IN THE SUPREME COURT OF FLORIDA

PAUL O. STOVALL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

FSC CASE NO. 95,059

FIFTH DCA CASE NO. 97-2556

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
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112 Orange Avenue, Suite A
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(904) 252-3367

COUNSEL FOR PETITIONER

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced CG Times.

Susan A Fagan

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

PAUL O. STOVALL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	FSC CASE NO.
	)	
STATE OF FLORIDA,	)	FIFTH DCA CASE NO. 97-2556
	)	
Respondent.	)	
	)	

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts are set out in the instant decision as follows:

> (HARRIS, J.) Stovall was convicted of armed escape, battery upon a law enforcement officer, depriving an officer of means of protection or communication, three counts or aggravated assault upon a law enforcement officer, three counts of armed kidnapping, two counts of aggravated assault, and possession of a firearm by a convicted felon. The charges arose from an incident in which Stovall, after being taken to Halifax Hospital after he attempted to ingest drugs during a sting operation, escaped from the officer guarding him after throwing medication in her face and striking her and taking her firearm and walkie-talkie. He then took hostages. During the hostage situation, Stovall pointed the

firearm at other officers.

We affirm Stovall's convictions except for the count of possession of a firearm by a convicted felon. Although the state introduced a certified copy of a prior conviction of "Paul O'Neil Stovall" over Stovall's objection as to predicate, there was no showing that defendant was the Stovall referred to in the judgment of conviction received in evidence.

As held in *Killingsworth v. State*, 584 So. 2d 647, 648 (Fla. 1st DCA 1991):

As part of its prima facie case in a prosecution for possession of a firearm by a convicted felon, the state must prove that the defendant has previously been convicted of a felony. To do this, the state must prove the historical fact of a prior felony conviction and the identity of the defendant as a perpetrator. (Citation omitted.) Although the historical fact of a prior felony conviction can be proved by introducing a certified copy of a prior felony judgment (citation omitted), mere identity between the name appearing on the prior judgment and the name of the defendant on trial does not satisfy the state's obligation to present affirmative evidence that they are the same person... Because the certified copy of the judgment introduced in the trial below was a convicted felon, the appellant's identity as the person named in the judgment was never satisfactorily proved in the state's case in chief . . . Therefore, the trial court erred in denying the appellant's motion for judgment of acquittal on the count charging him with possession of a firearm by a convicted felon.

Such is the case before us; we therefore reverse on the authority of *Killingsworth*.

Stovall also urges the trial court erred in making his habitual offender sentences run consecutively. *See Hale v. State*, 630 So. 2d 521 (Fla. 1993). Because of our holding in Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev.

granted, 718 So. 2d 169 (Fla. 1998), we do not consider the issue.

AFFIRMED in part; REVERSED in part and REMANDED for further action consistent with this opinion. (COBB and GOSHORN, JJ., concur.)

Stovall v. State, 24 Fla. L. Weekly D 424-425 (Fla. 5th DCA February 12, 1999)

[Appendix A] Petitioner filed a notice to invoke this Court's discretionary jurisdiction on March 5, 1999.

SUMMARY OF ARGUMENT

This Honorable Court has discretionary jurisdiction pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981) to review the instant case where the Fifth District Court of Appeal cited in its opinion to a case which is currently pending review with this Court.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT CASE PURSUANT TO JOLLIE V. STATE, 405 So. 2d 418 (Fla. 1981).

On appeal to the Fifth District Court of Appeal, Petitioner argued that the trial court erred by imposing consecutive habitual felony offender sentences. On February 12, 1999, the Fifth District issued its opinion affirming Petitioner's sentences. See Stovall v. State, 24 Fla. L. Weekly D 424, 425 (Fla. 5th DCA February 12, 1999) [See Appendix A] In rejecting Petitioner's argument, the District Court held that this sentencing error was not addressable on appeal citing Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), which is currently pending for review with this Court in case number 92, 805, rev. granted, 718 So. 2d 169 (Fla. 1998). This Honorable Court has discretionary jurisdiction to accept the instant case pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981).

