

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 2006

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

Case No. 5D04-2706

CORRECTED

MICHAEL THOMAS RAINES,

Appellee/Cross-Appellant.

_____ /

Opinion filed November 9, 2006

Appeal from the Circuit Court
for Brevard County,
Charles M. Holcomb, Judge.

Charles J. Crist, Jr., Attorney General, Tallahassee,
and Kellie A. Nielan, Assistant Attorney General,
Daytona Beach, for Appellant/Cross-Appellee.

Roy Black, Christine M. Ng and Mark A.J. Shapiro,
of Black, Srebnick, Kornspan & Stumpf, P.A.,
Miami, for Appellee/Cross-Appellant.

GRIFFIN, J.

The State appeals an order of the trial court suppressing statements made by appellant Michael Thomas Raines ["Raines"] on the ground that the police had used misleading tactics in dealing with Raines's counsel, David Smith. Raines cross appeals, contending the trial court erroneously denied his motion to dismiss based on the State's interference with his right to present a witness. We affirm the order on the cross-appeal, but reverse the suppression order.

On February 20, 2002, Bernard Gibson was shot in Cocoa Beach. On February 22, 2002, while en route back home from Cocoa to Indiana, defendant Raines stopped at a police station in Nashville, Indiana, and told a deputy: "I shot and killed a guy in Florida and it was self-defense and I wanted to turn myself in." The deputy called the Cocoa Beach police to report this conversation.

On the same day, Raines sought legal advice from Attorney Roy Graham ["Graham"] in Bloomington. Graham, in turn, contacted Attorney David Smith ["Smith"], an experienced Indiana attorney who practiced criminal law and who was also licensed to practice in Florida. Raines and Graham went to Smith's office and conferred. The record does not reflect what Smith was told at that meeting because Raines invoked attorney/client privilege. We do know Smith was told that Detective Washburn ["Washburn"] of the Cocoa Beach police department wished to speak to Raines.

Smith called Washburn. He described the purpose of the call:

I had been asked to make contact with Detective Washburn to let him know that Mr. Raines wanted me to assist him in answering questions.

When Washburn returned the call, he told Smith:

As I recall, he indicated he was working on some sort of homicide investigation. He needed to speak with Mr. Raines as soon as possible. He wanted to talk to him about – I mean, I didn't get any information about the case other than it was my understanding he was in urgent need to speak with Michael as soon as he could.

Smith said he couldn't quote what Washburn said, but it was his understanding of the conversation that Raines was a witness in a pending investigation. When asked if Washburn told him Raines was a possible suspect, his response was: "Not that I recall."

After the call, Smith contacted Raines, who later came back to Smith's office. He met with Raines and his mother. He advised them: "It's probably the only way to do this, is to hit it square on and see what they've got." A call was then placed to Washburn. Washburn began the telephone interview by asking: "I was wondering if you could explain to me what happened and what your involvement was in it." Raines then described the event from his point of view, readily admitting that he shot the victim, just as he had already told the Nashville, Indiana, deputy.

When asked if he knew, prior to picking up the phone to call Washburn, that Raines had shot and killed somebody, Smith said: "I can't say for sure" He conceded, however, that very quickly during the conversation, it was clear that Raines had done the killing. On page three of the taped telephone interview, the question was asked:

Q: Okay, go ahead, sir. What happened next? You went to grab the gun and it went off?

A. Yeah, it went off. Somehow I got it from his hands and within a few seconds he threw something and I shot."

At no point did Smith make any effort to advise Raines not to continue answering Washburn's questions.

Based on these facts, Raines puts forth the following legal argument:

Here, Mr. Raines' statements were the direct result of Detective Washburn's deception. As attorney Smith testified, had he been advised of the true status of his client he would have advised Mr. Raines to remain silent. Moreover, because Detective Washburn deliberately deceived Mr. Raines' attorney, Mr. Raines could not and did not have a full awareness that he was waiving his rights or the consequences of that waiver.

The trial court framed the issue to be:

Although an officer can make misrepresentations to a defendant to elicit the facts of the situation the issue is whether or not he can make those representations or misinformation of facts to a lawyer to get the lawyer to allow the client to be interviewed by the detective.

