O/A 2-4-98

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
DEC 24 1997
CLERK, SUPREME COURT
By
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

HOWARD VINCENT DECK,

Respondent.
_____/

CASE NO. 85,652

DISTRICT COURT OF APPEAL
FIFTH DISTRICT - NO. 93-2623

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR
BREVARD COUNTY, FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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Point Two: Davis should be applied to the instant case because it is pending on direct review.

ARGUMENT & REBUTTAL

POINT ONE:

DEFENDANT'S GENERAL OBJECTION TO THE ADMISSIBILITY OF HIS STATEMENTS DID NOT PRESERVE FOR APPEAL OR REHEARING THE ARGUMENT AVAILABLE TO HIM UNDER ARTICLE I SECTION 9 OF THE FLORIDA CONSTITUTION.

Defendant contends that his general objection to the admissibility of his statements was sufficient to preserve for appeal and rehearing the "equivocal request to remain silent" argument available to him under Article I, Section 9 of the Florida Constitution. This argument is not supported by case law, the trial record, the Fifth District's opinion or Defendant's concession at the district court level.

Defendant's reliance on Castor v. State, 365 So. 2d 701, 703 (Fla. 1978) is misplaced because Castor discusses the requirement of a contemporaneous objection. In contrast, the instant case involves the requirement of a specific objection. As pointed out by the State in its Initial Brief, it is well-established that in order for an argument to be cognizable on appeal, it must be the specific legal argument **asserted below.** §90.104(1)(a), Fla. Stat. (1995); §924.051(1)(b), Fla. Stat. (Supp. 1996). This Court has repeatedly required a specific objection or legal argument in order to preserve that argument for appellate review. See Hadden v. State, 690 So. 2d 573, 580 ("Unless the party against whom the evidence is being offered makes this specific objection, the trial court will not have committed error in admitting the evidence.") and cases cited therein. See also Forrester v. State, 565 So. 2d

391, 393 (Fla. 1st DCA 1990) (failure to make privacy argument did not preserve issue for appellate review). Accordingly, Defendant's reliance on Hopkins v. State, 632 So. 2d 1372 (Fla. 1994) and Williams v. State, 611 So. 2d 1337 (Fla. 2d DCA 1993) for the proposition that a general objection to the admissibility of his statements was sufficient to preserve the issue is misplaced.

The requirement of apprising the trial judge of the specific legal argument is especially applicable in the instant case as the record shows that trial counsel did not even make a federal or state constitutional "equivocal request to remain silent" argument pretrial or at the trial itself. This is notwithstanding that Traylor v. State, 596 So. 2d 957 (Fla. 1992) had been decided over a year at the time the motion to suppress had been filed.

The failure to specify the Article I, Section 9 argument also is highlighted by the fact that Defendant did specify an Article I, section 16 argument in his written motion to suppress (Vol. VI, R 777). Defendant's failure to articulate one Florida Constitutional argument, while specifying a different Florida Constitutional argument on another issue, confirms waiver of the argument.

At the pretrial hearing, trial counsel's argument focused on the involuntary nature of the statements based on his physical and mental condition (Vol. IV R 518-522). Aside from the specific legal argument of voluntariness, trial counsel made a brief argument that the Defendant unequivocally wanted to end the interview (Vol. IV, R 523). The trial judge asked trial counsel to identify where Defendant made a request to terminate questioning

other than his statement on page 82 of the interview transcript (at the end of the interview). Trial counsel merely returned to his argument that the statements were not freely and voluntarily made under the totality of the circumstances (Vol. IV, R 524-525). Thus, it is apparent that trial counsel chose to focus on a voluntariness argument and did not even place before the trial court the "equivocal request to remain silent" argument under either the Federal or State constitutions.

At trial, trial counsel merely renewed his objection to publication of the interview on the grounds "as previously made at my motion to suppress," which was denied (Vol. XI, TT 622, 625). In his motion for new trial, Defendant did not tender an "equivocal request to remain silent" argument or an argument under Article I, Section 9 of the Florida Constitution or cite to Traylor (Vol. VI, R 949-950). In light of the foregoing, it is unfair to blame the trial judge or to complain that the trial judge had adequate notice of this specific legal argument.

Defendant's claim of preservation also is refuted by the Fifth District's March 24, 1995 opinion (App. C), appellate counsel's concession in his February 23, 1995 Motion for Rehearing (5th DCA ROA R 36-40) and his concession in his April 11, 1995 Response to the State's Motion for Rehearing and Certification (5th DCA ROA R 53-62). The argument available to him under Article I, Section 9 of the Florida Constitution was not preserved for appellate review for the first time on his appellate motion for rehearing.

Next, Defendant argues that the Fifth District's addressing of

the Article I, Section 9 argument was appropriate because the Fifth District was "leveling the playing field" because the State did not raise Davis v. United States, 512 U.S. 452 (1994) in its answer brief or oral argument, but waited until its motion for rehearing (5th DCA ROA R 6-24). First, the State points out that the State never waived the specific legal argument that the lower court's ruling on the motion to suppress should be affirmed under federal constitutional law. Second, Davis was not decided until after its Answer Brief had been filed.[1] Third, Davis was not raised at oral argument because argument did not focus on the "equivocal request to remain silent argument." Therefore, there was no reason for the State to raise the Davis case until after the Fifth District surprisingly premised its initial reversal on Defendant's equivocal request to remain silent under federal constitutional law (App. A).

