IN THE SUPREME COURT OF FLORIDA

CASE NO. 57,077

GARY HENRY TRAWICK,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

* *

ON APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

* *

BRIEF OF APPELLEE

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INTRODUCTION

The appellant, GARY TRAWICK, was the defendant in the trial court. The appellee, the State of Florida, was the prosecution. In this brief, the parties will be referred to as they stood at trial. The symbol "R" will be used to designate the record on appeal; the symbol "T" will be used to designate the transcript of proceedings.

STATEMENT OF THE CASE

The defendant was charged by Indictment with first degree murder, robbery, attempted first degree, attempted robbery, attempted first degree murder, aggravated assault, and two counts of unlawful possession of a firearm while engaged in a criminal offense. (R. 8). He was convicted of first degree murder, robbery, attempted robbery, and attempted first degree murder. (R. 58). He was sentenced to death by electrocution on count one, life imprisonment on count two, fifteen years imprisonment on count four, and thirty years imprisonment on count five. (R. 60).

The judgments were filed on May 8, 1979. (R. 58). The sentence was rendered on May 11, 1979. (R. 60). A motion for new trial was denied on May 14, 1979. (R. 110-111a). The notice of appeal was filed on June 11, 1979. (R. 114).

STATEMENT OF THE FACTS

At the hearing on the motion to suppress, Detective Tim Martin testified that he went to the defendant's residence to follow up a lead concerning the investigation. (T. 87). He met the defendant's sister at the front door. (T. 87). As the conversation terminated, the officer observed Detective Singleton running north towards the backyard. (T. 88). Two officers followed. (T. 88). They saw Detective Singleton detain the defendant by the fence at the back of the yard. (T. 88).

The defendant was handcuffed to avoid further flight. (T. 89). The defendant was read his rights. (T. 89). He waived his rights. (T. 90).

The defendant admitted that he was involved in the homicide along with three other people. (T. 90). After he admitted his involvement, he was placed under arrest. (T. 91). The defendant advised the police of the location of a rifle which was used in the homicide. (T. 92).

The defendant was advised of his rights again once they arrived at the police station. (T. 93). He read, signed, and initialed a constitutional rights warning interrogation form. (T. 94-96). The defendant gave a formal statement

which was transcribed. (T. 97). The defendant signed the confession. (T. 97).

The police officers went to speak with the defendant in the first place because there was a tentative identification made by one of the victims. (T. 114). Ballistics comparison tests tied all three incidents together. (T. 116).

When the defendant was initially apprehended he was not under arrest, he was merely being detained. (T. 122). His attempt to flee added suspicion. (T. 123). He had a felony past. (T. 125).

The trial court made a finding that the testimony was clear and convincing and that the statement of the defendant was voluntary, intelligent, and free from duress. (T. 173). The motion to suppress was denied. (T. 173).

The defendant was initially going to withdraw his pleas of not guilty and plead guilty to all eight counts in Case No. 79-355. (T. 189). In exchange for the plea the State was going to announce a nolle prosse as to Case No. 78-16124. (T. 189). A proffer of the facts was made so that the defendant could hear it. (T. 190).

The State proffered that the defendant met with three people and decided to go out and commit some robberies. (T.

190). The defendant obtained a rifle. (T. 190). Then the four defendants went to an Exxon gas station. (T. 190).

At the Exxon station the defendant and a co-defendant approached the glass booth where the cashier was. (T. 190, 191). When the victim would not give up the money, the defendant, at the request of a co-defendant, shot the victim in the face. (T. 191). Then they went to a Big Daddy's. (T. 191).

As they drove past Big Daddy's, the defendant fired three shots at the crowd of people who were in front of the Big Daddy's. (T. 192). Then they went to a U-Totem. (T. 192).

The defendant held the gun in his hand while the victim was told to give up all of his money. (T. 192). The victim surrendered his money. (T. 193). Apparently because the victim looked at the defendants although he was told not to, the defendant shot the victim. (T. 193). The victim died thirty-six hours later. (T. 193).

An off-duty policemen who heard the shot tried to apprehend the defendant. (T. 193). The defendant shot at the police officer. (T. 193). The defendant dropped his hat at the scene. (T. 194). His hat had the defendant's nickname on the inside, which is what led the police to the

defendant. (T. 194). The defendants split up the proceeds of the robbery, which amounted to approximately $28.00. (T. 194).

The defendant was questioned as to the voluntariness of the plea. (T. 194). Defense counsel stated that he talked to the defendant at great length after having a forensic team and then independently having another psychiatrist visit with the defendant. (T. 195). The defendant was informed of the possible penalties if he entered a guilty plea. (T. 195). The discussions with the defendant took place over a long period of time. (T. 196). Defense counsel wanted to be sure that the defendant had enough time to refresh himself on the advise of defense counsel and to be informed of all the consequences attendant to the plea. (T. 196).

At first the defendant was going to plead guilty to all eight counts of the indictment. (T. 197). The defendant stated that he had sufficient time to discuss the matter with his attorney. (T. 197). The defendant understood that he was waiving his right to trial by jury, his right to counsel throughout the trial, the right to call witnesses, and to have his attorney cross-examine witnesses against the defendant. (T. 197).

The defendant knew that he was waiving his right against self-incrimination. (T. 198). He stated that he was pleading guilty because he was guilty. (T. 198). He stated that he had no physical or mental problems, only that he was a little nervous. (T. 198).

He understood that he was waiving his right to appeal the finding of guilt. (T. 199). He understood that he was going to proceed to the penalty phase of the proceedings. (T. 200). Being aware of all these things, the defendant changed his mind and decided not to plead guilty. (T. 201, 202).

Later that afternoon the defendant changed his mind again and decided to plead guilty. (T. 203). However, as part of the agreement the State decided not to prosecute Counts III, VI, VII and VIII. (T. 205). As earlier agreed upon, the State announced a nolle prosse in another robbery case, Case No. 78-16124. (T. 205). It was understood that the State would present evidence of all the counts charged and the confession in the penalty phase. (T. 206). The State proffered the facts once again. (T. 207-208).

