

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92-34156

FILED
THOMAS D. HALL

NOV 17 2000

JOSE JIMENEZ

CLERK, SUPREME COURT
BY _____

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FOR THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of Rule 3.850 post conviction relief. The following symbols will be used to designate references to the record in this appeal: "TR" (trial) -- record on direct appeal to this Court; "Supp. R" -- supplemental record on direct appeal; "PC-R." -- record on postconviction appeal; "Supp. PC-R." -- supplemental record on postconviction appeal"

REQUEST FOR ORAL ARGUMENT

Mr. Jimenez has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Jimenez, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF FONT

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TABLE OF CONTENTS

PRELIMINARY STATEMENT i

REQUEST FOR ORAL ARGUMENT i

STATEMENT OF FONT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE AND OF THE FACTS 1

SUMMARY OF ARGUMENT 6

ARGUMENT I -- ERRONEOUS DENIAL OF RULE 3.850 RELIEF . 7-13

1. Whether the trial court committed reversible error in denying appellant's petition for relief under F.R.Cr.P 3.850 where this court in it's opinion in Delgado v. State, SC 88638 _____ So.2d _____ (Fla. Aug., 2000) reinterpreted the rules pertaining to burglary and receded from it's previous opinion in Jimenez v. State, 703 So.2d 437 (Fla. 1999) which opinion affirmed appellant's conviction on the burglary count.

Appellant Jimenez under this court's Delgado opinion was entitled to relief on the burglary count as well as a new trial on the first degree murder count where the State relied on the doctrine of felony murder in order to obtain a death sentence as a result of appellant's conviction on the first degree murder count.

CONCLUSION 14

CERTIFICATE OF SERVICE 15

STATEMENT OF THE CASE AND OF THE FACTS

Appellant Jose Jimenez was indicted by the Dade County grand jury for the crimes of first degree murder and burglary. A jury trial on the indictment began before the Honorable Leslie Rothenberg in the Circuit Court of the Eleventh Judicial Circuit of Florida, on October 3, 1994. (TR. 515)

At trial the testimony established that Jose Jimenez lived in the same apartment complex and was a neighbor of the victim Mrs. Phyllis Minas for about a year. (TR. 628)

All neighbors were friendly, knew each other and got along with one another. (TR. 660-661)

On October 2, 1992 some of the neighbors, Mrs. Virginia Taranco and Mrs. Lecrecia Ponce, heard a noise in Mrs. Minas' apartment. (R. 616-624)

When they proceeded to the victim's apartment to investigate the noise, the neighbors opened the door which was unlocked and heard someone on the inside pushing the door closed and locking it. (R. 620-622)

Thereafter another witness, Mr. Merriwether, saw appellant jump from a second story apartment onto the ground and disappear into the building. (R. 709-705)

After police were called they found Mrs. Minas barely conscious and stabbed near her kitchen floor. (R. 684-685)

A forensic examination of the scene found the Defendant's fingerprints on the inside part of the front door to Mrs. Minas' apartment. (R. 670)

Before the police arrived the Defendant was seen using a telephone from one of the neighbors so that he could call a cab and leave the apartment house. (R. 658-662)

Later on while the police were looking for the Defendant, who had come under suspicion by the police as a burglar, (TR. 494) the Defendant called his probation officer and stated to her that the police wanted him for stabbing somebody. (R. 773-777)

During trial the jury was instructed on both premeditated as well as felony murder. (R. 934-935)

The basis for the felony murder instruction was the state's theory that the Defendant Jimenez had burglarized Mrs. Minas' apartment and in the process of such a burglary killed her. (R. 885-886)

There was absolutely no evidence produced by the State that the Defendant had made an unauthorized entry into Mrs. Minas' apartment.

Appellant Jimenez and Ms. Minas were neighbors in the same apartment complex. Mrs. Minas resided in the complex for about ten (10) years. Appellant resided in the complex for about one (1) year.

All neighbors knew each other, were friendly and got along. There were no problems with Appellant. (TR. 660-662)

On the day of the murder Appellant was allowed inside one of his neighbor's apartment to use the phone.

