640 So.2d 1079
Supreme Court of Florida.

Chadwick WILLACY, Appellant, Cross-Appellee,
v.
STATE of Florida, Appellee, Cross-Appellant.

No. 79217. | May 12, 1994.
| Rehearing Denied Aug. 15, 1994.

Defendant was convicted in the Circuit Court, Brevard County, Theron Yawn, J., of first-degree murder, and he appealed. The Supreme Court held that: (1) trial judge erred in not affording defense counsel opportunity to rehabilitate death-scrupled venireperson and as a result, defendant's death sentence would be vacated, and (2) illegal showup impermissibly tainted witness' sighting of man driving murder victim's car.

Conviction affirmed; sentence vacated and remanded.

West Headnotes (8)

[1] Jury
Personal Opinions and Conscientious Scruples

Sentencing and Punishment
Determination and Disposition

Trial judge erred in not affording defense counsel an opportunity to rehabilitate death-scrupled venireperson, who stated that she could not recommend the death penalty, pursuant to rule providing that counsel for both the state and defendant shall have right to examine jurors orally on their voir dire and because only death sentence was affected, defendant's death sentence would be vacated and case would be remanded for new sentencing proceeding. West's F.S.A. RCrP Rule 3.300(b).

3 Cases that cite this headnote

[2] Jury
Peremptory Challenges

There was no *Neil* violation in the state's peremptorily challenging the sole African-American member on venire panel; state's criminal background check of veniremember was not a contrived plan directed against sole African-American on venire panel and the state put forth legitimate nonracial reasons for its peremptory challenge, namely veniremember's prior involvement with criminal judicial system, his misrepresentation of prior employment and his testimony on behalf of defendant in drug trial.

2 Cases that cite this headnote

[3] Jury
Prosecution for or Conviction of Crime

Sentencing and Punishment
Effect of Disposition

Veniremember who was placed in pretrial intervention program was not under "prosecution" since pretrial intervention is merely an alternative to prosecution and thus, veniremember's selection and seating as juror did not violate statute prohibiting person under prosecution for crime from serving as juror. West's F.S.A. § 40.013(1).

2 Cases that cite this headnote

[4] Criminal Law
Competency of Jurors and Challenges

By failing to make timely objection, defendant waived for purposes of appeal his claim that statute, prohibiting person under prosecution for crime from serving as juror, was violated by selection and seating of veniremember who was in pretrial intervention program as juror. West's F.S.A. § 40.013(1).

1 Cases that cite this headnote

[5] Witnesses
Conduct of Witness Inconsistent with Testimony; Silence

Before defendant's inculpatory statement can be admitted for impeachment purposes, the state must, by preponderance of the evidence, show that statement was voluntarily made

and voluntariness is determined by examining totality of the circumstances surrounding statement, including whether defendant was read his rights.

Cases that cite this headnote

[6] Witnesses

Conduct of Witness Inconsistent with Testimony; Silence

Record supported trial court's determination that defendant's inculpatory statement, introduced for impeachment, was voluntarily made.

Cases that cite this headnote

[7] Criminal Law

Independent Basis; Opportunity for Observation

While pretrial identification obtained by unnecessarily suggestive means is normally not admissible in court, such identification is not per se inadmissible and may be introduced into evidence if found to be reliable and based upon witness' independent recall absent illegal police conduct and in determining reliability of identification, trial judge must consider prior opportunity witness had to observe alleged criminal act, existence of any discrepancy between any pretrial lineup description and defendant's actual description, any identification prior to lineup of another person, any identification by picture of defendant prior to lineup, failure to identify defendant on prior occasion, time lapse between alleged act and lineup identification, and any other factors raised by totality of the circumstances that bear upon likelihood that witness' in-court identification is not tainted by illegal lineup.

Cases that cite this headnote

[8] Criminal Law

Homicide, Assault, and Kidnapping

Illegal showup impermissibly tainted witness' sighting of man driving murder victim's car, where witness was unable to make identification of man driving car based solely on his independent recall, witness was unable to identify defendant solely on basis of the sighting and it was only after unnecessarily suggestive procedure that witness concluded that defendant looked a lot like the driver, but he still was not 100 percent sure.