The defendant once again stated that he understood he would have no right to appeal the judgment of guilt. (T.209)

The court inadvertently explained that the penalty phase would decide whether the penalty should be for manslaughter with a minimum of fifteen years, or death. (T. 209). However, the court was corrected and informed the defendant that the choice would be between death or a minimum mandatory of twenty-five years imprisonment. (T. 210).

The defendant waived his right to trial, to be represented by counsel at trial, to confront the State's witnesses, to call witnesses in his own behalf. (T. 211). He also waived his right to remain silent and to have the burden on the State to prove his guilt. (T. 211). He once again admitted that he was pleading guilty because he was guilty and for no other reason. (T. 211). Defense counsel made it clear that he informed the defendant that he had no right to appeal the conviction but had a right to appeal the sentence. (T. 212.

The defendant denied having any problems, either physical or emotional, which would interfere with his understand of the proceedings. (T. 212). The court found the proffer to be sufficient, that the defendant was adequately represented, and that the plea was entered voluntarily, freely and intelligently. (T. 213). The defendant stated that he was satisfied with the representation of his attorney and had sufficient time to discuss the matter with his attorney. (T. 213).

Defense counsel informed the court that the defendant was despondent about the proceedings, had thought about the death penalty, and did not find it beyond his capability to take his own life. (T. 214). The court stated that its observations of the defendant supported the finding that the defendant made an intelligent decision and there was no appearance of any emotional influence other than that of nervousness. (T. 215).

When selecting jurors for the penalty phase, Ms. Jordan stated that she could not vote for the death penalty under any circumstances. (T. 229). Mr. Weinstein stated that he could not vote for the death penalty under any circumtances. (T. 231-232). Marguerite Arlt stated that she could not vote for the death penalty under any circumstances. (T. 232). Virginia Colucci stated that she could not vote for the death penalty under any circumstances. (T. 232-233). George Cummings stated that he could not vote for the death penalty under any circumstance. (T. 237). Mrs. Kosta stated that she did not have the ability to follow the judge's instructions. (T. 288). Mr. Parotte stated that he could not vote for the death penalty under any circumstances. (T. 314). Mrs. Robbie Click stated that she could not vote for the death penalty under any circumstances. (T. 315). Carlton Brown stated that he could not vote for the death penalty under any circumstances. (T. 315). Mrs. Machado

stated that she would vote for life in jail as opposed to death no matter what the defendant did. (T. 375). There was an objection to excusing her for cause. (T. 375, 376). Mr. Smith would not vote for the death penalty under any circumstances. (T. 383). Mr. Rios would not vote for the death penalty under any circumstances. (T. 385, 386). Defense counsel joined the State in excusing Mr. Rios for cause. (T. 386, 387).

Defense counsel noted whenever the State excluded blacks from the jury by the use of peremptory challenges. (T. 396). The State Attorney pointed out that each black person was excused when there was a reason. (T. 396). There were two black people on the jury who were not excused and the State had no intention of excusing them. (T. 396, 397).

At the sentencing hearing Detective Timothy Martin testified that he investigated an incident which occurred at an Exxon gas station, an incident which happened shortly thereafter at a Big Daddy's, and an incident which occurred at a U-Totem Store all within the same general vicinity. (T. 436, 437). There was a projectile hole in the glass enclosure at the Exxon gas station. (T. 438). He observed a large amount of blood with a trail of blood to the corner. (T. 438). The defendant admitting using an M-1, .30 caliber carbine. (T. 445).

The victim had been shot on the right side of her face. (T. 450). The projectile fragment lodged there in her jaw, and a partial projectile fragment created an exit wound on the other side of the face. (T. 450). The projectile went through her face. (T. 450). She was bleeding profusely at the time as a result of the gunshot wound. (T. 451). The defendant shot the victim in the face when she would not give money to the defendants. (T. 452-455).

Moments after departing the Exxon station, while driving north, the defendant held the weapon out of the rear passenger side window and shot the weapon three or four times at several customers who were standing in front of the Big Daddy's. (T. 460). Although the defendant said that he did it to scare the individuals, several people took action in order to avoid being struck.(T. 460). One of the bullets hit a car. (T. 460).

At the U-Totem store, the officer showed where the victim's blood was being trailed by the wheels of the stretcher. (T. 463). The bullet passed through the victim's chest cavity and went into a wall. (T. 463). The victim never offered any type of provocation or resistance to the robbery. (T. 464, 465). The victim died approximately 36 hours later. (T. 465). The defendant shot the victim because he could possibly identify the defendant at a later date. (T. 469, 470).

The State attempted to introduce a photograph of what purported to be the defendant holding a machine gun. (T. 471-473). The photograph was not admitted into evidence and the jury was instructed to disregard any reference to the photograph of the defendant holding a machine gun because it was not a photograph of the defendant. (T. 474-479).

The witness identified a formal statement made by the defendant. (T. 481). The statement was admitted into evidence. (T. 482). Defense counsel specifically stated that he had no objection to the admission of the sworned statement into evidence. (T. 482).

Defense counsel moved for a mistrial because the State attempted to introduce a photograph of the defendant carrying a machine gun, which is not an enumerated aggravating circumstance. (T. 483, 484). Although a curative instruction was given, defense counsel did not consider it sufficient. (T. 484, 485). The court reserved ruling on the motion. (T. 486).

The sworn statement was published to the jury. (T. 497). Defense counsel objected to having the statement read. (T. 489, 490, 497). The court overruled the objection. (T. 490, 497).

After the incident at the Exxon gas station and after shooting at the people at the Big Daddy's, the defendant and the others were laughing about it in the car. (T. 519). They did not get any money from the Exxon station, so they went to the U-Totem store to commit a robbery because they needed the money. (T. 522). The defendant shot the victim because he had a full description of the defendants. (T. 526).

As he exited the store, the defendant shot at a vehicle "because he was looking at me". (T. 527). He shot at the vehicle three or four times. (T. 529). The defendant recalled shooting the victim in the center of his back. (T. 530).

