IN THE SUPREME COURT OF FLORIDA

EDWARD CLIFFORD THOMAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 61,170

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellant was the Defendant and the Appellee the Prosecution in the Seventeenth Judicial Cricuit, in and for Broward County, Florida.

The parties will be referred to as the "Appellant" and the "Appellee."

The following symbol will be used:

"R"	Record on Appeal, including the trial transcript and transcript of the hearings.

STATEMENT OF THE CASE AND FACTS

The Appellee accepts the Appellant's Statement of the Case.

The Appellee accepts the Appellant's Statement of the Facts except where argumentative and, in particular, takes exception to the following statement:

At page 6 when the Appellant characterizes the trial judge's comment "get out" as being in an obvious derrogatory manner.

POINTS INVOLVED

POINT I

WHETHER THE DEATH PENALTY IS UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED?

POINT II

WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OVER THE DEFENDANT'S OBJECTION?

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ARGUMENT

POINT I

THE DEATH PENALTY IS NOT UNCONSTITUTIONAL ON ITS FACE OR AS APPLIED.

The Appellant acknowledges that the Florida death penalty has been upheld as constitutional by our Florida Supreme Court and the United States Supreme Court. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied; Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); Proffitt v. State, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The Appellant has not advanced any new legal theory that would warrant reconsideration of the above precedent. See, e.g., Hitchcock v. State, Case No. 51,108 (1982 F.L.W. 99)[Feb. 25, 1982]; Proffitt v. State, 428 U.S. 242 (1976); Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

The Appellant's argument that Florida's Constitution prohibits cruel or unusual punishment while the United States Constitution cruel and unusual punishment is not well taken (Appellant's Initial Brief, p. 8). The Appellee submits that Florida's Constitution is more restrictive and, therefore, the Appellant has made no showing of how he was harmed so that he may not be heard to complain.

Finally, the Appellant makes a bare allegation that the death penalty is unconstitutional as applied to him. The basis of this allegation is that there is supposed doubt as to whether the Defendant was competent to aid and assist defense counsel

(Appellant's Initial Brief, p. 13). The record on appeal totally rebutts such allegation as not only did defense counsel not request a psychiatric examination for the Defendant, but counsel moved to allow Defendant to participate at trial as co-counsel (R 1409). Although the record does not contain a ruling on said motion, the Appellee submits that it can be assumed that defense counsel felt the Defendant was competent to aid and assist him.

POINT II

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OVER THE DEFENDANT'S OBJECTION.

The Appellant has initially alleged that his confession should have been suppressed because of his limited intelligence. Although mental capacity may be considered in determining whether under the totality of the circumstances a confession is voluntary, State v. Chorpenning, 294 So.2d 54 (Fla. 2nd DCA 1974), the lack of mental capacity is generally considered only as it relates to credibility and not admissibility, see, e.g., Palmes v. State,397 So.2d 648 (Fla. 1981); Reddish v. State, 167 So.2d 858 (Fla. 1964). A confession will not be excluded on the ground of limited intellect of the Defendant where it is shown that the Defendant understands his rights. See, e.g., Myles v. State, 399 So.2d 481 (Fla. 3rd DCA 1981); Ashley v. State, 370 So.2d 1191 (Fla. 3rd DCA 1979); Lane v. State, 353 So.2d 194 (Fla. 3rd DCA 1977).

In the instant case, the Appellant has not alleged that his limited intelligence rendered him incompetent to knowingly and intelligently waive his Miranda rights. Even if, however, the Appellant had so alleged, there is sufficient evidence to justify the findings of the trial court that the Appellant knowingly waived these rights. There is no question that the Appellant was read his Miranda rights (R 28,55). The Appellant has a ninth grade education, he stated affirmatively that he understood each right read to him, and he signed the waiver form (R 78,30-31,28).

In Myles v. State, 399 So.2d 481 (Fla. 3rd DCA 1981), the defendant had the literary level of a first grader and was found to be of borderline intelligence. The defendant alleged that his statement should have been suppressed as a matter of law because Myles was of limited intelligence and functionally illiterate rendering him mentally incompetent to knowingly and intelligently waive his Miranda rights. The court held that Myles was not a juvenile, nor was there any evidence in the record which would justify reversing the decision of the trial court. In the instant case, the Appellant made no attempt to prove, by expert testimony or otherwise, that he lacked the mental capacity to knowingly and intelligently waive his Miranda rights. Therefore, the Appellee respectfully submits that there is no evidence in the instant record to justify reversing the decision of the trial court. See, e.g., State v. Riscado, 372 So.2d 126 (Fla. 3rd DCA), dismissed, 378 So.2d 348 (1979)(trial court's determination upon question of fact in a suppression hearing will not be reversed unless clearly shown to be without basis in evidence or predicated upon an incorrect application of law). See also, Ross v. State, 386 So.2d 1191 (Fla. 1980) (mental weakness alone will not automatically render confession involuntary and inadmissible, but, rather, it is only a factor to be considered in determining voluntariness of confession).

