Respondent confuses an alias with a nickname. (AB12) "Mad Dog" was a nickname, Ronald Jones an alias. Use of the nickname did not help appellant's cause, but the jury could not have mistaken it for consciousness of guilt, as with the alias.

The argument that use of the name was "part and parcel" of a longer, relevant statement falls of its own weight. First, use of the name was preliminary to the statement. (T161-162) Second, irrelevant, prejudicial remarks are not per se admissible because they are uttered amid other, relevant statements. The objectionable portion should be pared from the remainder. Finally, the cases cited by respondent, Jackson v. State, 530 So.2d 269 (Fla. 1988) and Swafford v.State, 533 So.2d 270 (Fla. 1988), provide no support whatsoever for the proposition on which they were offered.

IV. PROSECUTORIAL MISCONDUCT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO TRIAL BY AN IMPARTIAL JURY.

Petitioner is unable to find record support for respondent's theories on this point. First, the state asserts that "the defense stated that they would present a defense of consent." (AB14) This is to be found neither in the opening statements nor the portions of the transcript cited by respondent. In ruling on a defense objection to the state's closing argument, the trial judge stated that he perceived a consent defense. Nonetheless, petitioner's reading of the record shows no embrace or announcement of such defense by petitioner's trial counsel. If, in the absence of a consent defense, testimony presented by defense witnesses was inadmissible, the prosecutor should have objected on that basis. The testimony of Wayne Westberry, Manson McClain and Russell Riggs on specific acts of prior conduct was introduced largely without objection. Most of their testimony established a relationship between petitioner and M.M.. The prosecutor acknowledged revelance of this testimony. (T237-238) The state cannot use its forbearance from objecting to testimony it now deems inadmissible as having invited its improper remarks in closing argument.

The state's use of the collective "they" obscures who testified to what. (AB14) "They" did not "announce outside the courtroom" the statements attributed by respondent. In response to redundant questioning by the prosecutor -- to which defense counsel objected -- Russell Riggs denied making the precise statements attributed by the prosecutor to "them." Westberry and

McClain weren't asked. As to whether "friends of the defendant employed a scheme" of discrediting M.M., the record shows no collaboration.

The state correctly asserts that the state had every right to comment on evidence introduced by petitioner. (AB15) It had no right, however, to evoke victim sympathy or mount a personal attack against petitioner and his trial counsel with pejorative remarks.

Respondent similarly portrays the prosecutor's comment that he did not like petitioner as having been invited by defense counsel. True, defense counsel did raise the matter, in a wholly proper attempt to divorce the jury's perceptions of petitioner from a determination of his guilt. To say that this invited the prosecutor to share with the jurors his personal distaste for petitioner is a gross distortion.

VI. THE HABITUAL VIOLENT FELON PROVISIONS OF SECTION 775.084, FLORIDA STATUTES (1989), VIOLATE THE DOUBLE JEOPARDY AND EX POST FACTO PROVISIONS OF ARTICLE I, SECTION 10 AND THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 10 OF THE FLORIDA CONSTITUTION.

In Ross v. State, 17 FLW S367 (Fla. June 17, 1992), this Court stated: "The entire focus of the [habitual offender] statute is not on the present offense, but on the criminal offender's prior record." Id. at S368. This observation is wholly in line with petitioner's argument on this point.

CONCLUSION

Based on the arguments contained herein and in the initial brief, petitioner requests that this Honorable Court quash the decision of the district court and remand with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail on Edward C. Hill, Jr., Assistant Attorney General, 2020 Capital Circle S.E., Suite 211, Tallahassee, FL 32301, on this 25th day of September, 1992.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER