SUPREME COURT OF LOUISIANA

No. 95-K-1876

STATE OF LOUISIANA

versus

FLOYD CARMICHAEL FRANKLIN

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIRST CIRCUIT, PARISH OF TERREBONNE

CALOGERO, C. J. concurring in part, dissenting in part.

I believe that the majority is correct in concluding that there is insufficient evidence in the record to establish that the defendant possessed specific intent to kill the store manager and the four employees. However, I disagree with majority's conclusion that the search of defendant's home was consensual.

First and foremost, I disagree with the majority's reading of the record. The majority says that "Officer Lopez admitted that he told [the defendant's girlfriend] that she would be arrested as an accessory if their search ultimately yielded evidence of the armed robbery in the home where she lived with the defendant." Slip op. at 6. Based upon this characterization of Officer Lopez's testimony, the majority then concludes that the officer's statement "was not made in the context of a promise to forego arrest in exchange for consent," but rather "was made in the context of information of what to expect if the search, either with a warrant or with consent, yielded evidence of an armed robbery." ***Id.***

However, according to the record, Officer Lopez did more than inform the girlfriend of "what to expect" with or without a warrant, as is evidenced by the following colloquy at trial between the prosecutor and Officer Lopez:

> Q. Did you inform at any time or suggest in any way to Miss Bergeron that if she did not sign the consent to search form that she would be charged with a crime?
>
> A. I told Miss Bergeron that **if we have to go through the procedures to apply for a search warrant** and we would secure the residence --if we would have to apply for a search warrant, and if the judge signed the search warrant, and we found contraband that would leave or implicate Mr. Franklin in the robbery, she would be arrested as an accessory.

(R. at p. 70) (emphasis added). The obvious inference from Officer Lopez's testimony is that an arrest would follow only if the police had "to go through the procedures to apply for a search warrant." Further, Officer Lopez's own actions belie the majority's conclusion, as even though the warrantless search did in fact yield evidence of the armed robbery, neither Officer Lopez nor anyone else arrested the girlfriend as an accessory to the armed robbery. Further, Officer Lopez admitted at the suppression hearing that he harbored doubts that he had probable cause to search the home at the time at which he sought the girlfriend's consent. Under these circumstances, it appears that the officer's statement was calculated to overbear the girlfriend's will by the threat of arrest and separation from her four children who also occupied the home if she did not consent to the search. As observed by this nation's highest court, consent that is "the product of official intimidation or harassment is not consent at all." ***Florida v. Bostick***, 501 U.S. 429, 438 (1991). Therefore, in my view, the court of appeal was correct in concluding that the search was non-consensual.

Further, although the majority does not reach this issue, I conclude that the court of appeal erred in finding the inevitable discovery doctrine applicable to the search at issue. As noted above, Officer Lopez, the Chief of Detectives of the Houma Police Department, candidly testified that he believed that he did not have probable cause to search the defendant's home. The record also reveals that the police were not in the process of preparing an affidavit or applying for a warrant at the time that they entered the defendant's home.

The inevitable discovery doctrine permits the admission of evidence, which otherwise would have been excluded for police misconduct, ***if*** the prosecution can establish, by a preponderance of the evidence, that the tainted evidence "ultimately or inevitably would have been discovered by lawful means." ***Nix v. Williams***, 467 U.S. 431, 444 (1984). In the instant case, given Officer Lopez's doubts about his probable cause showing and the absence of any effort to obtain a warrant, the State simply cannot establish by a preponderance of the evidence--or by anything more than conjecture--that the police would have reassessed their case and inevitably come at their evidence through independent lawful means.

Accordingly, for the reasons given above, I dissent.