

IN THE SUPREME COURT OF FLORIDA

JOSE PENA,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

Case No. SC02-2411

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT ON THE MERITS

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

ERICA M. RAFFEL
Assistant Attorney General
Florida Bar No. 0329150
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2367
(813)801-0600
Fax (813)873-4771

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as substantially correct, but would add the following for further accuracy regarding the issues raised:

Anthony Batista testified that after Petitioner threw Miranda's body on the side of the street they stopped at a gas station and got some food and then went back to the apartment. Anthony was concerned about what had occurred and he got his clothes together and left. (R. 214). Petitioner told Anthony he had given Miranda five grams of heroin, and also told Anthony to tell the police that when Bridget left the apartment that Miranda ran after her. (R. 215). Anthony said he saw the heroin from about three feet away and it was light brown in color. (R. 218). Anthony testified that it was the Petitioner who gave drugs to Miranda, she did not give drugs to Petitioner. (R. 223).

Bridget Spicer said she knows what people look like when they are doing ecstasy and how they behave. (R 234). She said after Petitioner gave Miranda a pill upon Miranda's request for ecstasy, Miranda did start to show signs of someone under the influence of ecstasy. (R. 234-235). Petitioner gave Bridget ecstasy as well, but she did not take it and gave it back to the Petitioner. (R. 235-236). On Thursday, Bridget spent most of the day with Miranda. Miranda did not have any drugs or money

on her when they went over to Petitioner's apartment. (R. 238).

Petitioner also told Jose Batista to tell the police that Miranda had left a little while after Bridget left. (R. 259).

Petitioner's first statement was played before the jury. (R. 271-285). Petitioner's confession was also played before the jury. (R. 296-319). It appears that Miranda had sex with the Petitioner numerous times the first night, but kept putting him off and teasing him the second night, telling him to wait, that he would get it later, so when she asked for heroin, he gave it to her. (R. 299, 312, 315-318).

Dr. Adams testified that heroin kills by depressing the part of the brain that controls breathing, and ecstasy kills by stimulating the heart at an abnormal rate so it does not pump blood. (R. 357). Dr. Adams also said that the presence of the morphine in Miranda's system came from the body's degradation of heroin. (R. 361). The doctor said an observation of Miranda that she was having difficulty in breathing would be consistent with heroin intoxication. (R. 371).

Jose Batista testified that when he went out into the living room that morning to go to work, he noticed some funny breathing sounds coming from her. (R. 262).

The doctor agreed that the fact that there were seven different types of drugs in Miranda's system does not necessarily mean that she took seven different types of

narcotics. It was explained that if a person ate chicken, the protein in the chicken would be broken down ultimately into amino acids. (R. 372-373). The doctor said his opinion was that Miranda's death was caused by the combined effects of heroin and ecstasy. (R. 373).

Dr. Duer testified that heroin contains morphine and codeine. (R. 380). The doctor said that if someone has ingested heroin they will also find most of the time that there is codeine and morphine present. (R. 380-381).

Dr. Buffington, the Petitioner's expert, a pharmacologist, testified he never read the statement of Dr. Duer, the county's chief toxicologist, he merely reviewed the results of his report. (R. 428). Dr. Buffington was also not aware of any corrections or clarifications Dr. Duer made in his report. (R. 429-430). Dr. Buffington was unaware of the testing procedures utilized in the instant case that were not reflected in the reports, and without that information he was unaware whether he was disadvantaged or not in his opinion. (R. 433). Dr. Buffington said his interpretation of the data is from a pharmacology basis, not a forensic pathology. (R. 439).

SUMMARY OF THE ARGUMENT

Issue I: Since Petitioner was aware of the crime for which he was being charged, there was no prejudice from the indictment's failure to allege he was 18 years of age or older. Since this went unaddressed even through jury instructions, this issue has been waived.