The record in the instant case reflects with unmistakable clarity that the trial judge found that the Defendant gave the statement "without any duress or hope of reward freely and voluntarily make [sic[the statement." (R 94). Peterson v. State, 382 So.2d 701 (Fla. 1980). The trial court also specifi-

cally found against the Appellant's allegation that he was intoxicated. The court noted that the Appellant's signature on the waiver form "has appreciably more clarity than mine does." (R 94). The trial court also compared the Appellant's voice on the taped confession with his voice in the courtroom before ruling that he was sober enough for the confession to be voluntary (id.). See Reddish v. State, 167 So.2d 858 (Fla. 1964)(the effect of intoxicating liquors or narcotics generally relates to the credibility to be given the confession, rather than its admissibility). The interrogating officers both testified that the Appellant did not appear to be under the influence of drugs or alcohol (R 40,56). The record demonstrates that the trial judge understood his responsibilities and properly fulfilled them. The record further supports a finding that the confession was, by a preponderance of the evidence, voluntary and made in accordance with Miranda.

The Appellant next alleges that "there are many subtle errors by the trial court" but only enlightens this Honorable Court to one of such alleged errors (Appellant's Initial Brief, p. 18). The Appellee has examined the entire error on appeal and is not able to discern any of the "subtle errors" referred so, therefore, will discuss the one alleged error brought to this Court's attention by the Appellant.

The State introduced into evidence what the Appellant admittedly wore on the night of the homicide (R 710). Among the pieces of clothing was the Appellant's shirt which had a "speck of blood" and which the expert testified he could not determine to be human blood (R 718). The Appellant acknowledges

that it was harmless error to admit the shirt (Appellant's Initial Brief, p. 18). The Appellee submits, however, that the shirt could be construed to be exculpatory to the Appellant in light of the other evidence introduced by the expert, to-wit: blood from the victim's car in which he was murdered which included the presence of human blood on the driver's seat back, the ceiling above the driver's side, the left rear door glass inside, and the front bumper (R 717). In light of the amount of blood found in and around the murder site, the fact that the shirt worn by the accused on the night of the homicide contained only a speck of blood could be construed as exculpatory.

The Appellee's assertion is buttressed by the fact that the expert further testified that approximately four out of every ten items examined from a laundry contained specks or spots of blood (R 718). Further, the Appellant was wearing bib overalls over the shirt and the overalls covered up that part of the shirt that contained the speck of blood (R 719). The overalls contained no blood at all (R 720).

Additionally, a trial judge has broad discretion to determine what evidence is material and relevant. Shale v. United States, 388 F.2d 616 (5th Cir. 1968), cert. denied, 393 U.S. 984, 89 S.Ct. 456, 21 L.Ed.2d 445 (1969). The trial court specifically found that the shirt was probative evidence (R 710). The Appellant has not met his burden of showing an abuse of discretion. Further, a defendant is entitled to a fair trial, not a perfect trial.

POINT III

THE TRIAL COURT DID NOT ERR BY ALLEGED CONDUCT [PRECLUDING A FAIR AND IMPARTIAL TRIAL FOR DEFENDANT].

Robert Redding, the witness most integral to the thrust of the defense, was a self-styled and admitted male prostitute who hustled men for homosexual favors (R 957,1321). The defense presented Redding in order to challenge the content of the Appellant's confession. The Appellant gave as a motive for the killing of the principal, Mr. Walsworth, that Walsworth owed the Appellant $150.00 for two sex tricks (R 839-841). Witness Redding was called as a defense witness to testify that $75.00 was an excessive figure, based upon the going rate of hustling and male prostitution for Fort Lauderdale, the area where the murder occurred (R 1321).

