

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2008

ARTHUR SOSNOWSKY,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D07-1326

[July 30, 2008]

KLEIN, J.

We reverse appellant's conviction of attempted second degree murder because the court erred in admitting appellant's conversations in which he solicited an undercover officer to kill the victim and another witness. These conversations, which were made after he was arrested and had retained counsel, violated appellant's Sixth Amendment right to counsel.

While appellant was an inmate following his arrest for attempted second degree murder, he tried to arrange, through a cellmate, to have the victim and a witness killed. Through the cellmate appellant was placed in touch with an undercover officer who was represented to be a hit man, and solicited the officer to commit murder. Although the solicitation was not the charge in this trial, the trial court, over appellant's objection, admitted taped conversations involving the solicitation and alleged killings of the victim and witness by the hit man.

In *Massiah v. United States*, 377 U.S. 201 (1964), the Court held that incriminating statements elicited by a government agent outside the presence of counsel cannot be admitted in evidence. *United States v. Henry*, 447 U.S. 264 (1980), interpreted *Massiah* to require suppression of statements made to a jail-house informant who was placed by the state in the same cell as the defendant and instructed to be alert to any incriminating statements made by the defendant. *See also U.S. v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990) (court suppressed statements by a defendant to an undercover informant, even though the government's alleged purpose was to investigate an unrelated crime not involving the defendant.)

Because appellant was represented by counsel, his statements to the undercover officer were not admissible. Neither was appellant's gun, which was discovered through these statements. We find no merit to the other issues raised, except for the issue arguing that the solicitation became a feature of the trial, but that issue is now moot.

Reversed for a new trial.

TAYLOR and DAMOORGIAN, JJ., concur.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Krista Marx, Judge; L.T. Case No. 2004CF009254AXXMB.

Barbara J. Scheffer, Palm Beach Gardens, for appellant.

Bill McCollum, Attorney General, Tallahassee, and Thomas A. Palmer, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.