Issue II: Petitioner was aware the State did not believe this aspect of the jury instructions were applicable, and he did not ask for a ruling from the judge on excusable and justifiable homicide, but failed entirely to make any objection. Therefore this issue has been waived.

Issue III: The trial court correctly rejected Petitioner's proposed jury instruction, as it was faulty in several respects; the trial court did instruct the jury however correctly using an instruction that was similar to the proposed one.

Issue IV: The practice in Hillsborough County is to swear the potential jurors as group in the auditorium prior to being sent into the courtroom for voir dire.

ARGUMENT

ISSUE I

**THE INDICTMENT GAVE LEGALLY SUFFICIENT
NOTICE OF THE CHARGE AND THE INSTRUCTIONS
GIVEN WERE APPROPRIATE.**

(RESTATED)

The defense in this case was causation and resolution of this issue is very fact specific to this particular record because there was no dispute over the Petitioner's age because it would not have helped him ... he was close to thirty. Therefore there could not have been an argument on failure of proof and no jury would or could have found him to be under the statutory age. Therefore the Second District Court of Appeal has correctly resolved this issue.

A. INDICTMENT; ALLEGATION OF AGE.

Petitioner claims the indictment failed to allege he was over 18 years of age, but then went on to state in his initial brief before the Second District Court of Appeal:

"... it is clear the indictment was brought under § 782.04(1)(a)3."

He now has changed that statement before this Court to:

"... it is now apparent that the indictment was intended to be brought under § 782.04(1)(a)3."

(See Brief of Petitioner at p. 13).

The change in wording is somewhat disingenuous since Petitioner never argued before that he was unaware of which

provision he was charged with violating, and appears only to be changed in order to create a previously nonexistent assertion or to try to lay a predicate here for an ineffective assistance of counsel claim (which would have no merit because there was no prejudice).

Since it is clear Petitioner was aware of the provision under which he was charged and knew of this oversight, the indictment was subject to a motion to dismiss. Failing to so move, Petitioner waived this "defect" by entering a plea. Petitioner did not allege a failure of proof before the Second District Court of Appeal; there he argued ... merely a failure of allegation. Florida Rule of Criminal Procedure 3.190(b) provides:

(b) Motion to Dismiss; Grounds.

All defenses available to a defendant by plea, other than not guilty, shall be made only by a motion to dismiss the indictment or information whether the same shall relate to matter of form, substance, former acquittal, former jeopardy, or any other defense.

Section 3.190(c) provides in pertinent part:

(c) Time for Moving to Dismiss.

Unless the court grants further time, the defendant shall move to dismiss the indictment or information either before or upon arraignment.... Except on objections based on fundamental grounds, every ground for a motion to dismiss that is not presented by a motion to dismiss within the time hereinabove provided for shall be taken

to have been waived.

Further, Florida Rule of Criminal Procedure 3.140(o) provides:

(o) Defects and Variances.

No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses or for any cause whatsoever, unless the court should be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense or expose the accused after conviction or acquittal to substantial danger of a new prosecution of the same offense.

Since the purpose of an information or indictment is to place a defendant on notice of the charge, and Petitioner admitted before the Second District Court of Appeal that he knew what statutory provision he was charged with violating (it was in the charging document), to allow this to be resolved in his favor is nothing but an ambush. Mr. Pena now adds to his brief before this Court "It does not allege an offense under § 782.04(1)(a)3)." (See Brief of Petitioner at p. 14). Fla. R. Crim. Proc. 3.190(b) and (c) squarely address what remedies were available; since there was no prejudice, prudent trial counsel apparently chose not to challenge an omission, when the substance was obviously known. Petitioner attempts to compare this case to a capital sex battery but even a brief review of

such cases such as M.J.C. v. State, 681 So.2d 1203 (Fla. 5th DCA 1996) where the court held that a juvenile not yet 18 cannot be convicted of capital sex battery establishes the correctness of the opinion of the Second District Court of Appeal in the instant case: "From a functional standpoint, such an age requirement for a defendant simply limits an offense to an adult offense and not a crime supporting an adjudication of juvenile delinquency." Pena v. State, 829 So.2d 289, 292 (Fla. 2d DCA 2002). Petitioner's age is not nor can it be considered part of the act (or intent) required for a conviction under this statute.

