IN THE SUPREME COURT OF FLORIDA

OSCAR RAY BOLIN,	:	
Appellant,	:	
vs.	:	Case No. SC95774
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

STATEMENT OF THE CASE

Appellant will rely upon his statement of the case presented in his initial brief.

STATEMENT OF THE FACTS

Appellant will rely upon his statement of the facts as presented in his initial brief.

ARGUMENT

ISSUE I

THE TRIAL COURT'S RULING WHICH SUPPRESSED BOLIN'S LETTER ON BOTH FOURTH AND SIXTH AMENDMENT GROUNDS, WAS ERRONEOUSLY REVERSED BY THE SECOND DISTRICT IN STATE V. BOLIN, 693 SO. 2D 583 (FLA. 2D DCA 1997).

Initially, Appellee contends that this Court should decline to review the suppression issue on the ground that the opinion of the Second District established the "law of the case" and no exceptional circumstances which would result in "manifest injustice" exist. Brief of Appellee, Page 16-8. Appellee simply ignores this Court's prior decision of Preston v. State, 444 So. 2d 939 (Fla. 1984) which was cited in Appellant's initial brief. Under identical circumstances, the Preston court wrote:

> ... reconsideration of the suppression issue is proper. Section 921.141(4), Florida Statutes (1981), mandates automatic and full review of a judgment of conviction resulting in imposition of the death penalty. This Court has determined that the statute requires that "[i]n capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial." Fla. R. App. P. 9.140(f). The interest of justice, substantive due process requirements and Florida's constitutional and statutory scheme of death penalty review jurisdiction support our decision to review this issue.

444 So. 2d at 942.

Turning to the merits, Appellee urges this Court to accept the Second District's reasoning that the seizure of Bolin's letters and personal effects was permissible in the course of an

investigation into his attempted suicide. The United States Supreme Court has previously rejected an attempted suicide exception to the warrant requirement in Thompson v. Louisiana, 469 U.S. 17 (1984). There, the defendant's daughter told police that her mother had shot her father and ingested a large quantity of pills in a suicide attempt. When the police arrived at the residence, they found the man dead and the woman unconscious. After the unconscious suspect was transported to the hospital, the police searched the house, seizing items which included a suicide letter.

The Court rejected the state court's conclusion that the circumstances created a "diminished expectation of privacy in petitioner's dwelling". 469 U.S. at 22. While agreeing that the police were justified in making a warrantless entry into the residence, the Thompson court concluded that the subsequent search after assistance had been rendered violated the Fourth Amendment.

As applied to the case at bar, Appellant recognizes that he did not have the same expectation of privacy in his jail cell that a person would have in his or her home. However, what expectation of privacy Bolin did have in the content of his personal writings was not decreased by the circumstances of his attempted suicide. Once Bolin was removed from his cell and given medical attention, there was no justification for Captain Terry and Corporal Baker to seize the letter at issue and Bolin's other private papers to further their investigation and bolster

the State's evidence at trial.

A more recent decision of the United States Supreme Court reaffirms the reasoning of Thompson. In Flippo v. West Virginia, 528 U.S. 11 (1999), the accused and his wife were vacationing at a cabin in a state park. He called the police to report that they had both been attacked and his wife killed. After the accused had been taken to the hospital, the police searched the cabin and its environs, collecting evidence which included photographs found in an unlocked briefcase. The prosecution argued that the evidence was permissibly seized without a warrant because the police were conducting a crime scene investigation. The state further relied on the "plain view" doctrine.

The Flippo court again rejected a "murder scene exception" to the warrant requirement of the Fourth Amendment. See also, Mincey v. Arizona, 437 U.S. 385 (1978). If there is no "murder scene exception" which allows a general investigatory search and seizure, the Second District's view that an attempted suicide permits a similar investigation is questionable, to say the least.

On page 25 of Appellee's brief, this Court's decision in Kight v. State, 512 So. 2d 922 (Fla. 1987) is cited for the proposition that "Bolin had no reasonable expectation of privacy, as he knew that he had no privacy in the cell or its contents". What this Court actually wrote in Kight is the following:

> Kight had no reasonable expectation of privacy in the clothing on his person. It is recognized that a pretrial detainee such as Kight, has a diminished expectation of pri-

vacy with respect to his room or cell.

512 So. 2d at 927. Appellant agrees that his expectation of privacy was diminished, however he still had a reasonable expectation that his papers would only be searched for contraband; rather than read to gather evidence which could be used at trial to convict him.

