IN THE SUPREME COURT OF FLORIDA

NATHAN JOE RAMIREZ, :

Appellant, :

vs. : Case No. 89,377

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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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, AND WERE OBTAINED IN COMPLIANCE WITH MIRANDA V. ARIZONA.

On page 7 of its brief, Appellee cites Thompson v. State, 548 So. 2d 198 (Fla. 1989), and this Court's discussion, in a footnote, of the "clearly erroneous" standard. The footnote reads as follows:

> The trial court's conclusion on this question [i.e., the question of whether a confession was freely and voluntarily given and the rights of the accused were knowingly and intelligently waived] will not be upset on appeal unless clearly erroneous; however, the clearly erroneous standard does not apply with full force in those instances in which the determination turns in whole or in part, not upon live testimony, but on the meaning of transcripts, depositions or other documents reviewed by the trial court, which are presented in essentially the same form to the appellate court.

548 So. 2d at 204, n. 5 (emphasis supplied). Appellee ignores the fact that the trial court's order denying suppression turned in large part upon the videotape of Appellant's interview with the detectives, a good portion of which the court viewed at the suppression hearing, and which is available for viewing by this Court just as it was by the trial court. The videotape was, in essence, a verbatim "document" as to what occurred during the interrogation session. Therefore, pursuant to Thompson, where the

lower court's conclusion did not turn only upon live testimony, the "clearly erroneous" standard of review does not apply with "full force."

With regard to Appellee's contention that Appellant voluntarily agreed to speak to law enforcement and was not under arrest when he entered the police station, and thus Miranda warnings were not required, when Appellant agreed to go with Deputy Blum to the sheriff's office, the young man was most likely merely acquiescing in the apparent authority of the armed deputy who confronted him at his residence when his parents were not at home, negating the supposed voluntariness of the encounter. See State v. Richardson, 575 So. 2d 274 (Fla. 4th DCA 1991); Shelton v. State, 549 So. 2d 236 (Fla. 3d DCA 1989); United States v. Edmonson 791 F. 2d 1512 (11th Cir. 1986); Dunaway v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824, 832, footnote 6 (1979) ("request to come to police station 'may easily carry an implication of obligation while the appearance itself, unless clearly stated to be voluntary, may be an awesome experience for the ordinary citizen'" [quoting from ALI, Model Code of Pre-arraignment Procedure § 2.01(3) and commentary, p 91 (Tent Draft No. 1, 1966)]). Appellant was obviously concerned about whether he could leave the station, as evidenced by his question to Detective Bousquet if he was being "like being placed under arrest."

Appellee does not really address law enforcement's failure to comply with section 39.037(2) of the Florida Statutes, the parental notification statute, but does refer to Appellant's supposed

"reluctance to involve his parents." (Answer Brief of the Appellee, p. 14) The record does not reflect so much a reluctance as the fact that Appellant simply did not know how to contact his parents at that particular time; they were apparently at work and difficult to reach. However, even if Appellant had been adamant that the detectives not contact his parents, this would not excuse the failure to comply with the statute. It does not require that the juvenile request that his parents be notified or consent to their notification before law enforcement's obligation to contact them is triggered. There is nothing in the record to show why the police could not have suspended their interrogation of Appellant until his parents were contacted.

ISSUE II

APPELLANT'S CONSTITUTIONAL RIGHTS TO CONFRONT AND CROSS-EXAMINE THE WITNESSES AGAINST HIM AND TO DUE PROCESS OF LAW WERE VIOLATED WHEN THE PROSECUTOR BELOW WAS PERMITTED TO QUESTION DETECTIVE BOUSQUET EXTENSIVELY REGARDING STATEMENTS JOHNATHAN GRIMSHAW MADE TO HIM WHICH INCULPATED APPELLANT.

Appellee asserts that Appellant's issue has not been preserved for appellate review because trial counsel for Appellant lodged a Hearsay objection rather than a Bruton[1] objection during the guilt phase when the State began questioning its witness regarding what Johnathan Grimshaw said in his statement to the police. (Answer Brief of the Appellee, pp. 21-22) Certainly, what was in Grim-

[1] Bruton v. United States, 391 U.S. 123 (1968).

shaw's statement was inadmissible hearsay. In Tompkins v. State, 502 So. 2d 415, 420 (Fla. 1986) this Court wrote as follows:

> Although appellant did not argue a constitutional error at trial, we recognize that the admission of hearsay in criminal proceedings may constitute a violation of the accused's sixth amendment right to confront witnesses testifying against him. [Citation omitted.]

Thus, the Court has recognized that a problem with admitting hearsay is the same as the problem with admitting a confession of a non-testifying codefendant which implicates the defendant, namely, the denial of the defendant's constitutional right to confront the witnesses against him. If there is any difference between the objection lodged below and the argument made here on appeal, the difference is razor-thin, and this Court should find the objection sufficient to preserve Appellant's issue. Furthermore, at penalty phase, the prosecutor himself recognized that there was a potential Bruton problem with what he was doing, but dismissed it on the assumption that defense counsel had opened the door. (Vol. VII, pp. 960-961)

Appellee is incorrect in saying that defense counsel "acquiesced" in the trial court's overruling of his objection. (Answer Brief of the Appellee, p. 22) Although counsel may have accepted the court's ruling, as he should have, and not continued arguing after the court had already ruled, he did not utter any words of acquiesce as did trial counsel in Lucas v. State, 376 So. 2d 1149 (Fla. 1979), which Appellee cites on page 22 of its brief.

