

IN THE SUPREME COURT OF FLORIDA

MARK A. DAVIS,

Appellant,

v.

Case No. 70,551

STATE OF FLORIDA,

Appellee.

DEC 7 1981
CLERK OF COURT
By: *DC*

ON APPEAL FROM THE PINELLAS COUNTY CIRCUIT COURT

BRIEF OF APPELLEE IN RESPONSE TO COMPANION BRIEF

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SUMMARY OF THE ARGUMENT

The trial court did not err in limiting appellant's request to act as co-counsel in this case. It is well-settled law in this State that a criminal defendant does not have a constitutional right to be represented by counsel and to represent himself at the same time. *See, Goode v. State*, 365 So.2d 381 (Fla. 1979), *cert. denied*, 441 U.S. 967 (1979).

It is not clearly demonstrated in the record that appellant was absent from the courtroom during the time that peremptory challenges were being made. Even if appellant was absent, he had an opportunity and did consult with counsel concerning the exercise of challenges. Furthermore, this Court's ruling in *Francis v. State*, 413 So.2d 1175 (Fla. 1982), is not applicable to this situation since appellant was not involuntarily absent from the proceedings.

The record in this case demonstrates that none of the comments complained of by appellant were objected to at trial; therefore, the issues concerning prosecutorial comments have not been preserved for appellate review. Additionally, none of the comments complained of by appellant constitute error much less reversible error. When the comments are read *in para materia* with the defense argument or in proper context, it is abundantly clear that the comments are in response to defense arguments or fair comments on the state of the evidence. Error has not been demonstrated.

ARGUMENT

ISSUE I

THE T COURT DID NOT ERR IN LIMITING THE
SCOPE OF APPELLANT'S PARTICIPATION IN THE
TRIAL AS CO-COUNSEL SINCE A CRIMINAL
DEFENDANT DOES NOT ENJOY SUCH A RIGHT

While the appellant was being represented by the Office of the Public Defender, he filed a motion requesting that he be allowed to be co-counsel in his own behalf. Judge Allbritton granted the motion. Thereafter, the Public Defender's Office was removed from the case and John Thor White began representation of appellant. Prior to the commencement of testimony in the case, which was being tried before Judge Penick, the issue of appellant acting as co-counsel was again addressed. The prosecutors presented the trial court with case law which indicated a criminal defendant was not entitled to be represented by counsel and to represent himself. Therefore, the trial court ruled, based on those cases, that the appellant could "work with his attorney fully". However, appellant was not going to be allowed to approach the bench, examine witnesses or make objections. The court explained that during bench conferences, defense counsel could go back to counsel table to explain things to the defendant. (R891-892)

It is uncontested that a criminal defendant, after being fully informed of the ramifications, has a constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). There is no indication in this record that appellant ever requested the opportunity to represent himself, rather the record supports the conclusion that

the appellant wanted to have the assistance of counsel and conduct the trial on his own terms, in other words, he "wanted to have his cake and eat it too".

Just as it is clear that under the proper circumstances a defendant can represent himself, it is equally clear that a criminal defendant does not enjoy a right to the assistance of counsel and be self-represented at the same time. In both Goode v. State, 365 So.2d 381 (Fla. 1979), cert. denied, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979) and Sheppard v. State, 391 So.2d 346 (Fla. 5th DCA 1980) this Court and the Fifth District indicated a defendant had no right to be partially represented by counsel and to partially represent himself. This issue was addressed in terms of the Florida Constitution by this Court in State v. Tait, 387 So.2d 338 (Fla. 1980). This Court opined:

The guaranty of the Declaration of Rights of the Florida Constitution, that "[i]n all criminal prosecutions the accused . . . shall have the right . . . to be heard in person, by counsel, or both . . .," has been interpreted to include a qualified, not an absolute, right to self-representation. When the accused is represented by counsel, affording him the privilege of addressing the court or jury in person is a matter for the sound discretion of the court. *Powell v. State*, 206 So.2d 47 (Fla. 4th DCA 1968); *Thompson v. State*, 194 So.2d 649 (Fla. 2d DCA 1967). *Powell* and *Thompson* were decided under section 11 of the Declaration of Rights of the Constitution of 1885. The fact that the people framed article I, section 16 of the Constitution of 1968 in the same language gives strong support to the proposition that the construction provided by *Powell* and *Thompson* is correct. We conclude that article I, section 16 does not embody a right of one accused of crime to representation both by counsel and by himself. (emphasis added)(test at p. 340)

Appellant has failed to demonstrate an abuse of the trial court's discretion in denying him the right to be co-counsel in the full sense of that word.

Since appellant has no constitutional right to the "hybrid" form of representation he requested, he cannot complain that his constitutional rights have be violated, Error has not been demonstrated.

