IN THE SUPREME COURT OF FLORIDA

MAURICE LAMAR FLOYD,

Appellant,

v. CASE NO. SC95824

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR PUTNAM COUNTY, FLORIDA

SECOND SUPPLEMENTAL BRIEF OF APPELLEE

RICHARD E. DORAN
ATTORNEY GENERAL

DOUGLAS T. SQUIRE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0088730

OFFICE OF THE ATTORNEY GENERAL
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
Telephone: (386)238-4990
Facsimile: (386)226-0457

COUNSEL FOR APPELLEE

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the trial court, will be referenced in this brief as Appellee, the prosecution, or the State. Appellant, Maurice Lamar Floyd, the defendant in the trial court, will be referenced in this brief as Appellant or his proper name.

The record on appeal consists of twelve volumes, which will be referenced by the letter "R," followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State relies on the statement of the case and facts contained in its Answer Brief.

SUMMARY OF THE ARGUMENT

Under Yates v. United States, 354 U.S. 298 (1957), when a court submits a case to a jury on two or more alternate theories, one of which is legally (as opposed to factually) inadequate, and it is impossible to discern the basis on which the jury actually rested its verdict, reversal is required. However, when there has been no timely objection, it is not enough for an appellant to establish that it is impossible to tell whether the verdict rested solely on the misinstruction. Instead, an appellant must affirmatively demonstrate that the jury convicted pursuant to the erroneous instruction. To do that, Appellant must show that the jury rested its verdict solely on the legally inadequate theory that he formed the intent to murder Ms. Goss after he entered without permission. Appellant cannot satisfy this burden; because, as this Court noted in finding that the murder was premeditated, "one day prior to the fateful events of July 13 that led to Ms. Goss's death, Appellant threatened to kill his wife or someone she loved," and "brought a gun with him to the victim's home on the night of the killing." Therefore, Appellant cannot possibly show that no reasonable juror could have found that by the time

Appellant (who had apparently gone there to kill someone) kicked in the front door, he had formed the intent to kill Ms. Goss.

Further, although Appellant may be entitled to review of the instant alleged error through an ineffective assistance of counsel claim, because it is not apparent from the face of the record that a tactical explanation for the decision is inconceivable, that claim cannot be addressed on direct appeal.

Finally, given the uncertainty as to the continued viability of Delgado, an admittedly incorrect interpretation of legislative intent, this Court's reliance on Valentine, a case that incorrectly extended Delgado's requirement that there be a "surreptitious remaining" to entries without permission, can only lead to the conclusion that Delgado remains binding precedent that can be expanded as it was in Valentine. For these reasons the State again asks this Court to clarify whether Delgado has been upheld and expanded by the instant decision.

ARGUMENT

ISSUE

WHETHER 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 MACKERLY V. STATE, 777 So.2d 969 (FLA. 2001), HAS ANY IMPACT ON THE INSTANT CASE?

Standard of Review

The issue of whether 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 Mackerly v. State, 777 So.2d 969 (Fla. 2001), has any impact on the instant case is a mixed question of law and fact addressing constitutional issues, requiring de novo review. See State v. Glatzmayer, 789 So.2d 297, 306 n.7 (Fla. 2001).

Argument

Under Yates, when a court submits a case to a jury on two

or more alternate theories, one of which is legally (as opposed to factually) inadequate, and it is impossible to discern the basis on which the jury actually rested its verdict, reversal is required. Yates, 354 U.S. at 311-12. However, when there has been no timely objection, it is not enough for an appellant to establish that it is impossible to tell whether the verdict rested solely on the misinstruction. Instead, an appellant must affirmatively demonstrate that the jury convicted pursuant to the erroneous instruction. United States v. Hastings, 134 F.3d 235, 242 (4th Cir. 1998). This, Appellant cannot do.

The Hastings plain error review for an alleged Yates error, is comparable to this Court's fundamental error review for un-preserved objections to jury instructions. This Court has repeatedly held "that in order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So.2d 481, 484 (Fla. 1960).

In the instant case, the trial court commented, when it reached the burglary instruction, that "[t]his may be the area where we need to adjust the instruction," and the court

specifically mentioned the remain in portion of the instruction. (R, 1882). The State responded that it addressed an entry with consent. (R, 1882). The trial court further commented that the or "remain" presumes you have a lawful entry. (R, 1883). Appellant's trial counsel responded "[n]o objection, your Honor. Understood." (R, 1883). Nor did Appellant object after the instructions were given. (R, 1991). Therefore, as Appellant clearly approved the specific portion of the jury instruction he now challenges, he must affirmatively demonstrate that the jury convicted him pursuant to the alleged erroneous instruction. Hastings, 134 F.3d at 242; Brown, 124 So.2d at 484.

Notwithstanding what Appellant must demonstrate, the State must correctly identify the alleged jury instruction error to analyze the impact of the rule of law announced in Yates on the instant case as ordered by this Court. Appellant's brief offers no help. This is understandable given the unnecessary confusion the reliance on Valentine v. State, 774 So.2d 934 (Fla. 5th DCA 2000), and, in turn, Delgado v. State, 776 So.2d 233 (Fla. 2000), to reverse Appellant's armed burglary conviction created.

