IN THE SUPREME COURT OF FLORIDA

THEODORE R. BUNDY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPEAL NO. 57,772
Capital Case Appeal
Second Judicial Circuit of Florida

SUPPLEMENTAL BRIEF OF APPELLANT

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A.

THE FIRST TWO FINDINGS OF AGGRAVATING CIRCUMSTANCES IN THE TRIAL COURT'S SENTENCE INVOLVED THE SAME STIPULATED FACT, AND THIS CONSTITUTES IMPERMISSIBLE DOUBLING OF AGGRAVATING CIRCUMSTANCES.

In the trial court's sentencing report, Judge Cowart made specific findings of aggravating and mitigating circumstances as required by §921.141, Fla.Stat. (R 1637-1643). The first two findings are reproduced below:

(a) That the crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment.

FINDING:

The defendant stipulated that he was under sentence for aggravated kidnapping in the state of Utah, which had not been served, pardoned, or paroled; is applicable to both counts.

(b) That at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person.

FINDING:

The defendant stipulated that he had been convicted of the crime of aggravated kidnapping in the state of Utah, and, that it was a crime involving the use of, or threat of violence to, the person, which is applicable to both counts. (R 1637)

In Provence v. State, 337 So.2d 783 (Fla. 1976), the Florida Supreme Court quashed a sentence of death for a murder committed in the course of an armed robbery. The trial court in Provence found that the fact of robbery established two aggravating factors, to-wit, commission of the murder in the course of a robbery and commission for the purpose of pecuniary

gain. Provence v. State, 337 So.2d at 786; § 921.141 (5)(d)(f). The Court ruled that, while the two factors constitute separate analytical concepts, they both referred in that case to the same aspect of the defendant's crime. Id. As such, the fact of robbery could only validly be considered as one aggravating circumstance. The principle ennunciated in Provence has been consistently followed in Florida capital cases. Quince v. State, 414 So.2d 185, 188 (Fla. 1982); Vaught v. State, 410 So.2d 147, 150 (Fla. 1982); Francois v. State, 407 So.2d 885 (Fla. 1982); Welty v. State, 402 So.2d 1159, 1164 (Fla. 1982); Armstrong v. State, 399 So.2d 953, 962 (Fla. 1981); Sireci v. State, 399 So.2d 964, 971 (Fla. 1981); Maggard v. State, 399 So.2d 973, 977 (Fla. 1981); Palmes v. State, 397 So.2d 170, 175 (Fla. 1980); Gafford v. State, 387 So.2d 333, 337 (Fla. 1980); Harvard v. State, 375 So.2d 833, 934 (Fla. 1977).

In the instant case, as in Provence and its progeny, the same operative fact was held to constitute two aggravating circumstances. A Utah conviction for aggravated kidnapping was held to provide both the status of being under sentence for a prior conviction and a previous conviction for a crime involving the use or threat of physical violence. (R 1637). See also §921.141(5)(a)(b), Fla.Stat. As such, BUNDY's sentence is illegal and should be vacated and his case remanded to the trial court for resentencing.

B.

THE TRIAL COURT DID NOT ESTABLISH THAT THE CRIMES COMMITTED WERE ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

In its sentencing report, the trial court found that both murder victims had been strangled and beaten while asleep, and that their deaths followed shortly thereafter. (R 1638-1639). It characterized the victims' deaths as "heinous, atrocious and cruel in that they were extremely wicked, shockingly evil, vile and the product of a design to inflict a high degree of pain with utter indifference to human life." Id. Other than a detailed account of the injuries themselves (as opposed to the acts which caused them) the Court offered little in support of this conclusion. Id.

All first degree murders are heinous and cruel. To constitute an aggravating circumstance, the murder must be especially heinous and cruel. It must be

> accompanied by such additional acts as to set the crime apart from the norm of capital felonies - - the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). See also Tedder v. State, 372 So.2d 908 (Fla. 1975).

The mere fact that a murder occurred while the victim was asleep does not constitute an aggravating circumstance. Williams v. State, 386 So.2d 538, 543 (Fla. 1980). Nor does the infliction of repeated injuries to effect the victims' death merit per-se , the conclusion that the murder was especially heinous, atrocious or cruel. Lewis v. State, 377 So.2d 640, 646 (Fla. 1980). In Lewis, the victim was shot once in the chest, then three times in the back as he attempted to flee. The Florida Supreme Court ruled that this did

not make the killing especially heinous, atrocious or cruel.

Given this, the trial court lacked grounds to find this aggravating circumstance from the facts before it. As such, BUNDY's sentence should be vacated and his case remanded to the trial court for resentencing.

C.

THE FINDING OF THE TRIAL COURT THAT THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF THE CRIME OF BURGLARY IS ERRONEOUS (R 1638).

The record on appeal is silent as to any alleged nonconsensual entry. The gravaman of the offense of burglary is a nonconsensual entry with the intent to commit an offense within; the purpose of the law is to punish an invasion of the possessory property rights of another in structures and conveyances. Presley v. State, 61 Fla. 46, 48, 54 So. 367, 368 (1911); Holzapfel v. State, 120 So.2d 195, 197 (Fla. 3rd DCA 1960) [cert. den., State v. Holzapfel, 125 So.2d 877 (Fla. 1960)]; Vazquez v. State, 350 So.2d 1094 (Fla. 3rd DCA 1977) [cert. denied, State v. Vazquez, 360 So.2d 1250 (Fla. 1978)]; State v.Hankins, 376 So.2d 285 (Fla. 5th DCA 1979).

The Indictment (R1) was not framed under the language of §810.07, Fla. Stat., but for reference, the statute provides:

> Prima facie evidence of intent
>
> In a trial on the charge of burglary, proof of the entering of such structure or conveyance at any time stealthily and without consent of the owner or occupant thereof shall be prima facie evidence of entering with intent to commit an offense.

The statute is an alternative of charging and proving criminal intent. The intent charged in the Indictment (R 1-ff) was of battery. Therefore it was not necessary that the state prove the underlying essential elements of (a) breaking and entering in the nighttime, (b) a dwelling house and (c) with

stealth. Peters v. State, 76 So.2d 147 (Fla. 1954), at 148. However, breaking or unlawful entry was not even circumstantially proven. This court has stated that the elements of a statutory burglary are (1) the breaking and (2) the entering of a building with (3) the intent to commit a felony therein. Non-consent is not, per se, an element of the crime; the element of "breaking" however, means the actual or constructive use of some force against a part of a building in effectuating an unconsented entry. See 12 C.J.S. Burglary §11. State v. Jackson, 281 So.2d 353 (Fla. 1973).

When the crime charged is breaking and entering with intent to commit larceny, we have held that non-consent to the alleged taking intended may be established by circumstantial evidence. Johnson v. State, 157 Fla. 328, 25 So.2d 801 (1946). Non-consent to entry of a building may also be established in this manner. State v. Jackson, supra, 281 So.2d at 355. In the case at bar, however, the evidence presented at trial showed nothing as to whether the assailant was invited into the sorority house and was lawfully present.

D.

THE EVIDENCE AS A MATTER OF LAW WAS INSUFFICIENT AS A MATTER OF LAW AS TO THE BURGLARY COUNTS ONE AND SIX.

The argument in section "C" above is hereby adopted in support of this conclusion.

CONCLUSION

For reasons more specifically argued above, the death sentence imposed on Appellant should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument has been furnished to David P. Gauldin, Esquire, Assistant Attorney General, The Capitol, Suite 1502, Tallahassee, Florida 32301, by hand/~~mail~~ this 9 day of November, A.D. 1982.

Respectfully submitted,

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