The Defendant's remaining arguments on this issue have been addressed in the State's Initial Brief on the Merits.

[1]The Answer Brief was filed on June 6, 1994, whereas Davis was decided on June 24, 1994.

POINT TWO:

DAVIS APPLIES TO THE INSTANT CASE BECAUSE IT IS PENDING ON DIRECT REVIEW AND IS NOT YET FINAL.

The general principle regarding retroactive and prospective application is that decisional law in effect at the time an appeal is decided governs a case even if there has been a change since the time of trial. S ate v. y, 654 So. 2d 552, 554 (Fla. 1995) (decision that there is no crime of attempted felony murder must be applied to all cases pending on direct review or not yet final); Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992)(adopting U.S. Supreme Court's holding in Griffith[2] that decisions applying or announcing new rules of criminal law must be applied retrospectively to all cases that are pending on direct appeal). The instant case is pending on direct review before this Court. Therefore, Davis applies to the instant case.

Defendant argues that "the decision of the United States Supreme Court announced in Davis, should be limited to prospective application, and not forfeit the Respondent's right to a new trial as initially granted by the Fifth District Court of Appeal in its opinion dated December 27, 1994." See page 8 of Answer Brief. However, the United States Supreme Court issued its opinion on June 24, 1994, six months **prior** to the Fifth District's December 22, 1994 decision. Even the Fifth District recognized in its February 10, 1995 decision on rehearing that, at the time of its December

[2] ith v. Kentucky, 479 U.S. 314 (1987).

1994 decision, affirmance under Davis was warranted. See Appendix B.

Defendant's argument that Davis should be afforded prospective application, because Davis was issued after the trial, is without legal support. Defendant's reliance on Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), State v. Glenn, 5.58 so. 2d 4 (Fla. 1990) and Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995) is misplaced because those cases address the nonretrospective application of changes in criminal law to cases on collateral review, i.e., cases which are final (wherein the direct appeal has been decided and mandate has issued). Smith, 598 So. 2d at 1066 n.5 ("We have in numerous cases distinguished collateral cases from 'pipeline' cases, i.e., those not yet final at the time the law changed, applying the change in law retrospectively only to the pipeline cases."). Davis applies because this is a "pipeline" case.

Defendant's reliance on Lee v. State, 685 So. 2d 1275 (Fla. 1996) (involving Coney[3] issue), Allen v. State, 662 So. 2d 323 (Fla. 1995) (involving Koon[4] procedure), Green v. State, 641 So. 2d 391 (Fla. 1994) (involving flight instruction found invalid in Fenelon[5]), and State v. Lyles, 576 So. 2d 706 (Fla. 1991) (involving Ree[6]) is misplaced because in those cases (or the cases relied upon

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[3] ___ev v. State, 653 So. 2d 1009 (Fla. 1995).

[4] ___on v. Dugger, 619 So. 2d 243 (Fla. 1993).

[5] ___elon v. State, 594 So. 2d 292 (Fla. 1994).

[6] Ree v. State, 565 So. 2d 1329 (Fla. 1990).

therein) the Florida Supreme Court had expressly held the new rule or procedure to be prospective in application. In contrast, neither the United States Supreme Court in Davis nor this Court in , a e v. we , 696 So. 2d 715 (Fla. 1997) expressly held that the rule was to be applied prospectively, i.e., after the Defendant's trial. Rather, they have applied Davis to cases which are not yet final. See State v. Weber, 22 Fla. L. Weekly S703 (Fla. Nov. 4, 1997); Walker v. State, 22 Fla. L. Weekly S537, 541 (Fla. Sept. 4, 1997); State v. Almeida, 700 So. 2d 640 (Fla. 1997) ; State v. Kipp, 698 So. 2d 1204 (Fla. 1997); State v. Skyles, 698 So. 2d 816 (Fla. 1997).

Finally, it is respectfully submitted that there is no legal basis to support the perpetuation of a rule which the United States Supreme Court and this Court have determined to be an undue restriction of legitimate law enforcement activity. To do so would result in a manifest injustice to the people of this State. See Owen, 696 So. 2d at 720 (stare *decisis* did not warrant reliance on prior decision because it would perpetuate a rule which was now determined to be an undue restriction of legitimate law enforcement activity).

CONCLUSION

The Petitioner, State of Florida, respectfully requests this Honorable Court to quash the decision of the Fifth District Court of Appeal and reinstate Respondent's convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Reply Brief on the Merits has been furnished by U.S. Mail to counsel for respondent, Richard G. Canina, The Law Firm of Mitchell & Canina, P.A., 930 S. Harbor City Blvd., Suite 500, Melbourne, FL 32901, this 23d day of December, 1997.

Steven J. Guardiano
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