The answer to the question, no doubt, is: "It depends," but the question has very little to do with the undisputed facts present here.

Raines had already admitted the killing to Indiana police. He had consulted with two attorneys and was personally accompanied and advised throughout the telephone interview by an attorney licensed in both Indiana and Florida. The suggestion that the law would allow, much less require that this confession be suppressed because the Cocoa Beach police department detective failed to inform Smith that Raines was the target of this investigation is nonsense. This case is nothing like *Haliburton v. State*, 514 So. 2d 1088 (Fla. 1987), where police subterfuge prevented the suspect from communicating with his lawyer. Here, the lawyer was fully involved and had no right or expectation of being told what the policeman was thinking. No matter how many epithets Raines hurls at Washburn and his conduct, and there are many, including "fraud", "lies", "misrepresentation", "deceit", the facts do not change and these facts do not give rise to a constitutional violation in obtaining Raines's statement.¹

Even if it is true that Smith was bamboozled by Washburn's failure to disclose (or, if you will, "concealment") that Raines was more than a witness to the Florida

¹ As the State points out in its reply, Raines not only alleges misconduct by Washburn in failing to disclose that he was the target of the investigation, but by suggesting that Raines's explanation that he was acting in self-defense exonerated him from liability. Even if there were evidence of this in the record, this assertion is meritless. Raines's "explanation" could not exonerate him; only the facts would exonerate him. Raines's counsel could not reasonably have relied on such a proposition of law.

homicide, his bamboozlement is not a basis for suppression. There is no fiduciary duty of full disclosure between police and criminal defense counsel. Besides, Washburn certainly had the right to expect that Raines had told his lawyer that he was the shooter, since he had made this admission to the Indiana police. If Smith knew Raines was the shooter, he had enough facts to properly advise his client. If he did not know, Washburn is not the one to blame.

AFFIRMED in part; REVERSED in part.

MONACO, J., concurs.

THOMPSON, J., concurring in part, dissenting in part, with opinion.

THOMPSON, J., concurring in part, dissenting in part, with opinion.

I concur that the order on cross-appeal should be affirmed. However, I respectfully dissent from the decision to reverse the suppression order.

The State challenges the trial court's suppression of admissions deemed involuntary due to Detective Washburn's use of misleading and deceptive tactics that interfered with Michael Raines's right to counsel regarding a charge of first-degree premeditated murder. Raines responds that statements made by law enforcement to mislead his attorney deprived him of due process as guaranteed by the Florida Constitution, article I, section 9. I agree with Raines and would affirm the trial court's suppression of his statements.

First, we all agree the Bloomington statement is not suppressed by this opinion. The Nashville, Indiana, statement is the basis of the suppression hearing. Second, Detective Washburn's behavior was more egregious than the majority benignly described. During the suppression hearing, Detective Washburn testified that he telephoned 17-year-old Dustin Ginter in Indiana and spoke with him and his father concerning the crime. Ginter had been staying with Raines in the apartment where the shooting occurred. Washburn commenced his conversation with remarks that he was ready to issue warrants for murder and everything "is gonna depend on what you are gonna have to tell me. . . ." Washburn advised Ginter's father that whether one or two warrants issued for premeditated murder depended on what his son said. Based on his review of the two young men's history, Washburn said he didn't think Ginter did it. Ginter's version, that the victim pointed a gun at them and demanded all their money, was consistent with the story Raines had provided the Indiana authorities.

