

IN THE SUPREME COURT OF FLORIDA

DARRYL MOODY,

Appellant,

vs.

APPEAL NO. 94,487

STATE OF FLORIDA,

Appellee.

_____ /

APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

ROBERT A. NORGARD
ATTORNEY AT LAW
FLORIDA BAR NUMBER 322059

P.O. BOX 811
BARTOW, FL 33831
(863)533-8556

ATTORNEY FOR APPELLANT

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PRELIMINARY STATEMENT

Petitioner will be responding to each of the Issues in this case.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS WHERE THE OFFICER HAD NO REASONABLE SUSPICION OF CRIMINAL ACTIVITY TO PROVIDE A BASIS FOR A LEGAL STOP IN VIOLATION OF THE FOURTH AMENDMENT

Mr. Moody's position in this case has always been that the stop of his vehicle violated the Fourth Amendment to the United States Constitution because there was no reasonable suspicion to justify the stop of his vehicle. The initial defense motion was filed and testimony was taken regarding the propriety of the stop. Prior to ruling on the motion, the trial court, sua

sponte requested that the State and defense counsel respond to four questions: (1) the inventory procedure; (2) whether the search was authorized apart from a vehicle inventory; (3) whether the stop required reasonable suspicion or probable cause; and (4) would inevitable discovery apply. (V,R778). An additional hearing was held to present testimony on the inventory procedure on May 30, 1996. (V,R659-772)

Following that hearing, argument was made by both the State and the defense. The State clearly asserted that the applicable standard to be applied to the facts of this case was whether or not

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the law enforcement officer had a reasonable suspicion to stop Appellant. (V,R729) The State alternatively argued that the search was proper as incident to a lawful arrest. (V,R729) The State specifically conceded that there was no probable cause to stop the vehicle:

Reading through those cases is I think really the key to making the determination in this particular case. And it's my contention that the officer clearly did not have probable cause to stop, but based upon everything that has come from the stand back in the December case as well- ... He [Officer Bly] really didn't have much----he didn't have knowledge of the defendant before then. But

taking into consideration the testimony it's my belief that the officer certainly had articulable reason---reasonable suspicion to stop the vehicle and was authorized to do that.

This Court has concluded in Perkins v. State, 760 So. 2d 85 (Fla. 2000), that a stop based on the belief of a law enforcement officer that a person may have a suspended license is not a reasonable suspicion. The evidence seized as a result of a stop where the sole purpose is to determine whether or not a person is driving with a suspended license is subject to suppression.

The Assistant Attorney General seeks to limit the ruling in Perkins by arguing that Perkins would only support the suppression of the identity of the driver. There is nothing in Perkins which

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supports this position. What Perkins did was expand the scope of what evidence should be suppressed to include the identity of the driver. Prior cases had held that the identity of the driver was distinguishable from other suppressable evidence. Perkins held that the identity of the driver, in addition to (emphasis supplied) other evidence, was subject to suppression where a stop was made in violation of the Fourth Amendment to the United States Constitution. In determining that the driver's

identity is also subject to suppression, this Court upheld the basis for the suppression which was the illegal stop. The trial court and the Fourth District Court of Appeals had determined that the stop was illegal, but they had been unwilling to extend the parameters of what evidence was suppressable to include the identity of the driver. This Court approved the rulings of the lower court which found the stop to be in violation of the Fourth Amendment and extended those protections to include the suppression of the identity of the driver.

The Assistant Attorney General's argument that the stop in this case was legal because the trial court ruled that it was legal is misplaced. Quite simply, under Perkins, the trial court was wrong. As stated in the dissent in Perkins, Mr. Perkins was stopped after one officer radioed to stop the officer and told him to effectuate a stop on Mr. Perkins because the first officer did not believe that Mr. Perkins had a valid license. This is precisely

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what happened in the instant case. The trial court in the instant case incorrectly determined that a lawful stop of a motor vehicle could be based on a suspicion that the driver did not have a valid driver's license.

The Assistant Attorney General also argued that Perkins is

distinguishable because the identity of the driver was not sought to be suppressed in the instant case. (State's Brief at 25-26). Perkins does not hold that the identity of the driver is the only evidence subject to suppression. Perkins holds that the identity of the driver in addition to other evidence is subject to suppression when law enforcement officers stop a motor vehicle based solely on the belief that a person is driving with a driver's license that is not valid.

