IN THE SUPREME COURT OF FLORIDA

JACK R. SLINEY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

Case No. 83,302

FILED
SID J. WHITE
SEP 25 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

ROBERT F. MOELLER
Assistant Public Defender
FLORIDA BAR NUMBER 234176

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TOPICAL INDEX TO BRIEF **(continued)**

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER UTHORITIES

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN REFUSING TO SUPPRESS THE STATEMENTS APPELLANT MADE TO LAW ENFORCEMENT, AS THE STATE FAILED TO SUSTAIN ITS BURDEN OF SHOWING FROM THE TOTALITY OF THE CIRCUMSTANCES THAT THE STATEMENTS WERE MADE FREELY AND VOLUNTARILY.

On page 5 of its brief, Appellee cites Williams v. State, 441 So. 2d 653 (Fla. 3d DCA 1983) for the proposition that a reviewing court must interpret the evidence pertaining to a motion to suppress "in the light most favorable to sustaining the trial court's ruling. [Footnote omitted.]" However, the Williams court reversed the lower court's denial of the appellant's motion to suppress her confession, and this Court should do the same.

Similarly, on pages 5-6, Appellee cites this Court's decision in Thompson v. State, 548 So. 2d 198 (Fla. 1989), a capital case, for the proposition that a trial court's ruling on the issue of whether a confession was given freely and voluntarily will not be reversed unless it is "clearly erroneous," however, in Thompson this Court determined that a portion of the trial court's ruling on the motion to suppress was in error, and that Thompson's confession should have been suppressed in part.

On page 8 of its brief, Appellee asserts, without citing to pages in the record in support of the assertions, that Appellant "was repeatedly read his rights and given the opportunity to rest," and that "the entire interview lasted for two hours." It appears from the testimony at the suppression hearing that Appellant's

rights were read to him only twice--at the beginning of the interview and during the taped statement. (R 305-308, 316-318) They were not read "repeatedly," nor did Appellant "repeatedly ackowledg[e] his right to remain silent," as Appellee also claims at page 8. In addition, the record does not support Appellee's claim that Appellant was given an opportunity to rest; he was kept in the little room far the duration of the interview. Furthermore, the questioning lasted for more than two hours. In its own brief, the State says that Appellant was arrested between 1 and 2 a.m., was read his rights at 1:55 a.m., and the taped interview concluded at 4:09 a.m. (Brief of the Appellee, pages 6-8) Therefore, the interrogation clearly continued for something beyond two hours.

Appellee twice cites Colorado v. Connelly, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) for the proposition that "in order to find that a confession is involuntary within the meaning of the Fourteenth Amendment, there must first be a finding that there was coercive police action." (Brief of the Appellee, pp. 6, 11) However, the type of "coercive police action" needed is something far less than pummeling a suspect with a rubber hose. In Connelly the Court referred to coercive tactics employed by the police in Blackburn v. Alabama, 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960) as including such things as prolonged interrogation in a tiny room, which was at times filled with police officers, in the absence of Blackburn's friends, relatives, or legal counsel. 93 L. Ed. 2d at 483. Appellant's treatment was not much different than what the Court wrote of in Connelly. And, of

course, Appellant's argument is not grounded merely upon the Fourteenth Amendment, but upon several other provisions of the Federal and State Constitutions as well.

In contending that many of Appellant's points are procedurally barred because not explicitly argued by counsel below, Appellee apparently seeks to shift the burden of proof from the State to the defendant to prove the involuntariness of his confession. However, as **the** cases cited in Appellant's initial brief on page 41 clearly show, it was the State's burden to show that Appellant's statements were made freely and voluntarily, and that he knowingly and intelligently waived his rights. Anything appearing in the record that tends to establish that the State did not carry its burden should be fair game to argue on appeal.

It is also interesting to note that Appellee breaks down Appellant's arguments into various categories for discussion purposes (Brief of the Appellee, pp. 8-13), and **does** not really address the cumulative effect of the matters raised by Appellant, when it is the totality of the circumstances that must be considered, not isolated points.

ISSUE II

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE AT THE GUILT PHASE OF APPELLANT'S TRIAL A TRANSCRIPT OF THE 911 CALL MARILYN BLUMBERG MADE AFTER FINDING THE BODY OF HER HUSBAND IN THE PAWN SHOP.