Pressured to tell the truth, Ginter changed his story and told the detective that Raines had a gun. The revised story elicited various comments and warnings from the detective about lying. At the suppression hearing, Washburn admitted he used threats and mistruths as interrogation tools. He also admitted that his threat to issue a warrant for Ginter for first-degree murder was intended to mislead and frighten him. Ginter told Washburn that Raines shot Gibson almost as soon as he entered the apartment. Raines told Gibson he had messed with the wrong guy, retrieved a gun, wrapped it in a pillow, and shot him in the back. Washburn recovered the gun after Ginter told him where it had been discarded. Washburn knew Raines had counsel when he asked Ginter to make a controlled telephone call to Raines to elicit incriminating statements. Ginter agreed. Washburn discussed how Ginter would pretend everything was cool - - - that Ginter had given the police the self-defense story and he had covered for Raines. Washburn coached Ginter how to handle the police-initiated phone call. The detective explained that he would make Raines feel comfortable to speak openly by portraying him as a witness, not a suspect. Washburn did not recall whether he told the state attorney's office that he was going to have Ginter tape record Raines in his lawyer's presence. After Ginter made the telephone call to Raines and reassured him about the self-defense story, Smith and Raines called Washburn. Raines gave his self-defense version of the events. Smith testified that he remained silent throughout this interview because he was told that Raines was only a witness in the case, not a target of an investigation. Had he known Washburn's intentions, he would not have allowed Raines to speak to the detective. During the conversation, Washburn pretended he had not already recovered the gun, but instead asked Raines its whereabouts.

The detective asked Raines as a favor to return to Florida with his mother to show him the gun's location. Washburn offered to pay for gas and a hotel. He suggested that after Raines took him to the spot where he threw the gun, the detective could get "you all out of here." Washburn insisted that it would demonstrate Raines's good faith and that it would go a long way with the state attorney's office. Washburn employed a ruse to discourage Raines from cleaning their rental car of any possible evidence. Washburn urged Raines to leave with his mother as soon as possible; the phone call took place at 3:00 p.m., and the detective inquired whether Raines and his mother could be on the road by 5:00 or 6:00 p.m. that same night. Washburn asked them as soon as they arrived the next day to report directly to the Cocoa Police Department to immediately look for the gun; then he'd cut them all loose to the hotel.

With these additional facts before the trial court, the question presented was whether the statement should be admitted after considering the investigator's behavior. Raines contended the actions of Washburn violated his due process rights. The trial court articulated reasons for suppressing the statement after listening to the testimony at the hearing. It ruled that Raines's statements were rendered involuntary by tactics that misled defense counsel in order to obtain admissions without benefit of legal advice. The court explained:

The only armor between an individual suspected of a crime and the formidable power of the State is legal counsel. A lawyer is bound by a strict code of ethics and conduct and is an officer of the Court. While the law allows latitude and use of deception and untrue statements as an investigative technique speaking to a suspect not in custody and unrepresented, the rule changes when the interrogator knows the suspect has availed himself of his right to counsel. The interrogator misled Raines's attorney to get admissions without benefit of legal advice based upon the

true status of Defendant. The Detective even tried to entice Raines to return to Florida under false pretenses in the presence of Raines's attorney. This practice is condemned by this Court and renders the statements involuntary.

The comments of the majority notwithstanding, rulings by the Florida Supreme Court are dispositive in this case. In Haliburton v. State, 514 So. 2d 1088, 1090 (Fla. 1987), the court quoted Justice Stevens' dissent from Moran v. Burbine, 475 U.S. 412 (1986): "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.'" Haliburton, 514 So. 2d at 1090, quoting Burbine, 475 U.S. at 453. As Justice Stevens so aptly expressed in Burbine:

[D]ue process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's 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. . . . Burbine, 475 U.S. at 467.

In Walls v. State, 580 So. 2d 131, 133 (Fla. 1991), the Florida Supreme Court, again quoted the above paragraph from Burbine. Further, the court quoted from Scull v. State, 569 So. 2d 1251 (Fla. 1990): "The term 'due process' embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals."

Washburn's conduct embodies the improper use of subterfuge and deception to gain information for the prosecution's case. Detective Washburn deceived Raines's counsel by portraying his client as a witness and not as the undisputed suspect in the murder investigation. The elaborate scheme involved many misleading statements and included threatening and intimidating Ginter to mislead Raines. The deception

interfered with the attorney-client relationship and rendered the statements involuntary. The detective's conduct violated due process and was a deliberate attempt to interfere with Raines's ability to obtain effective assistance of counsel. It deprived Raines of his constitutional protections. Whether Attorney Smith was bamboozled or inept does not diminish Raines's right to protection under the law. This court should neither countenance nor encourage such police behavior.

I would affirm the trial court's suppression of Raines's statements.