

0/a 6-5-86

IN THE SUPREME COURT OF FLORIDA

ERINEO ACENSIO,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

FILED

SID J. WHITE

CASE NO. 67,888 APR 4 1986

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

DISCRETIONARY REVIEW OF DECISION
OF THE DISTRICT COURT OF APPEAL,
SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

ERINEO ACENSIO will be referred to as the "Petitioner" in this brief, and the STATE OF FLORIDA will be referred to as the "Respondent". The record on appeal consists of three (3) volumes and will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Statement of the Facts subject to changes and additions noted in the argument.

SUMMARY OF THE ARGUMENT

ISSUE I

Petitioner was charged with attempted first-degree murder. Attempted manslaughter is a lesser-included offense of the crime charged. Therefore, the distinction made in State v. Bruns, 429 So.2d 307 (Fla.1983) between lesser-included offenses and attempts has no application to the case sub judice.

There is, thus, no conflict between the Second District Court of Appeal's decision in the case sub judice and the opinion in State v. Bruns. Moreover, the trial court's refusal to instruct the jury on battery was harmless error since attempted manslaughter, a third-degree felony, provides an intervening "step" between aggravated battery, a second-degree felony of which Petitioner was convicted, and battery, a first-degree misdemeanor.

ISSUE II

Petitioner's motion to suppress was properly denied. Petitioner was 21 years old at the time he committed the offense and was not shown to be mentally incompetent. Although Petitioner does not speak English well, his rights were explained and the interview was conducted in Spanish. Petitioner did not indicate any difficulty understanding the interpreter. The fact that Petitioner had been drinking that day did not render his confession inadmissible. Although Officer Yonce's statement that Petitioner had been positively identified by witnesses was untrue, considering all of the circumstances surrounding the interview, that statement cannot

be said to have vitiated Petitioner's confession. Yonce's statements that they weren't trying to get anyone in trouble and were just trying to learn the truth cannot reasonably be construed as an implied promise not to prosecute.

ARGUMENT
ISSUE I

WHETHER THE TRIAL COURT ERRED BY
REFUSING TO INSTRUCT THE JURY ON
THE LESSER-INCLUDED OFFENSE OF
BATTERY.

Petitioner seeks review of the opinion of the Second District Court of Appeal in Acensio v. State, 477 So.2d 38 (Fla. 2d DCA 1985). Jurisdiction is based on Art. V, §3(b)(3), Fla. Const. and Fla.R.App. Proc. 9.030(a)(2)(A)(iv). Respondent submits that no conflict exists in this case, and furthermore, that the decision of the Second District Court of Appeal is correct.

Petitioner was charged with attempted first-degree murder. The trial court gave the jury instructions on the following offenses: attempted first-degree murder, a first-degree felony under §§782.04(1) and 777.04(4)(a), Fla. Stat. (1985); attempted second-degree murder, a second-degree felony under §§782.04(2) and 777.04(4)(b) Fla. Stat. (1985); attempted manslaughter, a third-degree felony under §§782.07 and 777.04(4)(c); and aggravated battery, a second-degree felony under §784.045 Fla. Stat. (1985).

Petitioner's trial counsel also requested that the trial court give a jury instruction on battery, which is a first-degree misdemeanor. 784.03 Fla. Stat. (1985). The trial court refused to give the instruction because the court was of the opinion that battery was "too far down the line" (R.219). Petitioner contends that the trial court committed reversible error by refusing to give the battery instruction.

The trial court is required to instruct the jury on lesser-included offenses necessarily included in the major offense charged (category 1 offenses) and lesser-included offenses covered by the charging document and the proof (category 2 offenses). Brown v. State,

206 So.2d 377 (Fla.1968); Florida Standard Jury Instructions in Criminal Cases (1981 ed.). Battery is a category 2 lesser-included offense of attempted first-degree murder. Florida Standard Jury Instructions in Criminal Cases (1981 ed.). Therefore, because the allegations in the information and the evidence at trial included the offense of battery, a jury instruction on battery was appropriate.

