

IN THE SUPREME COURT OF THE STATE OF FLORIDA

HAROLD LEE HARVEY, JR.,)

Appellant,)

v.)

STATE OF FLORIDA,)

Appellee.)

FILED
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CASE NO. 69,101 OCT 30 1987

CLERK, SUPREME COURT
By *[Signature]*
Deputy Clerk

APPELLANT'S SUPPLEMENTARY BRIEF

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PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County, Florida. In this brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will designate the appropriate portions of the record:

"R" Record on Appeal

STATEMENT OF THE CASE

The Appellant hereby adopts and realleges the Statement of the Case as set forth in the Appellant's Initial Brief.

STATEMENT OF THE FACTS

The Appellant hereby adopts and realleges the Statement of the Facts as set forth in the Appellant's Initial Brief.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS BECAUSE THE TRIAL COURT FOUND THAT THE CONDUCT OF THE LAW ENFORCEMENT AUTHORITIES IN EXCLUDING AND PRECLUDING THE APPELLANT FROM CONSULTING WITH HIS ATTORNEY PRIOR TO THE MAKING OF THE APPELLANT'S STATEMENT DID NOT CONSTITUTE A VIOLATION OF THE APPELLANT'S FIFTH AMENDMENT AND SIXTH AMENDMENT RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND DID NOT DENY THE APPELLANT DUE PROCESS OF LAW UNDER ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION CONTRARY TO THE RULE OF LAW SET FORTH IN HALIBURTON VS. STATE.

It is initially clear that the trial court's finding of fact come to the Appellate court with a presumption of correctness which will not be set aside unless there is no basis for the findings of fact in the Record on Appeal. Additionally, it is also clear that there existed sufficient evidence in the Record in support of the trial court's findings. The trial judge specifically found in his findings of fact and conclusions of law that the Appellant's attorney was precluded from having access and contact with the Appellant. The trial court also found that the law enforcement authorities had refused to notify the Appellant that his attorney had requested to speak with the Appellant. (R 727)

The evidence which was presented to the trial court in support of the Appellant's Motion to Suppress his confession established that the Appellant was arrested on February 27, 1985, at approximately 6:15 A.M. (R 542, 543) The Appellant was then taken to the Detective Bureau which adjoins the Indian River County Detention Center at 7:00 A.M. (R 544) Thereafter, the Appellant on numerous occasions was advised of his rights and the Appellant acknowledged his rights. The Appellant never asked to consult with an attorney, and, in fact, after being advised of his rights to counsel indicated that he would continue making his statement in the absence of his counsel. (R 612, 618) Based upon a

stipulation between the parties, it was agreed that Sherry Heard with the Office of the Public Defender of the Nineteenth Judicial Circuit, was contacted at 9:00 A.M. and advised that the Appellant had been arrested. She contacted the Office of the Public Defender and informed them of that fact. (R 468-469) At approximately 9:00 A.M. Assistant Public Defender Clyde Killer spoke with law enforcement officials at the Indian River County Detention Center and inquired as to the arrests which had been made in the Boyd case. (R 517, 518)

At approximately 11:40 A.M. the Appellant commenced a polygraphic examination which was offered to him. (R 545) At 2:00 to 2:25 P.M. Assistant Public Defender Clyde Killer arrived at the Indian River County Detention Center and requested to speak with the Appellant. (R 519, 520) The tape of the Appellant's confession began at 2:22 P.M. (R 650) Shortly after the Appellant commenced his statement he was allowed an opportunity to visit with his wife after which he continued making the statement which was sought to be suppressed. (R 650, 651) It should be noted that the trial court specifically found that this occurred at 2:22 P.M. and that Assistant Public Defender Clyde Killer was refused the right to meet with the Appellant by the law enforcement authorities at the Indian River County Detention Center. (R 520, 721, 727)

Assistant Public Defender Clyde Killer then spoke with the Appellant's co-defendant and was informed that the Appellant was in the process of making his statement to the detectives. (R 523) At that time the Assistant Public Defender was again denied access to the Appellant. (R 524) The Record reveals that an official at the Indian River County Detention Center told the Assistant Public Defender, Clyde Killer