Cases that cite this headnote

Attorneys and Law Firms

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Robert A. Butterworth, Atty. Gen. and Gypsy Bailey, Asst. Atty. Gen., Tallahassee, for appellee, cross-appellant.

Opinion

PER CURIAM.

Chadwick Willacy appeals his conviction of first-degree murder and sentence of death. [1] We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the conviction and vacate the sentence of death.

1 The jury recommended death by a vote of nine to three. The judge found the aggravating factors of a crime committed while engaged in the commission of arson, a crime committed for pecuniary gain, a murder that was especially heinous, atrocious or cruel, and a murder that was committed to avoid arrest. The statutory mitigating factor was Willacy's lack of prior criminal activity and the non-statutory mitigating factors were Willacy's history of nonviolence and his attempts at self-improvement while in jail.

On September 5, 1990, when Ms. Marlys Sather failed to return to work after lunch, her employer notified the Sather family of the absence. Mr. Loveridge, Ms. Sather's son-in-law, went to her home and found a shotgun and several electronic items lying on the back porch. Inside the home he found Ms. Sather's body. Her ankles and wrists had been taped and bound, a cord was tightly wrapped around her neck, she had been struck several times in the head with a force so intense that a portion of her skull was dislodged, and she had been set afire. Medical testimony established that her death was caused by inhalation of smoke from her burning body. Willacy was convicted of first-degree murder and now asserts

eight issues on appeal.[2] We address four of Willacy's claims and dismiss the others as moot.[3]

2 The issues raised by Willacy are: 1) the court committed reversible error when it refused the defense an opportunity to rehabilitate a prospective juror; 2) a prospective juror was improperly challenged based on his race; 3) the jury foreman was ineligible to serve; 4) the court improperly found that Willacy's statements were voluntarily made; 5) the killing was not committed to avoid arrest; 6) the killing was not heinous, atrocious or cruel; 7) the court improperly weighed the mitigating and aggravating factors; and 8) death is an inappropriate penalty.

3 Our resolution of issue one renders issues five through eight moot.

Three of Willacy's claims concern the voir dire examination of venirepersons Cruz, Payne, and Clark.

The State struck prospective juror Cruz for cause when she said she could not recommend the death penalty.[4] The court denied defense counsel's request for an opportunity to rehabilitate Cruz. Willacy argues that the denial was a violation of rule 3.300(b) of the Florida Rules of Criminal Procedure,[5] *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and *O'Connell v. State*, 480 So.2d 1284 (Fla.1985).

4 MR. WHITE [state attorney]: Is there anything that you know of that would make it impossible or difficult to serve on this jury?

MS. CRUZ: The same as the first gentleman. If it ever came to the penalty part, I will not be able to give a death penalty sentence.

MR. WHITE: You realize from all the questions that the law is, if you are to serve here, you should consider the death penalty under the applicable rules and law that the Court gives you. Are you saying you cannot abide by that law?

MS. CRUZ: Right.

....

MR. WHITE: Well, your Honor, with regard to Miss Cruz, it's the State's position that she's announced that under her beliefs, religious or conscientious or whatever, she could not abide by the law with regard to the penalty in this case, and for that reason we would ask the Court to excuse her for cause.

THE COURT: Very well. Miss Cruz, you may step on down and return to the jury pool area.

....

MR. ERLENBACH [defense counsel]: Your Honor, we would like a brief opportunity to try to rehabilitate.

THE COURT: The Court has ruled, Mr. Erlenbach.

5 "Counsel for both the State and defendant shall have the right to examine jurors orally on their voir dire." Fla.R.Crim.P. 3.300(b).