At the conclusion of Redding's testimony, the trial court asked if there was anything else (R 966). When defense counsel replied in the negative, the trial court then stated in a soft voice, "Okay. Get him out of here. Next witness" (R 966, 969). When defense counsel objected, the state attorney responded, "Basically, I think the tone of the Court's voice was not that upsetting. And I don't know if the jury heard it, Your Honor, when the court indicated...." (R 968). When the jury returned, the trial court gave a curative instruction that "if I made any offensive remarks regarding the last witness, I hereby instruct you that you should disregard any remarks that the Court made, okay?" (R 969). The defense did not request that the jury be polled in order to ascertain whether

or not the remark was heard. The Appellee submits that if the defense felt that the remark was so prejudicial as to warrant a mistrial or a new trial, questioning the jury would have been appropriate in order to ascertain the prejudicial effect, if there was any.

At the hearing on the motion for new trial, the court reporter present during the trial was called to testify (R 1323). The court reporter testified, "The words were very soft, and I almost didn't hear it myself, and the judge was sitting facing me with almost his back to the jury." (R 1323). The court reporter was approximately three feet from the trial judge while the jury was substantially farther away (R 1324). When defense counsel asked if the trial judge's tone was favorable, the court reporter replied that"(i)t was too low to have any emotion attached to it, one way or the other." (R 1324).

The Appellee submits that in order for a remark made by the trial judge to be so prejudicial as to deprive the Appellant of a fair and impartial trial, the remark must at least be heard by the jury. In Villageliu v. State, 347 So.2d 445 (Fla. 3rd DCA 1977), the Appellant alleged as error that a comment of the trial judge prejudiced his defense. The court held:

> The third point is without merit because it clearly appears that the comment of the trial judge which was made out of the presence of the jury was not prejudicial to the defendant and could not, except with the aid of a most vivid imagination, be said to have intimidated anyone. Judicial comments during a trial must be carefully scrutinized for their possible effect on the jury or a witness.

> See the rule in Parise v. State, 320 So.2d 444 (Fla. 3rd DCA 1975). Where it appears, as it does here, that the comment could not have prejudiced the defendant's trial in any way, the comment will not be sufficient to require a new trial. Cf. Lister v. State, 226 So.2d 238 (Fla. 4th DCA 1969).

347 So.2d at 447 (emphasis added). See also, Raulerson v. State, 103 So.2d 281 (Fla. 1958)(a judge errs if he comments on the evidence in the presence of the jury); United States v. Jackson, 470 F.2d 684 (5th Cir.), cert. denied, 412 U.S. 951, 93 S.Ct. 3019, 37 L.Ed.2d 1004 (1973)(trial court's judicial aside to the effect that "I wish you could find all the defendants guilty, and punish them, and everything else" did not constitute reversible error since the judge made it clear that the aside was not a statement of the law and since it did not appear that the remark had any influence on the jury's verdict). One of the jurors did, however, testify on August 20, 1981, at the hearing on the motion for new trial that she heard the trial judge say "get out." The juror further testified, though, that the remark did not influence her vote or verdict (R1346-1347). The Appellee respectfully submits that the record on appeal does not support the Appellant's contention that he was denied a fair and impartial trial because of the trial judge's comment. Hamilton v. State, 366 So.2d 8 (Fla. 1978).

As to the alleged error of the trial court in denying defense counsel's motion for continuance, a motion for continuance is addressed to the sound discretion of the trial court and will not be disturbed on appeal unless a clear abuse

of that discretion is demonstrated. E.g., Hicks v. Wainwright, 633 F.2d 1146 (5th Cir. 1981); United States v. Cueto, 611 F.2d 1056 (Fla. 1980); United States v. Harbin, 601 F.2d 773 (5th Cir.), cert. denied, 444 U.S. 954, 100 S.Ct. 433, 62 L.Ed.2d 327 (1979). The denial of a motion for continuance should not be reversed by the appellate court unless there has been palpable abuse of the court's sound judicial discretion, which appears clearly and affirmatively in the record. Magill v. State, 386 So.2d 1188 (Fla. 1980).

In the instant case, defense counsel moved for a new trial on July 2, 1981. A hearing was held on the motion approximately six weeks later, August 20, 1981. At that time defense counsel requested a continuance on the ground that he (the defense counsel) had himself been arrested and had been concentrating on exonerating himself; therefore, he did not have time to prepare the motion (R 1334). The motion for new trial was the only motion argued on August 20, 1981. One of the jurors was present as a defense witness. The Appellee submits that there has been no showing of palpable abuse of discretion and, therefore, this Court should refuse to say the trial court committed error. Id.

