IN THE SUPREME COURT OF FLORIDA

TOMMY LEE RANDOLPH,

Appellant

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 54,869

REPLY BRIEF OF APPELLANT

On Appeal From the Circuit Court of the Nineteenth Judicial Circuit of Florida, In and For St. Lucie County Criminal Division

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida

CRAIG S. BARNARD
Chief Assistant Public Defender

JERRY L. SCHWARZ
Assistant Public Defender

JON MAY
Assistant Public Defender

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS PAGE

AUTHORITIES CITED

PRELIMINARY STATEMENT

Appellant will rely upon his Initial Brief herein except the symbol (AB) will denote the Answer Brief of Appellee.

STATEMENT OF THE CASE AND FACTS

Appellant will rely upon his Initial Brief herein.

POINT I

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE INTRODUCTION OF COLLATERAL FACT EVIDENCE THAT WAS NOT LOGICALLY OR LEGALLY RELEVANT AND THAT WAS PREJUDICIAL TO APPELLANT.

Appellee's entire argument rests on the premise that the collateral fact evidence was "extremely similar to the instant incident"(AB 3). Unfortunately for Appellee the facts belie that assertion. Whether the collateral fact evidence was submitted to prove the conspiracy or as argued by the prosecutor to show motive or common scheme(T 694-695), it was inadmissible because it was not sufficiently similar to meet the standards of logical and legal relevancy. Appellee, as the prosecutor at trial was, is bound by the evidence elicited from the State's own witnesses and sine Althea Glinton testified there was no conspiracy or plan to rob the deceased, that alone makes the collateral fact evidence so dissimilar as to be irrelevant. Further, a judgment of acquittal was granted as to the conspiracy count because there were no questions of fact regarding the instant incident to be resolved by the jury. Finally, Appellee's contention that the threat Appellant allegedly made to the prior robbery victims was relevant to show state of mind, motive or intent is erroneous. Not only was there no evidence of similar threats made to the deceased, but more importantly, there was no evidence that the threat was anything more than bravado since no one was shot in the prior incident. Additionally, the State's sole theory of the case was that appellant killed the deceased in an attempt to rob him (T 860, 873-874); nowhere did the pros-

ecutor argue to the jury that the evidence supported a finding of premeditation.

Thus the only possible relevance of this collateral fact evidence was to show propensity. To allow admission of such evidence on that basis alone would constitute a radical departure from the established jurisprudence of this State. Even if this evidence had some probative value, it was far outweighed by its prejudicial effect. It was error for the Court to allow the testimony.

POINT II

APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE CREATION OF SYMPATHY FOR THE DECEASED THROUGH THE INTRODUCTION OF IRRELEVANT TESTIMONY BY THE DECEASED'S FATHER.

The testimony of the deceased's father was not probative of any material issue in dispute and was in fact nothing more than an effort by the prosecution to create a "red herring." The fact that the deceased had $100 earlier and only $20 when found dead is no more probative of a robbery(which of course appellant was not charged with) than the distinct probabilty, in light of the testimony regarding the deceased's level of intoxication(T 369-371), that the missing money had been spent on vast quantities of alchoholic beverages. Thus Appellee's attempts to make Mr. Chesser's testimony relevant are doomed to failure. Calling this witness to testify was another example of the State's penchant for prosecutorial overkill, a fact which did not escape the trial judge(T 683). The real purpose was to seek sympathy for the witness and the deceased and as such

deprived Appellant of a fair trial.

POINT III

APPELLANT'S CUSTODIAL STATEMENTS TO POLICE AND PHYSICAL EVIDENCE SEIZED PURSUANT TO A CONSENT TO SEARCH WERE THE FRUIT OF AN ILLEGAL ARREST.

