

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner  
Cross-Respondent,

v.

CHARLES WESLEY PRICE,

Respondent  
Cross-Petitioner.

CASE NO. 67,240

**FILED**

SID J. WHITE

APR 2 1968

CLERK, SUPREME COURT

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Chief Deputy Clerk

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CROSS-PETITIONER'S (PRICE'S)  
REPLY BRIEF  
\_\_\_\_\_

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CROSS-ARGUMENTS IN REPLY

POINT I

THE PANEL DECISION IMPROPERLY CONDONES ADMISSION OF MS. MILLER'S TESTIMONY OF ELLIOT'S "THREATS" FOR REHABILITATION PURPOSES FOLLOWING DEFENSE IMPEACHMENT WITH HER PRIOR INCONSISTENT FIRST TRIAL TESTIMONY, SINCE THE RECORD IS DEVOID OF EVIDENCE SHOWING THAT PRICE HAD ACTUALLY SOLICITED OR PARTICIPATED IN ELLIOT'S "THREATS" AND MILLER WAS UNCERTAIN IF THESE THREATS EVEN PERTAINED TO TESTIFYING FALSELY AT PRICE'S TRIAL.

The State maintains in its Reply Brief at Page 5 that it has "no quarrel" with proposition of law that testimony of threats to falsely testify is inadmissible unless it can be shown that the threats were made by the defendant or with his knowledge. Notwithstanding, the State attempts to respond to Price's point sub judice as follows:

"If the record fails to show a sufficient link between the threats Elliot made to the witness and Price, then it is the direct result of Price's own doing. We are confident that had no objections been made, the State would have been able to conclusively show that Price was directly responsible to the threats."  
(State's Reply brief, Page 7).

Such an assertion is simply preposterous, since if the State did actually have any such evidence showing that Price had, in fact, participated in Elliot's supposed "threats," the State would have readily, promptly and lawfully presented it in the first instance in its case-in-chief. But it never did and had no such evidence. The State had every such opportunity to respond to the claim of Price's trial counsel that there was absolutely no evidence that

Elliot's "threats" had in any way emanated from Price (R 98), but didn't.

In any event, the fact of the matter is that Miller repeatedly testified throughout the second trial that Price had never threatened her:

"Q Ms. Whitlow, did someone communicate to you a threat if you did not lie in the Charles Price Quaalude possession case?

A Yes.

Q Who?

A James Elliot.

Q Not Mr. Price?

A No." (R 96) (Emphasis added).

"Q And you hadn't seen him [Price] for some little time, right, until about two, three weeks ago?

A Yeah.

Q And yet you don't recall this singular conversation?

A No.

Q Did he threaten you in any way?

A No.

Q You don't recall telling him everything is the way it was before, I'm going to testify just like I did before [i.e. exculpating him]?

A No.

Q Ma'am?

A No.

Q Do you deny that?

A No. I don't recall the conversation.

Q Okay. You don't deny, however, telling

him that everything is fine, you were going to testify the same as you did before?

A I just said I don't recall the conversation." (R 143) (Emphasis added).

The only evidence appearing in the record showing other participants involved in threats against Miller to lie points straight to the Orlando SWAT team officers. Miller testified at Price's first trial that she had implicated Price only after "10 or 12 hours of harassment" when the officers had threatened to lock her up if she didn't do what they told her. (R 154-155). At Price's second trial Miller could "not remember" making these statements under oath about the police officers' threats at the first trial. (R 155). And Price testified at his second trial that Miller had told him about three weeks earlier that she was being harassed by a special investigator named Mr. Rhodes from the State Attorney's Office. (R 284-285). According to Price, Miller stated further: "they've done all they could to me. I'm going to stick to my story." (R 284-285).

Thus, the record is clear and unequivocal that the State had no actual evidence to show Price's participation in Elliot's supposed "threats," and by no stretch of the imagination did Price "prevent" the prosecutor from producing such evidence.

Notwithstanding, the State argues that an evidentiary link showing Price's actual participation is implied in the record, based upon Elliot's bonding her out of jail on the perjury charges and Elliot helping her rehearse her testimony: "The logical inference and reasonable deduction from that evidence alone is that Elliot was acting at the behest of Price."

(State's Reply Brief, Pages 7-8). It is just for that exact reason that Florida law emphatically precludes the admission of such evidence, since third party threats naturally cause jurors to suspect or assume that a defendant had somehow participated in the coercion, even though they may not have. See Reeves v. State, 423 So.2d 1017, 1018 (Fla. 4th DCA, 1981) (admission of evidence that someone had induced a witness to testify falsely, not shown to be acting with the defendant's actual participation, "only serves to create undue prejudice in the minds of the jury against the accused.").