In its August 22, 2002, opinion, this Court found that:

> "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.

Floyd v. State, 27 Fla. L. Weekly S697, (Fla. Aug. 22, 2002).

Initially, the State would point out that you do not reach the issue whether the "remaining in" was surreptitious if the entry was without permission. Unlawful presence is the key to any burglary. All entries without permission satisfy the unlawful presence element without requiring an additional finding of a "surreptitious remaining." Thus, it is unclear why Delgado, a case involving an allegedly consensual entry, has any impact on the instant case.

> In Florida, burglary of a dwelling is committed in two different ways: (1) by entering a dwelling without permission with an intent to commit an offense; or (2) by remaining in a dwelling surreptitiously [or after permission to remain therein is withdrawn], after a consensual entry, with an intent to commit an offense. See Tinker v. State, 784 So.2d 1198, 1199 (Fla. 2d DCA 2001). Where the facts demonstrate that entry was without permission, the burglary instruction may not include the phrase "remaining in," as it wrongly allows conviction based on an intent to commit an offense formed after entry.

Lopez v. State, 805 So.2d 41, 43 (Fla. 4th DCA 2001).

In the instant case, the evidence of a forced entry was overwhelming; therefore, the question is whether it was error to instruct the jury on the "remaining in" language when the facts at trial overwhelmingly indicated that the entry was

without permission. In other words, had Appellant made a timely objection, the issue would be whether the instruction given allowed a conviction based on an intent to commit an offense formed after entry. However, absent a timely objection, to establish entitlement to relief under Yates, Appellant must affirmatively demonstrate that the jury convicted him pursuant to the alleged erroneous instruction. Hastings, 134 F.3d at 242. See also, United States v. Stitt, 250 F.3d 878, 884 (4th Cir. 2001).

To do that, Appellant must show that the jury rested its verdict solely on the legally inadequate theory that he formed the intent to murder Ms. Goss after he entered without permission. Appellant cannot make this showing; because, as this Court noted in finding that the murder was premeditated, "one day prior to the fateful events of July 13 that led to Ms. Goss's death, Appellant threatened to kill his wife or someone she loved," and "brought a gun with him to the victim's home on the night of the killing." Floyd, 27 Fla. L. Weekly at S700-S701. Therefore, Appellant cannot possibly show that no reasonable juror could have found that by the time Appellant (who had apparently gone there to kill someone) kicked in the front door, he had formed the intent to kill Ms. Goss. Because Appellant cannot show that a verdict of guilty could not have

been obtained without the assistance of the alleged error, he cannot establish that he is entitled to any relief under Yates. See Hastings, 134 F.3d at 242.

Had Appellant's counsel made a timely objection to the inclusion of the "remaining in" language, Appellant would only have had to establish that the instruction given allowed a conviction based on an intent to commit an offense formed after entry. This Court has already held that it did; therefore, Appellant may be entitled to review of the instant alleged error through an ineffective assistance of counsel claim. However, because it is not apparent from the face of the record that a tactical explanation for the decision is inconceivable[1], that claim cannot be addressed on direct appeal. See Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987).

Finally, given the uncertainty as to the continued viability of Delgado, an admittedly incorrect interpretation of legislative intent, this Court's reliance on Valentine, a case

[1]Appellant's trial counsel could have reasonably decided that the instant argument, that the jury might find Appellant formed the intent to commit the murder after he entered, would only have caused the State to change the specified offense in the burglary charge to aggravated assault. This would have allowed a conviction for the armed burglary, and a life sentence, even if the jury acquitted Appellant of the murder because it believed the defense theory that the murder was committed by someone else. As written, the jury instructions would have mandated a not guilty for the armed burglary if the jury rendered a not guilty for the murder.

that incorrectly extended Delgado's requirement that there be a "surreptitious remaining" to entries without permission, can only lead to the conclusion that Delgado remains binding precedent that can be expanded as it was in Valentine. For these reasons the State again asks this Court to clarify whether Delgado has been upheld and expanded by the instant decision.

CONCLUSION

For the reasons set forth herein, the State of Florida, respectfully asserts that Petitioner cannot establish that he is entitled to any relief under Yates, and respectfully

requests that the Court (1) grant rehearing and affirm Floyd's conviction for armed burglary, and/or (2) clarify its opinion to reflect whether Delgado has been upheld and extended to burglaries involving entries without permission by the instant decision.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to: **Christopher Quarles**, Assistant Public Defender, 112 Orange Ave., Suite A, Daytona Beach, FL 32114, on this _____ day of November, 2002.

Respectfully submitted and served,

RICHARD E. DORAN
ATTORNEY GENERAL

_____
DOUGLAS T. SQUIRE
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0088730

OFFICE OF THE ATTORNEY GENERAL
444 Seabreeze Blvd., Suite 500
Daytona Beach, Florida 32118
Telephone: (386)238-4990
Facsimile: (386)226-0457

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Douglas T. Squire
Attorney for State of Florida