Appellee argues that the transcript of Marilyn Blumberg's 911 call **was** relevant "to the question of how, when and where the **body**

[of her husband] was found." (Brief of the Appellee, p. 14) However, Blumberg had already provided testimony to this effect. Indeed, Appellee concedes as much in stating that "Mrs. Blumberg testified consistent with the 911 call." (Brief of the Appellee, p. 16) Thus the 911 call was cumulative to the testimony already given. All it tended to do was improperly to bolster Blumberg's testimony. (Please see cases cited in footnote 16 of Appellant's initial brief regarding the inadmissibility of prior consistent statements of a witness.) Previous statements of the witness such as the 911 call cannot be equated with separate evidence such as photographs of a crime scene, as Appellee attempts to do at pages 15-16 of it3 brief. The harmfulness of the tape transcript was in its revelation to Appellant's jury of Marilyn Blumberg's highly distraught condition, as discussed in Appellant's initial brief at pages 55-57.

With regard to the case of Ware v. State, 596 So. 2d 1200 (Fla. 3d DCA 1992), which is incorrectly cited by Appellee on page 14 of its brief as Weir, the appellant in that case, unlike Appellant here, admitted that portions of the tape were admissible as excited utterances, and the Third District Court of Appeal concluded, virtually without analysis, that the contents of the tape were admissible as excited utterances and spontaneous statements. The opinion is quite short, and does not reveal the exact contents of the tape in question. Ware provides scant support for admitting the transcript of the tape in the instant case.

ISSUE III

THE COURT BELOW ERRED IN ADMITTING PORTIONS OF THE TAPES OF CONVERSATIONS BETWEEN APPELLANT AND THADDEUS CAPELES WHICH CONTAINED IRRELEVANT AND PREJUDICIAL MATERIAL.

Appellee says at page 18 of its brief that "the trial court did redact certain portions of the tape. (T 898)" The only portion that was redacted was apparently a part containing nothing but music that was playing inside the Club Manta Ray, which both sides conceded was irrelevant. The fact that this portion was not played for the jury has nothing to do with Appellant's issue.

Not nearly all of the prejudicial portions of the tapes occurred when Appellant and Capeles were discussing an alibi, as Appellee suggests at page 18 of its brief. See, for example, pages T 883, 884, 892, 893, 901, 902, 904, 905, in which Appellant uses the "s" word and the "f" word, not in connection with any alibi.

Robinson v. State, 574 So. 2d 108 (Fla. 1991), which Appellee cites on page 18 of its brief, is inapposite. Robinson knew he was speaking with the police, and so could have been expected to omit any words he did not want used against him. Appellant did not know that Thaddeus Capeles was acting as a police agent and that his words were being recorded for later use against him. Furthermore, Robinson sought deletion of a single, non-derogatory word ("white"), whereas there were a number of highly offensive words used on the tapes in question.

ISSUE IV

THE COURT BELOW ERRED IN ADMITTING INTO EVIDENCE STATE'S EXHIBIT NUMBER 33, A FIREARMS REGISTER TAKEN FROM ROSS PAWN, AS THIS DOCUMENT CONSTITUTED INADMISSIBLE HEARSAY.

Appellee asserts that the firearms register was not hearsay because it was not offered to prove the truth of the matter asserted, but "was being offered to show that it was found at the scene of the crime containing a listing of serial numbers prior to the purchase of the weapons from the defendants that matched the serial numbers on the weapons obtained from the defendants." (Brief of the Appellee, p. 22) While it is far from clear just what Appellee means by this statement, it is clear that the register was being offered for the truth of the matter asserted therein, namely, that certain specific guns were present in the pawn shop at the time of the alleged robbery, which fact was used to link the guns with the guns Thaddeus Capeles purchased from Appellant. [Appellant does not understand the analogy Appellee attempts to make between the firearms register and "hearing the name of the defendant at the scene of a crime." (Brief of the Appellee, p. 22) The two things seem totally unrelated.]

Appellee also argues that, if hearsay, the firearms register was properly admitted under the business records exception to the hearsay rule pursuant to the testimony of Marilyn Blumberg when she was recalled. (Brief of the Appellee, pp. 21-22) There are at least three major problems with this argument. Firstly, the exhibit was admitted long before Blumberg was recalled and gave the

testimony that would allegedly qualify the document for admission as a business record. Secondly, the prosecutor never specifically offered the exhibit as a business record. And, finally, as discussed in Appellant's initial brief at page 61, even **after** Marilyn Blumberg testified, there was an inadequate predicate for the register to be admitted as a business record.