The Assistant Attorney General also argues that the information in the instant case was not too stale to support the stop. The Answer Brief cites cases from other jurisdiction that were utilized by the trial court to uphold the stop. None of these cases, however, are binding upon this court. The Assistant Attorney General does not cite any Florida cases which have upheld a stop based on information that was as stale as the information in the instant case. It is also noteworthy that even the trial judge recognized that the suspension in this case was not for a fixed period and it was therefore reasonable that Mr. Moody could have obtained a valid driver's license in a few days. (V,R781)

The Assistant Attorney General also asserts that the staleness doctrine might not be applicable to the stop of a motor vehicle, citing Denton v. State, 524 So. 2d 495 (Fla. 2d

DCA 1988). In Denton, the defendants sought to suppress evidence seized as a result of a confidential informant's information which led to an intensive police investigation. The defendants apparently asserted, as one basis for their suppression argument, that the information provided by the informant was too stale to support the stop of their vehicle. The facts contained in the opinion indicate that in September of 1986 a confidential informant called the police and provided information. This information led to an independent investigation and surveillance by the police that culminated in a November arrest of the defendants. The Second District Court of Appeals determined, as did the trial court, that based upon the independent investigation of the officers, there was a well-founded suspicion that the defendants were committing or about to commit a criminal offense on the night they were stopped. After the stop, a K-9 dog alerted to the car and drugs were discovered. Factually, Denton is inapplicable to the instant case. First, in Denton the time period between the alleged stale information and the arrest was less than two months, as opposed to the several years in the instant case. Second, in Denton during the six week period between obtaining the information from the informant and the stop, additional investigation and surveillance

was being conducted that provided a basis for a well founded suspicion. Contrary to the Assistant Attorney General's assertion, staleness is fatal to the search in this case.

Contrary to the assertions of the Assistant Attorney General's the law enforcement officers would not have been derelict in their duties if they had failed to stop Mr. Moody. There is no evidence in the record to support the Assistant Attorney General, assertions that Mr. Moody had ever endangered other drivers on the road or streets, including at the time of this stop. In fact, the evidence found by the trial court suggests the contrary that Moody could have easily gotten a driver's license. (V,R781)

The Assistant Attorney General also relies on Voorhees v. State, 699 So. 2d 602 (Fla. 1997). Voorhees is not applicable to the Fourth Amendment analysis presented here. Voorhees concerns the suppression of statements that were made after a consensual encounter became an illegal detention. The question in Voorhees was whether or not the statements were made after there had been a sufficient time to purge the taint of the initial illegal detention. Voorhees does not address the application of the Fourth Amendment and the exclusionary rule to evidence seized as the result of a vehicle stop based on information that was several years old.

With respect to the weapon that law enforcement officer's received from Bruce Foster, the Appellant did not assert at the

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trial level that this evidence was subject to suppression as fruit of the poisonous tree stemming from the stop of his vehicle. The Appellant asserted below and in this proceeding that the evidence subject to suppression based on the stop of his vehicle would include the items removed from the car, including the P380 gun, stereo equipment, and tools, and the evidence that was seized as a result of the officers obtaining search warrants for the apartment of Sherita Leeks and the Appellant's home. The search warrants were based on the seizure of the P380 gun.

The Assistant Attorney General also asserts that the evidence in this case should not be suppressed because it would have "inevitably been discovered." The inevitable discovery exception enunciated in Nix v. Williams, 467 U.S. 431, 81 L.Ed.2d 377 (1977) is inapplicable in this case.

The "inevitable discovery" exception permits evidence that would be otherwise excludable due to unlawful conduct by the police, to be admitted where the state can prove by a preponderance of the evidence (emphasis supplied) that the evidence would have been discovered by lawful means. The State must establish that

the evidence would have ultimately or inevitably been discovered through lawful means. The possibility that the evidence could have been discovered is not enough. See, Ruffin v. State, 651 So. 2d 206 (Fla. 2d DCA 1995).

The American Heritage Dictionary defines inevitable as

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"incapable of being avoided or prevented." Black's Law Dictionary, 5th Edition, defines inevitable as "...incapable of being avoided,... transcending the power of human care, foresight, or exertion to avoid or prevent."

