

IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,176

MANUEL VALLE,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

FILED
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BY
DEC

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

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CORRECTED SUPPLEMENTAL BRIEF OF APPELLEE

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TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS.....	1-3
QUESTION PRESENTED.....	4
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	6-12
CONCLUSION.....	13
CERTIFICATE OF SERVICE.....	14

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
Skipper v. South Carolina, U.S. _____, 39 Cr.L.Rptr. 3041 (April 29, 1986).....	3,4,5,6, 8,9,10,11, 12,13
Valle v. State, 474 So.2d 796 (Fla. 1985).....	1,4

INTRODUCTION

The following symbols will be used in this Brief: "R." will designate the record on appeal; "T." the transcripts of the lower court's proceedings; and "A." the Appendix simultaneously filed by Appellee with this Corrected Supplemental Brief.

STATEMENT OF THE CASE AND FACTS

On July 11, 1985, this Court rendered an opinion which affirmed the conviction for first degree murder and death sentence of Manuel Valle. A motion for rehearing was denied on September 17, 1985. One of the arguments raised during the appeal by Valle was whether the trial court, during the sentencing phase, improperly excluded testimony that Valle would be a model prisoner in the future. This Court's opinion of July 11, 1985 addressed that argument in two ways. First, the Court stated:

. . . there was no testimony by the expert witnesses here that appellant had the capacity to be rehabilitated, only that he would be a model prisoner while in prison. It does not necessarily follow that if one behaves while he is in prison that he will behave outside of prison."

Valle v. State, 474 So.2d 796,
804 (Fla. 1985).

The opinion continued to observe:

Competent evidence of this same type had already been heard by the jury. Eurvie Wright, special administrator of the Dade County Corrections and Rehabilitation Department, was a bureau supervisor of the Dade County Stockade in 1975 when appellant was an inmate there. Wright, who was a rehabilitation officer, testified that during the time appellant was in prison, he was a model prisoner and was rehabilitated.

Id.

Thus, this Court concluded that, "[w]e believe, then, that there was substantial, competent evidence presented to the jury on the issue of appellant Valle's rehabilitation; thus, . . . any other evidence on this issue was merely cumulative." Id.

On December 16, 1985, Valle served a Petition for Writ of Certiorari which was filed in the Supreme Court of the United States. (A.1). One of the issues raised in the Petition was stated as follows:

The exclusion of expert testimony that Petitioner would be a model prisoner if incarcerated and not executed violated the Eighth Amendment.

(A.32).

The State submitted a Brief of Respondent in opposition to Petition for Writ of Certiorari. (A.37).

While the Petition was pending in the Supreme Court of the United States, that Court rendered a decision in the case of Skipper v. South Carolina, ___ U.S. ___, 39 Cr.L.Rptr. 3041 (April 29, 1986). (A.67). In Skipper, the Supreme Court held, in part, that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under Eddings, such evidence may not be excluded from the sentencer's consideration." 39 Cr.L.Rptr. at 3042. (A.68). The facts and holding of Skipper will be addressed in greater detail in the Argument portion of this Brief. On May 5, 1986, the Supreme Court of the United States rendered the following order:

The motion for Leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Florida for further consideration in light of Skipper v. South Carolina, 476 U.S. ___ (1986).

(A.72).

This Corrected Supplemental Brief is submitted for the purpose of discussing whether Skipper v. South Carolina, affects the decision previously rendered by this Court.

QUESTION PRESENTED

WHETHER SKIPPER V. SOUTH CAROLINA,
476 U.S. _____, 39 CR.L.RPTR. 3041
(1986), AFFECTS THE HOLDING OF THIS
COURT IN VALLE V. STATE, 474 SO.2D
796 (FLA. 1985), AND WHETHER A NEW
SENTENCING TRIAL IS REQUIRED.