They divided the proceeds. (T. 531). The defendant and "Headway" kept all the money, the other two perpetrators got the food stamps and the change. (T. 532). There was $26.00 all together. (T. 532).

The police were led to suspect the defendant because they had a tentative identification from the attempted murder victim, Linda Gray, and because the defendant was one of several individuals who went by the nickname "Pig". (T. 539). The defendant was arrested at his sister's residence. (T. 541). When the defendant found out what had happened to the victims, he did not show any remorse. (T. 560).

Sara Hayes testified that she visited her husband in the hospital before he died. (T. 565). He communicated with her by writing. (T. 56). He stated that the defendant shot the victim for nothing. (T. 566).

Dr. Larry Tate testified that in his opinion the victims suffered excruciating pain during the entire 36 hours before he died. (T. 570). In addition, Linda Gray suffered excruciating pain throughout the entire time she was in the hospital. (T. 572). The doctor also testified without objection that death in the electric chair does not cause any pain. (T. 572, 573). The State rested. (T. 575).

The defendant testified that he was twenty years old. (T. 576) The defense rested. (T. 576).

Defense counsel moved the court to direct the jury to disregard the testimony of the pain and suffering of Linda Gray. (T. 577). The prosecutor noted that there was no objection to the testimony at the time it was given. (T. 578). The motion was denied on the ground that the acts were all part of one single transaction or occurrence. (T. 578).

Defense counsel moved to strike the testimony of the doctor relating to the electric chair. (T. 579). The trial

court instructed the prosecutor not to mention that testimony as part of the closing argument. (T. 579).

The prosecutor argued to the jury that they do not have the power to pass sentence on the defendant, and that it was the provence of the judge. (T. 587). The prosecutor then informed the jury that it was their duty to give the judge some guidance, and that the recommendation is not to be made based on their gut feeling or by flipping a coin. (T. 587). The prosecutor also reminded the jury of their duty to follow the law "as it relates to this most important question concerning the life of a person". (T. 587).

The prosecutor argued that the defendant knowingly created a great risk of death to many persons. (T. 589). There was a risk of death to Linda Gray, there was a risk of death to many people outside of Big Daddy's, and there was a risk of death to the off-duty police officer who was passing by the U-Totem store whom the defendant took a shot at. (T. 590).

The prosecutor argued that another aggravating circumstance was that the defendant was engaged in the commission of a robbery when he committed the murder. (T. 590).

The prosecutor argued that the defendant committed the crime to avoid lawful arrest or to effect an escape from custody. (T. 590). The defendant admitted that the reason he shot the victim was because he could have identified the defendant. (T. 591).

The crime was committed for pecuniary gain. (T. 591). There was ample testimony that the crime was committed because they needed the money. (T. 591).

The prosecutor argued that the the crime was especially heinous, atrocious or cruel. (T. 592). The victim was shot in the back. (T. 593). The medical examiner testified as to the pain and suffering. (T. 593). The prosecutor concluded that the act of the defendant was shockingly evil, with utter indifference, and pitiless. (T. 593).

After discussing which aggravating circumstances applied, the prosecutor went on to establish the absence of mitigating circumstances. (T. 593, 594). There was no showing that the defendant was under the influence of extreme mental or emotional disturbance. (T. 594). There was no insanity claim. (T. 594). The defendant was able to recollect each and every fact about what he did on that night. (T. 594).

The victim did not consent to being shot through his body in the back. (T. 595).

The defendant's participation was major. (T. 595). The defendant is the one who actually fired these shots. (T. 595).

No one was forcing the defendant to commit the crime. (T. 596). The defendant was doing it willingly to get money. (T. 596).

The defendant appreciated that what he was doing was wrong. (T. 597).

The prosecutor argued that they may give the defendant the benefit of the doubt on the mitigating circumstance concerning the defendant's age. (T. 598). However, the prosecutor noted that if the defendant is sentenced to life imprisonment, he would be eligible for parole at the age of forty-five. (T. 598). There was no objection to that argument. (T. 598).

The prosecutor argued that to allow the defendant to go to prison would be giving him a break. (T. 600). The prosecutor argued that the defendant was proud of his nickname "Pig". (T. 600). The prosecutor argued that the

jury should not show the defendant mercy because he did not show mercy to Linda Gray or the deceased. (T. 600, 601).

The prosecutor reminded the jury that it is their duty to make a recommendation, not to pass sentence. (T. 601). The prosecutor realized that the decision is not easy and is probably one of the most difficult decisions of their lives. (T. 602). Finally the prosecutor noted that the defendant did not show any remorse. (T. 602, 603). At no time did defense counsel object to those arguments. (T. 598-603).

The jury recommended a sentence of death. (T. 621).

The court recited its findings as to aggravating circumstances. (T. 625). The defendant created a great risk of death to many persons preceding, during, and after committing the robbery. (T. 625). Shooting Linda Gray in the face was unnecessary and pitiless. (T. 625). The reckless discharge of a high powered rifle in the direction of innocent bystanders in the front of Big Daddy's, which the defendants subsequently "made light of" is evidence of the utter disregard for the life of other people. (T. 626). In addition, the defendant was engaged in the commission of a robbery. (T. 626).

The casual method by which the robberies were planned, conceived, and executed, was evidence of a flagrant disregard for the dangerous consequences of their actions. (T. 626).

The crime was committed for the purpose of avoiding or preventing identification and lawful arrest. (T. 626).

The crime was committed for pecuniary gain. (T. 626).

The court found that the crime was especially heinous, was atrocious, and was cruel. (T. 627).

Defense counsel noted that the trial court was doubling the factors of committing the murder during a robbery and committing the murder for pecuniary gain. (T. 627).

The court was convinced there was no demonstration of remorse. (T. 627). It was especially shocking to hear the confession suggesting that there may be other circumstances where the defendant could just as easily take the life of another person. (T. 628).