Appellee first contends that Fla.R.Crim.P. 3.190(h)(4) and (i)(2) which require a motion to suppress to be filed before trial, bar relief. However as Appellee itself notes, a recognized exception to this general requirement is where the search was unlawful as a matter of law. Kelly v. State, 202 So.2d 901 (Fla. 2d DCA 1967). There wereno disputed facts herein. Appellant's arrest was clearly a violation of Payton v. New York, ___U.S.___, 100 S.Ct. 1371(1980) as a matter of law. Appellee next asserts that Appellant's trial objections were not sufficiently specific. Appellee makes the point that Appellant did not object to the State's failure to procure an arrest warrant, but rather objected on theground that there was insufficient probable cause to arrest. As Payton however points out, the purpose of securing a warrant from a neutral and detached magistrate is to insure that a proper predicate is laid prior to the invasion of fundamental constitutional rights. 100 S.Ct. at 1377-1378, n. 17. Surely Appellant's objections were sufficient to put the trial court on notice as to the constitutional violation herein. Even if Appellant's objections were not sufficient, the violation of so basic a constitutional right is fundamental error. Cf. Payne v. Arkansas, 356 U.S. 560(1958); Gideon v. Wainwright, 372 U.S. 335(1963); Tumey v. State of Ohio, 273 U.S. 510(1927).

Appellee next proceeds to a lengthy discussion of the applicability of Payton to the instant case. Appellee's argument however totally ignores Florida law on the subject. This is perhaps not surprising as it is well settled in Florida that "[t]he decisional law in effect at the time an appeal is decided governs the issues raised on appeal, even where there has been a change of law since the time of trial." Wheeler v. State, 344 So.2d 244,245(Fla. 1977). See also Morgan v. State, ___So.2d___(Fla. 1981), Case No. 53,418, opinion filed January 15, 1981. Thus,irrespective of federal decisions on the question of retroactivity, Florida law clearly entitles Appellant to the benefits of Payton on direct appeal.

Assuming for the moment that this Court need reach the retroactivity question, Appellee's entire argument is based on a faulty premise. The initial inquiry must be directed towards whether Payton constituted a new pronouncement of law. A careful review of the decision indicates that it did not.

In holding that a warrantless arrest at a person's home violates the Fourth Amendment the Court in Payton applied principles of law as old as the amendment itself. As the Court pointed out, "the simple language of the Amendment applies equally to seizures of persons and seizures of property." 100 S.Ct. at 1379. Thus the very nature of the violation in Payton sets it apart from that complained of in United States v. Peltier, 422 U.S. 531(1975). Unlike Peltier this is not a mere question of the scope of a border search. What was at stake in Payton was the sanctity of the home itself. To apply Peltier, supra

to the facts of the instant case is to say that no matter how contrary to the Constitution a state's statute might be that statute is nevertheless constitutional until challenged. That however was not the Court's intent in Peltier.

The language of the Fourth Amendment is as well known to the police as it is to the Courts. Nowhere does it talk about borders. In Peltier the police relied on specific statutory authority which was upheld repeatedly against constitutional attacks in the Circuit Courts. 422 U.S. at 541. Although in Almeida-Sanchez v. United States, 413 U.S. 266(1973) the Supreme Court addressed border searches for the first time, its ruling overturned what was at that time unanimous authority. Not so in Payton, supra. As the Court in Payton pointed out although Florida and New York had upheld warrantless arrests at a person's home, Arizona, California, Colorado, Iowa, Kansas, Massachusetts, Oregon, Pennsylvania, West Virginia and Wisconsin had held such arrests to be unconstitutional. Further of seven(7) United States Circuit Courts of Appeals which had considered the issue five(5) held that such arrests were unconstitutional. 100 S.Ct. at 1374. The Court further noted that this trend among "virtually all of the state courts that have had to confront the constitutional issue directly" was prompted by dicta from the Court's earlier decisions. Id. at 1387.

