4

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JAN 13 1997
CLERK, SUPREME COURT
By
Chief Deputy Clerk

CURTIS CHAMPION GREEN,

Appellant,

vs. CASE NO. 86.983

STATE OF FLORIDA,

Appellee,

REPLY BRIEF OF APPELLANT

GLENN ANDERSON, ESQUIRE
Florida Bar Number: 0093961
1128 First Street, South
Winter Haven, Florida 33880
(941) 299-7348

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

POINT I 1

WHETHER FREQUENT REFERENCES BY THE PROSECUTOR IN VOIR DIRE TO THE VICTIM'S ALLEGED PROSTITUTION PRECLUDED A FAIR TRIAL.

POINT II 4

WHETHER THE LOWER COURT ERRED IN ALLOWING THE TRIAL TO PROCEED BECAUSE DEFENSE COUNSEL DECLINED TO DEPOSE STATE WITNESSES.

POINT III 7

WHETHER THE TRIAL COURT FAILED TO MAINTAIN AN ATMOSPHERE TO ENSURE A FAIR AND OBJECTIVE EXAMINATION OF THE EVIDENCE BY THE JURY.

POINT IV 8

WHETHER A MAJORITY RECOMMENDATION BY A JURY AT PENALTY PHASE IS PERMISSIBLE.

POINT V 9

WHETHER THE LOWER COURT ERRED IN FAILING TO GRANT A MOTION FOR MISTRIAL WHEN THE JURY BECAME DEADLOCKED

POINT VI 10

WHETHER THE LOWER COURT ERRED IN ALLOWING APPELLANT TO ADDRESS THE JURY AT PENALTY PHASE.

POINT VII 11

WHETHER THE LOWER COURT ERRED IN ALLOWING DETECTIVE ASHLEY TO TESTIFY AS TO THE SUSPECTS HE DEVELOPED, CURTIS GREEN AND BARNEY FRANKLIN.

POINT VIII 12

WHETHER THE LOWER COURT ERRED REVERSIBLY IN ALLOWING DEPUTY SHERIFF CORBITT TO TESTIFY HE HAD NOTICED THAT FRANKLIN AND GREEN PROVIDED ALIBIS FOR EACH OTHER.

CONCLUSION 13

CERTIFICATE OF SERVICE 13

TABLE OF CITATIONS

Alvord v. State,
322 So.2d 533 (Fla. 1975) 8

Brown v. State,
565 So.2d 304 (Fla. 1990) 8

Garron v. State,
528 So.2d 353 (Fla. 1988) 3

James v. State,
453 So.2d 786 (Fla. 1984) 8

Kelley v. State,
486 So.2d 578 (Fla. 1986) 2, 9

Landry v. State,
666 So.2d 121 (Fla. 1995) 5, 6

Occhicone v. State,
570 So.2d 902 (Fla. 1990) 2

State v. DiGuilio,
491 So.2d 1129 (Fla. 1986) 3

Thompson v. State,
648 So.2d 692 (Fla. 1994) 8

POINT I

WHETHER FREQUENT REFERENCES BY THE PROSECUTOR IN VOIR DIRE TO THE VICTIM'S ALLEGED PROSTITUTION PRECLUDED A FAIR TRIAL.

The prosecutor, Mr. Aguerro, deliberately employed the concept of prostitution and pimp throughout the trial. That conduct began in the voir dire and culminated in his argument in the penalty phase. It was egregious and cumulative, spurious and fallacious, and inherently inflammatory and damaging.

Appellee apparently believes

> . ..an inquiry whether the jurors thought that some prostitution may be voluntary and some prostitutes may be pressured into it...(Appellee's Brief 14-15)

is innocuous or excused by the defense counsel's reference to Hugh Grant and Divine Brown. One does not need an advanced degree in psychology or semantics to know that the prosecutor's real intent was to poison the minds of the jurors with the common perception of pimps being physically abusive to their victims and link that to the battered and abused state of Karen Kulick. The fact that the testimony in the case in chief did not support the liberties taken by the prosecutor in voir dire is bad enough, but the prosecutor made an outrageous and totally unsupported claim that the victim had been sexually abused in the penalty phase:

> So when they punched her in the face, I submit to you this girl was conscious, and being sexually assaulted, that's what he told Mr. Gay. Her clothes were not on her. And yet they were not at the scene, they were never found. (TR2627)

The prosecutor obviously did not listen to the testimony of his witness, Angelo Gay. What Mr. Gay actually said was:

> . ..He say, supposedly this girl had got killed, me and my buddy had picked up this girl and we started doing things.
>
> He never specified what, you know, he said in his words he said, the bitch got crazy on us, like that... (TR1896)

The prosecutor was also incredibly inattentive when his witness, Dr. Melamud, the medical examiner, testified as follows on cross examination:

> Q. But you found no evidence of any recent sexual activity?
>
> A. I didn't.
>
> Q. And in regards to alcohol, you found her blood alcohol .1?
>
> A. Yes, yes. The postmortem blood alcohol level was 0.106 gram over decaliter. (TR1577)

The voir dire excesses of the prosecutor coupled with the outright fabrication in his penalty phase argument constitute fundamental error by any standard or measure. The State cites <u>Kelley v. State</u>, 486 So.2d 578 (Fla. 1986) elsewhere in his argument, but the Court in that case stated:

> . ..We Wish to emphasize, however, that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different.