Under *Witherspoon*, death-scrupled prospective jurors could be properly excluded for cause if they "unmistakably" indicated that they would "automatically" vote against the death penalty regardless of evidence presented or if they indicated that their view of capital punishment would hinder their ability to impartially evaluate the defendant's guilt. ***1082** 391 U.S. at 523 n. 21, 88 S.Ct. at 1777 n. 21. The *Witherspoon* standard was modified in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). Under *Wainwright*, a prospective juror can be excused for cause if the juror's views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 469 U.S. at 424, 105 S.Ct. at 852 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)). This Court adopted the *Wainwright* reasoning in *Foster v. State*, 614 So.2d 455 (Fla.1992), *cert. denied*, 510 U.S. 951, 114 S.Ct. 398, 126 L.Ed.2d 346 (1993).

[1] The trial judge properly sustained the State's challenge for cause, but committed error in not affording defense counsel an opportunity to rehabilitate the juror pursuant to rule 3.300(b). We find *O'Connell v. State*, 480 So.2d 1284 (Fla.1985), and most recently, *Hernandez v. State*, 621 So.2d 1353 (Fla.1993), dispositive. In *O'Connell*, the trial court denied the defendant an opportunity to question two death-scrupled venirepersons before excusing them for cause. Based on the rule 3.300(b) error, and the trial court's refusal to excuse for cause three venirepersons who stated that they would automatically recommend the death penalty, we reversed O'Connell's conviction and vacated his sentence of death. In so doing, we stated that "the combination of the two errors: 1) refusing to allow defense counsel to examine excluded jurors on voir dire, and 2) refusing to excuse three jurors for cause who would automatically recommend death in a capital case permeated the convictions themselves and therefore warrant a new trial." 480 So.2d at 1287.

In *Hernandez* we found a rule 3.300(b) violation when the trial judge refused defendant's request to question a death-scrupled venireperson who stated he was unable to recommend the death penalty. We concluded that the *O'Connell* rationale controlled, but we did not set aside the conviction. We noted that unlike the situation in *O'Connell* where the convictions themselves were tainted by the error, only the death sentence was affected in *Hernandez.* We find the facts in the instant case more analogous to *Hernandez* than to *O'Connell* and we therefore vacate Willacy's sentence of death and remand for a new sentencing proceeding.

[2] When Payne, the sole African-American on the panel, was peremptorily challenged, Willacy objected to the challenge as racially motivated. *State v. Slappy,* 522 So.2d 18 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S.Ct. 2873, 101 L.Ed.2d 909 (1988); *State v. Neil,* 457 So.2d 481 (Fla.1984). The court conducted a *Neil* inquiry, and determined that Willacy's objection was groundless. We agree. The State put forth the following reasons for the Payne challenge: 1) his prior involvement with the criminal judicial system (he pled nolo contendere to disorderly conduct and resisting without violence); 2) his misrepresentation of prior employment (the employment discrepancy was later clarified); 3) misrepresentation of past criminal charges; and 4) the fact that he testified on behalf of a defendant in a drug trial. We find that the court conducted a proper *Neil* inquiry, that the State's criminal background check [6] was not a contrived plan directed against the sole African-American on the jury panel, and that the State put forth legitimate non-racial reasons for its peremptory challenge. We find no *Neil* violation.

6 When Payne stated that he knew a State's witness, the State contacted the witness in an effort to determine the extent of the relationship. The witness was a police officer and a former high school classmate of Payne. On his own, the officer offered to run a criminal background check on Payne and give the results to the State.

[3] **[4]** In his final voir dire challenge, Willacy claims that Clark was under prosecution when selected as a juror and seating him violated section 40.013(1), Florida Statutes (1991). [7] We disagree. Willacy mistakenly equates Clark's placement in the Pretrial Intervention Program with prosecution. Pretrial intervention is "merely an alternative to prosecution." ***1083** *Cleveland v. State,* 417 So.2d 653, 654 (Fla.1982). Since Clark was not under prosecution, Willacy's motion for a new trial was properly denied. Moreover, during the trial the State informed Willacy's counsel of Clark's status and his counsel voiced no objection. By failing to make a timely objection, Willacy waived the claim he now seeks to assert. We affirm the trial court's decision.

7 "No person who is under prosecution for any crime ... shall be qualified to serve as a juror." § 40.013(1), Fla.Stat. (1991).

