IN THE SUPREME COURT OF FLORIDA

BYRON B. BRYANT,

Appellant

Vs.

STATE OF FLORIDA,

Appellee

SUPREME COURT NO. 81,862
CIRCUIT COURT NO. 92-791CF A02

APPEAL FROM CIRCUIT COURT, PALM BEACH COUNTY, FLORIDA

CRIMINAL DIVISION

APPELLANT'S REPLY BRIEF

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POINT I

THE COURT ERRED IN REFUSING TO EXCUSE DEATH BIASED JURORS FOR CAUSE AND IN REFUSING TO GRANT THE DEFENSE ADDITIONAL CHALLENGES

The State takes factual issue with Bryant on this point. It points out, correctly, that prospective juror Knowles was excused for cause by agreement of the parties (R492, 504). The undersigned apologizes for the error.

Other factual assertions are not so accurate. Prospective juror Provenzano said she "would like to hear the case and see what the circumstances were." Her "receptiveness" to mitigating evidence lay in her willingness to vote against the death penalty only if she was presented with "some information" to persuade her against it. It was her belief that the starting point for a murder sentence should be death which Dahmus, Gorelick, Pekkola, Rodden, Mott and Fernandez agreed with. McClurg agreed a little (R355-356).

The State says counsel challenged Gorelick, Fernandez and Pekkola for cause at R452 but not Provenzano. In fact, the challenges were to Pekkola, Provenzano and Gorelick, but not Fernandez, who was number 6 (R381).

Legally, the State is wrong in claiming these jurors were adequately rehabilitated to avoid the challenges for cause. With the answers these jurors gave initially, they could not properly have been left on the jury. Therefore, it was incumbent on the State to rehabilitate them.

It is not enough for the jurors to say they would listen to the evidence and weigh the aggravating and mitigating factors, as Gorelick did (R384). She never said whether she could follow the Judge's instructions because she was not asked. She never said she would not require the defense to convince her to vote for life. The State simply failed to adequately rehabilitate her.

Judge Mounts was wrong when he said the challenged jurors all clearly said they could recommend life (R453). When Mr. Pekkola was asked if he could, he

answered ambiguously: 'Yes, I don't think so" (R388). Moreover, it is also not enough to say the juror could vote for life if he or she would require the defense to convince him, Hill v. State, 477 So.2d 553 at 556 (Fla. 1985).

The State claims a juror must be "irrevocably" committed to refusing to consider a possible punishment, and cites Fitzpatrick v. State, 437 So.2d 1072 at 1075-1076 (Fla. 1983). That test is no longer valid in view of Hill v. State, supra, where the juror was willing to consider a life sentence, but inclined toward a death sentence. To the same effect is Taylor v. State, 19 Fla.L.Weekly, 250 (Fla. 5-4-94) where this Court approved the striking of a juror whose answers raised a doubt of his or her ability to faithfully and impartially apply the law.

The answers given by the prospective jurors here raise similar doubts as to their impartiality. Two were not adequately rehabilitated and the other two did not really dissipate the doubts. All should have been excused for cause under Hill v. State, supra, and Sydleman v. Benson, 463 So.2d 533 (Fla. 4DCA 1985).

The State also claims the defense made no showing that any of the jurors who decided his case were biased against him. It cites Penn v. State, 574 So.2d 1079 at 1081 (Fla. 1991) for the proposition that the defense must make such a showing.

The State misreads Penn, supra. If the defense could show a potential juror was biased against him, he would have grounds to challenge for cause. There has never been such a requirement before a lost peremptory challenge can be called reversible error. All that is necessary under Penn v. State, supra, Floyd v. State, 569 So.2d 1225 at 1230 (Fla. 1990) or Young v. State, 85 Fla. 348 at 354, 96 So. 381 at 383 (1923) is for the defense to identify one or more jurors it wished to strike. In Trotter v. State, 576 So.2d 691 at 693 (Fla. 1990), this Court explained:

> "Under Florida law, '[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted.' Pentecost v. State, 545 So.2d 861, 863 n. 1 (Fla. 1989). By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted."

When the defense identified the five jurors it wanted to strike peremptorily (R669), it did all that was necessary to preserve this issue.