Appellee complains on page **22** of its brief that defense counsel did not renew his objection to the exhibit after Blumberg testified, but it is difficult to see what the basis for objecting at that point would have been. As noted above, the exhibit had already been admitted, and the State did not seek to have it admitted as a business record following Blumberg's testimony. There **was**, therefore, no reason to object, and nothing to object to.

ISSUE V

THE TRIAL COURT ERRED IN PREVENTING APPELLANT'S JURY FROM HEARING THE PROFFERED TESTIMONY OF APPELLANT'S WITNESSES, THEREBY DEPRIVING APPELLANT OF HIS FUNDAMENTAL RIGHT, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES **AND** BY ARTICLE I, SECTION 16 OF THE CONSTITUTION OF THE STATE OF FLORIDA, TO PRESENT WITNESSES IN HIS OWN BEHALF TO ESTABLISH A **DEFENSE**.

Appellee's reliance upon Pittman v. State, 646 So, 2d 167 (Fla. 1994) (Brief of the Appellee, pages 23-24) is misplaced, In Pittman, unlike here, the declarant was available to testify, and so the proffered evidence clearly did not come within the ambit of section 90.804(2)(c) of the Florida Statutes. Furthermore, in

Pittman, there was only one witness who was prepared to testify with regard to the alleged admission made by the declarant, and the trial court ruled that the statement lacked corroboration and trustworthiness. Here, there were two witnesses, George Morris Davis, III, and Robert Ryan, who used exactly the same words when quoting what Keith Witternan said while in jail. Thus, the witnesses provided corroboration for each other. Additionally, the State had substantial evidence that Witteman was involved in the killing of George Blumberg; like Appellant, he was charged with that homicide. (We would know the exact extent of said evidence if this Court had granted in full Appellant's Motion for Leave to Supplement the Record on Appeal, as the transcript of the guilt phase of Witteman's trial would be part of the record in the instant case.) This evidence provided further corroboration and indications of trustworthiness for the proffered testimony. Appellant finds it incredible that the State would argue that the confession of Keith Witteman is inherently unreliable (Brief of the Appellee, page 25) when the State prosecuted Witteman and sought the death penalty for the very offense that was subject of the confession. The State should not be permitted to make an argument so inconsistent with its actions in prosecuting the declarant.

The issue in Czubak v. State, 644 So. 2d 93 (Fla. 2d DCA 1994), cited at pages 24-25 of Appellee's brief, where the declarant was available and did testify, was not the admissibility of hearsay statements under the exception found in section 90.804(2)(c), but the admissibility of hearsay statements inculpat-

ing the declarant pursuant to Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973), which has also been invoked by Appellant as a basis for admitting his proffered testimony. The Second District Court of Appeal ruled that the testimony at issue in Czubak was inadmissible under Chambers because it was unreliable. The same cannot be said here, where the declarant, Keith Witternan, was clearly involved in what happened at Ross Pawn, and was charged with the very murder that he admitted to while in jail.

Appellee says that Witternan "didn't even identify the person he allegedly killed." (Brief of the Appellee, p. 25) There is nothing in the record to suggest that Witternan killed any "old man" other than the one he was charged with killing, namely, George Blumberg.

Appellee also says that failure to admit the proffered testimony was harmless because Appellant "fully confessed." (Brief of the Appellee, p. 25) This ignores Appellant's trial testimony, in which he denied killing Blumberg. It was up to the jury to sort out what really happened at the pawn shop, and hearing Appellant's proffered evidence would have assisted them in doing so. At the very least, Appellant's jury might well have found this evidence significant to its decision as to what penalty Appellant should receive.

ISSUE VI

APPELLANT WAS PREVENTED FROM ADEQUATELY DEVELOPING AND PRESENTING MITIGATING EVIDENCE FOR THE JURY AND THE TRIAL COURT TO CONSIDER BY THE COURT'S REFUSAL TO APPOINT A CAPITAL CASE INVESTIGATOR/MITIGATION SPECIALIST TO ASSIST THE DEFENSE AND DENIAL OF ADEQUATE TIME FOR APPELLANT TO PREPARE FOR PENALTY PHASE.