The court made its findings as to mitigating factors. (T. 628). The court was aware that the defendant was awaiting trial for robbery. (T. 628). The only mitigating

factor the court found was age, even though being twenty years old is not exactly being adolescent. (T. 628). In fact, it is an age at which people are thought to be adult and responsible for their conduct. (T. 628). The court also found that the defendant dominated the other younger people. (T. 628). The court sentenced the defendant to death. (T. 629).

Three days later defense counsel moved for a mistrial alleging, among other grounds, that the remarks of the prosecutor were inflammatory. (T. 635). The court found that defense counsel waived those grounds during the course of the proceedings and denied the motion. (T. 636).

POINTS ON APPEAL

I

WHETHER THE TRIAL COURT WAS OBLIGATED UNDER THE FACTS OF THIS CASE TO CONDUCT A COMPETENCY HEARING ON ITS OWN MOTION?

II

WHETHER THE TRIAL COURT WAS CORRECT IN ACCEPTING THE DEFENDANT'S GUILTY PLEAS WHERE THE DEFENDANT NEVER CHALLENGED THE KNOWING AND VOLUNTARY NATURE OF THE PLEAS IN THE TRIAL COURT?

III

WHETHER THE TRIAL COURT WAS CORRECT IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION?

IV

WHETHER THE TRIAL COURT WAS CORRECT IN IMPOSING THE DEATH SENTENCE?

V

WHETHER THE TRIAL COURT CORRECT IN EXCLUDING FOR CAUSE THOSE VENIREMEN WHO COULD NOT VOTE FOR THE DEATH PENALTY UNDER ANY CIRCUMSTANCES?

VI

WHETHER THE TRIAL COURT WAS CORRECT IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL BASED ON THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES WHERE THOSE CHALLENGES WERE NOT SYSTEMATICALLY USED TO EXCLUDE PROSPECTIVE BLACK JURORS?

ARGUMENT

I

THE TRIAL COURT WAS CORRECT IN NOT CONDUCTING A HEARING ON THE QUESTION OF THE DEFENDANT'S COMPETENCE WHERE THERE WERE INSUFFICIENT GROUNDS TO QUESTION THE DEFENDANT.

The defendant argues that the trial court, on its own motion, should have held a hearing on the question of the defendant's competence. See, Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Lane v. State, 388 So.2d 1022 (Fla. 1980). The only factor the defendant relies on is that he was despondent about pleading guilty to first degree murder and was contemplating suicide. The State submits that contemplation of suicide, either when considered by itself or in conjunction with the other facts in this case, does not require a competency hearing.

Defense counsel had a forensic team examine the defendant (T. 195) and a psychiatrist examined the defendant. (T. 195). Those examinations did not raise any doubt as to the defendant's competency.

The defendant stated that he had no physical or mental problems, only that he was a little nervous. (T. 198). During the final plea colloquy the defendant denied having any problems, either physical or emotional, which would

interfere with his understanding of the proceedings. (T. 212). The trial court stated that its observation of the defendant supported the finding that the defendant made an intelligent decision and there was no appearance of any emotional influence other than that of nervousness.(T. 215).

In Walker v. State, 384 So.2d 730 (Fla. 4th DCA 1980), counsel represented to the court that he had difficulty communicating with the defendant, that the defendant looked vague and somewhat spacey, and that the defendant seemed strange and disoriented. Defense counsel moved for the appointment of psychiatrists because the defendant's demeanor and conduct lend counsel to believe that the defendant was incompetent to plead, stand trial, or assist counsel in the preparation and presentation of his defense. The appellate court held that defense counsel's claim was not sufficient to mandate a competency hearing.

In Williams v. State, 396 So.2d 267 (Fla. 3d DCA 1981), defense counsel advised the court of the defendant's refusal to testify concerning the issue of self-defense despite his previous willingness to testify. Defense counsel requested a psychiatric evaluation. The defendant interrupted the trial demanding to be seen by a psychiatrist. The defendant advised his attorney that the defendant was hearing voices and was insane. The court held that a competency hearing

was not required because the evidence was not sufficient to raise a bona fide and reasonable doubt as to the defendant's competency.

In Bryant v. State, 373 So.2d 380 (Fla. 1st DCA 1979), the defendant claimed that his plea of guilty was invalid because the trial judge failed to inquire as to the defendant's mental condition. The defendant was never adjudged incompetent or declared insane, although he had received psychiatric treatment prior to the offense, and was of a very low intelligence so as to be classified as a low moron or imbecile. In addition, the defendant had a mild degree of mental illness involving periodic psychotic episodes. Psychiatrists had determined that his mental condition did not impair his ability to know the difference between right and wrong or to understand and be capable of cooperating with counsel. The court held that although the proceeding was "rushed", it was sufficient.

In State v. Tait, 387 So.2d 338 (Fla. 1980), there was an issue as to the defendant's sanity at the time of the offense. That factor was not sufficient to raise a reasonable doubt as to the defendant's mental competence at trial. The court held that the trial court was not required to order a hearing of its on motion. Compare, Scott v. State, 420 So.2d 595 (Fla. 1982), where before trial a

competency hearing was requested, defense counsel stated that it was difficult communicating with the defendant and he was unable to assist counsel in the preparation of a defense, before sentencing a request for a competency hearing was made again, an agreement favorable to the defendant to waive the death penalty in exchange for a six man jury was personally overruled by the defendant, the trial court erroneous thought that there had been an evaluation and a determination of the defendant's competency, and the only doctor who had interviewed the defendant before trial ultimately opined that the defendant was not sane and competent.

In Owens v. Sowders, 661 F.2d 584 (6th Cir. 1981), defense counsel expressed doubts as to his client's competency and reported that the defendant mentioned suicide and complained of hallucinations to members of his family, to counsel, and to other inmates. In addition, the rape victim's testified as to the unusual behavior of the defendant while committing the crimes. The court held that those factors were not sufficient to require the trial court to initiate an inquiry into the defendant's competency.

