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Chief Deputy Clerk

SUPREME COURT OF FLORIDA

FREDERICK CAVE,

Petitioner,

vs .

STATE OF FLORIDA,

Respondent.

_____ /

Case No. 77,937

District Court of Appeal,
1ST District - No.89-01694

ON APPEAL FROM THE DISTRICT COURT OF
APPEAL FOR THE FIRST DISTRICT OF FLORIDA

REPLY BRIEF OF PETITIONER

GEORGE F. SCHAEFER
ATTORNEY AT LAW
FLORIDA BAR NO. 308870
15 S.E. SEVENTH STREET
GAINESVILLE, FLORIDA 32601
(904) 338-1111

ATTORNEY FOR PETITIONER

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SUPREME COURT OF FLORIDA

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District Court of Appeal,
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REPLY BRIEF OF PETITIONER

I PRELIMINARY STATEMENT

Frederick Cave was the defendant in the trial court. He will be referred to in this brief as "petitioner," "defendant," or by his proper name. Reference to the transcript of the trial proceedings or sentencing hearing will be used by the symbol "T" followed by the appropriate page number in parentheses.

II ARGUMENTS

ISSUE I

THE DEFENDANT'S CONVICTIONS AND SENTENCES **FOR BOTH** AGGRAVATED BATTERY AND ARMED **ROBBERY** VIOLATE THE FEDERAL AND STATE PROHIBITIONS PLACING **A** DEFENDANT TWICE IN JEOPARDY FOR THE SAME ACT.

The State of Florida argues that petitioner Frederick Cave's convictions for armed robbery and aggravated battery do not violate the federal and state double jeopardy bars. The state then concludes its argument that if the conviction for aggravated battery is error, it is harmless error.¹ The State of Florida reasons that even if the aggravated battery offense is vacated, the reduction by only ten points on the sentencing guidelines scoresheet is harmless error because petitioner Frederick Cave on the remaining armed burglary and armed robbery offenses would still fall within the four and one-half to nine years permitted range of the sentencing guidelines.

The state overlooks the fact that the trial court judge might not have deviated from the sentencing guidelines on the basis of timing alone of the new offenses if Mr. Cave had been

¹In the state's answer brief it is actually stated, "Finally, Cave's conviction for aggravated assault is harmless error," (State's answer brief at page 13). This is simply an error on the part of the respondent's counsel. Mr. Cave was convicted of aggravated battery, not aggravated assault.

convicted for only two new offenses instead of three new offenses. The State of Florida has failed to prove beyond a reasonable doubt that there is no reasonable possibility that the erroneous conviction and sentence for aggravated battery contributed to the trial court's decision to deviate from the sentencing guidelines and impose life sentences for the armed burglary and armed robbery offenses.

ISSUE 11

THE APPELLATE COURT ERRED BY NOT REVERSING THE DEFENDANT'S CONVICTIONS AND SENTENCES SINCE AN INVOLUNTARY AND COERCED CONFESSION WAS ADMITTED AT THE DEFENDANT'S JURY TRIAL.

The State of Florida goes to great length to argue that "admission of the incriminating statements, if error, could properly be found to be harmless." (State's answer brief at 23). In support of this argument the state notes that the victim stated that she did not recall the police saying anything suggesting that Mr. Cave was the parson who attacked **her** (T-62). The state then takes exception to petitioner Cave's claim that the victim identification was made under "highly suggestive circumstances." The state has overlooked that the investigating officer at trial testified under oath before the **jury** to the following:

Q Okay, after observing Fred Cave at the location that you described, where did you go next?

A I went to get the victim to have her do an ID of the defendant.

Q Okay. Where was she?

A **She** was still at her residence.

a **And** who was there with her?

A Her boyfriend.

Q Okay. What did you say to her that you wanted her to do to the best of your recollection?

A When I arrived on the scene, I said, "We have an individual that matches the description of the person" and if she would take a look at him to see if that was the individual that committed the crime.

Q She agreed to go with you?

A She agreed.

(T-72). This testimony substantiates that the identification procedure was so suggestive that the admission of the coerced confession was not harmless error.

The state further points out in support of its harmless error argument that a nurse testified from hospital records that he stabbed himself with an artist's knife about 7:30 P.M. However, the nurse conceded that she had no independent recollection of Mr. Cave making this statement (T-117). When she was asked by the trial prosecutor whether she had some recollection about the hospital incident, she responded that she had a "hazy memory of the incident" and could not recall **any** specifics (T-119). For these reasons, a jury could have reasonably concluded that the information in the medical charts that Mr. Cave **was** cut with an "artist's knife" at approximately 7:30 P.M. could have come from others at the hospital which included the victim and the investigating officer.