Thus, the question of the prospective application of Payton is not a genuine issue before this Court because prospectivity only applies where the Court has announced a new pronouncement of law, a pronouncement which has not been clearly

foreshadowed by earlier decisions. Hanover Shoe, Inc. v. United Shoe Machinery Corp, 392 U.S. 481, 499(1968); Berger v. California, 393 U.S. 314(1969). Sub judice it did not require clairvoyance to anticipate the decision of the Supreme Court in Payton. That decision was merely the culmination of a long and consistent line of authority grounded in respect for the Fourth Amendment and particularly the sanctity of the home.

Appellee next argues that even if Payton is applicable, Officer Walker's concern for Edna Plain was a sufficient exigent circumstance to obviate the warrant requirement. Although an imminent threat to life is such an exigent circumstance as would justify a warrantless entry, the perceived threat to life here was by no means imminent. Johnson v. State, 386 So.2d 302(Fla. 5th DCA 1980). There was absolutely no way that Appellant could have harmed Edna Plain. Appellant was inside his home which was surrounded by police. If Appellant attempted to escape he would have been arrested the moment he stepped outside. United States v. Santana, 427 U.S. 39(1976). Nothing prevented the police from maintaining their watch while they procurred a warrant. Further if the police were genuinely concerned about Edna Plain's safety they could have placed her under protective custody. Despite Appellee's protestations to the contrary there were no exigent circumstances herein. Appellant's arrest was illegal.

Since Appellant's arrest was illegal both his subsequent statement and the physical evidence seized must be suppressed if they were the fruit of that arrest. Appellee is correct in

stating that such evidence would be admissible if there was sufficient attenuation between the arrest and Appellant's statement in the discovery of the physical evidence but here there was no such attenuation. Although Appellant asked to speak with Detective Skovsgard he did so the same day that he was arrested and he did so without benefit of any legal counsel. At least in United States v. Rodriguez, 585 F.2d 1234(5th Cir. 1978) relied on by Appellee, the defendant received legal advice (albeit from a friend in law enforcement) before deciding to cooperate with the police. In the instant case Appellant, having that day been charged with first degree murder, had to rely on his own uncounseled judgment. Appellee's contention that the consent to search form attenuated the link between the arrest and the search is falacious. If knowing that one has the right to refuse to speak is not sufficient attenuation to permit questioning subsequent to an illegal arrest, Dunaway v. New York, 442 U.S. 200(1979), then how can knowing that one has the right to refuse to consent sufficient attenuation to permit a search following an illegal arrest? Appellant's statement and the physical evidence seized subsequent to his illegal arrest were the first of that arrest. The court erred in not suppressing this evidence.

POINT IV

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE SEIZED PURSUANT TO AN ILLEGAL SEARCH.

Appellant will rely upon his Initial Brief herein.

POINT V

THE TRIAL COURT ERRED BY EXCEPTING A STATE WITNESS FROM THE RULE OF WITNESS SEQUESTRATION AND BY FAILING TO CONDUCT A HEARING AFTER APPELLANT ALLEGED THAT HE WOULD BE PREJUDICED AS A RESULT OF THE COURT'S RULING.

Appellant will rely upon his Initial Brief herein.

POINT VI

THE EVIDENCE OFFERED BY THE PROSECUTION WAS LEGALLY INSUFFICIENT TO SUPPORT THE CONVICTIONS AND/OR THE INTERESTS OF JUSTICE REQUIRE A NEW TRIAL.

Appellee attempts to find support in the record for a theory of premeditation, but those attempts fail. The prosecutor's sole theory in voir dire(T 60, 201), his opening statement (T 223-328), his response to appellant's motions for judgments of acquittal(T 821-823), and finally in his closing argument (T 860, 874) was that Appellant killed the deceased in an attempt to commit robbery. Nowhere did the prosecutor argue or contend that there was sufficient evidence to support a conviction for premeditated murder beyond a reasonable doubt. Appellee's citation to the prosecutor's comments during the charge conference, taken out of context, are misleading. In objecting to defense requested instruction number one(R 9), the prosecutor argued it was an incorrect statement of the law because the jury could return a verdict of guilty of murder in the first degree under either theory(T 830). Defense counsel then explained the basis for the instruction was that there had been no inference of premeditation, to which statement the Court voiced its agreement(T 831). Thus although the prosecutor argued in

objecting to the requested instruction that the jury could find guilt based on premeditation, nowhere did it present a theory of the facts to support such a verdict.