CONCLUSION

Petitioner respectfully requests this Honorable Court to exercise its discretionary jurisdiction and accept the instant case for review.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Susan A Fagan

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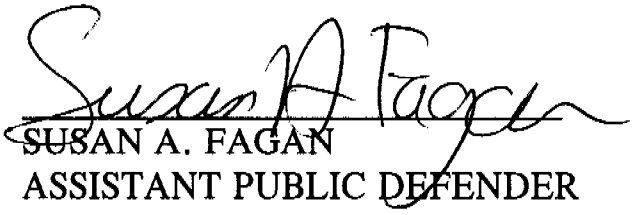
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Paul O. Stovall, DC # 621892, Washington Correctional Institution, 4455 Sam Mitchell Drive, Chipley, FL 32428, this 15th day of March 1999.



SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

PAUL O. STOVALL,	)	
	)	
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vs.	)	FSC CASE NO.
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STATE OF FLORIDA,	)	FIFTH DCA CASE NO. 97-2556
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Respondent.	)	
	)	

JURISDICTIONAL BRIEF OF PETITIONER

APPENDIX

APPENDIX A -- Stovall v. State, 24 Fla. L. Weekly D 424, 425 (Fla. 5th DCA February 12, 1999)

if it would result in a sentence not befitting the crime. Polhill stated he disagreed with the principal theory insofar as it would permit a defendant to be found guilty of a killing though the defendant was involved only in planning a lesser crime and the killing was beyond his control. After the court assured him this was not a death penalty case, Polhill stated he could apply the law on principals, though he did not like it.

We cannot say the trial court erred in finding this single statement insufficient to overcome Polhill's bias against the principal theory and concerns about harsh sentencing. *See Foster v. State*, 679 So. 2d 747 (Fla. 1996) (trial court's determination that challenge for cause is proper not to be disturbed absent showing of manifest error); *Massad v. State*, 703 So. 2d 1134 (Fla. 5th DCA 1997) (trial judge must determine whether juror's bias or prejudice is overcome with assurances that juror can, in spite of them, render fair verdict). In this case, the principal theory applied to every offense charged, including felony murder, and to the lesser included offenses. The possibility that Calvert could be found guilty of felony murder under the principal theory is a situation Polhill specifically stated he could not countenance.

CO-CONSPIRATOR HEARSAY STATEMENTS

Calvert argues the State failed to establish that the hearsay statements of McKevitt and Calabrese were made during and in furtherance of a conspiracy, or even that a conspiracy existed. *See* § 90.803(18)(e), Fla. Stat. (1995). We find the State sufficiently established, through McKevitt's in-court testimony, the existence of a conspiracy to commit robbery and murder and Calvert's participation in the conspiracy. We further find that McKevitt's hearsay statements were properly admitted. Calabrese's statements, however, were made after the robbery and shootings had occurred, and thus, after the conspiracy ended. They were therefore inadmissible under section 90.803(18)(e). *See Burnside v. State*, 656 So. 2d 241 (Fla. 5th DCA 1995); *Usher v. State*, 642 So. 2d 29 (Fla. 2d DCA 1994). Nevertheless, testimony from McKevitt and other witnesses, along with Calvert's pretrial admissions, sufficiently evidenced Calvert's participation in planning and carrying out the robbery and murders. Calabrese's statements simply described what transpired at Lopez Plaza, and any error in admitting them was harmless. *State v. DiGiulio*, 491 So. 2d 1129 (Fla. 1986).