The Assistant Attorney General's theory that all the evidence in this case would have been discovered because Bruce Foster would have turned in the gun, which would have led to the obtaining of search warrants, which would have led to a search of the apartment, house, and two cars, which would have led to the discovery of the identical evidence, which would have...., which would have.... does not satisfy the preponderance of the evidence standard. At best, this chain of "would haves" is a possibility, but certainly not a probability, and clearly not an inevitability.

According to the facts in this case, Mr. Moody was stopped by the police on May 23, 1994. (XXIII,R2357) He was arrested for being in possession of the stolen P380 gun on May 24, 1994.

(XXXIV,R4203) According to the factual recitation in the Answer Brief and the record, Mr. Moody sold the gun to Mr. Foster after he was stopped by the police. At the time of the alleged sale, Mr. Moody told Mr. Foster he was worried that the police had gotten a gun out of his car. (XXVIII, R3116-18; State's Brief at 8-9)

Mr. Foster did not contact the police until May 25, the day after Mr. Moody was arrested. (XXV,R2581) There is no proof by a preponderance of the evidence that Bruce Foster would have gone to

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the police without the arrest of Mr. Moody. The State cannot establish that Mr. Foster's actions were inevitable. Quite clearly, he turned in the gun only after Mr. Moody's arrest. Without the arrest, there is nothing to suggest Mr. Foster would have done anything. Thus, the inevitable discovery exception is not applicable to the case at bar.

Likewise, the search of the Leeks' apartment would not have been instituted without the discovery of the P380 gun. Without the gun, the law enforcement officers would have had no reason to search Leeks' apartment.

As demonstrated above, law enforcement officers illegally stopped Mr. Moody's car, thus any evidence seized as a result of

the illegal stop should be suppressed. The order of the trial court denying the motion to suppress should be overturned, the conviction reversed, and a new trial ordered.

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ISSUE II

WHETHER THERE IS SUFFICIENT EVIDENCE TO ESTABLISH APPELLANT'S GUILT (as stated by the Appellee)

The Assistant Attorney General asserts a series of facts which they argue are sufficient support Appellant's conviction. The Appellant acknowledges that the Assistant Attorney General is entitled to make inferences from the evidence in favor of the State's position. However, the Assistant Attorney General is not allowed to omit facts and take facts out of context in order to reach a favorable inference.

The Assistant Attorney General cannot ignore the facts

regarding who was present in the orange grove at the time Mr. Mitchell was killed. Dexter Moody's car was seen in the orange grove, not the Appellant's. There was no reliable identification of Mr. Moody as being one of the individuals in the grove. Much of the evidence purportedly linking Mr. Moody to the crime was equally consistent with excluding him from the crime in favor of Dexter Moody. The damaging evidence linking Bruce Foster to the murder cannot be ignored. The State's evidence in this case does not exclude Bruce Foster and Dexter Moody as the perpetrators of this homicide.

The dictates of Law v. State, 559 So. 2d 187 (Fla. 1990) and the hundred of cases prior to Law cannot be ignored. These cases date back as early as Joe v. State, 6 Fla. 591 (1856) and Whetson

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v. State, 31 Fla. 240, 12 So. 661 (Fla. 1893). By using the principles set out in these cases for testing the sufficiency of evidence a defendant is afforded protection from the improper use of inferences and the danger of an improper conviction based on nothing stronger than a suspicion. See, Brown v. State, 428 So. 2d 250 (Fla. 1983); Diecidue v. State, 131 So. 2d 7 (Fla. 1961); Moffat v. State, 583 So. 2d 779 (Fla. 1st DCA 1991); Weeks v. State, 492 So. 2d 719 (Fla. 1st DCA 1986); Williams v. State, 713 So. 2d 1109 (Fla. 2d DCA 1998). The

State's case is largely a chain of inferences. It is a chain of inferences that is full of gaps and does not hold together under close examination. The State failed to prove its case and Mr. Moody now asks that this Court reverse his conviction.

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ISSUE III

THE TRIAL COURT ERRED IN PERMITTING AN
ALTERNATE JUROR TO BE SUBSTITUTED FOR
A JUROR WHO BECAME ILL AFTER THE JURY
HAD BEGUN DELIBERATIONS

The Assistant Attorney General argues that Mr. Moody cannot seek relief on this claim because the error in this case was invited. The Assistant Attorney General cites three cases,

McPhee v. State, 254 So. 2d 406 (Fla. 1971); State v. Belien, 379 So. 2d 446 (Fla. 3rd DCA 1980); and Goodwin v. State, 751 So. 2d 537 (Fla. 1999), to support their contention that relief is barred. Upon close examination, however, these cases are distinguishable and it is the Appellant's position that the invited error doctrine is inapplicable to this case.