In the instant case the defendant had been examined by a forsenic team and by a psychiatrist. Defense counsel, who was in the best position to evaluate the competency of the

defendant, never questioned the ability of the defendant to assist counsel in the preparation of the case. In addition, the trial court's observations of the defendant was consistent with the presumption that the defendant was competent. Apparently defense counsel mentioned the possibility of the defendant committing suicide simply to protect the defendant, not to challenge his competency. The mere fact, either standing alone or when considered in conjunction with the other facts of this case, that the defendant had contemplated suicide was not sufficient to mandate a competency hearing.

II

THE TRIAL COURT WAS CORRECT IN FINDING THE DEFENDANT'S PLEAS TO BE KNOWINGLY AND INTELLIGENTLY ENTERED WHERE THE DEFENDANT NEVER CHALLENGED THE KNOWING AND VOLUNTARY NATURE OF THE PLEAS.

The defendant challenges the knowing and voluntary nature of his guilty pleas. However, he never moved to withdraw his pleas. Although he has a right to review issues which occur contemporaneously with the entry of the pleas, an appeal from a guilty plea should never be a substitute for a motion to withdraw a plea. Robinson v. State, 373 So.2d 898, 902 (Fla. 1979). Because this issue has never been raised in the trial court, this court should decline to consider the merits. Should this court consider the merits, the conclusion to be reached is that the defendant's allegations are without merit.

The defendant claims that his pleas were involuntary because he was incompetent due to his "suicidal state." As discussed in Point I, if the record does not establish a bona fide reasonable doubt as to the defendant's competency, then the record is clearly insufficient to establish an actual showing of incompetency.

The defendant argues that because the trial court did not inform him of the elements of the crime, he was not aware of the nature of the crimes to which he was pleading. Defense counsel represented to the court that he counseled the defendant and talked to him at great length. (T. 195). Counsel recognized his responsibility to give the defendant the best possible advise. (T. 196). Discussions with the defendant concerning the entire matter occurred over a long period of time. (T. 196). The defendant admitted that he understood the nature of the proceeding. (T. 196). In fact, the defendant understood it so well that he initially decided not to plead guilty. (T. 201). Of course the defendant ultimately decided to plead guilty when the State made a better offer. From those facts we may infer that the defendant understood what he was doing.

In addition, a proffer of the facts was made so that the defendant could hear it. (T. 190). He stated that he was pleading guilty because he was guilty. (T. 211). Therefore, if the proffer was sufficient in that it contained all the elements of the crime, and the defendant admitted committing those acts, then the defendant admitted that he committed all the elements of the crime.

The defendant complains that he was not aware of the defenses that were available to him. The cases which the

defendant relies on only require a specific waiver of a defense when such is asserted at the time of the plea. See, for example Williams v. State, 316 So.2d 267 (Fla. 1975). In the instant case the defendant never protested his innocence during the plea colloquy. Therefore there was no need to specifically waive any defense.

The defendant argues that he did not know he was waiving his right to trial by jury. The first time the defendant pled guilty he was informed that he was waiving his right to trial by jury. (T. 197). The defendant has not even suggested any reasonable explanation why he claims he was not aware of it two hours later during the second plea colloquy.

The defendant complains that he was not informed that he was waiving his right to appeal. The defendant was informed numerous times during both plea colloquy's that he was waiving his right to appeal the judgments. (T. 199, 209, 212). Therefore this contention is clearly belied by the record.

The defendant complains that he was ignorant of the maximum possible penalties of the crimes he was pleading

guilty to, except for the charge of first degree murder. Defense counsel specifically stated that the defendant had been informed of the possible penalties if he entered a guilty plea. (T. 195). Defense counsel informed the defendant of all the consequences attendent to the plea. (T. 196). Therefore the record refutes the defendant's contention that he was unaware of the possible penalties he would receive.

The defendant complains that he did not understand the proceedings because of his youth. The mere fact that a person is twenty years old does not render a guilty plea involuntary.

The defendant complains that part of the plea agreement was that the prosecution would not use the unrelated robbery charge against him. The record shows that the agreement was that the State would dismiss the charge. (T. 205). There was no agreement concerning whether the fact that he had been charged would be stricken from everyone's memory. In fact, there was an express understanding that other charges which were dismissed against the defendant would be considered against him because they were a part of the entire transaction. (T. 206). The deal was that the unrelated robbery charge would be dismissed. The agreement was kept.

III

THE TRIAL COURT WAS CORRECT IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION.

The defendant is not entitled to review of the denial of the motion to suppress his confession because he pleaded guilty. A plea of guilty severs any right to an appeal from court rulings that preceded the plea in the criminal process including independent claims relating to deprivations of constitutional rights that occur prior to the entry of the guilty plea. Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973); Robinson v. State, 373 So.2d 898, 902 (Fla. 1979).

Secondly, defense counsel made no objection to the admission of the confession into evidence at the sentencing hearing. (T. 482). Therefore, even if he has a right to raise this issue, he has waived that right. Fraterrigo v. State, 10 So.2d 361 (Fla. 1942); Bowles v. State, 414 So.2d 236 (Fla. 4th DCA 1982).

At the hearing on the motion to suppress, Detective Tim Martin testified that he went to the defendant's residence to follow up a lead concerning the investigation. (T. 87). He met the defendant's sister at the front door. (T. 87). As the conversation terminated, the officer observed

Detective Singleton running north towards the backyard. (T. 88). Two officers followed. (T. 88). They saw Detective Singleton detain the defendant by the fence at the back of the yard. (T. 88).

The defendant was handcuffed to avoid further flight. (T. 89). The defendant was read his rights. (T. 89). He waived his rights. (T. 90).

The defendant admitted that he was involved in the homicide along with three other people. (T. 90). After he admitted his involvement, he was placed under arrest. (T. 91). The defendant advised the police of the location of a rifle which was used in the homicide. (T. 92).

The defendant was advised of his rights again once they arrived at the police station. (T. 93). He read, signed, and initialed a constitutional rights warning interrogation form. (T. 94-96). The defendant gave a formal statement which was transcribed. (T. 97). The defendant signed the confession. (T. 97).