A neighbor, Mrs. Ponce testified that she had permitted Appellant in her apartment in the past to use the phone. It was a close knit community. (TR. 641, 660-661)

There was no physical evidence of a forced entry.

No property was taken from the apartment. (R. 518-520)

The door to Mrs. Minas' apartment was unlocked.

The State was traveling on the theory which has since been receded from by this court in Delgado v. State, SC 88638 ____ So.2d ____ (Fla. Aug. 24, 2000) that because there was a crime committed in the apartment, that is the killing of Mrs. Minas, Jimenez's entry into Mrs. Minas' apartment, even if consensual, became a burglary at some point.

This theory or line of cases was specifically receded from by this Court in Delgado v. State, SC 88638 ____ So.2d ____ (Fla. Aug. 24, 2000).

Jimenez was convicted by the jury of both first degree murder and burglary.

During the closing argument the prosecutor argued that even if the State had not proved premeditated murder Jimenez was nonetheless guilty of first degree murder due to the felony murder component of the homicide instruction. (R. 884-886)

Appellant was convicted on a general verdict of first degree murder, sentenced to death and appealed to this Court.

This Court affirmed Appellant's conviction in Jimenez v. State, 703 So.2d 437 (Fla. 1997) and thereafter decided Delgado v. State, SC 88635 ____ So.2d ____ (Fla. Aug. 24, 2000) which receded from the court's opinion affirming Appellant's conviction and sentence of death.

Based on Delgado Appellant thereafter filed his motion under

F.R.Cr.P. 3.850 to set aside his conviction and sentence in this case. (PC R 38, 39)

One of the grounds cited by Appellant was that as a result of the Delgado decision the trial court, under the facts of this case, in which there were no signs of a forced or involuntary entry, or property taken, in which Appellant and victim were neighbors in the same apartment complex for at least a year, and where there was no evidence to establish that the entry into Mrs. Minas' apartment was anything other than consensual, the court should have vacated the conviction and sentence on count II, the burglary count and should have entered an order for a new trial on count I, the murder count since the State argued felony murder to obtain it's conviction to the detriment of Mr. Jimenez, Appellant herein.

The reason we argue that the felony murder rule was to the detriment of Appellant is that felony murder does not logically permit a lesser included verdict of perhaps murder in the second degree or manslaughter.

Felony murder does not allow for a heat of passion type argument which was very viable in this case which would have subjected the Defendant to a second degree murder conviction which did not carry the death penalty.

Appellant raised his argument pursuant to this court's Delgado opinion in his Rule 3.850 motion to vacate judgement and sentence.

The trial court without argument denied it.

Appellant submits that under the Delgado decision this court must vacate the burglary conviction and must grant a new trial or

at least a new penalty phase hearing on the first degree murder
count.

SUMMARY OF THE ARGUMENT

The trial court erred when it failed to vacate Appellant's conviction on the burglary count following this court's opinion in Delgado v. State, SC 88638 _____ So.2d _____ (Fla. Aug. 24, 2000)

The trial court erred in failing to set aside Appellant's conviction for first degree murder and death sentence where the State relied on and argued the felony murder doctrine in order to obtain Appellant's conviction for first degree murder and sentence of death.

The trial court erred when it failed to set aside Appellant's death sentence where one of the aggravators argued to the jury and cited by the court in it's sentencing order was the burglary count.

ARGUMENT

Under Delgado v. State, SC 88638 ____ So.2d ____ (Fla. Aug. 24, 2000) the trial court should have set aside Appellant's convictions on count I and count II, that is first degree murder and burglary where the state could not establish that Appellant burglarized the victim's apartment and therefore could not lawfully argue felony murder to the jury. The state could not prove felony murder to the jury based on the facts in the case.

Consequently the trial court under Delgado should have granted Appellant's motion to set aside the judgement of conviction on count II, the burglary count, and ordered a new trial on count I, the conviction on the first degree murder count.

Appellant Jose Jimenez argues to this Honorable Court that under this court's Delgado opinion he is entitled to an order vacating his conviction on count II, of the indictment, the burglary count.

He is also entitled to a new trial on his first degree murder conviction since the State argued felony murder to the jury in order to secure his conviction and sentence of death on that count.