The doctrine of invited error is intended to prevent a defendant or his attorney from inducing or causing error in the trial court and then claiming that his case should be reversed as a result of that error. The rationale behind the invited error doctrine, from an analysis of the case law, is to preclude a defendant or his attorney from making deliberate tactical decisions, incurring error, and then trying to benefit from the error on appeal. Hence the "gotcha" principle enunciated in State v. Belien, 379 So. 2d at 447. This "gotcha" element is missing from this case.

In Belien, for example, the defense lawyer deliberately made

a tactical decision to abandon speedy trial considerations in an attempt to later secure a dismissal. In Belien there was an intentional relinquishment of a known right. In McPhee the defense lawyer argued that a separate count of possession of LSD should be dismissed because it was a lesser included offense to the other count, sale of LSD. The Assistant State Attorney

agreed and dismissed one of the counts. The defendant was then convicted of possession and proceeded to argue on appeal that his conviction was fundamental error because possession of LSD was not a lesser included offense of sale of LSD. Because the action by the defense lawyer induced the state to abandon one of the counts, it was found that the error was invited. In both these cases, the defense affirmatively sought the alleged error in order to gain an advantage.

Other cases not cited by the Assistant Attorney General, that address invited error, also support an interpretation that the defendant must be trying to gain an advantage by his actions or intentionally trying to cause the harm. For example, in Norton v. State, 709 So. 2d 89, 94 (Fla. 1997), defense counsel asked a question on cross-examination to which only the defense would know the answer. Counsel received an unfavorable response from the witness. On appeal, the defendant asserted reversible error based on the answer. This court determined that the error was invited, where defense counsel knew the answer to the question he asked.

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By way of contrast, in Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990), a witness testified during cross-examination by defense counsel that the defendant had previously been to prison. The

State argued on appeal that the error was invited. This Court found that defense counsel had not invited the error, because she was cross-examining a difficult witness and the answer was non-responsive to the question. Defense counsel had not sought that response. See also, Terry v. State, 668 So. 2d 954 (Fla. 1996).

In the instant case Juror Fagan was unable to continue deliberations. Defense counsel's comments and suggestions regarding Fagan were not made to intentionally gain a tactical advantage at a later date on appeal. In fact, replacing Fagan would on its face be disadvantageous to Mr. Moody. Mr. Moody is a black male. Juror Fagan was a black female. Juror Fagan gave every indication of being a fair and able minority juror during jury selection. Neither the State or the defense attempted a peremptory challenge of juror Fagan during jury selection. Neither the State or defense attempted a cause challenge of Juror Fagan during jury selection. (XVII,R1260) Obviously, the defense wanted her as a juror. There is nothing in the record to suggest that defense counsel wanted to remove Fagan in favor of Martin to gain a tactical advantage. Unlike the circumstances in Norton, McPhee, and Belien, there was no showing on this record that Fagan's removal was sought as a tactical advantage by the defense. Without this element of intent,

Mr. Moody submits that the record does not demonstrate that the invited error doctrine should apply to this case.

Mr. Moody would also rely upon his arguments in the Initial Brief regarding why the substitution of an alternate juror after deliberations had commenced was reversible error in this case.

ISSUE IV

WHETHER THE RECORD SUPPORTS A FINDING
OF THE AGGRAVATOR THAT THE HOMICIDE
WAS COMMITTED TO AVOID OR PREVENT A
LAWFUL ARREST

The Assistant Attorney General's response to the Appellant's position that the avoid arrest aggravator is inapplicable to this case is to rely upon improper inferences. A reliance by the State on improper inferences is prohibited. Robertson v. State, 611 So. 2d 1228 (Fla. 1992).