The police officers first went to speak with the defendant because there was a tentative identification made by one of the victims. (T. 114). Ballistics comparison tests tied all three incidents together. (T. 116).

When the defendant was initially apprehended he was not under arrest, he was merely being detained. (T. 122). His attempt to flee added suspicion. (T. 123).

The trial court made a finding that the testimony was clear and convincing and that the statement of the defendant was voluntary, intelligent, and free from duress. (T. 173). The motion to suppress was denied. (T. 173).

The defendant argues that the confession should have been suppressed because it resulted from a warrantless arrest in the home. See, Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980); State v. Rickard, 420 So.2d 303 (Fla. 1982). This was not a ground which was raised below as part of the motion to suppress. Therefore it may not be reviewed. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Should this court reach the issue, it is clear for several reasons that Payton does not apply. First of all, there is no need for a warrant when there are exigent circumstances.

In the instant case the defendant was just about to leave the backyard of the residence when he was apprehended.

(T. 88). If the police had allowed the defendant to leave the property surrounding the residence, they might not have been able to apprehend him. Because of the exigent circumstances, there was no need for a warrant.

Secondly, there was no causal connection between an arrest in the home and the confessed. There was no showing that the defendant confessioned only because he was arrested at his residence. Since there is no causal connection between a warrantless arrest in the home and a confession, the exclusionary rule does not apply. State v. Thomas, 405 So.2d 462, 463 (Fla. 3d DCA 1981). As long as there was probably cause to arrest, custodial interrogation was proper. See, Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

The defendant also complains that there was custodial interrogation without probable cause. The police officers wanted to investigate the defendant because he left his hat at the scene of the crime and there was a tentative identification made by one of the victims. (T. 114). Before they could speak with the defendant, the defendant took flight. (T. 87, 88).

Even though the police officers testified that they were temporarily detaining the defendant, the State submits

that there was probable cause to arrest at that point. Even if they only had an articulable suspicion that the defendant was involved in the crimes, the level of suspicion clearly met the probable cause standard once the defendant started to flee.

Even if the police only had an articulable suspicion sufficient to temporarily detain the defendant, the incriminating statements made by the defendant during that pre-formal arrest would be admissible, either because a limited interrogation of the defendant is permissible as part of a temporary detention, Section 901.151(2)(4), Fla.Stat. (1979); Terry v. Ohio, 392 U.S. 1 (1968); Young v. State, 234 So.2d 341 (Fla. 1970); Cockerham v. State, 237 So.2d 32 (Fla. 1st DCA 1970); James v. State, 223 So.2d 52 (Fla. 4th DCA 1969), or because the statement was volunteered.

While the defendant was being temporarily detained, the police officer merely recited the background of the case under investigation when the defendant spontaneously made the unsolicited incriminating statements. (T. 90). Therefore the statements were not given in response to custodial interrogation, hence there was no Fourth or Fifth Amendment violation. Once the defendant made his incriminating statements, there was probable cause to arrest so that the formal statement given at the police station did not violate the mandate of Dunaway v. New York, supra.

The defendant also complains that the confession should have been suppressed because the defendant was detained without a prompt judicial determination of probable cause. The failure to have a prompt judicial determination of probable cause does not call for suppress unless the delay in itself resulted in the confession, and it should not be presumed that such was the case. Barton v. State, 193 So.2d 618 (Fla. 2d DCA 1966); Romanello v. State, 160 So.2d 529 (Fla. 1st DCA 1964). Thus, when it can be demonstrated that a defendant was advised of his rights, and the confession was voluntary and not induced by the delay, the confession is admissible. Headrick v. State, 366 So.2d 1190 (Fla. 1st DCA 1978).

Finally the defendant argues that the Miranda warnings were not sufficient, but fails to specifically allege how they were deficient. The record belies the defendant's contention. (T. 93-97). This court should interpret the evidence and all reasonable inferences and deductions in a manner most favorable to sustain the trial court's ruling. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978).

IV

THE TRIAL COURT WAS CORRECT IN IMPOSING THE DEATH SENTENCE BASED ON A PROPER WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES.

The defendant argues that the trial court erred by not making written findings. The trial court read his findings into the record. It was transcribed. The procedure used by the trial court was sufficient to satisfy the requirement that his findings be in writing. Thompson v. State, 328 So.2d 1 (Fla. 1976).

The defendant argues that the prosecutor relied on non-statutory aggravating factors, thereby tainting the jury's recommendation of death. At trial, defense counsel did not consider the evidence nor the arguments objectionable, he did not ask for curative or cautionary instructions, and did not move for a mistrial on any of the grounds now being raised on appeal. Therefore the issues being raised regarding the prosecutor's arguments are not preserved for review. Ferguson v. State, 417 So.2d 639, 641 (Fla. 1982) and Clark v. State, 363 So.2d 331 (Fla. 1978). Assuming arguendo this Court reviews the merits, the State would submit the defendant is not entitled to relief.

The defendant argues that evidence as to lack of remorse should not have been admitted, should not have been argued by the prosecutor, and should not have been

considered by the trial court in its findings. Lack of remorse is a factual which is relevant to determine whether the crime was heinous, atrocious or cruel. Sireci v. State, 399 So.2d 964 (Fla. 1981); Hargrave v. State, 366 So.2d 1 (Fla. 1978).

Alone these same lines, the defendant argues that the trial court should not have found that it was especially shocking to hear from the defendant's confession that he did not think it was wrong for one person to kill another person on certain circumstances. Although the defendant argues that the his statement shows a propensity for violence, it is clear that the defendant's statement was considered as showing lack of remorse.

In Hargrave v. State, supra, statements of the defendant that he had killed before and it would not bother him to kill again were properly admitted and argued showing lack of remorse. Similarly, in the instant case, it was proper for the prosecutor to argue based on the defendant's statement and for the trial court to consider the defendant's statement in its findings.