ISSUE II

THE TRIAL COURT DID NOT ERR IN HEARING AND
RULING ON CHALLENGES TO PROSPECTIVE JUROR IN
THE DEFENDANT'S ABSENCE

Appellant argues the trial court erred in hearing and ruling on challenges to prospective jurors during his absence. The record in this case is unclear as to whether or not the defendant was in fact absent at this point. It is clear, however, that appellant was present at the beginning of the voir dire examination. Appellant was pointed out to the prospective jurors, and they were asked if any of them knew him, (R593) At no point during the questioning that followed is there an indication that the defendant ever left the courtroom. Before challenges were made and after the venire panel had been removed from the courtroom, the court made the following statement, "Let the record be clear. The attorney is waiving his presence." (R764) Appellant relies on this statement to indicate he was not present during the challenges that followed. Even assuming, *arguendo*, that statement refers to the defendant being absent, appellant is still not entitled to relief on this issue.

Appellant relies heavily on this Court's decision in Francis v. State, 413 So.2d 1175 (Fla. 1982) to support his claim that it was error to conduct the proceedings in his absence. While Francis does indicate that a criminal defendant has a right to be present at all critical stages of the proceedings against him, Francis does not indicate this is an absolute right nor does Francis indicate that a defendant may not waive that right. Appellee submits this case is both legally and factually distinguishable from Francis.

The defendant in Francis v. State, *supra*, had been excused by the court *to* go to the restroom. All of the court personnel, as well as counsel for the defense and the State, went to the juryroom to exercise challenges. The defendant was specially told by his counsel that he could not be present. The defendant at the hearing and his motion for new trial stated he wanted to be present. Under those circumstances, this Court found the defendant was involuntarily absent from the proceeding and was entitled to a new trial.

However, other cases subsequent to the Francis decision make it abundantly clear that Francis was decided on its own peculiar facts and is not an absolute rule. In both Ferry v. State, 507 So.2d 1373 (Fla. 1987) and Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985) this Court stressed the involuntary nature of the defendant's absence in Francis. The defendants in Ferry and Johnson had voluntarily absented themselves, and under those circumstances this Court said no new trials were necessary.

This Court has specially held that a capital defendant much like a noncapital defendant can waive his right to be present just as he can waive any other constitutional right. Peede v. State, 474 So.2d 808 (Fla. 1985) There is nothing in this record which suggests the absence of the appellant, assuming he was absent, was anything but voluntary; he was not told that he could not be present during this portion of the proceeding. Additionally, it should be noted that appellant was present during the entire questioning of the panel. After the questioning was over, defense counsel had a point of consulting

with his client concerning the questioning and the upcoming challenges. (R761)

The ruling of this Court in Francis is not applicable to this case since appellant was not involuntarily absent from the proceeding where some challenges were exercised. Appellant had been present during the questioning and had consulted with his attorney prior to the exercise of the challenges. Reversible error has not been demonstrated.

ISSUE III

APPELLANT HAS NOT DEMONSTRATED THAT THE PROSECUTOR COMMENTED ON THE RIGHT TO REMAIN SILENT

As with the other issues bring argued by this appellant, he begins with a general proposition of law which is true. However, he again fails to demonstrate that that general principle is applicable in this particular case. Yes, comments by the prosecutor on the defendant's right to remain silent is or can be violative of the Fifth Amendment. However, prosecutorial misconduct based on alleged comments on the defendant's right to remain silent, like most, other **issues, must be** objected to in order to be preserved for appellate review. *See, Smith v. State*, 515 So.2d 182 (Fla. 1987). The **failure to preserve the issue** via a **timely** objection results in a procedural default. *Glendening v. State*, 536 So.2d 212 (Fla. 1988); *Tillman v. State*, 471 So.2d 32 (Fla. 1985); *Stewart v. State*, 420 So.2d 862 (Fla. 1982) and *Steinhorst v. State*, 412 So.2d 332 (Fla. 1982). *Sub judice*, no objection was made to any of the comments; this issue is not properly before this Court.

Although appellee is relying on procedural default and urges this Court to specially **rule** on the default, it is also submitted that the issue, if there had been objection, would not have been error since there was no comment on the defendant's right to remain silent. All of the comments the defendant lists under this issue are legitimate comments on the state of the evidence before the jury, the absence of evidence or comments in response to defense argument. *Gray v. State*, 28 So.2d 53 (Fla. 1900) The

comment concerning the defense having the power to call witnesses was directly related to argument defense counsel made during his initial closing. Counsel, in discussing the evidence, indicated there were two jailhouse informants. He went on to stress that one of them had been called by the State but the other one had not. Additionally, while discussing the testimony of Beverly Castle, indicated that his daughter's boyfriend and his brother had testimony to offer but were not called by the State as witnesses. (R1374-1375) The prosecutor simply pointed out that the defense has the equal ability to call a witness; such comments are not improper. Dunbar v. State, 458 So.2d 424 (Fla. 2d DCA 1984) and Dixon v. State, 206 So.2d 55 (Fla. 4th DCA 1968).

