IN THE SUPREME COURT OF FLORIDA

MAURICE L. FLOYD,)
)
)
Appellant,)
)
vs.) CASE NUMBER SC95-824
)
STATE OF FLORIDA,)
)
Appellee.)
_____)

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY, FLORIDA

SECOND SUPPLEMENTAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

Appellant appealed his convictions for first-degree murder, armed burglary of a dwelling, aggravated assault and resulting death sentence. Appellant filed his initial brief in October, 2000, contending, *inter alia*, that his conviction and sentence for armed burglary of a dwelling should be vacated, based on this Court's decision in ***Delgado v. State***, 776 So.2d 233 (Fla. 2000). During the pendency of the appeal, appellant filed a notice of supplemental authority citing ***Valentine v. State***, 774 So.2d 934 (Fla. 5th DCA 2001). After oral argument, this Court ordered supplemental briefs addressing the retroactive application of Chapter 2001-58, Laws of Florida which purported to nullify this Court's holding in ***Delgado***, ***supra.***

On August 22, 2002, this Court rendered its decision affirming appellant's convictions and sentences in all respects, except this Court vacated appellant's conviction for armed burglary of a dwelling. In so holding, this Court wrote:

> Floyd asserts that he is entitled to relief under ***Valentine v. State***, 774 So.2d 934 (Fla. 5th DCA 2001), ***review dismissed***, 790 So.2d 1111 (Fla.2001). On this point we agree, noting that in Floyd's case the jury instruction on burglary was similar to the instruction for which relief was granted in ***Valentine***. We therefore reverse Floyd's conviction for armed burglary.
>
> In ***Valentine***, the trial judge instructed the jury with regard to a burglary charge:
>
> > Before you can find the defendant guilty of burglary, the State has to prove the following three elements beyond a reasonable doubt:
> >
> > One is that Ramon Valentine entered or *remained in* a conveyance owned by or in the possession of Johanny Rosa;
> >
> > Two, that Ramon Valentine did not have the permission or consent of Johanny Rosa or anyone authorized to act for her to enter or *remain in* the conveyance at that time, and at the time of entering or *remaining in* the conveyance, Ramon L.Valentine had a fully formed conscious intent to commit the offense of burglary with an assault or battery in that conveyance. ....
>
> Even though an unlawful entering or remaining in a conveyance is proved, if the evidence does not establish that it was done with the intent to commit burglary with an

assault or battery, the defendant must be found not guilty. ***Valentine v. State,*** 774 So.2d at 937.

In analyzing the above instruction the district court in ***Valentine*** stated:

> This instruction suggests to the jury that it could convict Valentine [the defendant] if it found that he formed the requisite intent while he remained in the [victim's] vehicle. However, because this is not a case where the facts could support a "surreptitious remaining," Valentine could not be convicted of burglary unless he had the requisite intent when he entered the [victim's] vehicle.

Id. The district court in ***Valentine*** granted relief, based on our opinion in ***Delgado v. State,*** 776 So.2d 233, 240-42 (Fla.2000), despite the lack of an objection from the defendant to the jury instruction with regard to burglary. ***See Valentine,*** 774 So.2d at 937. In ***Delgado,*** this Court interpreted the "remaining in" language in Florida's burglary statute to allow a conviction for burglary based upon a defendant remaining in an occupied dwelling only when the defendant's "remaining" therein was performed "surreptitiously."

The instruction in Floyd's case was substantially similar to that in ***Valentine.*** Similar to the situation in ***Valentine,*** the jury instruction in this case suggests that the jury could have convicted Floyd of burglary if it found that he formed an intent to commit murder while he remained in Ms. Goss's home. As in ***Valentine,*** this case is not one "where the facts could support a 'surreptitious remaining.' " ***Valentine,*** 774 So.2d at 937. Therefore, Floyd is entitled to have his conviction for armed burglary reversed due to fundamental error in the jury instruction. The reversal of Floyd's conviction for armed burglary requires that we also strike the finding of

> the murder in the course of a felony aggravating circumstance in this case. Moreover, the theory of Floyd's guilt based on felony murder cannot stand. As noted ***supra***, however, the jury also found Floyd guilty based on the theory of premeditated murder. Competent, substantial evidence still supports Floyd's conviction for premeditated murder.

Floyd v. State, Slip Opinion, p.34-37 [Footnotes omitted.]

Appellant filed a motion for rehearing. Appellee filed a motion for rehearing and/or clarification. In response, this Court ordered supplemental briefing "addressing the impact on the instant case of the rule of law announced by the United States Supreme Court in ***Yates v. United States***, 354 U.S. 298 (1957), and followed by this Court in ***Delgado v. State***, 776 So.2d 233 (Fla. 2000) and ***Mackerley v. State***, 777 So.2d 969 (Fla. 2001), regarding the validity of a general jury verdict that rests on multiple bases, one of which is legally inadequate." This brief follows.