Another exaggeration by Appellee should also be corrected. In footnote 2 of her brief on page 22, she states that it was "undisputed" that the letter addressed to Captain Terry was on top of the box in Appellant's cell. In fact, it was very much disputed whether the letter was outside or inside the box seized by Terry and Corporal Baker. Appellant testified that a letter to his attorneys was on top of the box and the letter to Captain Terry was among several that were inside the box (XIII, T1031). Detective Ernest D. Walters did an detailed inventory of the contents of Bolin's cell immediately following the attempted suicide (XIV, T1189-93). Although he noted the box of Bolin's possessions and a white business envelope affixed to the top of it, he was unable to describe "any name or address" on that envelope (XIV, T1192-3).[1]

Finally, it is the trial judge's original ruling which suppressed the letter that is entitled to the presumption of correctness. It was he, not the Second District, that heard the

[1]There appears to be nothing illegible about the address on the letter to Captain Terry as photographed in the record (III, R380, 388). Also, it appears that the letter in the photo is not affixed to the box, but merely laying on top of it (III, R380).

testimony and observed the demeanor of the witnesses. As this Court stated in San Martin v. State, 717 So. 2d 462 (Fla. 1998):

> A trial court's ruling on a motion to suppress comes to this Court clothed with a presumption of correctness and, as the reviewing court, we must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling.

717 So. 2d at 469. Accord, Rhodes v. State, 638 So. 2d 920 (Fla. 1994). Since the trial judge's findings were supported by the record, this Court should now order the letter suppressed and grant Bolin a new trial.

ISSUE II

THE TRIAL JUDGE ERRED BY RULING THAT BOLIN'S LETTER TO CAPTAIN TERRY ACTED AS A WAIVER OF THE SPOUSAL PRIVILEGE.

Appellee asserts that this Court should give the trial judge's ruling on whether Bolin's letter to Captain Terry constituted a waiver of his marital privilege the same presumption of correctness that applies to a ruling on a motion to suppress evidence. Brief of Appellee, page 28-9. However, this is not the proper standard of review when the trial court's ruling is based upon interpretation of a written exhibit rather than live testimony. As the court explained in Town of Jupiter v. Alexander, 747 So. 2d 395 (Fla. 4th DCA 1998):

> Although generally decisions of the trial court come to this court with a presumption of correctness, in the instant case that presumption is slight at most. Where a trial

> court rules on the basis of a written record and not on testimony requiring credibility determinations, the appellate court has before it everything the trial court reviewed, and we have the same opportunity to weigh it as the trial court did.

747 So. 2d at 399. When a finding of fact by a trial judge rests "on conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, [it] does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion". Holland v. Gross, 89 So. 2d 255 (Fla. 1956).

Indeed, the court's ruling at bar that Bolin's letter operated legally as a voluntary waiver of his marital privilege is comparable to a trial judge's construction of a contract. Regarding the latter, Judge Padovano of the First District observed:

> A decision construing a contract presents an issue of law that is subject to review on appeal by the de novo standard of review.
>
> * * *
>
> Here, the trial court did not decide any issue of fact. Nor did the court exercise judicial discretion. Because the order denying Powertel's motion to compel arbitration is based entirely on the trial court's construction of the contract and related documents, we review the decision by the de novo standard.

Powertel v. Bexley, 743 So. 2d 570 at 573 (Fla. 1st DCA 1999). Accordingly, this Court should examine Bolin's purported waiver under the de novo standard of review.

Appellee analogizes the trial court's ruling that Bolin's letter established a voluntary waiver "prospective only in its

tone, [but] had the legal effect of acting or operating retroactively"[2] to the "inevitable discovery" exception to the Fourth Amendment. Brief of Appellee, pages 35-8. There are several defects in this reasoning. To begin with, waiver principles have nothing to do with Fourth Amendment protections against illegal searches or seizures. Certainly, there was nothing improper about the homicide detectives speaking to Cheryl Coby, Bolin's ex-wife, to learn what she knew about the Natalie Holley homicide or the others. Indeed, the majority of Coby's testimony, whether true or false, is unquestionably not subject to the marital communications privilege.

As explained by the Court in Nix v. Williams, 467 U.S. 431 (1984), the justification for the inevitable discovery exception to the exclusionary rule is that the state should be placed in the same position with respect to admissibility of evidence that it would have if no police misconduct had occurred. If evidence which would have been inevitably discovered through legitimate means were excluded because of police misconduct, the state would be placed in a worse position.