SUMMARY OF ARGUMENT

Skipper v. South Carolina, 476 U.S. _____, 39 Cr.L.Rptr. 3041 (1986), does not affect this Court's opinion of July 11, 1985. Skipper held that "model prisoner" testimony is admissible as mitigating evidence. In the instant case, model prisoner testimony was admitted from the stockade supervisor, but was not permitted from three other witnesses, none of whom observed Valle's behavior in jail. The additional testimony was thus cumulative, and its exclusion was harmless. While Skipper rejected a similar cumulative evidence/harmless error argument, the Court's rejection of that argument was limited solely to the particular facts of Skipper, which, as detailed in the Argument section of this Brief, are clearly distinguishable from those of the instant case. Thus, while the harmless error argument was inapplicable in Skipper, it is applicable in this case.

ARGUMENT

SKIPPER V. SOUTH CAROLINA, 476 U.S. _____, 39 CR.L.RPTR. 3041 (1986), DOES NOT AFFECT THE OPINION OF THIS COURT IN VALLE V. STATE, 474 SO.2D 796 (FLA. 1985), AND DOES NOT REQUIRE A NEW SENTENCING HEARING.

Skipper v. South Carolina, 476 U.S. _____, 39 Cr.L.Rptr. 3041, 3042 (1976), held that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating" and "such evidence may not be excluded from the sentencer's consideration." (A.68). Skipper is inapplicable to the instant case where "model prisoner" testimony was admitted from the bureau supervisor of the Dade County Stockade, and the excluded testimony, from other witnesses, that Valle would be a "model prisoner" was cumulative, and thus, its exclusion was harmless.

In Skipper, the defendant and his wife both testified during the sentencing trial that the defendant "had conducted himself well during the seven-and-one-half months he spent in jail between his arrest and trial." 39 Cr.L.Rptr. at 3041. He also testified that if sentenced to life imprisonment "he would behave himself in prison...." Id. at 3042. He also sought "to introduce testimony of two jailers and one 'regular visitor' to the jail to the effect that petitioner had 'made a good adjustment' during his time

spent in jail." Id. As noted above, the Supreme Court held that such testimony could not be excluded. The State had attempted to argue that the exclusion was harmless because the excluded testimony was merely cumulative to the testimony given by Skipper and his wife. The argument was rejected for the following reasons:

Finally, the State seems to suggest that exclusion of the proffered testimony was proper because the testimony was merely cumulative of the testimony of petitioner and his former wife that petitioner's behavior in jail awaiting trial was satisfactory and of petitioner's testimony that, if sentenced to prison rather than to death, he would attempt to use his time productively and would not cause trouble. We think, however, that characterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us. The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges--would quite naturally be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations. The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to

rape other inmates. Under these circumstances, it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute a reversible error.

39 Cr.L.Rptr. at 3043.

Thus, it can well be seen that the rejection of the cumulative evidence/harmless error argument in Skipper is specifically limited to the facts in Skipper and does not mandate a reversal in the instant case.

A review of the relevant sentencing evidence in the instant case will show that the evidence proffered by Valle was cumulative, that competent evidence from a disinterested jailer was presented, and that the exclusion of the proffered testimony was therefore harmless.

Eurvie Wright, the special administrator of the Dade County Corrections and Rehabilitation Department, testified that in 1975, while he was the bureau supervisor of the Dade County Stockade, and Valle was an inmate, he found Valle to be a model prisoner and that as a rehabilitation officer, found Valle to be rehabilitated. (T.1495-1497). Thus, contrary to Skipper, competent "model prisoner" testimony was

presented from a Stockade supervisor, as opposed to the self-serving testimony referred to in Skipper (of Skipper and his ex-wife). Indeed, the Court in Skipper emphasized the great weight and credibility that such a jailer's testimony would likely carry.