The defendant argues that the prosecutor should not have referred to the pain and suffering of Linda Gray to argue that the murder was heinous, atrocious or cruel. The test for determining whether a murder is heinous, atrocious

or cruel is whether the horror of the murder was accompanied by additional acts which would justify a sentence of death. Cooper v. State, 336 So.2d 1133 (Fla. 1976). In this case, the murder was part of a spree of shooting and robbery, which included the cruel and atrocious act of shooting Linda Gray in the face with a high-powered rifle. The evidence was relevant.

The defendant argues that the prosecutor should not have presented evidence of crimes for which the defendant had not been convicted. First of all, as part of the plea colloquy the prosecutor stated that he would be presenting evidence of all counts charged because it was necessary to show the entire circumstances surrounding the murder. (T. 206). Crimes which are committed along with the murder may be considered even if the defendant is not charged or convicted of those other crimes. Ruffin v. State, 397 So.2d 277 (Fla. 1981), cert.den. 454 U.S. 882 (1981).

The defendant argues that the deceased's pain and suffering should not have been considered. The State submits that the fact that the murder victim did not die instantaneously, but rather, died only after thirty-six hours of excruciating pain was relevant to whether the crime was heinous, atrocious or cruel.

The defendant argues that the medical examiner should not have testified that death by electrocution was painless. There was no objection to that testimony and no motion for mistrial, but defense counsel did move to strike the testimony. The trial court instructed the prosecutor not to refer to that testimony in closing argument.

The defendant argues that it was improper to present testimony that the defendant was holding a machine gun on some prior occasion. The trial court stated "Unless there is been a tremendous change in this man in the last six months, that is clearly not Gary Trawick"(T. 476). The photograph was not admitted. Based on the statement by the trial court, it was clear to the jury that the defendant was not the person holding the machine gun.

The defendant argues that the prosecutor attempted to minimize the jury recommendation. If the statements of the prosecutor are considered in context, the opposite conclusion should be reached. The prosecutor told the jury that it was their duty to give the judge guidance. (T. 587). The recommendation is not to be made based on their gut feeling or by fliping a coin. (T. 587). The prosecutor reminded the jury that it was their duty to follow the law "as it relates to this most important question concerning the life of a person." (T. 587). The prosecutor realized that the

decision was not easy and was probably one of the most difficult decisions of their lives. (T. 602).

The defendant argues that the prosecutor should not have commented on the defendant's nickname. The defendant's nickname was "Pig". (T. 455). It was fair comment under the facts of this case to refer to the defendant by his nickname. See, Darden v. State, 329 So.2d 287 (Fla. 1976).

The defendant argues that the trial court should not have doubled the aggravating factors of committing a murder while engaged in the commission of a robbery and of committing the murder for pecuniary gain. This issue was presented to the trial court. (T. 627). Even if one factor is eliminated, the other factor remains valid and unchallenged.

The defendant argues that the defendant did not create a great risk to numerous people. The murder in this case was committed during a spree of shooting and robbery. The defendant shot Linda Gray in the face, he shot at a crowd of people in front of a Big Daddy's Lounge, he shot the murder victim, and he shot at an off-duty police officer when fleeing. Therefore the defendant's behavior during this episode created a great risk to numerous people.

The defendant argues that the crime was not heinous, atrocious, or cruel. The State submits that this is not a case where death by gunfire was instantaneous. See, Odom v. State, 403 So.2d 936 (Fla. 1981). In this case, the victim suffered a excruciating pain for thirty-six hours after being shot.

In addition, the victim agonized over whether he would be shot. He kept looking back at the defendant because the victim was worried whether he would be shot. It is ironic that the defendant stated that he shot the victim because he was looking back.

The court also considered the additional acts surrounding the murder. The defendant shot Linda Gray in the face. The defendant shot into a crowd of people. The defendant laughed about it. (T. 626). The court was shocked to hear that there may be other circumstances where the defendant could just as easily kill someone, and the casual method by which the robberies were planned, conceived, and executed, was evidence of a flagrant disregard for the dangerous consequences of their actions. (T. 626-628).

The defendant argues that there was a violation of Gardner v. Florida, 430 U.S. 349 (1977), because the trial court imposed the death sentence on the basis of information

which was not known to the defendant. The defendant points to the fact that the trial court knew the defendant was awaiting trial for a collateral robbery and that it was suggested at preliminary negotiations that the defendant dominated the other people. Since it must be obvious that the defendant knew that he had been charged for that other robbery and that the defendant knew what was going on at preliminary negotiations, this point is clearly frivolous since all the information relied on by the judge was known to the defendant.

The State submits that even if improper aggravating circumstances were considered, the remaining aggravating factors, when considered against the single mitigating factor, warrants the conclusion that the death penalty was properly imposed. See Jackson v. Wainwright, 421 So.2d 1385, 1388 (Fla. 1982). There was no question that the defendant committed the murder while engaged in the commission of a robbery, or committed the murder for pecuniary gain. In addition, the defendant expressly stated that his motive for the murder was to eliminate the witness. See, Menendez v. State, 368 So.2d 1278 (Fla. 1979).

The only mitigating factor was age, but it is clear from the record that the trial court gave that factor the least amount of weight. Although the trial court found

age to be mitigating factor, that finding was qualified by noting that being twenty years old is not actually being adolescent (T. 628) in fact, it is an age at which people are thought to be adult and responsible for their conduct. (T. 628). The court also found that the defendant dominated the other younger people. (T. 628).

In Meeks v. State, 339 So.2d 186 (Fla. 1976), the murder of the victim was for the express purpose of executing the victim to prevent identification. In addition, the defendant committed the crime while committing a robbery at gunpoint for pecuniary gain. The mitigating circumstance that the defendant was of a "young age" (twenty-one) and had no prior history of criminal conduct were insufficient to outweigh the aggravating factors. This court held that the death penalty recommended by the jury and imposed by the court was justified. See also, Demps v. State, 395 So.2d 501 (Fla. 1981), where two of four aggravating factors were valid, and there were no mitigating factors, the sentence was upheld.