In this case there is not enough evidence to establish that Mr. Mitchell was killed trying to escape. There is no evidence to support the Assistant Attorney General's claim that Mr. Moody armed himself with the intent to use deadly force if observed in the grove. (State's Brief, at 57-58)

The cases cited by the Assistant Attorney General do not support a finding of the avoid arrest aggravator in this case. For example, in Young v. State, 579 So. 2d 721 (Fla. 1991), the defendant was asked by his three juvenile companions why he had taken a gun with them. The defendant responded by saying that he planned to shoot anyone who pointed a gun or shot at him. During their attempt to steal a car, the victim and his son came upon the defendant and his companions. The victim told his son

to go call the police. The defendant took his shotgun with him as he left the area of the car and confronted the victim. In the instant case

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there is no evidence that is even similar to the evidence in Young regarding proof of an intent to eliminate a witness or to kill in order to avoid arrest.

In Knight v. State, 756 So. 2d 423 (Fla. 1998), the defendant approached one of the victims and made him drive home and get his wife. The two victims were then made to go to a bank and withdraw a large amount of money. The victims were then put back in the car and driven to a secluded area, where they were shot. This Court determined that the State had proven the existence of the avoid arrest aggravating factor beyond a reasonable doubt.

In the instant case there is no evidence that is even similar to the evidence in Knight. In the instant case there is no evidence to support the State's improper inferences that the killing was to avoid arrest. The State has failed to prove beyond a reasonable doubt that the killing was committed solely or predominantly for the purpose of witness elimination. Urbain v. State, 714 So. 2d 411 (Fla. 1998). This aggravating factor should be stricken.

ISSUE V

THE SENTENCE OF DEATH IS DISPRO-
PORTIONATE BECAUSE THIS IS NOT
THE MOST AGGRAVATED AND LEAST
MITIGATED OF CASES.

The Assistant Attorney General argues that the sentence of death is proportionate when compared to other death cases. The Assistant Attorney General cites several cases for that proposition. Each of these cases, however, is distinguishable from the case at bar.

The Assistant Attorney General asserts that Kearse v. State, ___ So. 2d ___, 25 Fla. Law Weekly S507 (Fla. 2000) is analogous to this case and thus supports the imposition of a death sentence. Appellant disagrees. First, Kearse was charged with the killing of a police officer. Mr. Moody did not kill a law enforcement officer. Second, although the same aggravating factors were established in Kearse that are present in this case, if the aggravating factor of avoid arrest is stricken as

urged in Issue IV, Kearse would be distinguishable on that basis as well. Finally, the mitigation in Kearse was not as persuasive as the mitigation in Mr. Moody's case. Thus, Kearse does not support a death sentence in this case.

In Holland v. State, __ So. 2d ____, 25 Fla. Law Weekly S796 (Fla. 2000), the defendant attacked a woman and then ran. He was apprehended by law enforcement officers. Holland struggled with

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one of the officers, got his gun, and shot and killed the officer. The three aggravating circumstances included a prior violent felony conviction and the avoid arrest aggravator. The avoid arrest aggravator was clearly applicable because the defendant intentionally and forcibly removed a gun from the officer. In the instant case the avoid arrest aggravator should be stricken as urged in Issue IV. In Holland there were no statutory mitigators. There were only two non-statutory mitigators: (1) drug abuse and (2) a history of mental illness. Each of those mitigators was assigned little weight. The case at bar is far more mitigated than Holland.

In Armstrong v. State, 642 So. 2d 730 (Fla. 1994), there were four aggravating factors. Armstrong had a prior conviction for sexual assault. Moody has no prior convictions for violent offenses. There were no statutory mitigating circumstances in

Armstrong, unlike the instant case.

The facts in this case do not merit a sentence of death. This is not among the least mitigated and most aggravated of homicides. A death sentence is not proportionate in this case.

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CONCLUSION

Based on the facts, law and argument, Appellant requests the following relief:

Issue I: Reverse the convictions and remand for a new trial.

Issue II: Reverse the convictions and remand for discharge.

Issue III: Reverse the convictions and remand for a new trial.

Issue IV: Reverse the sentence and remand for a new sentencing proceeding, or in the alternative remand for the imposition of a life sentence.

Issue V: Reverse the sentence and remand for the imposition

of a life sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Attorney General, 2002 north Lois Ave., 7th Floor, Tampa, Florida 33607, this ___ day of February, 2001.

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ROBERT A. NORGDARD
Attorney at Law
P.O. Box 811
Bartow, FL 33831
(863)533-8556
Fla. Bar No. 322059

Attorney for Appellant