Such an analysis makes no sense when applied to a purported waiver of the marital communications privilege. Strong public policy arguments support a privilege which makes private communications inside a marital union inadmissible as evidence against an accused. The state never had a reasonable expectation that Bolin's statements to his then-wife would be part of the evidence

[2] vol. XIII, page T1177.

presented to the jury at trial. Only if Bolin waived his privilege could the spousal communications come in. Therefore, the state is basically arguing for a windfall rather than for being placed in the same position they would have without Bolin's suicide letter.

In this Court's prior opinion reversing Bolin's conviction, Bolin v. State, 642 So. 2d 540 (Fla. 1994), it was written:

> In the instant case Bolin and his attorneys tried to maintain the spousal privilege at every step of the proceedings.

642 So. 2d at 541. Nothing in Bolin's suicide letter should alter that conclusion. He never conducted himself in a manner that was inconsistent with maintaining the privilege. At most, he simply recognized that the police homicide investigation was dependent on what Cheryl Coby chose to tell them about her own activities. The marital privilege was not waived.

ISSUE III

THE TRIAL JUDGE ERRED BY FAILING TO FIND A DISCOVERY VIOLATION WHEN A DIFFERENT FBI AGENT WAS ALLOWED TO TESTIFY ABOUT SHOEPRINT EVIDENCE. THE ERROR WAS COMPOUNDED WHEN DEFENSE WITNESS, ROBERT LIMA, WAS NOT PERMITTED TO REBUT FBI AGENT GILKERSON'S TESTIMONY.

Appellee relies heavily on this Court's decision in Bush v. State, 461 So. 2d 936 (Fla. 1984) for the proposition that the State's failure to disclose changed testimony by a witness does not constitute a discovery violation. Brief of Appellee, page 45. Since Appellee filed her brief, this Court has re-examined the holding of Bush in State v. Evans, 25 Fla. L. Weekly S744 (Fla. Case No. SC94673 October 5, 2000).

Although Evans involved a situation where the State failed to disclose that a witness who previously said she hadn't seen the homicide would change her testimony to give an eyewitness account of the killing, the Evans court cited with approval to the Second District's decision in Neimeyer v. State, 378 So. 2d 818 (Fla. 2d DCA 1979). There, the medical examiner had prepared an autopsy report and indicated at deposition that none of the findings were inconsistent with the defendant's theory of self-defense in a manslaughter prosecution. The evening before trial, the assistant state attorney notified defense counsel that the expert witness would actually testify that the victim couldn't have been moving aggressively toward the defendant when the lethal shotgun blast was fired. When the defendant objected to

the surprise testimony, the prosecutor admitted that he had been alerted six or seven days prior to trial that the doctor might testify "to information bearing critically on appellant's defense which was not included in her autopsy report" and arguably inconsistent with her deposition. Not until the afternoon before trial did the prosecutor learn of the specific changes in the medical examiner's findings.

The trial judge found that the discovery violation was not willful and denied any relief to Neimeyer. On appeal, the Second District held that the continuing duty to promptly disclose new information under Fla. R. Crim. P. 3.220(f)[3] was violated by the State. While reversing because of an inadequate Richardson[4] hearing, the Neimeyer court noted apparent prejudice to the defendant's trial preparation because of the prosecution's tardy disclosure of the changed expert testimony.

Similarly, in Alfaro v. State, 471 So. 2d 1345 (Fla. 4th DCA 1985), the state did not notify the defense that the county medical examiner would also testify as an accident reconstruction expert. Because expert testimony was used at trial to prove "matters other than those previously disclosed to the defense through the examiner's report and deposition", the Fourth District reversed the convictions for a new trial.

Turning to the case at bar, the State's previous footwear expert, FBI agent Heilman testified that he couldn't specify the

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[3]In the current rules, this is subsection (j) of Rule 3.220.

[4]Richardson v. State, 246 So. 2d 771 (Fla. 1971).

exact size of the TRAX shoes which made the impressions outside Natalie Holley's abandoned vehicle. But he did give a range of possible sizes as follows:

> I should explain that several sizes of shoes may have made an impression that size. In other words, perhaps a ten-and-a-half or an 11, or a nine-and-a-half may have made an impression of a similar size that's represented by the questioned impression.

Quoted from Brief of Appellee, page 39 and PR vol. VI, p.691. Given that the defense evidence included a pair of Pro-Line tennis shoes[5] represented to be Bolin's (IX, T579-88) and Robert Lima's testimony that Bolin's shoe size was "7 and-a-half to an 8, and preferably an 8" (X, T632), Appellant expected testimony that would suggest that someone with bigger feet than Bolin made the shoe impressions by Holley's vehicle. This supported the defense theory that Cheryl Coby was wrongfully accusing Bolin of the homicide and protecting the real killer who she had accompanied during the night's events.