Appellee says at page 26 of its brief that the public defender's office was appointed to represent Appellant at penalty phase "with his approval." Any such "approval" was lukewarm at best. Appellant told the court he could not hire new private counsel for the penalty phase, because his parents were "almost bankrupt" due to the amount of money they had spent on his guilt phase defense. (R 1347) Appellant also pointed out to the court that the assistant public defender, Mark Cooper, had previously "filed a discharge" from Appellant's case "[d]ue to his case load." (R 1348) Thus, Appellant reluctantly accepted the services of the public defender's office for penalty phase only because his family's funds had been depleted, and he had no money to employ his own attorney.

Furthermore, Mark Cooper himself objected to being appointed to represent Appellant at such a late date, and expressed reservations concerning his ability adequately to defend Appellant. (R 1352-1353)

Espinosa v. State, 589 So. 2d 887 (Fla. 1991), cited by Appellee at page 30 of its brief, involved a different situation from that of the instant case, as Espinosa was represented by the

same attorney throughout the proceedings (guilt and penalty phases), and his attorney agreed with the trial court on the first day of trial that penalty phase would begin approximately two hours after the jury returned its verdicts. Furthermore, in Espinosa v. Florida, 505 U.S. ____, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), the Supreme Court of the United States reversed the judgment of this Court in Espinosa (albeit on other grounds).

Appellee cites Martin v. State, 455 So. 2d 370 (Fla. 1984) for the proposition that whether to appoint a capital case investigator was within the discretion of the trial court. However, Martin did not involve capital investigators, but mental health professionals, and Martin had already been examined by seven experts when his lawyer sought the appointment of yet another one. Thus, Martin is readily distinguishable from this case, in which Appellant's penalty phase attorney was not provided with the services of a single capital case investigator/mitigation specialist to assist him in developing Appellant's penalty defense.

In Dingle v. State, 654 So. 2d 164 (Fla. 3d DCA 1995), a prosecution for first degree murder and aggravated child abuse, the court recently found reversible error in the trial court's refusal to appoint additional experts to assist the defense, beyond the two that had already been appointed, noting that "the principles of fundamental fairness require that the defendant be given the opportunity to present his or her case adequately within the adversary system. Ake v. Oklahoma, 470 U.S. 68, 83, 105 S.Ct. 1087, 1097, 84 L.Ed.2d 53, 65-66 (1985)." 654 So. 2d at 166. The

appellate court found significance in the specificity of the request, noting that defense counsel "specifically identified for the court the experts he sought to have appointed," and told the trial court what testimony he would attempt to elicit. Similarly, defense counsel here specifically identified for the trial court the capital investigator/mitigation specialist he wished to have appointed (Ray D. Matthews and Associates, Inc.), and set forth the areas in which he needed the assistance of this expert. (R 176-177) Thus, fundamental fairness in the penalty proceeding was thwarted when the court below denied Appellant the assistance of this expert, who was needed to aid in preparation of Appellant's defense.

ISSUE VII

THE COURT BELOW ERRED IN INSTRUCTING APPELLANT'S JURY ON, AND FINDING IN AGGRAVATION, THAT THE HOMICIDE WAS COMMITTED DURING A ROBBERY AND WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

A. During a robbery

On page 32 of its brief, Appellee cites three of the nine cases cited by Appellant in support of his argument and attempts to distinguish them by saying the items taken in those cases "were personal to the victim leaving open the question as to whether there was ever any intent to rob." Appellant is not certain what Appellee means in referring to items that were "personal to the victim," but in two of the cases cited, items were taken that cannot be considered "personal to the victim" under any definition

of that term. In Clark v. State, 609 So. 2d 513 (Fla. 1992), in addition to the victim's boots, money was taken, and in Knowles v. State, 632 So. 2d 62 (Fla. 1993), a truck was taken. These were hardly personal items. Moreover, Appellee is really proposing a distinction without a difference; whether the items were personal is of no moment, as long as they were valuable.

Jones v. State, 652 So. 2d 346 (Fla. 1995), cited by Appellee on page 34 of its brief, is distinguishable from Appellant's cause. In Jones there could have been no reason for the assault on the victims other than to take their property. Here, Blumberg was assaulted during a heated argument over the price of a chain.