The facts reveal that Jose Jimenez and Phylis Minas were neighbors for at least one year. They lived in the same apartment complex.

It was a close knit community. The neighbors knew and saw each other. They were permitted in each other apartments. (TR 660-662)

There was no evidence of forced entry or any signs of a break in into Mrs. Minas' apartment at the time that Mrs. Minas was

found. There was no evidence that anything was taken. There was cash as well as jewelry found in the apartment. The evidence shows that neighbors heard a commotion or a noise in Mrs. Minas' apartment and proceeded to investigate.

It is important to note that while the trial court in its order denying Rule 3.850 relief stated that the lights were off at 8:00 P.M. in the Minas' apartment this is so only after the attack on Mrs. Minas was over, not before. (TR 632-634) (PC R 109)

At the time the door was unlocked and when one of the neighbors proceeded to investigate, the neighbor, Mrs. Ponce tried to open the front door and the door was pushed closed from the inside and then locked.

Appellant's fingerprints were found on the inside part of the front door in the Minas' apartment.

Appellant was then seen jumping from a balcony to the first floor by a groundskeeper at the apartment complex. Thereafter Appellant was seen coming down from his third floor apartment and asking one of the neighbors for the telephone so that he could call a cab and leave the premises.

When the case was tried the state proceeded under both the premeditation as well as felony murder component of the first degree murder statute. The indictment alleged premeditation as well as felony murder.

The state also argued burglary relying on the line of cases that made even a consensual entry revoked if a crime is committed within the premises.

The case of Delgado v. State decided by this court changed all that.

In it's Delgado opinion this court specifically receded from it's previous holding in Appellant's direct appeal to this court.

Appellant suggests that under this court's Delgado decision, and taking into consideration that this court specifically stated in Delgado that it was receding from it's decision in State v. Jimenez 703 So.2d 437 Fla. (1997), Appellant's own case on direct appeal, that the trial court should have granted Appellant's Rule 3.850 motion and vacated the conviction and sentence on count II, the burglary count and ordered a new trial on count I, the first degree murder count since the State pled both premeditated murder as well as felony murder in Appellant's indictment (R. 1-3).

Moreover the prosecutor argued both premeditation as well as felony murder to the jury in closing argument in order to secure a conviction and death sentence on the first degree murder count.
(TR. 884-887, 928-931)

There was no evidence of forced entry into the victim's apartment, both victim and Appellant were neighbors, there was no evidence shown by the State, other than the fact that Mrs. Minas was stabbed, that the original entry into her apartment was unauthorized.

Indeed the front door was unlocked and was opened by one of the neighbors prompting Jimenez to close it thereby leaving his fingerprints on the inside of it.

That being stated, especially after this court's decision in Delgado and after Appellant raised the argument in his Rule 3.850

petition for relief, it is more than apparent that the trial court should not have let the conviction and death sentence stand where the State relied on the burglary to obtain it's conviction for first degree murder and sentence of death.

And the prosecutor did just that. There was no proof of what provoked the attack on Mrs. Minas.

The prosecutor argued that the Defendant, apparently in a quest for money to buy drugs broke into Mrs. Minas' apartment and stabbed her to death. (R. 930)

There was absolutely no proof of this. It was a theory which fit well given the Defendant's past for burglary as well as his drug addiction. A slam dunk of a penalty phase guaranteed to obtain a death sentence. And that it did, twelve to zero. A unanimous death recommendation by the jury.

The stabbing of Mrs. Minas could have been a heat of passion type situation such as second degree murder that did not involve premeditation but rather involved an act eminently dangerous to another and evincing a depraved mind regardless of human life.

What made this case a first degree murder was the state's reliance on the burglary, the felony murder, which was ably argued by the assistant state attorney who tried the case.

Indeed the record shows that at least twice on closing argument the State relied on felony murder to prove up it's first degree murder case. The burglary which the Delgado case reversed.

Appellant Jose Jimenez raised the Delgado argument in his F.R.Cr.P. 3.850 motion to set aside conviction and sentence. The trial court denied the motion without argument.