Valle proffered the testimony of Dr. Brad Fisher. Dr. Fisher, a clinical psychologist, would have testified that because of Valle's lack of violent behavior while in jail, Valle would not be a danger to inmates. (R.1092, 1109). Dr. Fisher's opinion was based on his review of available depositions "and even more importantly the entire jail record for Manuel Valle." (R.1095). Additionally, he interviewed Valle for eight-ten hours and spent some hours talking to another psychologist, Dr. Toomer, who had evaluated Valle. (R.1096). Dr. Fisher's second-hand testimony about Valle's good behavior in jail is clearly inferior in quality when compared to the first-hand testimony of Eurvie Wright, the stockage supervisor.

Valle also proffered the testimony of Lloyd McClendon, an assistant administrator for prison industries in Ohio, who had an employment history related to the corrections field. (R.1079). He would have testified that Valle would have been a model prisoner because he was a loner in prison, and that he would tend towards the mainstream, follow rules

and stay out of prison. (R.1084-86). His conclusions were based on a review of Officer Spell's deposition, the confession of Valle, and a meeting with Valle of unspecified duration. (R.1083-84). Again, the witness did not have the direct, first-hand, lengthy contact with Valle as did Eurvie Wright, and McClendon's testimony would thus obviously carry less weight than Wright's and adds nothing to Wright's testimony.

Valle also sought to use the testimony of John Buckley, a consultant on correctional matters, who had been a sheriff and taught courses on law and justice. (T.1505-1506). He would have testified that Valle was a model prisoner. (T.1507, R.1074-1075). His opinions were based on reading Valle's confession, Officer Spell's deposition, and a 3-1/2 hour meeting with Valle. (R.1073-1074). Here too, the testimony adds nothing to Wright's and it is of less value than Wright's because of its second-hand nature consisting of a cursory review.

Thus, as can readily be seen, the proffered evidence was truly cumulative in the instant case, the important first-hand testimony of the stockade supervisor was admitted into evidence, and the exclusion of the evidence in the instant case was clearly harmless. The most important point is that in Skipper, the only model prisoner testimony

admitted was the self-serving testimony of Skipper and his ex-wife. In this regard it should be further noted that the testimony of the three proffered witnesses would also be somewhat self-serving, as these witnesses were apparently retained by the defense and were not as truly disinterested as the stockade supervisor.

Other distinctions exist between Skipper, and the instant case. In Skipper, the exclusion of model prisoner testimony could not be deemed harmless because the prosecutor, during his closing argument, "made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to rape other inmates." 39 Cr.L.Rptr. at 3043. See, Gardner v. Florida, 430 U.S. 349, 362 (1977). In the instant case, the prosecutor did not present any such argument to the jury. (T.1512, et. seq.). Thus, Skipper presented one further reason for rejecting the harmless error argument, which reason does not exist in the instant case.

Moreover, as the initial briefs from this appeal reflect, Valle was on probation at the time that he murdered the police officer. At the sentencing hearing Valle stipulated that he violated his prior probation. (T.1550-1551). Valle was stopped for traffic violations immediately prior

to the murder (T.996-971, 977-979), and Valle, in his confession, indicated his concern, at the time of being stopped, of going back to jail. (T,1078). If that is how Valle behaved while on probation, the model prisoner argument, projecting future conduct in jail, is obviously mighty weak in the first place. The opinion in Skipper does not reveal a prior history of probation violation. Thus, one more reason for applying the cumulative evidence/harmless error argument exists in the instant case that did not exist in Skipper.

CONCLUSION

Based on the foregoing, the Court should conclude that Skipper v. South Carolina does not affect this Court's opinion of July 11, 1985. The State would respectfully request that an amended opinion, or supplementary opinion, be issued for the express purpose of distinguishing Skipper from the instant case, and showing why the cumulative evidence/harmless error argument applies to the facts of the instant case, while it did not apply to Skipper.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing CORRECTED SUPPLEMENTAL BRIEF OF APPELLEE was furnished by mail to MICHAEL ZELMAN, ESQUIRE, 3050 Biscayne Boulevard, Suite 503, Miami, Florida 33137, on this 23rd day of July, 1986.



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