POINT IV

THE WEIGHT OF THE EVIDENCE SUPPORTS A CONVICTION OF FIRST DEGREE MURDER ON COUNT II IN THE INDICTMENT OF THE DEFENDANT.

By the Appellant's own admission, victim Bettis had been the only witness to the murder of Walsworth and that he, the Appellant, had made up his mind that he would have to take care of Bettis (R 833,843). The Appellant saw Bettis witness the murder so he decided to finish it. The Appellant had the specific intention of "(g)etting rid of him, too." (R 847). The Appellant hit Bettis in the face and broke his jaw; kicked him in the face while wearing regular dress shoes when Bettis attempted to get up; kicked him in the ribs when Bettis again attempted to get up; and when Bettis attempted to get up again, the Appellant hit him again in the face (R 809-810). The Appellant was very muscular and was to become a professional boxer the week after his arrest (R 752,818).

Florida Statutes 782.04(1)(a), defines first degree murder as the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed. The Appellant had the specific intent of killing the victim and carried this intent out by mercilessly beating the life out of him. The police officer who responded to the scene observed that the victim was unconscious and could not get any vital signs on him (R 303). The victim was admitted to the hospital unconscious and remained continuously so until he died on May 16, 1981 (R 446-447). The medical examiner who per-

formed the autopsy testified that he died as a result of blunt injuries to his head and that he determined the manner of death to be homicide (R 449).

Premeditated design to effect the death of a human being is a fully formed and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. Matthews v. State, 130 Fla. 53, 177 So. 321 (1938); Forehand v. State, 126 Fla. 464, 171 So. 241 (1937); Littles v. State, 384 So.2d 744 (Fla. 1st DCA 1980); Weaver v. State, 220 So.2d 53 (Fla. 2nd DCA 1969). Premeditation may be established by circumstantial evidence. Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221, reh. denied, 429 U.S. 874, 97 S.Ct. 194, 50 L.Ed.2d 157 (1976).

In the instant case, however, circumstantial evidence was not needed as the Appellant confessed to the premeditation by declaring that he had the express purpose of finding victim Bettis in order "to get rid of him, too" (R 847). The Appellant, once he found Bettis, proceeded to carry out his premeditated design to effect Bettis' death. The Appellant used his hands and feet to brutally beat Bettis until blood came from his jaw due to the jaw being broken, swelling started immediately over his left eye, and there was blood on the sidewalk and the concrete wall (R 810, 811, 817). The victim offered no resistance at all (R 818). The Appellant stated that he did not know if Bettis was conscious or not when the Appellant left but his eyes were open although not moving (R 817). The Appellee submits that from the above recitation

of the facts by the Appellant it is reasonable to assume that the Appellant either knew Bettis was dead or was soon to die, especially in light of his testimony that he went to find Bettis in order to finish him off. The fact that Bettis lived for five months is totally irrelevant since expert testimony was provided to prove that it was the beating that killed Bettis (R 449).

The Appellant's allegation that the fatal injury was caused when the victim struck his head on a bottle or cement block in falling is not supported by the record (Appellant's Initial Brief, p. 27). The Appellee submits, however, that even if this fact were true, it would not lessen the Appellant's culpability as the fall was due to the force of Appellant viciously beating the victim with the express purpose of getting rid of him. See Hitchock v. State, Case No. 51,108 (1982 F.L.W. 99)[Feb. 25, 1982](defendant choked and beat the victim and pushed her body into some bushes after the victim said she was going to tell her mother that the defendant had had sexual relations with her).

POINT V

THE TRIAL COURT DID NOT ERR BY IMPOSING THE DEATH SENTENCE FOR THE DEFENDANT'S CONVICTION ON COUNT II.

After two jury verdicts of guilty of the crimes of murder in the first degree, the jury returned an advisory sentence recommending that life sentences be imposed (R 1526, 1527, 1537, 1538). The trial judge adjudicated the Defendant guilty (R 1528, 1529). After carefully considering and weighing all the evidence presented during the trial and sentencing procedure, the trial judge, pursuant to the safeguards afforded by §921.141, Florida Statutes, entered written detailed findings of fact in support of the death penalty (R 1545-1548). The trial judge specifically found three aggravating circumstances existed as to Count II: (1) that at the time of the crime for which he is to be sentenced, the Defendant had been previously convicted of another capital offense; (2) that the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (3) that the crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; (4) that the crime was especially heinous, atrocious or cruel; and (5) that the homicide was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial judge found two mitigating circumstances: (1) that the Defendant has no significant history or prior criminal acitivity and (2) the age of the Defendant at the time of the crime.