The State still insists in its reply that Elliot's threats were only offered as an anticipatory enhancement of credibility, but was not an attack on Miller's credibility. (State's Reply Brief, Page 3). Price's undersigned counsel fully agrees that "without the witness, in all likelihood, there was no case against Price." (State's Reply Brief, Page 2).

However, the State suggests in its reply brief at Page 2 that Price's trial counsel, Edward Kirkland, Esquire, was perhaps lying to the trial judge when he expressly stated on Miller's direct examination that he had not planned to try to impeach Miller with her prior trial testimony, rather only with general character reputation. (R 109-110). According to the State, to believe Mr. Kirkland's representation "is to simply ignore the realities of life," since refraining from impeachment use of Miller's prior trial testimony would raise "an issue of effective assistance of counsel." (State's Reply Brief, Pages 2-3). Additionally, well experienced counsel would certainly know that

delving into the impeachment by prior inconsistent statements would open the door to the full facts of the threat. Thus, exposing Price to the full wrath of Miller's assertions as proposed at the proffer by the State. (See Reply Brief at Page 5-7).

Based upon the foregoing arguments, Price respectfully requests this Honorable Court to affirm the Fifth District's reversal for a new trial and remand with instructions to bar admission of the testimony in question under any circumstances.

POINT II

THE TRIAL JUDGE ERRONEOUSLY EXCEEDED PRICE'S MAXIMUM PRESUMPTIVE GUIDELINE SENTENCE BY ALMOST FIVE TIMES ON THE GROUNDS THAT PRICE HAD THREATENED, COERCED AND INTIMIDATED WITNESSES, WHEN THE RECORD IS DEVOID OF CLEAR AND CONVINCING EVIDENCE THAT PRICE HAD ACTUALLY THREATENED, SOLICITED OR PARTICIPATED IN ANY SUCH THREATS.

The State suggests that the trial judge exceeded Price's presumptive sentences on the grounds that he was a danger to the community as a result of just the attempted trafficking conviction. However, it is obvious that the trial judge deemed Price to be a danger as a result of "threatening" witnesses, not due to the drug attempt charge. In any event, the guidelines rules prohibits use of facts concerning the conviction itself to exceed the guidelines.

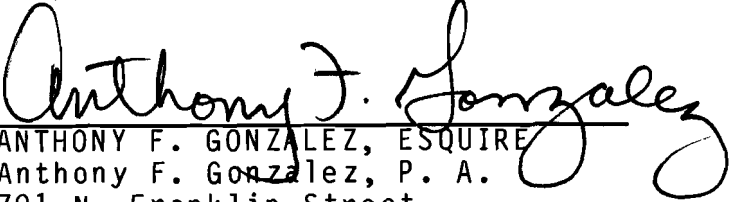
The State has already acknowledged that there is no evidence to show that Price had actually participated in Elliot's "threats" against Miller. Accordingly, the trial judge's departure from Price's presumptive sentence remains unsupported by clear and convincing evidence.

The trial judge erred in exceeding Price's presumptive guidelines sentence and this Court should reverse and remand Price's 12-year sentence with directions to resentence within the 12 - 30 month guidelines.

CONCLUSION

Based upon the foregoing arguments and authorities, Price respectfully requests this Court to approve the Fifth District's reversal based upon the State's improper "anticipatory" impeachment and rehabilitation, and to remand with instructions to bar admission of the testimony in question under any circumstances. Alternatively, if this Court determines that a new trial should not be forthcoming and the conviction affirmed, Price respectfully requests this Court to remand the cause for resentencing within his presumptive guidelines.

Respectfully submitted,

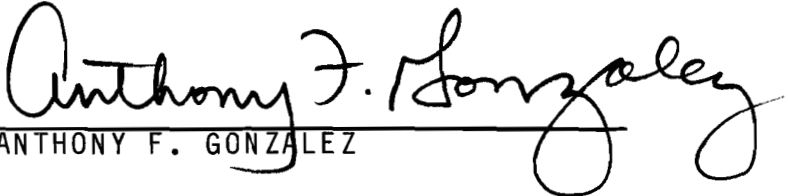


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard W. Prospect, Esquire, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, by United States Mail, this 1st day of April, 1986.

  
ANTHONY F. GONZALEZ