However, because battery is two steps removed from aggravated battery, the offense of which Petitioner was convicted, the trial court's failure to give the battery instruction was harmless error. State v. Abreau, 363 So.2d 1063 (Fla.1978). In State v. Abreau, this Court determined that when the trial court has given an instruction on the next immediate lesser-included offense from the offense of which a defendant was convicted, then the jury has been given a fair opportunity to exercise its "pardon" power by returning a verdict of guilty as to the next lower offense. Id. at 1064. Therefore, "[o]nly the failure to instruct on the next immediate lesser-included offense (one step removed) constitutes error that is per se reversible. Where the omitted instruction relates to an offense two or more steps removed, . . . reviewing courts may properly find such error to be harmless." Id.

Petitioner argues that, under State v. Bruns, 429 So.2d 307 (Fla.1983), the trial court's instruction on attempted manslaughter, the offense which falls between aggravated battery and battery, does not provide a "step" within the meaning of State v. Abreau, supra. In State v. Bruns, the defendant had been charged with and convicted of robbery of property having a value of less than \$100. At trial,

the defendant requested a jury instruction on petit larceny. The trial court refused the request and instead instructed the jury on attempted robbery. This Court, in responding to a question certified by the Fourth District Court of Appeal, held that an attempt does not provide a "step" within the meaning of State v. Abreau, and therefore, the trial court's failure to give the petit larceny instruction was reversible error. Id. at 309.

The case sub judice is clearly distinguishable from State v. Bruns. In this case, Petitioner was charged with the attempt to commit first-degree murder. Thus, as the Second District Court of Appeal stated in its opinion below, the "logical progression of the Abreau lesser included 'steps' would include attempted second-degree murder, attempted manslaughter and aggravated battery." Acensio v. State, 477 So.2d at 39 (emphasis in original).

This Court based its holding in State v. Bruns on the premise that attempts and lesser-included offenses are in separate categories and are not interchangeable. State v. Bruns, 429 So.2d at 309. Thus, this Court stated "[t]he application of the Abreau 'step' analysis should only be made in cases where both the instruction that was given and the omitted instruction relate to a lesser-included offense." Id.

The distinction between lesser-included offenses and attempts, however, has no application where, as here, the major offense charged was an attempt. Under the circumstances of this case, attempted manslaughter was a lesser-included offense of attempted first-degree murder. Therefore, attempted manslaughter must be considered a "step" under State v. Abreau.

Battery would, therefore, be two "steps" removed from aggravated battery, the crime of which Petitioner was convicted. Accordingly, the trial court's refusal to give the battery instruction does not constitute reversible error.

ISSUE II¹

WHETHER THE TRIAL COURT ERRED
IN DENYING PETITIONER'S MOTION
TO SUPPRESS.

Petitioner also contends that the trial court erred in denying Petitioner's motion to suppress his confession. The grounds for Petitioner's motion to suppress were that Petitioner is an uneducated, 21-year old illegal immigrant who speaks little or no English; that Petitioner had been drinking prior to making his confession; that Deputy Gonzalez, who interpreted for Petitioner, used psychological coercion by appealing to Petitioner's Spanish heritage and sense of manhood; that Detective Yonce made false statements about the evidence against Petitioner; and that Detective Yonce implied that Petitioner would not be prosecuted if he confessed. After a hearing, the trial court determined that Petitioner's statements were freely and voluntarily made and denied the motion to suppress (R.52). The Second District Court of Appeal also rejected Petitioner's arguments. Acensio v. State, 477 So.2d 38 (Fla. 2d DCA 1985). Those decisions are correct and should not be overturned.

It is the State's burden to prove by a preponderance of the evidence that a confession was freely and voluntarily made. DeConingh v. State, 433 So.2d 501 (Fla.1983), cert. denied, 465 U.S. 1005; Brewer v. State, 386 So.2d 232 (Fla.1980). The question of the admissibility of a confession is to be determined based on all of the

¹/Petitioner sought jurisdiction in this Court, based on conflict, only on the first issue of this brief. Respondent respectfully submits that this Court, therefore, should limit its consideration to Issue I. Should this Court decide to consider the merits of Petitioner's second issue, Respondent would submit the following response.

circumstances surrounding the confession. DeConingh v. State, supra. A confession may not be obtained by threats or violence, or by any direct or implied promises, however slight, or by the exertion of any improper influence. Hutto v. Ross, 429 U.S. 28, 97 S.Ct. 202, 50 L.Ed.2d 194 (1976); Brewer v. State, 386 So.2d at 235. On the other hand, "where a mentally competent defendant has been given Miranda warnings and has not been placed in fear of material or physical harm, or given false inducements, his voluntary confession may properly be admitted into evidence." La Rocca v. State, 401 So.2d 866, 867 (Fla. 3d DCA 1981).