DENIAL OF VOLUNTARY INTOXICATION INSTRUCTION

Calvert asserts he was entitled to an instruction on voluntary intoxication because there was testimony that he consumed marijuana prior to the shootings and that he was intoxicated. Voluntary intoxication is a defense to a specific intent crime.[1] *Stevens v. State*, 693 So. 2d 144 (Fla. 5th DCA 1997). A voluntary intoxication instruction is only required where the defendant produces "evidence of his intoxication sufficient to establish that he was incapable of forming the intent necessary to commit the crime." *Id.* at 145 (citing *Linehan v. State*, 476 So. 2d 1262 (Fla. 1985)). There was no evidence that Calvert was intoxicated when the robbery and, later, the killings were planned. The evidence only showed Calvert smoked marijuana at some point between planning to rob Miller and planning to kill him and anyone accompanying him to Lopez Plaza. Evidence of consumption alone is not sufficient to require that the voluntary intoxication instruction be given. *Id.*

AFFIRMED. (COBB and ANTOON, JJ., concur.)

[1]The jury was instructed it could find Calvert guilty of first-degree murder by either premeditated murder or felony murder for which robbery was the underlying felony. Robbery and premeditated murder are specific intent crimes.

* * *

Criminal law—Motion for judgment of acquittal made at conclusion of state's case is not waived by failing to renew motion at conclusion of all the evidence—Circumstantial evidence was sufficient to rebut defendant's theory that cocaine found at scene had never been in his possession—Trial court properly denied motion for judgment of acquittal

ANDREW J. MORRIS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 95-1230. Opinion filed February 12, 1999. Appeal from the Circuit Court for St. Johns County, Robert K. Mathis, Judge. Counsel: James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Michael D. Crotty, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) The supreme court, having determined that a motion for judgment of acquittal made at the conclusion of the state's case is not waived by failing to renew the motion at the conclusion of all the evidence, has remanded this case to us to review the issue as to whether the trial court erred in not granting the motion for judgment of acquittal.

Because we agree that on the merits the trial court was correct in not granting the motion, we affirm on this issue.

In a circumstantial evidence case, such as this, in order to survive a motion for judgment of acquittal the state is required only to introduce competent evidence inconsistent with the defendant's theory of the case. *State v. Law*, 559 So. 2d 187 (Fla. 1989). It was appellant's theory that the cocaine found at the scene had never been in his possession.

To rebut this theory, the state introduced the following evidence:

1. When Morris fled, two officers noticed that his pants pockets were tucked inside his pants and his hands were empty.
2. When Morris was apprehended, the officers found near him a cassette tape, some Juicy Fruit gum, forty cents in change, and a plastic baggie containing crack cocaine.
3. Although the area was wet with rain which had fallen during the preceding half hour, these items were dry.
4. Morris was chewing Juicy Fruit gum when he was apprehended.
5. When Morris was apprehended, the officers noticed that his pants pockets were turned outside his pants.

This evidence, collectively, satisfied the state's burden to introduce evidence inconsistent with the defendant's theory of the case and justified the denial of the motion for judgment of acquittal.

AFFIRMED. (COBB and SHARP, W., JJ., concur.)

* * *

Criminal law—Evidence insufficient to support conviction for possession of firearm by convicted felon where state failed to prove that defendant was the person referred to in the certified copy of prior judgment of conviction received in evidence over defendant's objection—Sentencing—Whether trial court erred in making habitual sentences consecutive not considered by appellate court

PAUL O. STOVALL, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-2556. Opinion filed February 12, 1999. Appeal from the Circuit Court for Volusia County, E. L. Eastmoore, Senior Judge. Counsel: James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Steven J. Guardiano, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) Stovall was convicted of armed escape, battery upon a law enforcement officer, depriving an officer of means of protection or communication, three counts of aggravated assault upon a law enforcement officer, three counts of armed kidnaping, two counts of aggravated assault, and possession of a firearm by a convicted felon. The charges arose from an incident in which Stovall, after being taken to Halifax Hospital after he attempted to ingest drugs during a sting operation, escaped from the officer guarding him after throwing medication in her face and striking her and taking her firearm and walkie-talkie. He then took hostages. During the hostage situation, Stovall pointed the firearm at other officers.