POINT II

THE COURT ERRED IN REFUSING TO DECLARE A MISTRIAL WHEN THE PROSECUTOR VIOLATED THE JUDGE'S ORDER NOT TO IMPLY THAT AN UNCALLED WITNESS IMPLICATED BRYANT

The State argues that the prosecutor's response was drawing fair inference from the evidence, and was invited by the defense argument. Neither theory is convincing,

It is true that attorneys are allowed to argue reasonable inferences from the evidence. That is a far cry from arguing or inferring that an uncalled witness obviously must have implicated Bryant. Under any view of the evidence, that would be impermissible.

The police officers could not have told the jurors what the witnesses allegedly told them. That would be hearsay. Even if police did not say what was said but only said they talked to the witnesses and then went to arrest Bryant, it would have been error, Conley v. State, 620 So.2d 180 at 182 (Fla. 1993), Harris v. State, 544 So.2d 322 (Fla. 4DCA 1989), Postell v. State, 398 So.2d 851 (Fla. 3DCA 1981), rev.den. 411 So.2d 384 (Fla. 1981).

If the police could not have told or inferred to the jurors what was said to them, how could the prosecutor possibly be allowed to do so. Prosecutors are not allowed to testify in closing argument, and if they could, it would be triple hearsay.

The idea that argument of defense counsel could somehow have invited this improper effort to bring in inadmissible evidence is laid to rest by State v. Baird, 572 So.2d 904 (Fla. 1990). There the trial Judge allowed evidence as to why a prosecution witness investigated Baird, based on the defense opening statement that Baird had been "targetted." This Court held that the investigator's state of mind did not become relevant until evidence was presented suggesting he was out to get Baird. Since argument was all we had here, the evidence was never admissible.

The State chose not to call any of the witnesses who allegedly implicated Bryant. Even if they had, the witnesses would not have been allowed to testify about their prior statements unless there was a suggestion that the trial testimony was a recent fabrication, VanGallon v. State, 50 So.2d 882 (Fla. 1951), Jackman v. State, 140 So.2d 627 (Fla. 3DCA 1962), Daniels v. State, 634 So.2d 187 at 191 (Fla. 3DCA 1994).

Once again, evidence which could not have been admitted during the trial can hardly be admitted during closing argument. When the prosecutor attempted to do so, his suggestion of other evidence the jurors had not heard was most improper and prejudicial.

The State's predictable harmless error argument must fail here. It claims overwhelming evidence because Bryant confessed, but overlooks that there was no other evidence at trial implicating him, and that his confession did not match the known facts. The improper comment impacts directly on the weight to be given to the confession the State claims is so overwhelming. Any possibility this Court could say beyond a reasonable doubt that the error did not affect the outcome disappeared when the jury returned to ask for a readback of the reasons Bryant was arrested (R1339-1340). Only a new trial will cure the error.

POINT III

THE COURT ERRED IN REFUSING TO CONSIDER INVOKING THE WITNESS RULE DURING THE SUPPRESSION HEARING

The State argues this point as though the rule of sequestration were invoked and a violation occurred. However, that is not what happened here.

Because the Judge did not invoke the rule, there was no basis for the defense to request a hearing to determine whether any witness allowed another witness to color his testimony. The defense can hardly be expected to fully demonstrate the prejudice that would be required for a rule violation when the rule was never invoked. Despite the fact that Brand disagreed with Hartmann about some of the times (R121), the chances that he would contradict Hartmann in any material respect certainly went down drastically. In fact, his testimony did vary from his deposition testimony, and tended to agree more with Hartmann's testimony.

On deposition, Brand said he did not know why Bryant never signed a rights card (Dep. Vol. 2, p. 255). At the suppression hearing, he expressly adopted Hartmann's explanation (R116).

A question which should have been critical was why Bryant could have his handcuffs removed so often but not to sign his rights card. On deposition, Brand testified the cuffs were off twice, once so Bryant could hug his girl (Dep. Vol. 2, p. 214) and once so he could eat (Dep. Vol. 2, p. 219). At the suppression hearing, he again expressly adopted Hartmann's answer that he was uncuffed once to remove his jewelry in addition to the time he ate (R118-119).