Appellee's theory of the facts to support premeditation is strained at best. In fact there is no more premeditation shown under Appellee's theory than there would be under any felony-murder. Thus, unless premeditation is somehow inherent in every felony-murder, Appellee's theory falls apart. The State failed to prove the underlying felony beyond a reasonable doubt and therefore Appellant's conviction for first degree murder cannot stand.

POINT VII

THE EXECUTION OF APPELLANT'S DEATH SENTENCE WOULD DEPRIVE HIM OF LIFE WITHOUT DUE PROCESS OF LAW AND SUBJECT HIM TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

A

THE EXTREME PENALTY WAS ASSESSED AGAINST TOMMY RANDOLPH WHERE THE TRIAL JUDGE IMPROPERLY CUMULATED AGGRAVATING CIRCUMSTANCES, ERRONEOUSLY FOUND THE AGGRAVATING CIRCUMSTANCE OF "HEINOUS, ATROCIOUS, OR CRUEL," AND FAILED TO GIVE INDEPENDENT MITIGATING WEIGHT TO ALL FACTORS IN MITIGATION.

Appellee's discussion of the aggravating factor of heinous, atrocious or cruel (AB 53-55) ignores the fact that the killing occurred by a single gunshot without any additional acts to set it apart from the norm of capital felonies. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). That the finding is improper in this case is so well settled by this Court's prior

decisions as not to require further elaboration. To uphold it in the present case would indeed constitute "such a broad and vague construction" of §921.141(5)(h)" as to violate the Eighth and Fourteenth Amendments to the United States Constitution." Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759, 1762(1980).

Appellee concedes, as it must, that the trial court's consideration of both §921.141(5)(d) and (f) was improper. However in citing to Hargrave v. State, 366 So.2d 1(Fla. 1978) and Fleming v. State, 374 So.2d 954(Fla. 1979), Appellee has in effect made the argument that such error was harmless in the instant case. However, unlike the present case, in both Hargrave and Fleming there existed ample other properly found statutory aggravating circumstances so as to make the cumulation of robbery and pecuniary gain harmless. Those other statutory aggravating circumstances were what set those felony-murders apart from the norm. Herein, the death sentence rests solely on the underlying felony of attempted robbery - it is the only one of the three aggravating factors found by the sentencing judge which is even arguably proper. Thus, unlike Hargrave and Fleming, there is nothing to set this felony murder apart from the norm of felony murders. And for all of the reasons expressed in Appellant's initial brief at 33-35, resting the ultimate penalty solely upon the underlying felony would render Appellant's death sentence disproportionate and arbitrary in violation of the Eighth and Fourteenth Amendments.

B

THE EXTREME PENALTY WAS ASSESSED AGAINST TOMMY RANDOLPH WHERE THE PROSECUTOR REPEATEDLY ATTEMPTED TO INTRODUCE NON-STATUTORY AGGRAVATING FACTORS INTO EVIDENCE, CROSS-EXAMINED APPELLANT ON MATTERS BEYOND THE SCOPE OF THOSE PRESENTED IN MITIGATION, AND MADE PREJUDICIAL AND INFLAMMATORY ARGUMENTS OUTSIDE THE EVIDENCE PRODUCED AT THE SENTENCING HEARING.