We affirm Stovall's convictions except for the count of possession of a firearm by a convicted felon. Although the state introduced a certified copy of a prior conviction of "Paul O'Neil Stovall" over Stovall's objection as to predicate, there was no showing that defendant was the Stovall referred to in the judgment of conviction received in evidence.

As held in *Killingsworth v. State*, 584 So. 2d 647, 648 (Fla. 1st

DCA 1991):

> As part of its prima facie case in a prosecution for possession of a firearm by a convicted felon, the state must prove that the defendant has previously been convicted of a felony. To do this, the state must prove the historical fact of a prior felony conviction and the identity of the defendant as the perpetrator. (Citation omitted.) Although the historical fact of a prior felony conviction can be proved by introducing a certified copy of a prior felony judgment (citation omitted), mere identity between the name appearing on the prior judgment and the name of the defendant on trial does not satisfy the state's obligation to present affirmative evidence that they are the same person . . . Because the certified copy of the judgment introduced in the trial below was the only evidence offered by the state to prove that the appellant was a convicted felon, the appellant's identity as the person named in the judgment was never satisfactorily proved in the state's case in chief . . . Therefore, the trial court erred in denying the appellant's motion for judgement of acquittal on the count charging him with possession of a firearm by a convicted felon.

Such is the case before us; we therefore reverse on the authority of *Killingsworth*.

Stovall also urges the trial court erred in making his habitual offender sentences run consecutively. *See Hale v. State,* 630 So. 2d 521 (Fla. 1993). Because of our holding in *Maddox v. State,* 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. granted,* 718 So. 2d 169 (Fla. 1998), we do not consider the issue.

AFFIRMED in part; REVERSED in part and REMANDED for further action consistent with this opinion. (COBB and GOSHORN, JJ., concur.)

* * *

Criminal law—Counsel—Where defendant requested that court-appointed counsel be discharged because he was not operating in defendant's best interests and had failed to contact witnesses, trial court reversibly erred in summarily denying defendant's request without conducting any inquiry regarding defendant's claims

JAMES HODGES, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-3340. Opinion filed February 12, 1999. Appeal from the Circuit Court for Orange County, Frank N. Kaney, Judge. Counsel: James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Lori E. Nelson, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM) James Hodges (defendant) appeals his judgments and sentences which were entered by the trial court after a jury found him guilty of committing the offenses of burglary of a dwelling and grand theft.[1] He contends that he is entitled to receive a new trial because the trial court failed to conduct an adequate *Nelson*[2] inquiry. We agree and therefore reverse.

This court recently explained:

> Under *Nelson*, once a defendant requests the trial court to discharge his court-appointed attorney because the attorney's representation is allegedly ineffective, the trial court is required to make an independent inquiry into whether there is reasonable cause to believe that the attorney is not providing effective assistance to the defendant. *Nelson v. State*, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973). If the court determines that there is a reasonable basis to conclude that the representation being provided by court-appointed counsel is ineffective, the trial court should make specific findings supporting that conclusion and appoint substitute counsel. *Id.* However, if there is no reasonable basis to believe that the attorney's representation is ineffective, the trial court must deny the request stating the reasons for the ruling on the record. *Id.*

Gaines v. State, 706 So. 2d 47, 49 (Fla. 5th DCA 1998). *See also Watts v. State*, 593 So. 2d 198, 203 (Fla.), *cert. denied*, 505 U.S. 1210 (1992). The purpose of a *Nelson* inquiry is to determine "if the appointed counsel is performing adequately and if not, to replace such counsel." *Denson v. State*, 689 So. 2d 1274, 1275 (Fla. 5th DCA 1997).