[5] **[6]** Willacy asserts that his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), were violated. After he was arrested by Detective Santiago, Willacy was read his rights and given an opportunity to speak to a public defender. Later, without the public defender being present, Santiago initiated a conversation with Willacy that led to Willacy's implicating himself in the murder. The trial court held that although Santiago's actions violated *Miranda,* Willacy's statements were voluntarily made and as such they could be used to impeach him if he took the stand. *Oregon v. Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975) (a substantive violation of *Miranda* does not preclude a defendant's voluntary statement from being used for impeachment purposes); *Nowlin v. State,* 346 So.2d 1020 (Fla.1977) (a defendant's voluntary statement made in technical violation of *Miranda* may be used to impeach). Before the defendant's statement can be admitted for impeachment purposes, the State must, by a preponderance of the evidence, show that the statement was voluntarily made. *Roman v. State,* 475 So.2d 1228 (Fla.), *cert. denied,* 475 U.S. 1090, 106 S.Ct. 1480, 89 L.Ed.2d 734 (1986); *Nowlin,* 346 So.2d 1020 (Fla.1977). Voluntariness is determined by examining the totality of the circumstances surrounding the statement, including whether or not the defendant was read his rights. *Traylor v. State,* 596 So.2d 957 (Fla.1992); *Roman,* 475 So.2d at 1232. The trial court's decision relative to the voluntary nature of Willacy's statement was based upon a hearing at which counsel for both sides were present. After hearing testimony, reviewing the transcript, listening to the cassette, and viewing the video of the interview between Santiago and Willacy, the judge determined that Willacy's statement was voluntarily made. The record supports that determination and we affirm.

[7] **[8]** The State cross-appeals the suppression of Mr. Barton's identification of Willacy. [8] On September 6, 1990, before Willacy's arrest, the police questioned Barton, a sixteen-year-old high school student. Barton stated that on September 5, 1990, he saw a man driving Ms. Sather's car, but he was unable to get a clear look at the driver's face. Detective Vail took Barton to Willacy's home, and while Barton and Vail drove by the house, Detective Santiago caused Willacy

to come outside and engage in conversation. Based on this show-up, Barton stated that Willacy "looked a lot like [the driver] but I wasn't a hundred percent sure." The court granted Willacy's motion to suppress Barton's September 6 identification because it was an illegal show-up, and to suppress the September 5 sighting because it was tainted by the illegal show-up. The State now asserts that the court's suppression of the September 5 sighting was an abuse of discretion. We disagree. While pretrial identification obtained by unnecessarily suggestive means is normally not admissible in court, such identification is not per se inadmissible and may be introduced into evidence if found to be reliable and based upon the witness's independent recall absent the illegal police conduct. *Edwards v. State,* 538 So.2d 440, 442 (Fla.1989). In determining the reliability of the identification, the trial judge must consider

> the prior opportunity the witness had to observe the alleged criminal act; the existence of any discrepancy between any pretrial lineup description and the defendant's actual description; any identification prior to the lineup of another person; any identification by picture of the defendant prior to the lineup; failure to identify the defendant on a prior occasion; any time lapse between the alleged act and the lineup identification; and any other factors raised ***1084** by the totality of the circumstances that bear upon the likelihood that the witness' in-court identification is not tainted by the illegal lineup.

Edwards, 538 So.2d at 443. It is clear from the record that Barton was unable to make an identification based solely on his independent recall. He was unable to identify Willacy solely on the basis of the September 5 sighting and it was only after the unnecessarily suggestive procedure that Barton concluded that Willacy looked a lot like the driver, but he still was not 100 percent sure. Under these circumstances, we find that the court did not abuse its discretion when it found that the illegal show-up impermissibly tainted the September 5 sighting.

Based on the foregoing, we affirm the conviction, vacate the sentence, and remand for resentencing before a jury.

It is so ordered.

GRIMES, C.J., and OVERTON, McDONALD, SHAW, KOGAN and HARDING, JJ., concur.

8 The State also asserts that the court improperly found that the murder was not cold, calculated, and premeditated. Based on our vacation of Willacy's death sentence we need not address this issue.

Parallel Citations

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