By not notifying Appellant's counsel that the replacement footwear expert would give a different opinion regarding the possible range of shoe sizes, the prosecutor hindered Bolin's trial strategy in much the same way as the changed expert testimony in Neimeyer prejudiced the defense. The trial judge should have found a discovery violation. In accord with Neimeyer, this Court should now grant Bolin a new trial.

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[5]Defense counsel actually tried to get two pairs of shoes collected by Detective Lee Baker from Bolin's ex-wife into evidence (IX, T578-83).

ISSUE IV

THE TRIAL JUDGE SHOULD HAVE GRANTED APPELLANT'S MOTION TO DISMISS COUNTS TWO AND THREE OF THE INDICTMENT BECAUSE THE STATUTE OF LIMITATIONS HAD RUN ON THESE OFFENSES.

Appellee argues that once an accused has left Florida to reside in another jurisdiction, the statute of limitations is tolled with respect to filing an indictment or information for a period of up to three years. She contends that this is so regardless of whether the accused could voluntarily return to Florida or whether the State can readily locate the accused in his out-of-state residence. As applied to Bolin, Appellee would apparently concede that he could not be prosecuted for kidnapping or robbery if he had been incarcerated in Florida from 1987 until the filing of the indictment on August 1, 1990. Since he was actually incarcerated in Ohio during this period, Appellee argues that the four year limitations period did not expire on these charges.

Such an interpretation of §775.15(6), Fla. Stat. (1985) would violate the federal constitutional right to travel from state to state. Although courts have disagreed about the precise source in the Constitution for the right to travel, it has been recognized as a fundamental right since the nineteenth century[6]. Laws which deprive persons of protections by a state based upon

[6]See, Attorney General of New York v. Soto-Lopez, 476 U.S. 898 at 901-3 (1986).

residency (or length of residency) have been struck down as violative of the Privileges and Immunities Clause of Article IV, section 2; the Privileges and Immunities Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment; to list only three of the seven sources in the federal constitution which various justices have proposed. Lutz v. City of York, Pennsylvania, 899 F. 2d 255, 260 (3rd Cir. 1990).

Using an equal protection analysis in Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986), the Court observed:

> the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents.

476 U.S. at 904. The Soto-Lopez court went on to say that state laws which burden the right to migrate must further a compelling state interest.

Applying this framework to the Statute of Limitations, it seems justifiable for Florida to discourage suspected criminals from leaving Florida for the purpose of evading prosecution by tolling the limitations period for up to three years. However, when a person such as Bolin, who was not even a suspect during the four year limitations period, migrates from Florida with no purpose to evade law enforcement; there is no compelling state interest involved. The facts that 1) Bolin was incarcerated in Ohio, 2) quickly located when Florida wanted to prosecute him, and 3) could not have voluntarily returned to Florida during the period of 1987-90 to prevent a tolling of the limitations period,

all necessitate a finding that it would be unconstitutional to extend the limitations period in order to prosecute Bolin on Counts Two and Three of the Indictment.

Because the offenses in question took place on January 25, 1986 and Bolin was not indicted until August 1, 1990, the four year limitations period applicable to robbery and kidnapping had already expired. No compelling state interest would be served by tolling the running of the limitations period where Appellant's travel to another state in no way impeded prosecution.

ISSUE V

THE PENALTY JURY RECOMMENDATION WAS TAINTED BECAUSE EVIDENCE ABOUT BOLIN'S CONVICTION FOR ANOTHER MURDER WAS PRESENTED BEFORE THE JURY AND THIS CONVICTION HAS SINCE BEEN VACATED.

Appellee argues that admission of evidence about Bolin's since-reversed conviction for the murder of Terry Matthews was harmless error because the prior violent felony aggravator was otherwise established by Bolin's convictions for kidnapping and rape in Ohio. While this Court has found harmless error in some instances where prior crimes were improperly admitted into evidence, Appellant knows of no case where the erroneous conviction was for murder.

Indeed, this Court made exactly this distinction in Long v. State, 529 So. 2d 286 (Fla. 1988). Long had other prior violent crimes which were properly admitted in the penalty phase

evidence, however, the improperly admitted conviction for murder was enough to taint the jury's penalty recommendation. Certainly a prior conviction for murder carries with it much greater weight than any other violent crime. We must assume that Bolin's jury gave the Terry Matthews homicide very significant weight which may have meant the difference between a recommendation of death and a recommendation of life. Therefore, the error cannot be harmless.