"Well, Killer, we can't do that. The detective aren't finished with him yet. I'm sorry." (R 524)

Thereafter, the Assistant Public Defender spoke with the State Attorney at approximately 4:40 P.M. and asked them to "suspend speaking with the defendant." (R 525) The Assistant State Attorney informed the Assistant Public Defender that he would not tell the detectives of his request to meet with the Appellant. (R 526) The Assistant Public Defender went to the local judge at 5:15 P.M. and complained of the denial of his right to meet with the Appellant. He was informed that at the First Appearance which had been previously set for 5:00 P.M. was being continued until 6:00 P.M. because the Appellant had not yet finished talking with the detectives. (R 527) The Assistant Public Defender was provided with an opportunity to speak with the Appellant for the first time at 6:00 P.M. (R 526)

The Appellant's Motion to Suppress was denied by the trial court because the trial court felt that it was bound by the decision of the United States Supreme Court in the matter of Moran vs. Burbine, 106 S. Ct. 1135 (1986). In Burbine (supra), an attorney, contacted by Burbine's sister on his behalf but without his knowledge called the police station and was told that Burbine would not be questioned until the following day. Less than an hour later, after Miranda warnings, the police began a series of interrogations that resulted in three (3) signed statements wherein Burbine admitted to the murder. The Court held that neither the police contact, nor Burbine's ignorance of the attorney's efforts to reach him, undermined the waiver of his Fifth Amendment Rights so to require exclusion of the statements. The Court considered the police contact irrelevant since it found that knowledge of the attorney's

telephone call was not essential to a knowing and intelligent waiver of Burbine's Miranda rights. In addition, the Court found that Burbine's Sixth Amendment right to counsel had not attached because the government had not committed itself to prosecution at the time the statements were made. The Court also found that there existed no Fourteenth Amendment violation. The Court specifically stated, however, that its' decision does not disable "the States from adopting different requirements for the conduct of it's employees and officials as a matter of state law", at page 1148.

In Haliburton vs. State, 12 Fla. Weekly 507 (Fla. 1987) the State contended that the conduct at issue was less egregious than in Burbine, and did not rise to the level of a due process violation since the police did not misinform or deceive Haliburton's attorney as to his client's status. This Court specifically disagreed with that position. This Court held, citing Justice Stevens' dissent in Burbine "any distinction between deception accomplished by means of an omission of a critically important fact and deception by means of a misleading statement is simply untenable." Further, this Court held, "there can be no constitutional distinction ... between a deceptive misstatement and the concealment by the police of the critical fact that an attorney retained by the accused or his family has offered assistance, either by telephone or in person." This Court also noted that the attorney not only telephoned the police station as to the status of his client, but subsequently arrived at the station and requested access with his client exactly as in the case sub judice. Haliburton was not told of the attorney's presence or request. The police similarly refused access with the client. This Court held that this conduct violated the due process

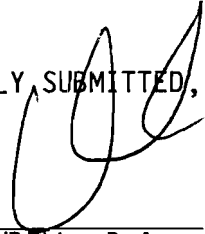
provision of Article I, Section 9 of the Florida Constitution. Again, agreeing with Justice Stevens, this Court held that "due process requires fairness, integrity and honor in the operation of the criminal justice system, and in it's treatment of the citizens cardinal constitutional protections... Police interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the Due Process Clause prohibits... Just as the government cannot conceal from a suspect material and exculpatory evidence, so too the government cannot conceal from a suspect the material fact of his attorney's communication." As such it is clear that the trial court erred in denying the Appellant's Motion to Suppress.

WHEREFORE, the Appellant respectfully requests that this Honorable Court remand the matter to the trial court for a new trial with instructions to enter an Order granting the Appellant's Motion to Suppress.

CONCLUSION

For the foregoing reasons, the Appellant would respectfully request that this Honorable Court enter an Order vacating the sentence, reversing the Judgment and remanding the matter to the trial court for a new trial, with instructions to enter an Order granting the Appellant's Motion to Suppress.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, by mail on this 29th day of October, 1987.



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