In the instant case, even if other aggravating factors were not valid, there are two aggravating factors which have not been challenged. Those aggravating factors clearly outweigh this sole mitigating factor, especially considering

that the trial court gave that mitigating factor little significance. Because one or more aggravating factors were not outweighed by the mitigating factors, the State submits that the defendant has not overcome the presumption that death was the proper sentence under the facts of this case. See, White v. State, 403 So.2d 331 (Fla. 1981).

V

THE TRIAL COURT WAS CORRECT IN EXCLUDING FOR CAUSE THOSE VENIREMEN WHO COULD NOT VOTE FOR THE DEATH PENALY UNDER ANY CIRCUMSTANCES.

The defendant complains that the jurors who stated that they could not vote for the death penalty under any circumstance were improperly excused. When selecting jurors for the penalty phase, Ms. Jordan stated that she could not vote for the death penalty under any circumstances. (T. 229). Mr. Weinstein stated that he could not vote for the death penalty under any circumstances. (T. 231-232). Marguerite Arlt stated that she could not vote for the death penalty under any circumstances. (T. 232). Virginia Colucci stated that she could not vote for the death penalty under any circumstances. (T. 232-233). George Cummings stated that he could not vote for the death penalty under any circumstance. (T. 237). Mrs. Kosta stated that she did not have the ability to follow the judge's instructions. (T. 288). Mr. Parotte stated that he could not vote for the death penalty under any circumstances. (T. 314). Mrs. Robbie Click stated that she could not vote for the death penalty under any circumstances. (T. 315). Carlton Brown stated that he could not vote for the death penalty under any circumstances. (T. 315). Mrs. Machado stated that she would vote for life in jail as opposed to death no matter what the defendant did.

(T. 375). There was an objection to excusing her for cause. (T. 375, 376). Mr. Smith would not vote for the death penalty under any circumstances. (T. 383). Mr. Rios would not vote for the death penalty under any circumstances. (T. 385, 386). Defense counsel joined the State in excusing Mr. Rios for cause. (T. 386, 387).

The defendant only objected to one of those jurors being excused for cause, Mrs. Machado. (T. 375-276). Mrs. Machado had difficulty understanding because she did not speak English very well. (T. 374). She finally understood that she had two ways to vote. (T. 375). She said she would vote for life in jail no matter what the defendant did. (T. 375).

The defendant has waived his right to review the excusal of any of the jurors based on the rationale of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), except for Mrs. Machado, by his failure to object at trial. Dobbert v. State, 409 So.2d 1053, 1057 (Fla. 1982). Mrs. Machado's statement that she would vote for life imprisonment no matter what the defendant did clearly disqualify her from the serving on the panel. Smith v. State, 407 So.2d 894, 899 (Fla. 1982). See Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981).

VI

THE TRIAL COURT WAS CORRECT IN NOT STRIKING THE JURY PANEL ON ITS OWN MOTION WHERE THERE WAS NO SYSTEMATIC EXCLUSION OF BLACK JURORS AND THE DEFENDANT ACCEPTED THE PANEL.

The defendant argues for the first time on appeal that there was a systematic exclusion of black jurors. At trial, defense counsel merely noted for the record whenever the State exercised a peremptory challenge on a prospective black juror. At no time was there an objection or a challenge on the basis of a systematic exclusion. In fact, defense counsel accepted the panel. (T. 397).

Furthermore, the record shows that there were, in fact, two black jurors. (T. 396, 397).

The defendant waived any right to challenge the jury by his failure to object at trial to the State's peremptory challenges to the jury panel. Cf. Dobbert v. State, 409 So.2d 1053, 1057 (Fla. 1982); Maggard v. State, 399 So.2d 973 (Fla. 1981). While defense counsel noted the times when the prosecutor used peremptory challenges against blacks, there were no objections to those challenges. It is entirely reasonable in view of that fact that the defendant himself did not want a particular juror to serve and was perfectly content with the State's peremptory challenge so

that he would not have to exercise one of his peremptory challenges.

Second, the defendant has failed to establish a systematic exclusion. It would be impossible for the defendant to meet his burden under Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), when, in fact, the prosecutor did not exclude all blacks from the panel in the instant case.

> "The general rule applied by the Supreme Court in Swain is that peremptory challenges may be exercised freely and without explanation or justification. The court recognized that there may be and exception to the general rule where, over a period of time, the State has systematically exercised its peremptory challenges to exclude all negroes from jury's for a reason wholly unrelated to the outcome of the particular case on trial and where the peremptory system is being used to deny negroes the same right to participate in the administration of justice enjoyed by the white population. (original emphasis).
>
> Dobbert v. State, 409 So.2d at 1057.

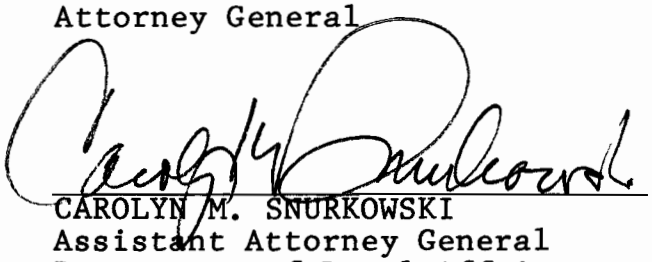
The State did not exclude all blacks from the jury in this case. Even if the defendant had objected to the panel in this case, he does not come close to establishing a systematic exclusion.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State respectfully submits that the judgment and sentence of the lower court should clearly be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



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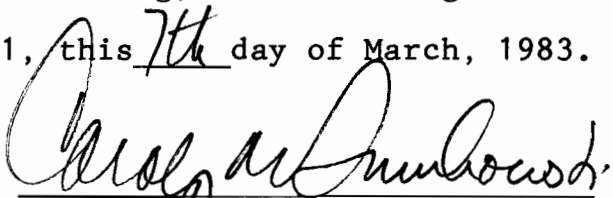
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF APPELLEE was furnished by mail to LOUIS M. JEPEWAY, JR., JEPEWAY AND JEPEWAY, P.A., Attorney for Appellant, 619 Dade Savings Building, 101 East Flagler Street, Miami, Florida 33131, this 7th day of March, 1983.



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