The Appellee acknowledges that the trial court erred in doubling up the aggravating circumstances by finding that the murder was committed to avoid arrest and committed to disrupt or hinder enforcement of law. Welty v. State, 402 So.2d 1159 (Fla. 1981). The trial court properly found that the murder was to avoid arrest but did err by also finding that the murder was committed to disrupt or hinder enforcement of law. Id. at 1164; Vaught v. State, Case No. 52,835 (1982 F.L.W. 13)[January 15, 1982].

The Appellee respectfully submits that the four remaining aggravating circumstances far outweigh the two mitigating circumstances. The facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. Tedder v. State, 322 So.2d 908 (Fla. 1975). The Appellant brutally murdered victim Walsworth because the victim owed the Appellant $150.00 (R 841). The Appellant stabbed the victim with a seven-and-a-half-inch kitchen type knife that he had expressly taken with him in order to murder the principal (R 845,846). After he murdered the principal, he pulled the victim from the victim's car and noticed out of the side of his eye that Bettis had witnessed the murder (R 842). The Appellant then threw away the knife and went and had a hamburger (R 847,850).

At the moment the Appellant saw Bettis, he formed the specific intention of murdering Bettis (R 847). The Appellant effected his premeditated design by brutally and viciously beating the victim with his fists and kicking him with his feet until Bettis lapsed into a critical unconscious condition that

lingered on for five months. After each beating, which lasted a total of approximately four minutes, the Appellant took his time in letting the victim get back up which, the Appellee submits, increased the fear and agony of the victim.

The Appellee respectfully submits that Appellant's conduct in murdering Bettis solely because he was a witness to the first murder was a cruel, senseless destruction of human life and the only appropriate penalty under Florida law is death. The instant capital felony is set apart, by the existence of four statutory aggravating circumstances, from the norm of capital felonies, there are only two mitigating circumstances, and the sentencing judge has given due consideration to the recommendation of the jury, then the Appellee respectfully submits that a sentence of death should be affirmed by this Honorable Court. See Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980); Tedder v. State, 322 So.2d 908 (Fla. 1975); Gardner v. State, 313 So.2d 675 (Fla. 1975), cert. denied, 428 U.S. 908, 96 S.Ct. 3219, 49 L.Ed.2d 1216 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

This Court has upheld the imposition of the death sentence despite the Defendant's youthful age and lack of any prior, significant criminal activity. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); Meeks v. State, 339 So.2d 186 (Fla. 1976). Thus, the trial judge's error in doubling up the two aggravating circumstances was harmless since it did not affect the weighing

process. Vaught v. State, supra. The murder was especially heinous, cruel, and atrocious because of the infliction of physical pain and mental anguish suffered by the victim before death was finally effected, State v. Dixon, supra; White v. State, 403 So.2d 331 (Fla. 1981), and committed in a cold, calculated, premeditated manner without any pretense of moral or legal justification.

Although the advisory recommendation of the jury is to be accorded great weight, the ultimate decision on whether the death penalty should be imposed rests with the trial judge. White v. State, id. at 340; Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978). Death is presumed to be the proper penalty when one or more aggravating circumstances are found unless they are outweighed by one or more mitigating circumstances. White v. State, supra; State v. Dixon, supra. The jurors in the instant case were obviously repulsed by the lifestyle of the characters involved (R 1347). This repulsion could very well account for the recommendation of life rather than death. The Appellee submits that the murder was outrageously wicked and vile, and designed to inflict a high degree of pain while the Appellant enjoyed the suffering of the victim. See Dobbert v. State, supra; State v. Dixon, supra. Therefore, the Appellee respectfully submits that the trial judge imposed the death sentence consistently with Tedder. Cf., White v. State, supra; Dobbert v. State, 375 So.2d 1069 (Fla. 1979); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892, 99 S.Ct. 249, 58 L.Ed.2d 237 (1978); Hoy v. State, supra; Sawyer v. State,

313 So.2d 680 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976).

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the Appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail, to Sheldon Golding, Esq., Special Public Defender, 700 S.E. Third Avenue, Suite 200, Fort Lauderdale, Florida 33316, this 22nd day of March, 1982.

_____
Of Counsel