> Moreover, any argument that Jones killed the Nestors for some unexplained reason and then took their property as an afterthought, thus negating the finding that the murders were committed while Jones was engaged in the commission of a robbery, is rebutted by Jones' statement to Nurse Crum that he killed "those people" because they "owed" him money. [Citation omitted.]

652 So. 2d at 350. Here, there was no similar statement made by Appellant which would negate the idea that property was taken from the pawn shop as an afterthought. In Jones, this Court also found significance in the fact that after he killed Jacob Nestor, Jones "rolled Mr. Nestor over in order to take the man's wallet and at some point rummaged through Mrs. Nestor's purse, removing any valuables." 652 So. 2d at 350. Here, Crime Scene Technician Gil Stover of the Charlotte County Sheriff's Office testified that he removed a wallet from George Blumberg's left rear pocket at the scene, thus providing a further indication of a lack of intent to

rob Blumberg; had there been such an intent, the perpetrators surely would have taken Blumberg's wallet.

Jackson v. State, 575 So. 2d 181 (Fla. 1991), which Appellee cites on page 35 of its brief, is similarly distinguishable. Nothing in the opinion in Jackson suggests that there could have been any other reason for killing the proprietor of the hardware store except to rob him; unlike here, there is no indication that the death was preceded by any type of argument. Indeed, in Jackson, this Court specifically noted that Jackson did "not present any reasonable hypothesis of innocence [with regard to the armed robbery charge] when viewed in light of the totality of the evidence against him." 575 So. 2d 186. Appellant has presented a plausible hypothesis of his innocence. Furthermore, there was testimony that several days before the homicide, Jackson bought some supplies at the hardware store, and stated upon his return, "I'm going to knock your buddy over down at the store." 575 So. 2d 185. And two witnesses (one at guilt phase and one at penalty phase) testified that Jackson told his mother after his arrest that he and his codefendant had to kill the man because he "bucked the jack," that is, resisted the attempt to rob him. 575 So. 2d at 185, 189. Thus, unlike here, the defendant's own statements in Jackson showed that he planned the robbery beforehand and carried it out.

Randolph v. State, 463 So. 2d 186 (Fla. 1984), cited on page 36 of Appellee's brief, in which the appellant was convicted of first degree murder and attempted robbery, lends no support to

Appellee's position. Unlike here, there is nothing in the opinion to indicate that the incident in question could have involved anything other than an attempted robbery; significantly, testimony showed that Randolph had been involved in an "extremely similar" robbery or attempted robbery of two individuals a few days earlier. 463 So. 2d 189. In addition, the Randolph opinion merely perfunctorily rejected his attack upon the sufficiency of the evidence as without merit, because the evidence was "sufficient to sustain a conviction either upon the theory of premeditated design or on the theory of felony murder." 463 So. 2d 192. Thus, it is not clear from the opinion that Randolph even challenged the sufficiency of the evidence regarding his conviction for attempted robbery or, if he did, what the basis for the challenge was. With regard to the trial court's finding in aggravation that the murder was committed during a robbery and for pecuniary gain, this Court determined that these factors overlapped and constituted only one factor; the opinion does not demonstrate that Randolph challenged the adequacy of the proof that he was engaged in a robbery.

B. Avoid arrest

Appellee says that Appellant said that he and Keith Witteman "were in the pawn shop the day before and they were also there on Tuesday late in the afternoon, two days prior to the murder. (T1006)" (Brief of the Appellee, pp. 33-34) Later, Appellee says that Appellant admitted that he and Witternan "had been in the pawn shop several times that week and that he killed him [Blumberg] because Keith Witteman told him that if they didn't they would get

caught." (Brief of the Appellee, p. 38) These statements are inaccurate. What Appellant actually said about having been in the shop that week was that he and Witternan were there on Tuesday afternoon, two days before the incident, and arranged to come back to see Blumberg on Thursday (the day of the homicide). (T 984-986, 1006-1007) Thus, they were there only one time that week prior to the homicide, not "several times," as stated by Appellee. Nor did Keith Witteman tell Appellant that they had to kill Blumberg because "they would get caught" if they didn't. Witteman told Appellant that they had to kill Blumberg because, if they did not, somebody would "find out or something." (T 1006)

In conjunction with the erroneous statement that Appellant and Keith Witteman had been in Ross Pawn several times during the week of the murder, Appellee insists that "there is no speculation that Mr. Blumberg 'might' have recognized appellant." (Brief of the Appellee, p. 38) However, in Caruthers v. State, 465 So. 2d 496, 499 (Fla. 1985), this Court pointed out that even where the victim knew her assailant a3 a customer far a number of years, this would not be sufficient to establish the avoid arrest aggravating circumstance.