The nurse's testimony also reinforces the conclusion that the state has failed to prove beyond a reasonable doubt that there is no reasonable possibility that the admission of Mr. Cave's coerced confession contributed to his convictions.

The state also argues that the state and federal constitutional rights to due process are identical "at least as to self-incrimination." (State's answer brief at 28). The state supports this argument by noting that the Supreme Court of Florida in Walls v. State, 580 So.2d 131 (Fla. 1991) found that the due process provision of the Florida Constitution at Article I, §9 embodies the principles of fundamental fairness elaborated by Justice Brennan in Illinois v. Perkins, _____ U.S. _____, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990).

The Supreme Court of Florida's due process holding in Walls was also based on Florida case law that did not rely on federal due process decisions. The Supreme Court of Florida citing Scull v. State, 569 So.2d 1251 (Fla. 1990) held in Walls that "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. The Scull case, in turn, was not anchored in federal case law, but only state case law.

The right of a Florida citizen not to have an involuntary confession used against him at his trial does in fact embody a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. Under Article I, §9 of the Florida Constitution the use of such an involuntary confession at a citizen's jury trial cannot be considered under any circumstances harmless error.

ISSUE III

THE TEMPORAL PROXIMITY OF CRIMES ALONE DOES NOT PROVIDE A VALID REASON FOR DEPARTURE FROM THE SENTENCING GUIDELINES WITHOUT A FINDING OF A PERSISTENT PATTERN OF CRIMINAL CONDUCT.

The State of Florida in its answer brief concedes that the question certified by the First District Court of Appeal--whether the temporal proximity of crimes alone provides a valid reason for departure from the sentencing guidelines without a finding of a persistent pattern of criminal conduct--should be answered in the negative. Nevertheless, the State of Florida also argues that there is no need for the Supreme Court of Florida to exercise its jurisdiction to again answer this question. In other words, the state is in essence asking the Supreme Court of Florida to decline jurisdiction even though petitioner Frederick Cave's departure life sentences were based on what the state now concedes to be an invalid reason for departure from the sentencing guidelines: temporal proximity alone.

Such a result would be manifestly unjust given that when Mr. Cave was sentenced by the trial court he had only one prior third degree felony and five misdemeanors. At the time of Mr. Cave's sentencing, he did not even qualify for application of the current habitual felony offender and habitual violent felony offender enhancement statute. See **S775.084**, Fla. Stat.

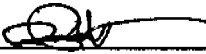
The state's fallback position is the same one that the state made before the First District Court of Appeal in its motion for a hearing which was rejected by the First District Court of Appeal. The state again argues in essence that the departure sentences should be affirmed because of alleged aggravating circumstances that were known to the trial court at sentencing which the trial court judge could have written on the sentencing guidelines scoresheet as a valid basis for departure. Unless State v. Simpson, 554 So.2d 506 (Fla. 1989) and Shull v. Dugger, 515 So.2d 748 (Fla. 1987) are to be overruled, the departure sentences cannot be legitimized by articulating new reasons for departure.

The most disappointing argument that respondent's counsel makes in support of an affirmance of the departure sentences is one based on fear and not persuasion. Respondent's counsel concludes that petitioner Frederick Cave "will likely use a firearm" to seek vengeance for his prosecution if his sentences are overturned on appeal. Nothing in Mr. Cave's prior record, which even the state in its answer brief describes as "minimal," supports this prophesy of carnage.² The state's prophesy of doom

²**Furthermore**, the undersigned counsel can represent to this court that based on his communications with the petitioner during the course of **his** appeal that there is absolutely no reason to believe he will seek retribution because of his prosecution. **Mr.** Cave seems calm and relatively mild-mannered compared to most inmates.

is nothing more than a crude and unprofessional attempt to frighten and intimidate the court into affirming the illegal departure sentences.

Respectfully submitted,




GEORGE F. SCHAEFER
Attorney at Law
Florida Bar Number 308870
15 S.E. Seventh Street
Gainesville, Florida 32601
(904) 338-1111

Attorney for Petitioner

TIFICATE OF SERVICE

I CERTIFY that a copy of this reply brief of petitioner has been furnished by mail delivery to Charlie McCoy, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050 this 5th day of September, 1991.



GEORGE F. SCHAEFER
Attorney at Law
Florida Bar Number 308870
15 S.E. Seventh Street
Gainesville, Florida 32601
(904) 338-1111

Attorney for Petitioner