The trial court's determination that Petitioner's confession was freely and voluntarily made is entitled to the same presumption of correctness that attaches to jury verdicts and final judgments. DeConingh v. State, 433 So.2d at 504; Gilvin v. State, 418 So.2d 996 (Fla.1982). Thus, the trial court's conclusion is presumed correct, and the evidence underlying the court's conclusion and all reasonable inferences to be drawn from the evidence are to be interpreted in a light most favorable to that conclusion. DeCastro v. State, 359 So.2d 551 (Fla. 3d DCA 1978).

At the motion to suppress hearing, J.D. Yonce, an investigator with the Polk County Sheriff's Department testified that he was called to the scene of the shooting of Alec Carmichael (R.12). Two witnesses, Melvin Harrell and Roger Harrell gave Yonce a description of the suspects and their vehicle and related the events leading up to the shooting (R.14-16). The witnesses told Yonce that they recognized one of the individuals in the car as being a Mexican male that lived in a duplex behind Melvin Harrell's residence; however, they were

unable to furnish police with names or descriptions of the suspects (R.32).

A vehicle matching the description given by the witnesses was subsequently stopped (R.15). Petitioner was a passenger in this car (R.15). The driver of the vehicle was arrested for driving without a license (R.23). The vehicle was impounded because none of the passengers in the car had a valid driver's license. The passengers were asked to accompany the officers to the sheriff's department (R.23).

Each of the suspects was then interviewed about the shooting. Petitioner was the second suspect to be interviewed. Because Petitioner spoke very little English, Deputy Jose Gonzalez was called in to interpret. Prior to the interview, Petitioner was given his Miranda rights in Spanish (R.17). Petitioner indicated that he understood his rights, and he agreed to talk with the officers about the offense (R.19, 39). Petitioner signed the Miranda waiver form with an "X" (R.17, 40).

Yonce told Petitioner about the shooting and asked Petitioner about the gun that had been found in the car (R.30). Petitioner initially denied any knowledge of the shooting (R.31). Yonce told Petitioner that witnesses at the scene had positively identified the individuals in the car (R.31). In fact, the witnesses recognized one of the individuals as being a Mexican male who lived in a nearby duplex, but they were unable to give names or descriptions of any of the suspects (R.31-32). Yonce also asked Petitioner "what if one of his friends in there said he was there and that he did the shooting?" (R.32). None of the other suspects had made such a

statement (R.33). Petitioner continued to deny any knowledge of the incident (R.32).

During the interview, Yonce was called out of the room (R.20). Petitioner was left with Gonzalez (R.20), 41). Gonzalez told Petitioner he would understand, that Spanish people have a "macho way of being," and if Petitioner did the shooting, he should confess and get it out of the way (R.41). Gonzalez did not recall making any threats or promises to get Petitioner to give a confession (R.41).

When Yonce returned to the room, Yonce made the following statement (R.290):

Tell him all I want to know is the truth; OK? Tell him the vehicle matches the description; two guns were found under the front seat. There were two guns used at, at this shooting. Tell him if we have to, we'll get the people down here to make an identification of everybody in that car. Tell him now, all we want to know is who did the shooting. We don't want to--we're not trying to get anybody in trouble, we just want to know what happened.

Petitioner then admitted that he did the shooting (R.35).

Yonce testified that no promises or threats of any nature were made to obtain Petitioner's confession (R.21).

Petitioner's first argument is that he was unable to make a voluntary decision to confess because of his age, lack of education and inability to speak English. Petitioner was 21 years old at the time of the offense, and there was no evidence that Petitioner was mentally incompetent. Furthermore, Petitioner's Miranda warnings were given in his native tongue. Petitioner indicated he understood his rights and signed the waiver form. The interview of Petitioner

was also conducted in Spanish. A review of the transcript of that interview does not reveal an inability on the part of Petitioner to understand the questions being asked (R.282-298). In fact, Petitioner responded appropriately to the questions that were asked.