All of the other comments appellant cites under this issue are comments on the **state** of the evidence or the **lack** of other evidence. The knife statement is simply the prosecutor laying out what evidence was presented and what was not. He is stressing that the argument, is not that the defendant brought the knife to the **scene**, but that he possessed the knife during the course of the robbery. The prosecutor's comment concerning the failure to impeach Ms. Castle and her daughter was a result also of the defense's attempt to minimize their testimony by saying they were shading their trial testimony in comparison to other statements. The State in the argument was pointing out the fact that impeachment would have **been** proper **if** there were differences, yet no impeachment: had taken place.

A part of the appellant's defense was that he was too intoxicated to form the intent necessary for first degree murder. Thus, evidence of intoxication was an issue. The prosecutor's statement concerning intoxication pointed to the lack of evidence to support an intoxication defense. Finally, the lack of challenge by the defense to statements made by the defendant to other persons was also a comment on the state of the evidence. The statements attributable to the defendant as related by Shannon Stevens, Kimberly Kieck and Beverly Castle were in fact not challenged in any meaningful way.

All of the comments complained of as being remarks on the defendant's right to remain silent were proper since they were not comments on the exercise of the defendant's constitutional rights. *Gray v. State, supra*, and *Dunbar v. State, supra*.

ISSUE IV

THERE WAS NO ERROR IN THE STATEMENTS MADE OR ELICITED BY THE PROSECUTOR SINCE HE DID NOT PLACE THE DEFENDANT'S CHARACTER AT ISSUE

As was the case with Issue III above, this issue has not been preserved for appellate review. No objections were made in the trial court to either the one statement by the prosecutor in closing argument or the statements taken from the testimony of Shannon Stevens. Since there were no objections, there has been a procedural default on this issue. Glendening v. State, supra.

While relying on the procedural default argument, appellee will again, for information purposes, address the merits of appellant's claim. The one comment taken from the prosecutor's closing argument is obviously a comment on the evidence. The evidence produced at trial indicated appellant was a "biker type". Thus, this statement is a fair comment on the evidence. The other statements excised by appellant are taken from the testimony of Shannon Stevens.

Shannon Stevens was, in the words of the defense, a jailhouse snitch. He testified concerning statements appellant had made to him concerning this case while both were inmates at the Pinellas County Jail. Whenever there is testimony from one inmate against another, there is always a question concerning the motions of the testifying inmate *and* a question concerning how that inmate became the defendant's confidant. Testimony was elicited from Shannon Stevens to explain and answer these questions. Stevens was asked, "How did you come to meet him?" The "him" was in reference to Mark Davis, appellant. (R1197 The

witness proceeded to tell the court and jury the circumstances surrounding his acquaintance with appellant, Those circumstances included biking and the selling of a bike, cutting hair, the security arrangement in jail, and the use and possession of coffee. (R1197-1204)

The witness was and is a convicted felon. His credibility as a witness was certainly in question. His recitation of the relation that existed between himself and the defendant was certainly an issue to be resolved by the jury. Appellant's character was not put in issue.

ISSUE V

NO IMPROPER COMMENTS HAVE BEEN DEMONSTRATED

Again appellant raises an issue which has not been preserved for appellate review since no objections were made in the trial court. Failure to contemporaneously object to comments or prosecutor arguments results *in* a procedural default. Smith v. State, *supra*.

The first comment complained of under this issue is the statement by the prosecutor in the course of an objection to questioning by the defense concerning an offer of life imprisonment. Defense counsel questioned Shannon Stevens about appellant being offered life by the prosecutors but wanting his day in court. (R1235) The prosecutor objected to the questioning because the question and answer implied false evidence. The objection was, thus, invited by the defense attorney.

The other comments mentioned in appellant's brief, when taken in context, are fair comments on the evidence. Appellant had given Shannon Stevens a newspaper article which contained information that was in conflict with what appellant had told Shannon. When questioned about the differences, it was appellant who indicated **he** had told law enforcement a different story. It was appellant who indicated he had his own theories of the case, The prosecutor was merely making reference to facts that had been introduced at trial and making logical inferences therefrom. *See, Breedlove v. State*, 413 So.2d 1 (Fla. 1982) and *Gosney v. Stag*, 382 So.2d 833 (Fla. 5th DCA 1980).

CONCLUSION

Based on the foregoing arguments and citations of authorities, as well as the arguments and authorities presented in the brief of the appellee and the supplemental brief of the appellee, the judgment and sentence of death in this case should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee in Response to Companion Brief has been furnished by U.S. Mail to Mark A. Davis, #106014, Florida State Prison, Post Office Box 747, Starke, Florida 32091 and Aubrey O. Dicus, Attorney for Appellant, Post Office Box 41100, St. Petersburg, Florida 33743, this 29th day of November, 1989.


Of Counsel for Appellee