SUMMARY OF THE ARGUMENT

The rule of law announced in ***Yates v. United States***, 354 U.S. 298 (1957), and followed by this Court in ***Delgado v. State***, 776 So.2d 233 (2000) and ***Mackerley v. State***, 777 So.2d 969 (2001) has no impact on appellant's case. Appellant's jury found appellant guilty of both premeditated murder and felony murder. Although the felony murder verdict was reached through erroneous jury instructions and therefore must fall, this Court found competent, substantial evidence to support the jury's verdict for premeditated murder. The opinion of this Court rendered on August 22, 2002 should remain unchanged. This Court should deny the state's motion for rehearing and/or clarification.

ARGUMENT

THE RULE OF LAW ANNOUNCED BY THE UNITED STATES SUPREME COURT IN ***YATES V. UNITED STATES***, 354 U.S 298 (1957), AND FOLLOWED BY THIS COURT IN ***DELGADO V. STATE***, 776 SO. 2D 233 (2000) AND ***MACKERLY V. STATE***, 777 SO. 2D 969 (FLA. 2001)HAS NO APPLICATION TO APPELLANT'S CASE WHERE THE JURY RETURNED VERDICTS ON BOTH THEORIES (PREMEDITATED AND FELONY) OF FIRST-DEGREE MURDER.

Yates v. United States, 354 U.S. 298 (1957) involved the prosecution upon a single count indictment charging the defendants with conspiring (1)to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence, and (2) to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit. The United States Supreme Court ultimately held that the charge of conspiring to **organize** the Communist Party of the United States with the intent of causing the overthrow of the Government was barred by the statute of limitations. Since **the jury returned a general verdict** on both counts, one of which was legally inadequate (i.e. barred by the statute of limitations), the

conviction was improper. Since the **general verdict** could have rested on multiple bases, one of which was legally inadequate, reversal was required.

As this Court pointed out in ***Delgado v. State***, 776 So.2d 233, 241 (Fla. 2000), reversal is not warranted where the **general verdict** could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient. ***Griffin v. United States***, 502 U.S. 46, 59-60 (1991) explained the distinction between a legally inadequate theory and a factually insufficient theory.

> It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance – remote, it seems to us – that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.

The first opinion issued by this Court in ***Delgado v. State***, 25 Fla. L.Weekly S79 (Fla. Feb. 3, 2000) held that the error in sending the felony murder charge to the jury was harmless since the evidence supported the conviction for premeditated murder. On rehearing in ***Delgado***, this Court acknowledged the rule of law announced in ***Yates v. United States***, 354 U.S. 298 (1957), and ultimately reversed

Delgado's convictions.[1] ***See Mackerley v. State***, 777 So.2d 99 (Fla. 2001).

In contrast, appellant's jury had a choice of premeditated murder, felony murder, or both. (R III 497) The jury concluded that the evidence was sufficient to support both theories of murder, premeditated and felony murder. However, as acknowledged by this Court, the jury was erroneously instructed as to the armed burglary and the felony murder. As a result of that fundamental error, this Court vacated appellant's convictions for armed burglary of a dwelling and struck that particular aggravating factor. However, this Court concluded that competent, substantial evidence existed to support the jury's verdict and appellant's conviction for premeditated murder. ***Floyd v. State***, slip opinion, p.37.

Although appellant disagrees with this Court's conclusion that competent, substantial evidence existed to support the jury's verdict as to premeditated murder, this Court nevertheless held otherwise. Since appellant's jury did not return a general verdict like the juries did in ***Delgado, supra***, ***Yates, supra*** and ***Mackerley, supra,*** the rule of law announced in ***Yates***, and followed by this Court, would have no effect on appellant's case. Under any analysis of this rule of law, the opinion of this Court on August 22, 2002 should remain unchanged.

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[1] The ***Delgado*** jury also apparently returned a **general verdict** of first - degree murder.

CONCLUSION

Based upon the foregoing cases, authorities and polices, appellant asked that this Court deny appellee's motion for rehearing and/or clarification. The opinion of this Court issued on August 22, 2002, should remain unchanged.

Respectfully submitted,

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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, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Maurice L. Floyd, #V01514, Union Correctional Institution, 7819 N.W. 228th St., Raiford, FL 32026-4210, this 7th day of November, 2002.

_____
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CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
CHRISTOPHER S. QUARLES
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