B. JURY INSTRUCTIONS.

Because Petitioner knew what statutory provision he was charged with violating and made no attempt to move to dismiss the indictment on that basis before trial or request the jury be instructed on the element of age or object to the court's failure to do so, this issue has been waived. The waiver is based upon his own knowledge. Petitioner can not be allowed to concede he knew what he was charged with and ignore the rules of procedure to ambush the State with an appellate issue thereafter either on the allegation, or the instructions, or to now alter the wording of his argument before this Court from that before the Second District Court of Appeal from "it is clear the indictment was brought under § 782.04(1)(a)(3)" to "it is now

apparent that the indictment was intended to be brought under §782.04(1)(a)(3)." Petitioner's new reliance on Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) is misplaced because Petitioner's age is not a factor that would increase the penalty of the crime beyond the prescribed statutory maximum; without the allegation, proof or instruction on this case, on this record there is no difference unless Petitioner is claiming he is in fact under the age of 18.

ISSUE II

**WHETHER THE TRIAL COURT'S FAILURE TO
INSTRUCT ON EXCUSABLE AND JUSTIFIABLE
HOMICIDE WAS FUNDAMENTAL ERROR.**

(RESTATED)

The trial court instructed counsel for Petitioner to get together with the prosecutor and tell him what standard instructions Petitioner wanted. It was therefore left to the Petitioner to advise the State and ultimately the court which instructions he wanted and to then bring this to the court's attention. If he opposed and/or objected the State's assertion to the trial court that the introduction to murder with the excusable and justifiable homicide instruction should not be given, he should have said so and objected both before and after the charge. Since Petitioner concedes he did not object to this failure below, he has waived this issue entirely.

The State recognizes the usual necessity of giving such an

instruction but cannot find any authority or caselaw addressing its mandatory inclusion when the charge is predicated on distribution of heroin and ecstasy, and would therefore assert any error is harmless under the facts of this case and the nature of the charge. Since the Petitioner agreed to the "lessers" the State was going to have prepared based on Petitioner's request (R. 160), and no objection was made after the jury was instructed, this issue has not been preserved for review.

Petitioner now relies on Tamayo v. State, 237 So.2d 251 (Fla. 3d DCA 1970). But there, the defendant admitted the crime, and the entire defense to the first degree murder was that it was justifiable and excusable. The instruction read to the jury in Tamayo indicated this should only be considered a defense to manslaughter. The Third District Court of Appeal said it is incumbent upon a judge to instruct the jury as to the law "applicable to the case." Id. at 237 and emphasis added. Obviously if the defense was that the murder was committed by Tamayo but that it was justifiable and excusable, instruction on the law "applicable to the case" was not given. This is not the defense in the instant case so reliance on Tamayo is misplaced.

It appears the only time a justifiable and excusable homicide instruction need be given in a case of this nature would be when the defendant is either a doctor or an individual

under a mistaken belief of what the substance was; not in a case where the evidence established the heroin was given to the victim to encourage sexual activity.

ISSUE III

**THE PROPOSED JURY INSTRUCTION WAS PROPERLY
REJECTED AND THE INSTRUCTION READ IN LIEU
THEREOF WAS APPROPRIATE.**

(RESTATED)

First, the State disagrees with Petitioner's assertion that this court's standard of review for the issue presented is de novo. That standard would be applicable only if the Petitioner argued that the instruction given was unconstitutional or an incorrect statement of the law. A trial court's decision as to either giving or rejecting a proposed instruction is reviewed under the abuse of discretion standard, Bozeman v. State, 714 So. 2d 570, 572 (Fla. 1st DCA 1998), and the court has wide discretion in instructing the jury. James v. State, 695 So. 2d 1229, 1236 (Fla. 1997).