In Burr v. State, 466 So.2d 1051 at 1054 (Fla. 1985), a witness who violated the rule was allowed to testify only to things she had said previously. As a result, the rule violation did not require a new trial.

On this record, it is difficult to believe Brand was not influenced by Hartmann. By the test established in Burr v. State, supra, the portions of his testimony which varied from his deposition should not have been allowed if the rule had been invoked.

Moreover, as Lambert v. State, 560 So.2d 346 (Fla. 5DCA 1990) recognizes, a witness often changes testimony from what he said on deposition. To the extent that Brand did not materially change his testimony, it would not show that refusal to invoke the rule was harmless error.

The State also makes the dubious assertion that the defense could have impeached detective Brand based on his presence for Hartmann's testimony at the pretrial hearing and chose not to do so. Since the Judge chose not to invoke the rule, it is difficult to believe he would allow a witness to be impeached for being present during the hearing.

Bryant realizes this was the pretrial suppression hearing and not the trial. However, the arbitrary refusal to invoke the rule flawed the suppression ruling and requires a new hearing. And, if there is a defect in the suppression hearing, it is not enough to go back and do a new suppression hearing. A new trial is required.

In Land v. State, 293 So.2d 704 at 708-709 (Fla. 1974), this Court ordered a new trial and not just a new hearing on voluntariness, noting that:

> "Where the hearings come after the trial, the likely result is that judges, who are concerned with, as was the majority below, 'court dockets [that] are entirely too congested' become somewhat less sensitive to due process considerations, and see retrials as 'useless and expensive trials which will serve no real purpose'. We, however, are convinced that, when a man's liberty is at stake, considerations of due process outweigh those of economics."

(293 So.2d at 708). This Court also cited with approval Allen v. State, 239 So.2d 33 at 37 (Fla. 1DCA 1970) which similarly granted a new trial and noted how frequently this Court had done so. This Court can do no less in a capital case where a reliable determination of admissibility was so crucial.

POINT V

THE COURT ERRED IN REFUSING TO OBTAIN A NEW JURY FOR PHASE TWO OR AT LEAST TO POLL THE JURORS AND TO COVER BRYANT'S SHACKLES PLACED ON HIM AFTER HE THREW A CHAIR AT THE TIME OF THE FIRST VERDICT

The Judge may have taken the least restrictive course, but he nonetheless violated Bryant's rights when he allowed the jurors to see that Bryant was shackled. The State makes no response to that point, because there can be no response under Blanco v. State, 603 So.2d 132 (Fla. 3DCA 1992) and McCoy v. State, 503 So.2d 371 (Fla. 5DCA 1987).

A new sentencing hearing is required.

POINT VI

THE COURT ERRED IN IMPOSING THE DEATH SENTENCE ON BRYANT

The State claims death is proportional here. The cases it cites are not in point.

Freeman v. State, 563 So.2d 73 (Fla. 1990), may have started as a burglary gone astray, but it ended with the victim attempting to crawl away and Freeman beating him unmercifully. In the instant case, the victim was killed while the killer struggled to free himself inside the store. There was no angry vendetta after the killer could have left the area.

Clark v. State, 613 So.2d 412 (Fla. 1992) is even less pertinent. Clark shot the victim before stealing his truck. There was no struggle, just a cold blooded murder.

This Court may not have to strike improperly found aggravating circumstances in this case, but it is still just a robbery gone astray. In Cook v. State, 542 So.2d 964 (Fla. 1989), Cook was not even sentenced to die for the murder while he struggled with an employee. In Rembert v. State, 445 So.2d 337 (Fla. 1984) and Lloyd v. State, 524 So.2d 396 (Fla. 1988), death sentences were reversed in robberies gone astray.

Bryant's sentence is not proportional.

CONCLUSION

Based on the reasons and authorities set out herein and in his initial brief, Bryant submits that a new trial is required, without the death qualified jury and without the inappropriate effort of the prosecutor to testify. A new suppression hearing is also required, with the witness rule in effect. He must not be visibly shackled during the proceedings. In any event, his death sentence cannot stand.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida, 33401, by mail, this 4th day of August, 1994.

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