ISSUE VI

THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S SPECIALLY REQUESTED PENALTY JURY INSTRUCTION ON THE PECUNIARY GAIN AGGRAVATING FACTOR.

The evidence to support application of the pecuniary gain aggravating circumstance was primarily Cheryl Coby's testimony that she saw Bolin with the victim's purse from which he took $75 (IV, R589). In itself, the taking of Natalie Holley's purse was very similar to the evidence in Hill v. State, 549 So. 2d 179 (Fla. 1989) where the victim's billfold was taken from her purse after she was murdered in the course of an attempted sexual battery. This Court struck the pecuniary gain aggravating circumstance in Hill, stating that the money "could have been taken as an afterthought". 549 So. 2d at 183.

At bar, there was additional testimony from Coby alleging that Bolin said he thought that Holley would have the cash receipts from the day's business with her and that he intended to

rob her of them (VIII, T439). While this testimony may provide a sufficient basis for the judge to find the pecuniary gain aggravating factor, it does not mean that the jury necessarily found Coby's testimony persuasive regarding the motive for the homicide. It also does not diminish the need for the jury to have a proper definition of the pecuniary gain aggravating circumstance before considering whether to apply it and what weight should be given to it.

In Castro v. State, 597 So. 2d 259 (Fla. 1992) this Court held that defense counsel's request for a limiting instruction regarding the pecuniary gain aggravating circumstance (duplicative when considered with robbery) should have been given to the penalty jury. At bar, the requested limiting instruction designed to inform the jury that the aggravating circumstance applies only when the murder is motivated by the defendant's desire for a financial gain should likewise have been given.

Because we cannot tell whether the jury would have found the aggravator proved if it had been correctly defined and we cannot tell how much weight Bolin's jury actually gave to the pecuniary gain circumstance, the error is not harmless. Bolin's sentence of death does not meet Eighth Amendment standards of reliability and should be vacated.

ISSUE VII

THE TRIAL COURT'S SENTENCING ORDER IS DEFECTIVE BECAUSE IT WEIGHS IMPROPERLY FOUND AGGRAVATING FACTORS AND GIVES ONLY SUMMARY TREATMENT TO MITIGATION.

Appellant will rely upon his argument as presented in his initial brief.

ISSUE VIII

THE TRIAL JUDGE ERRED IN SENTENCING BOLIN ON THE NON-CAPITAL FELONY COUNTS.

Appellee agrees that it was error to sentence Bolin on the non-capital felonies without reference to a guidelines scoresheet. Brief of Appellee, page 67. However, she goes on to assert:

> It is apparent, however, from the statements of both the state and the defense that they were aware of what Bolin's score would be and that he would score out to life for each of the non-capital convictions.

Brief of Appellee, page 67. There is absolutely no support in the record for this assertion. Indeed, Appellee evens refers to the guidelines scoresheet contained in the prior record on appeal, so it should be presumed that she was aware of Bolin's true score.

Appellant has attached a copy of this guidelines scoresheet as an appendix to this brief. As this Court can see, Bolin scored 409 points on a category 9 scoresheet properly prepared

under the procedure in effect in 1986. This corresponds to a recommended range of 17-22 years and a permitted range of 12-27 years for the crimes of kidnapping and robbery with a weapon. Fla. R. Crim. P. 3.988(i), see Appendix.

The prior record shows that the previous judge chose to depart from the guidelines and impose the statutory maximum sentences of life on the kidnapping and 30 years on the 1st degree felony of robbery with a weapon (PR1599-1604). While the current judge could also have departed from the guidelines, there is no evidence in the record that he was even aware that the sentencing guidelines were applicable to these sentences.

Finally, Appellee fails to address Appellant's assertion in his initial brief that imposing a sentence of life of the robbery with a weapon conviction is illegal. The Indictment charged Bolin in Count Two with a violation of §812.13 (1) and (2)(b), Fla. Stat. (1985) (I, R35). The pertinent statutory language of (2)(b) states:

> If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

A first degree felony is punishable by imprisonment not exceeding 30 years. §775.082(3)(b), Fla. Stat. (1985). Although the sentencing judge was misled by both the prosecutor and defense counsel (who agreed that the robbery was punishable by life), the Amended Judgment (IV, R575) correctly reflects that Bolin was charged and convicted of the 1st degree felony robbery with a

weapon rather than the offense of robbery with a deadly weapon (which is punishable by life). Accordingly, Bolin must be resentenced to a legal sentence.

APPENDIX

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 _____ day of August, 2001.

Respectfully submitted,

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