<u>Occhicone v. State,</u> 570 So2d 902 (Fla. 1990) involved an obviously trivial situation which in no way resembles an un-

supported claim of rape. Garron v. State, 528 So.2d 353 (Fla. 1988) rightly insists that

> . ..prosecutorial misconduct in the penalty phase must be egregious to warrant vacating the sentence...

and sets the following standard:

> . ..When comments in closing arguments are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument. These statements when taken as a whole and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct. In his determination to assure that appellant was sentenced to death, this prosecutor acted in such a way as to render the whole proceeding meaningless...

State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), enunciates the rule that the State has the burden:

> . ..to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction,..

Appellee did not even come close to that standard,

POINT II

WHETHER THE LOWER COURT ERRED IN ALLOWING THE TRIAL TO PROCEED BECAUSE DEFENSE COUNSEL DECLINED TO DEPOSE STATE WITNESSES.

Law is not applied in a vacuum. It is a commonplace that the facts of a case influence the application of the law. A defendant's ability to participate meaningfully in his defense is only as great as his skills and competence allow. Judge Prince found, inter **alia,** as mitigating factors that:

> 3. The Defendant's mother suffers from mental illness which impaired her parenting skills. The Court finds that this factor exists. The Defendant's mother, once thought schizophrenic but not believed psychotic, has undergone a series of court ordered commitments to mental facilities. Some of the early commitments were largely occasioned by the mother's bizarre behavior around her children, including the Defendant. The Court gives substantial weight to this factor. (TR0327)
>
> ...
>
> 8. The Defendant suffers from a history of drug and alcohol abuse. The Court finds that this factor exists, as established from the evidence, and the Court gives this factor some weight. (TR0328)
>
> ...
>
> **9.** The Defendant suffers from a limited intelligence quotient. The Court finds that this factor exists, established by the evidence presented. The Court gives this factor some weight. (TR0328)
>
> ...
>
> **10.** The Defendant suffers from learninq problems. The Court finds that this factor exists, established **by** the evidence presented. The Court has already given some weight to the Defendant's

> limited intelligence quotient, and the Court gives little weight to this independent factor. (TR0328)
>
> ...
>
> 11. The Defendant suffers from an organic brain disorder. The Court finds that this factor exists, established by mental health expert testimony regarding the Defendant's impulsive personality disorder. The Court gives this factor some weight. (TR0329)

The record also establishes a singular lack of harmony between defense counsel and appellant. Appellant manifested deep animus toward his attorney at the hearing held on September 22, 1995, when he said:

> I don't have time for him, I'll sit over here. I'll sit over here. Man, I got nothing for that man... (TR0195)

and later during the same hearing, he again returned to the theme:

> (Mr. Alcott attempts to communicate with the defendant.) Get up off of me. I ain't got time for you. Sit your ass over there and sit down... (TR0211)

It is obvious that the gulf between appellant and his counsel was based on more than mere tactical disagreements.

Factors such as a defendant's intelligence and the failure to establish a viable attorney/client relationship must be considered to evaluate whether abbreviated discovery has been authorized by a defendant. Landry v. State, 666 So.2d 121 (Fla. 1995), cited by appellee, was, according to the Court, a relatively simple case and was prosecuted soon after the crime. Intelligence and a viable attorney/client relationship were not considerations.

Appellee's enthusiasm for Landry notwithstanding, its ruling contains the following limitations:

> Our ruling in this case should not be read as a blanket prohibition on striking a demand for speedy trial as invalid when the defense maintains that the demand was made for tactical reasons.
>
> ...
>
> Rather, in determining whether a demand is valid under subdivisions (g) and (j) of rule 3.191, the court must consider whether the accused has a "bona fide desire" to obtain a speedy trial and whether the accused "has diligently investigated the case" and "is timely prepared for trial." This determination is primarily an objective one that must be made from the record on a case-by-case basis.
>
> ...
>
> Where a defendant chooses to forego discovery, the court may consider whether, under the circumstances present in that case, the defendant could be reasonably prepared for trial without the benefit of discovery.

POINT III

WHETHER THE TRIAL COURT FAILED TO MAINTAIN AN ATMOSPHERE TO ENSURE A FAIR AND OBJECTIVE EXAMINATION OF THE EVIDENCE BY THE JURY.

When a man is on trial for his life, even the most callous and partisan disputant should hesitate to categorize small things as "trivial." Every trial lawyer knows that appearance in the courtroom matters and that bad impressions can never be fully corrected. Indisputably, appellant was prejudiced.

The importance of these errors for appellant, however, is their cumulative impact on the other errors and on the final outrageous misstatement of fact by the prosecutor. They make it that much harder to justify the unjustifiable.

POINT IV

WHETHER A MAJORITY RECOMMENDATION BY A JURY AT PENALTY PHASE IS PERMISSIBLE.