The instruction read by the trial court mirrors the proposed instruction save for the "but-for" portion (but for Jose Pena's unlawful distribution of heroin or MDMA or both, the death Miranda Fernandes would not have occurred), and the definition of "distribute". The trial court did, just as in the proposed instruction, define proximate cause. The trial court also instructed "...the death of Miranda Fernandes was proximately caused by the criminal act or agency of Jose Pena", and Petitioner asked it be read as "...the death of Miranda Fernandes was proximately caused by the unlawful distribution of heroin or MDMA or both", without reference to the Petitioner.

In this last difference, this portion of the proposed instruction would have allowed the jury to consider Petitioner's guilt if the substance was distributed by someone else! The trial court, did thereafter define deliver: "deliver or delivery means the actual constructive or attempted transfer from one person to another of a controlled substance whether or not there is an agency relationship." (R. 470).

The defense in the instant case was that perhaps Petitioner thought the substance was heroin, but perhaps in fact it was not; in closing argument, completely ignoring Petitioner's confession, counsel suggested it might have been sand. A further defense was that morphine and codeine were also found in Miranda's system. This seems to suggest that perhaps she died of a combination of other drugs despite the fact that the expert opinion submitted by the State at trial clearly indicated that heroin will break down in the body into both morphine and codeine.

In Petitioner's own brief, quoting Eversley v. State, 748 So. 2d 963, 966 (Fla. 1999), he states "in those rare circumstances where two causes, each alone sufficient to bring about the harmful result, operate together to cause it, the 'but for' becomes impossible to prove." Therefore by Petitioner's own defense, the very testimony he now urges the jury should have been instructed on has been conceded in his own brief to be

impossible to prove. Respondent would urge in light of the evidence in this case as well as the Petitioner's confession which was played before the jury, the instruction given was proper and no error has been shown.

ISSUE IV

ALTHOUGH UNPRESERVED FOR REVIEW, THE TRIAL COURT'S FAILURE TO PERSONALLY SWEAR THE JURY VENIRE PRIOR TO VOIR DIRE WAS NOT ERROR SINCE THE JURORS WERE COLLECTIVELY SWORN BY THE CLERK IN THE JURY ROOM.

(RESTATED)

It is the practice in Hillsborough County for a clerk who can administer oaths to swear the potential jurors in before they are called to the courtroom for voir dire. Although the instant record does not and can not contain this, the Hillsborough County Clerk's office attests to this fact.

In Johnson v. State, 660 So. 2d 648 (Fla. 1995), this Court held it is not improper for a deputy clerk to swear the jurors in prior to voir dire, id. at 660, and Petitioner has failed to show any prejudice from this practice.

Further, Petitioner acknowledges he made no objection in this regard prior to the court swearing the jury in at the conclusion of voir dire. Obviously, had he made such an objection, the clerk would have been able to report to the courtroom to advise whether they had been sworn in in the auditorium. In Geibel v. State, 795 So. 2d 285 (Fla. 3d DCA

2001), the court held that issues that arise during voir dire are unpreserved if not raised before the trial court swears the jury in.

CONCLUSION

Respondent respectfully requests that this Honorable Court approve the opinion of the lower court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Terrence E. Kehoe, Special Assistant Public Defender, P.O. Box 9000–Drawer PD, Bartow, Florida 33831-9000, this ____ day of February, 2003.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney

General

Chief of Criminal Law, Tampa
Florida Bar No. 238538

ERICA M. RAFFEL
Assistant Attorney General
Florida Bar No. 0329150
2002 N. Lois Ave. Suite 700
Tampa, Florida 33607-2367
(813)801-0600
Fax (813)873-4771

COUNSEL FOR RESPONDENT