Appellant submits that under the Delgado decision he was entitled to set aside the conviction on count II and was entitled to a new trial on the first degree murder count, solely based on premeditation and not felony murder.

Undersigned is aware that while eight stab wounds to vital organs may prove premeditation and this court has so stated, the fact is that in this case premeditation and felony murder were both argued by the State and are inextricably intertwined in the conviction. The fact remains that the burglary is cited by the trial court in it's sentencing order and was argued to the jury by the State as one of the aggravators in this case.

The Defendant's argument for a new trial is simple. Felony murder does not allow for a heat of passion argument as a lesser included, the death either occurred during the felony or it did not.

This case lent itself under it's facts to a second degree type argument where the victim and the Defendant were neighbors, they lived in the same complex and the front door to the apartment was unlocked showing that the victim let Mr. Jimenez in.

While it is true that the Defendant did not testify during his trial and did not state that Mrs. Minas had allowed him into her apartment, we nevertheless argue that consent was proven circumstantially taking all the facts and considerations attendant to the case including but not limited to the fact that both victim and Defendant were neighbors for at least a year, the door was unlocked, it was a close knit community, they all knew each other,

others had allowed Mr. Jimenez into their apartment and there was no evidence by the State to negate consent. Moreover the State argued to the jury during the guilt phase that even if the entry was consensual the attack on the victim revoked the consent, (TR 930). The very issue which this court addressed in Delgado and decided against the State's position.

The argument could be made that the victim and the Defendant were friends and something occurred during the time that the Defendant was in the victim's apartment that the victim was killed.

This is a crime that lends itself to a lesser included or a non death recommendation by the jury.

What does not is, a burglar breaking into Mrs. Minas' apartment without any authorization whatsoever and killing her in his quest to obtain drugs such as was argued during the penalty phase.

The former argument lends itself to a second degree murder or manslaughter conviction or even a non death recommendation on a first degree murder conviction, while the latter could only lead a reasonable jury not only to convict on first degree murder but to return a recommendation of death, which is exactly what happened here. Appellant had a prior for burglary which was made known to the jury at the penalty phase.

It is also important to note that one of the aggravators which was argued by the State and cited by the court in it's sentencing order imposing a death sentence was the burglary conviction. For that reason alone this court should grant 3.850 relief and order a new trial.

Under this court's August 24, 2000 Delgado decision on the burglary issue, citing Yates v. United States, 354 U.S. 298 (1957); Griffin v. United States, 502 U.S. 46 (1991); and San Martin v. State, 717 So.2d 462 (Fla. 1998), Appellant Jimenez's conviction resting on a legally inadequate basis this court must set aside the judgement of conviction and sentence on count II, the burglary count and order a new trial on count I, the first degree murder count.

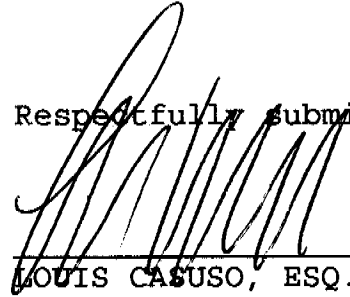
CONCLUSION

Based upon the decision of this court in Delgado v. State SC 88638 _____ So.2d _____ (Fla. Aug. 24, 2000) the trial court should have granted the Defendant's motion for relief under F.R.Cr.P. 3.850 and should have set aside the conviction on count II the burglary count and should have granted the Defendant a new trial on count I the first degree murder count.

In the alternative the trial court should have granted a new penalty phase hearing since at least one of the aggravators was based on the erroneous assumption that the Defendant burglarized Mrs. Minas' apartment.

WHEREFORE Appellant Jose Jimenez would respectfully ask this Honorable Court to vacate the conviction on the burglary count and to reverse the conviction for first degree murder and sentence of death.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was mailed to Fariba N. Komeily, Assistant Attorney General, 444 Brickell Ave., Suite 950, Miami, Florida 33131 and to the State Attorney's Office, 1350 N.W. 12th Ave., Miami, Florida 33135 on this 14th day of November, 2000.

Respectfully submitted,



LOUIS CASUSO, ESQ.