Appellant argues that the Courts have not really approved the legislative scheme allowing majority recommendations of death in the penalty phase. His point is that the lead Florida case, Alvord v. State, 322 So.2d 533 (Fla. 1975) involved a totally different legislative scheme. The majority recommendation in those days was for mercy, not death, which acted to protect the fundamental rights of defendants. Appellee cites two more cases based on Alvord, James v. State, 453 So.2d 786 (Fla. 1984) and Brown v. State, 565 So.2d 304 (Fla. 1990). The third case cited by appellant, Thompson v. State, 648 So.2d 692 (Fla. 1994), cites Brown. The conclusion is inescapable that the Court must, for the first time, be prepared to address the existing statutory scheme, rather than the scheme faced in Alvord, and enunciate the reasons why such a violation of fundamental rights is constitutional.

POINT v

WHETHER THE LOWER COURT ERRED IN FAILING TO GRANT A MOTION FOR MISTRIAL WHEN THE JURY BECAME DEAD-LOCKED.

Many legal actions can only be evaluated on the basis of unique facts. Whether the Standard Jury Instruction 3.06 is properly given in a particular case, is one of those actions. Obviously, the standard should be higher when death hangs in the balance.

In this case, appellee concedes that Mr. Gay's testimony was read to the jury about an hour after 3.06 was given. The jury then wanted even more testimony read. This sequence of events gave disproportionate emphasis to one witness, at the most critical phase of the trial. The jury's request for more such testimony is evidence that it was decisive. Appellant believes that in a case of this kind it was improper to allow the jury to hear only a small portion of the testimony long after 3.06 was read.

The previously cited caveat from **Kelley** v. State, 486 So.2d 578 (Fla, 1986), makes it clear that the prosecutorial misconduct of Mr. Aguero makes that case totally inapplicable.

POINT VI

WHETHER THE LOWER COURT ERRED IN ALLOWING APPELLANT TO ADDRESS THE JURY AT PENALTY PHASE.

Appellant believes this point has been adequately addressed.

POINT VII

WHETHER THE LOWER COURT ERRED IN ALLOWING DETECTIVE ASHLEY TO TESTIFY AS TO THE SUSPECTS HE DEVELOPED, CURTIS GREEN AND BARNEY FRANKLIN.

The record quoted by appellee shows that Mr. Alcott clearly objected to the use of Det. Ashley as an "expert" in the following statement:

> MR. ALCOTT: My objection is it's so brightened. He laid this predicate, here we got this well-trained, skilled detective that ferrets out crime and he says, did you develop a couple of suspects? Yeah, Barney and Curtis. I mean,, it just... (TR1943)

Appellant admits that the word "expert" wasn't used, but submits the meaning of Mr. Alcott is obvious. Further, once the words are out of the witness' mouth, they can never be taken back by any action of the Court. Mr. Aguero wasn't content with his improper advantage, but continued his questioning of Ashley in order to reinforce the spotlight of guilt already established by his initial question.

Mr. Alcott objected to the continuance of Mr. Aguero's line and was overruled by the Court:

> MR. ALCOTT: Well, I would even object to that, because he should just testify as to what he did. He got assigned the case, what did you do?
>
> THE COURT: I'm intending to overrule that objection, if that's what the testimony is going to be. I think the state is entitled to show how he became involved in the case. However, I think the state also has the obligation to show precisely how he became involved... (TR1944)

POINT VIII

WHETHER THE LOWER COURT ERRED REVERSIBLY IN ALLOWING DEPUTY SHERIFF CORBITT TO TESTIFY HE HAD NOTICED THAT FRANKLIN AND GREEN PROVIDED ALIBIS FOR EACH OTHER.

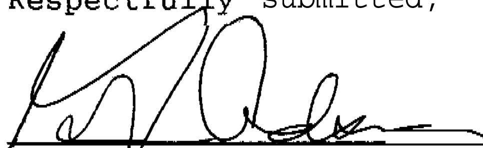
Appellant agrees that "a prosecutor is supposed to focus his attention on the defendant being prosecuted (and presumably any co-perpetrator)," but in the case in chief that should be done with objective testimony and not with alibis artfully employed as badges of guilt. Artistry, I might add, of officers of an agency that discharged a drunk woman from jail on the streets of Bartow in the middle of the night.

Simple logic and fairness suggests that the jurors should have been given a caveat that the Sheriff's office had more than the usual reasons to want this case successfully prosecuted. Appellant believes that would have been more pertinent than the self-serving testimony offered.

CONCLUSION

This case was old when it was tried and the trail had grown cold. The circumstances of the **victims** release from **jail** were a constant reproach and embarrassment. A conviction did much to allay a sense of culpability. Unfortunately, it was secured by tactics which were improper and made the result meaningless. If the State doesn't obey the rules, who will.

Respectfully submitted,



GLENN ANDERSON, Esq.
1128 -- 1st St. South
Winter Haven, FL 33880
(941) 299-7348
Florida Bar No. 0093961
Attorney for Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to, Robert J. Landry, Assistant Attorney General, at 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607, this 9th day of January, 1997.

GLENN ANDERSON, Esq.
Attorney for Appellant.