Appellee also observes, on page 38 of the brief, that there need not be an express statement by the defendant or an accomplice regarding their motive to avoid arrest in order for this aggravator to apply. However, in Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993), in rejecting the avoid arrest factor, this Court opined that "even the trial court may not draw 'logical inferences'

to support a finding of a particular aggravating circumstance when the State has not met its burden. [Citation omitted.]" Thus, there must be concrete evidence to establish the section 921.141-(5)(e) aggravating circumstance; mere supposition will not suffice,

ISSUE VIII

THE TRIAL COURT ERRED IN SENTENCING JACK SLINEY TO DEATH BECAUSE HIS SENTENCE IS DISPROPORTIONATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

On page 41 of its brief, Appellee cites Brown v. State, 565 So, 2d 304 (Fla. 1990) for the proposition that Appellant's death sentence is proportionate, stating that in Brown there were two aggravating factors. However, in Brown, there were actually three valid aggravating circumstances, more than in the instant case.

Appellee also claims that the evidence adduced at Appellant's trial showed that Appellant (rather than his codefendant) actually committed the murder. (Brief of the Appellee, p. 41) Appellant's sentencing jury might have concluded otherwise if they had been permitted to consider the evidence Appellant proffered regarding Keith Witteman's jailhouse statement that he killed the victim. (Please see Issue V herein.)

ISSUE IX

THE TRIAL COURT ERRED IN DEPARTING UPWARD FROM THE SENTENCING GUIDE-LINES WITHOUT PROVIDING CLEAR AND LEGITIMATE REASONS FOR DOING SO.

Although Appellee asserts on page 42 of its brief that the record shows that the trial court departed from the guidelines based upon the unscored capital crime, the court's reason for

departure is not evident from his sentencing order on the robbery count, (R 228) Most of the sentencing order is involved with reciting aggravating circumstances involved in the incident. The court failed adequately to articulate exactly why he was imposing a departure sentence much greater than the seven year sentence permitted under the guidelines.

ISSUE X

THE TRIAL COURT ERRED IN ASSESSING A PUBLIC DEFENDER'S FEE IN THE AMOUNT OF $3700 AGAINST APPELLANT WITHOUT ADVISING HIM OF HIS RIGHT TO A HEARING TO CONTEST THE AMOUNT OF THE LIEN. THE COURT ALSO ERRED IN ASSESSING $280 IN COSTS WITHOUT CITING TO THE STATUTORY AUTHORITY FOR DOING SO, OR PROVIDING APPELLANT WITH NOTICE AND AN OPPORTUNITY TO BE HEARD.

Appellee claims that Appellant had "adequate constructive notice" of the amounts assessed against him, but fails to explain where and how Appellant acquired the alleged "constructive notice." As discussed in Appellant's initial brief on page 94, the trial court did not cite statutory authority for the assessment of costs against Appellant, as required, and so there could have been no constructive notice to Appellant by virtue of any statute authorizing costs to be assessed.

Appellee incorrectly cites Arnold v. State, 596 So. 2d 486 (Fla. 2d DCA 1992) for the proposition that Appellant somehow agreed to the imposition of costs against him "by implication." (Brief of the Appellee, p. 43) In Arnold, the court found that the appellant had "affirmatively agreed" to the imposition of a fine

when he entered his guilty plea, thus waiving any notice claim, and that the "same rationale" applied to uphold the assessment of a cost of prosecution. 596 So. 2d at 487. The court struck two other assessments, because they were not authorized by the statutes cited by the trial court as authority for their imposition. Furthermore, the court receded from Arnold in Reyes v. State, 655 So. 2d 111 (Fla. 2d DCA 1995)

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Jack R. Sliney, renews his prayer for the relief requested in his initial brief.

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 22nd day of September, 1995.

Respectfully submitted,

Robert F. Moeller

ROBERT F. MOELLER
Assistant Public Defender
Florida Bar Number 234176
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

/rfm