As for Appellee's argument that defense counsel "waived the claim by not renewing his objection when the state subsequently

inquired as to Grimshaw's statements[,]" counsel was not required to perform a useless act when the court had already indicated by his ruling that he would allow the State to pursue its line of inquiry. See Brown v. State, 206 So. 2d 377, 384 (Fla. 1968) ("A lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless. Citation omitted.]"); Birge v. State, 92 So. 2d 819, 822 (Fla. 1957) ("It is certainly unnecessary that an accused undertake to accomplish an obviously useless thing in the face of a positive adverse ruling by the trial judge."); Thomas v. State, 419 So. 2d 634 (Fla. 1982) (No requirement to do a useless act.)

The case of Damren v. State, 696 So. 2d 709 (Fla. 1997), which Appellee discusses at some length on pages 28-30 of its brief, is clearly distinguishable from the instant case. Unlike here, the statements of the deceased in Damren were admissible as excited utterances. Moreover, the declarant in Damren, Chittam, was not a codefendant; he was never charged with Damren, and so did not have the same motive to deflect guilt away from himself and onto Damren as Johnathan Grimshaw had to deflect guilt away from himself toward Nathan Ramirez.

In Donaldson v. State, 23 Fla. L. Weekly S245 (Fla. April 30, 1998), this Court recently dealt with a similar issue and ruled that is was error for the deposition transcript of a co-felon to have been admitted at the penalty phase of Donaldson's trial. In the opinion, the Court emphasized again that the rights of the accused to due process of law, confrontation, and cross-examination

of witnesses apply at both the guilt and penalty stages of a capital trial.

With regard to Appellee's assertion that both Appellant and Grimshaw agreed that it was Appellant who shot the victim (Answer Brief of the Appellee, pp. 30-31), this is not what Appellant told the detectives during the early portion of the interrogation. Rather, he initially stated that he did not fire either shot, then said he fired one of the two shots, before finally stating that, at Grimshaw's urging, he fired both shots.

ISSUE III

THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS NOT PROVEN, AND THE COURT BELOW ERRED IN SUBMITTING THIS FACTOR TO THE JURY FOR ITS CONSIDERATION, AND IN USING IT IN SUPPORT OF APPELLANT'S SENTENCE OF DEATH. FURTHERMORE, THERE IS AN INCONSISTENCY IN THE COURT'S FINDING BOTH CCP AND COMMITTED TO AVOID ARREST.

Appellee asserts that any error in the trial court's findings in aggravation would be harmless because of the "absence of significant mitigation." (Answer Brief of the Appellee, p. 38) As discussed in Issue IV of Appellant's initial brief and this brief, the mitigation presented below was much more substantial than the State would suggest, particularly when one considers Appellant's extreme youth (he had just turned 17), and the fact that, as the trial court found, Appellant was "more immature emotionally, intellectually and behavior-wise than his chronological age..." (Vol. VI, p. 735)

ISSUE IV

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

With regard to the trial court's treatment of Appellant's history of "huffing" aerosol products, in Mahn v. State, 23 Fla. Law Weekly S219 (Fla. April 16, 1998), this Court once again emphasized that a history of drug/alcohol abuse must be considered in mitigation regardless of whether the defendant was under the influence of such substances at the time of the homicide. See also Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985) (appellant's drinking problems should have been considered in mitigation, even though he testified he was "cold sober" on the night of the murder.

This Court's recent opinion in Urbin v. State, 23 Fla. L. Weekly S257 (Fla. May 7, 1998) compels reversal of Appellant's sentence of death because of his youth. In Urbin, the Court found the fact that the appellant was only 17 years old at the time of the murder to be "particularly compelling," in its proportionality review. The Court went on to discuss the age factor as follows:

> In Allen v. State, 636 So. 2d 494,497 (Fla. 1994), we held that the death penalty was either "cruel or unusual if imposed upon one who was under the age of sixteen when committing the crime; and death thus is prohibited by article I, section 17 of the Florida Constitution." Here the defendant is seventeen, below the age of majority, although above the constitutional line for the death penalty. However, considering that it is the patent lack of maturity and responsible judgment that underlies the mitigation of young age, Livingston [v. State, 565 So. 2d 1288 (Fla. 1988)], the closer the defendant is to the age where

> the death penalty is constitutionally barred, the weightier this statutory mitigator becomes.

Here, Appellant was barely 17 and, as the trial court specifically found, was "more immature emotionally, intellectually and behaviorwise than his chronological age..." (Vol. VI, p. 735) Furthermore, in Urbin, this Court was impressed by the fact that, in addition to age, the trial court had found one other statutory mitigator (substantial impairment of Urbin's capacity to appreciate the criminality of his conduct). Here, although the lower court's findings are not crystal clear, it appears that, in addition to age, the court found several additional statutory mitigating circumstances (but gave them little weight). Under these circumstances, Appellant's youth is a singularly compelling mitigating factor, which must result in reversal of his sentence of death.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Nathan Joe Ramirez, 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) 873-4739, on this 9th day of June, 1998.

Respectfully submitted,

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