Appellee's contention that Appellant is estopped from asserting error in the prosecutor's repeated attempts to introduce convictions for non-violent felonies is ludicrous. First of all defense counsel identified only one of the four exhibits sought to be introduced as an example to the trial court as to why the submitted exhibits were objectionable and therefore inadmissible. No doubt had counsel not been so specific in reciting his objections than Appellee would be arguing to this Court that any error was waived. (See, e.g. arguments contained in Answer Brief at pp. 15-16). Secondly such an argument ignores the fact that the prosecutor tried not once, not twice, but three times to introduce evidence which did not fall within the parameters of the statute. That the evidence was improper was not even challenged by Appellee. See also Perry v. State, ___ So.2d___(Fla. 1980), Case No. 53,003, Opinion filed December 18, 1980. And Appellee concedes that Edna Plain's testimony that she was involved with Appellant and Althea Glinton in a robbery in January, 1978 was improper as that error was not discussed.

Appellee's citation to Messer v. State, F.S.C. No. 49,780, opinion filed 4-26-79 is either careless or evidence of bad faith. Had Appellee bothered to check it would have dis-

covered that by opinion dated November 8, 1979 the decision and opinion of April 26, 1979, relied on by Appellee, was withdrawn. Messer v. State, 384 So.2d 644(Fla. 1980). If the State is allowed to prospectively rebut mitigating factors in its case in chief then the constraints on capital sentencing discretion supplied by the strict limitation of aggravating factors to the statute will be destroyed and we will return to the sort of standardless discretion condemned in Furman v. Georgia, 408 U.S. 238(1972). This would be so because since there are no limits on what can be presented in mitigation, there could be no limits on what could be presented under the guise of prospectively rebutting mitigating factors. The only proper use of such evidence, as the trial court ruled, is in rebuttal after the defendant has sought to establish a mitigating circumstance. See Fla. Std. Jury Instr.(Crim.) p. 83(1976).

Appellee ignores the fact that when Appellant took the stand in the penalty phase to testify in mitigation, he could not be cross-examined as though he were testifying during the guilt phase because cross-examination is specifically limited by State v. Dixon, supra, at 7-8 to only those matters raised by the defendant in mitigation. Thus questioning Appellant as to the number of his prior convictions was impermissible and the trial judge erred in permitting it. Finally in contending that the prosecutor's various arguments were not prejudicial since "the ultimate sentencing authority is the trial judge(AB 60)", Appellee has overlooked the important role played by the jury under Florida's capital sentencing scheme. As this Court

recognized again recently, errors affecting the jury's advisory verdict mandate reversal for a new penalty trial. Perry v. State, supra.

C

THE TRIAL JUDGE LIMITED HIS CONSIDERATION AND THE JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE ENUMERATED IN THE STATUTE.

Appellant will rely upon his Initial Brief herein.

D

THE TRIAL JUDGE ERRED BY GIVING UNDUE WEIGHT TO THE JURY'S ADVISORY RECOMMENDATION AND BY IMMEDIATELY SENTENCING TOMMY RANDOLPH TO DEATH FOLLOWING THAT RECOMMENDATION.

Appellee's citation to King v. State, 390 So.2d 315 (Fla. 1980) is inapposite as previously discussed in Appellant's Initial Brief at 51, n.13, as the evidence in the present case does not indicate the trial judge was independently viewing "the issue of life or death within the framework of rules provided by the statute." State v. Dixon, supra, at 8. Rather it is apparent that he was merely following the jury's advisory recommendation and his findings in support of the death sentence filed thirteen days later were post hoc attempts to justify the result. Such a procedure violates the statutory safeguards and requires that Appellant's death sentence be vacated.

E

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Appellant will rely upon his Initial Brief herein.

POINT VIII

THE TRIAL ADJUDICATION AND SENTENCING OF APPELLANT FOR ATTEMPTED ROBBERY CONSTITUTED DOUBLE JEOPARDY.

Appellant will rely upon his Initial Brief herein.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Honorable Court to Vacate the Judgment of Conviction and Sentence of Death in the above-styled cause.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY _____
CRAIG S. BARNARD
Chief Assistant Public Defender

_____
TERRY L. SCHWARZ
Assistant Public Defender

_____
JON MAY
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Honorable Robert Bogen, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, this 12th day of February, 1981.

_____
Of Counsel.