Here, prior to trial, the defendant requested that the trial court discharge his court-appointed attorney, claiming that counsel was not operating in the defendant's "best interests" and that defense counsel had failed to contact witnesses. The trial court summarily denied the defendant's request, stating in a conclusory fashion, "You've got an attorney that's competent." The court did not conduct any inquiry of defense counsel regarding the defendant's claims before entering its ruling. This procedure was improper and in derogation of the law under *Nelson*. 274 So. 2d at 258.

Accordingly, we are constrained to reverse the defendant's judgments and sentences and remand this matter for a new trial.

REVERSED and REMANDED. (GRIFFIN, C.J., THOMPSON, and ANTOON, JJ., concur.)

[1]§§ 810.02, 812.014, Fla. Stat. (1995).

[2]*Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973).

* * *

Criminal law—Argument—Prosecutor's comments on possible penalty defendant faced, although improper, was harmless error where defense counsel had already advised the jury of possible penalty facing defendant when he cross-examined defendant's accomplices

DANNY BRANDON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-931. Opinion filed February 12, 1999. Appeal from the Circuit Court for Marion County, Carven Angel, Judge. Counsel: James B. Gibson, Public Defender, and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

(ANTOON, J.) Danny Brandon appeals the judgments and sentences entered by the trial court after the jury found him guilty of committing the crimes of attempted armed carjacking, felony causing bodily injury, armed carjacking, assault, and possession of a firearm by a convicted felon.[1] We affirm.

Two of Mr. Brandon's accomplices testified at trial on behalf of the state. During cross-examination, defense counsel attacked the accomplices' credibility by establishing that they had been charged with the same offenses for which Mr. Brandon was being tried. Defense counsel also elicited testimony that the accomplices were facing possible terms of life imprisonment if found guilty of the charges.

Thereafter, during final argument both the prosecutor and defense counsel referred to Mr. Brandon's possible sentence if convicted. First, the prosecutor informed the jury that Mr. Brandon faced life imprisonment, stating: "Well, if [the accomplices] are facing life sentences, certainly [Mr. Brandon] is in the same boat." The trial court overruled defense counsel's objection to the statement. Defense counsel later reminded the jury that Mr. Brandon's accomplices were charged with the same crimes as he was and then argued that their testimony was untrustworthy because they were required to testify in order to satisfy the terms of their plea agreements.

On appeal, Mr. Brandon correctly argues that, except in death penalty cases, it is improper to inform the jury of the possible penalties for the defendant's crime. *See Nixon v. State*, 572 So. 2d 1336, 1345 (Fla. 1990), *cert. denied*, 502 U.S. 854 (1991). Such information is improper because, except in death penalty cases, the jury does not recommend a sentence. *See id.* Thus, the prosecutor's comment made during closing that Mr. Brandon could be sentenced to life imprisonment was improper. *See id.*

However, by the time the prosecutor made the improper comment, the "cat was already out of the bag." Defense counsel had already advised the jury of the possible penalties facing Mr. Brandon should he be convicted of the crimes charged when he cross-examined Mr. Brandon's accomplices. As a result, the prosecutor's improper closing argument was harmless. *See Johnson v. State*, 670 So. 2d 1121 (Fla. 5th DCA 1996).

JUDGMENTS and SENTENCES AFFIRMED. (GRIFFIN, C.J., and THOMPSON, J., concur.)

[1]*See* §§ 812.133, 777.04, 782.051, 784.011, 790.23, Fla. Stat. (1997).

* * *

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JAMES R. WULCHAK
Chief, Appellate Division
CHRISTOPHER S. QUARLES
Chief, Capital Appeals
MARLEAH K. HILBRANT
Administrative Assistant

March 15, 1999

The Honorable Sid White
Clerk of the Supreme Court of Florida
Supreme Court Building
Tallahassee, FL 32301

Re: STATE v. STOVALL, No.

Dear Mr. White:

Enclosed please find the original and five copies of the Jurisdictional Brief of Petitioner. If you have any questions, please do not hesitate to call.

Sincerely,

Susan A Fagan

Susan A. Fagan
Assistant Public Defender

SAF/mll

Enclosure