Petitioner also contends that he was incapable of making a voluntary confession because he had been drinking that day. Yonce testified that Petitioner had been drinking and that beer cans had been found in the vehicle (R.22). Yonce also stated, however, that Petitioner did not appear to be intoxicated (R.22). Thus, there was insufficient evidence to conclude that Petitioner was so intoxicated that he was unable to make a voluntary decision to confess. Moreover, the fact that a suspect is under the influence of alcohol when questioned does not render the suspect's statements inadmissible as involuntary.

Thomas v. State, 456 So.2d 454 (Fla.1984). The "drunken condition of an accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession, but may affect its weight and credibility with the jury." Id. at 458.

Petitioner's third argument is that Deputy Gonzalez's appeal to Petitioner's Spanish heritage and sense of manhood during the break in the interview constituted improper psychological coercion. While Deputy Gonzalez admitted that, in making these statements Gonzalez was trying to get Petitioner to confess, Gonzalez's statements do not reach the level of improper influence prohibited in Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897).

Petitioner relies on Ware v. State, 307 So.2d 255 (Fla. 4th DCA 1975), cert. denied, 316 So.2d 286 (Fla.1975). In that case, the interrogating officer used the "family approach" to obtain a confession from the accused. The officer explained that, under this approach, he discussed how long the accused would be away from his wife and children if he was convicted, and indicated that by cooperating Petitioner would be away from his family for less time. Under the circumstances of that case, the officer's approach was determined to have rendered the accused's confession involuntary. Id. at 256. Clearly, Gonzalez's statements about Latin men being "macho" did not exert the same type of undue influence on Petitioner that the Fourth District Court of Appeal found improper in Ware v. State.

Petitioner's fourth contention is that Yonce made false statements about the evidence against Petitioner when he made the following statements (R.31, 32):

Tell him that people at the scene had positively identified the ones that were there.

Tell him how about if one of his friends in there says he was there and that he did the shooting.

Yonce admitted that, at the time he made the first statement, there had not been a positive identification of Petitioner, although he thought the victim would be able to provide a description (R.31-32, 35).

A confession will not be considered voluntary where the circumstances surrounding the confession were calculated to delude an accused as to his true position or to exert improper or undue influence

over the accused. Brewer v. State, 386 So.2d at 235-236. Yonce's first statement was a false statement of the evidence against Petitioner. However, whether Petitioner's confession was voluntary must be determined in light of the totality circumstances surrounding Petitioner's confession. The interview lasted only approximately 30 minutes. There was no evidence that Petitioner was physically abused or that he had been denied any comforts. As to Yonce's first statement, Respondent would note that Petitioner was also told that, if it was required, Yonce could bring witnesses in for an identification (R.35). Thus, Petitioner was aware that he had not been positively identified as of the time of the interview (R.35). Yonce also stressed to Petitioner that he was only trying to learn the truth about the shooting (R.34). In fact, even after Petitioner admitted shooting Carmichael, Yonce continued to question Petitioner to be sure that it was not one of the other suspects that did the shooting (R.291, 293). Furthermore, in light of the phrasing of Yonce's second statement, that statement cannot be construed as a representation that one of the other suspects had actually told Yonce that Petitioner did the shooting.

Finally, Petitioner argues that Yonce's statement "Tell him that all I want to know now is the truth; OK? . . . We don't want to-- we're not trying to get everybody in trouble, we just want to know what happened." was an implied promise not to prosecute, and therefore, Petitioner's confession was inadmissible. Such an assertion is incredible. Furthermore, Petitioner has taken that statement out of context. Yonce's complete statement was as follows (R.290):

Tell him all I want to know is the truth; OK? Tell him the vehicle matches the description; two guns were found under the front seat. There were two guns used at, at this shooting. Tell him if we have to, we'll get the people down here to make an identification of everybody in that car. Tell him now all we want to know is who did the shooting; OK? We don't want to -- we're not trying to get everybody in trouble, we just want to know what happened.

Yonce's statements clearly meant nothing more than that the officers were interested in learning the truth about the shooting. The statements cannot reasonably be construed as an implied promise not to prosecute.

Accordingly, the trial court did not err in denying Petitioner's motion to suppress.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, Respondent respectfully requests that this Honorable Court affirm the decision of the District Court of Appeal, Second District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Paul C. Helm, Assistant Public Defender, Hall of Justice Building, 455 North Broadway, P. O. Box 1640, Bartow, FL 33830-3798 this 2 April, 1986.

Kim W. Munch

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