FILED
DEC 24 1982
SID J. WHITE
CLERK SUPREME COURT

IN THE SUPREME COURT OF FLORIDA

DANIEL KARR JOHNSON,

Appellant,

v.

CASE NO. 61,937

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS

(Continued)

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

DANIEL KARR JOHNSON, :

Appellant, :

v. : CASE NO. 61,937

STATE OF FLORIDA, :

Appellee. :

_____:

REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant submits this brief in reply to the state regarding Issues III, IV, V, VI, and VIII of the initial brief. Appellant will rest upon the argument in the initial brief for the remaining issues. Appellee's brief will be referred to as "AB", followed by the appropriate page number in parenthesis.

II ARGUMENT

ISSUE III

ARGUMENT IN REPLY TO APPELLEE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN GRANTING THE STATE'S REQUESTED JURY INSTRUCTION NO. 1, AS MODIFIED, AND IN CHARGING THE JURY THAT INCONSISTENT EXCULPATORY STATEMENTS CAN BE USED TO AFFIRMATIVELY SHOW CONSCIOUSNESS OF GUILT AND UNLAWFUL INTENT BECAUSE THE INSTRUCTION GIVEN CREATED A CONCLUSIVE OR MANDATORY PRESUMPTION OF GUILT IN VIOLATION OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION.

The state argues that trial counsel did not properly object to the requested jury instruction (AB at 15-16). Trial counsel did say when the instruction was first discussed: "I don't feel that's a correct jury instruction" (R 1005). After the trial court had modified the state's request (and in doing so made the error worse), appellant's counsel objected to the version as constructed by the court, and was overruled (R 1011). If the purposes of requiring a contemporaneous objection to the granting or denial of special jury instructions are to place the trial court on notice of what it is doing, and to give the court an opportunity to avoid error, these goals were fully met here, because the trial court in actively debating the instruction (primarily with the prosecutor) during the charge conference (R 1006-1010) was keenly aware of what was happening. Thus, appellant's counsel could have done nothing more to preserve the point.

The state argues that the jury instruction was permissible because it "is premised upon a truthful statement of the law" (AB at 15). This is not correct, as demonstrated in the initial brief. Moreover, this Court's recent opinion in Smith v. State, ___ So.2d ___ (Fla.S.Ct. Case No. 57,743, opinion filed October 28, 1982) lends support to appellant's position. In Smith the defendant gave contradictory pretrial statements and did not testify at trial, much like appellant. The admissibility of the statements, not a jury instruction concerning them, was an issue on appeal. This Court held they were admissible, but not as conclusive evidence of guilt:

> Appellant also argues that his inconsistent exculpatory pre-trial statements were improperly admitted to impeach other pre-trial statements. He contends that since he was not a witness his credibility was not in issue and such impeachment evidence was therefore irrelevant. We disagree. The credibility of appellant's ultimate confession was, of course, a material issue for the jury to decide. His earlier exculpatory statements, and the sequence of events showing how his story changed through the course of several interviews, were certainly relevant to this issue. Furthermore, the earlier statements and the context in which they were given were also relevant to show that appellant had attempted to avoid detection by lying to the police. See Cortes v. State, 135 Fla. 589, 185 So. 323 (1938); 1 Wharton's Criminal Evidence, § 215 (13th ed. 1972). As such they were an indication of guilt, the ultimate material issue.

Id., slip opinion at 6 (emphasis added). Likewise, many years ago, this Court held that a defendant's arming himself and refusing to surrender is not conclusive evidence of

guilt, but rather is merely "one of a series of circumstances from which guilt may be inferred." Carr v. State, 45 Fla. 11, 16, 34 So. 892 (1903). Thus, even 80 years ago, this Court recognized the non-conclusive nature of a defendant's conduct after a crime is committed.

The state, as did the trial court, has placed improper reliance upon State v. Frazier, 407 So.2d 1087 (Fla. 3d DCA 1981) in support of this jury instruction. In Frazier, the question on appeal was whether a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c)(4) should have been granted where the defendant had given conflicting accounts of how a stabbing had occurred. The Third District held the motion should have been denied, because the defendant's conflicting stories created a jury question. The court's careless language in Frazier cannot be used to support a jury instruction which mandates that a defendant be found guilty because he gave false statements. Therein lies the danger in extracting a jury instruction from an entirely different principle of law. This Court must reverse for a new trial.

ISSUE IV

ARGUMENT IN REPLY TO APPELLEE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN CHARGING THE JURY THAT BURGLARY AND ROBBERY ARE PRIOR VIOLENT FELONIES.

Appellee seems to argue that this Court's recent opinion in Mann v. State, 420 So.2d 578 (Fla. 1982) would permit appellant's jury to be instructed on a prior burglary conviction to show a prior crime of violence as an aggravating circumstance (AB at 18). Counsel for appellee apparently did not view State Exhibit No. 27, the prior judgment and sentence, for it clearly shows a conviction for "burglary of a dwelling (2nd degree felony)" under Section 810.02(3), Florida Statutes (1977). It does not show any of the aggravating factors in the burglary statute which would transform a simple residential burglary into a violent felony. As stated by this Court in Mann, the jury is limited to the four corners of the judgment and sentence:

> We hold that a prior conviction of a felony involving violence must be limited to one in which the judgment of conviction discloses that it involved violence.[4]
>
> . . .
>
> [4]Such as a conviction under § 810.02 (2)(a), Fla.Stat.

Id. at 581.

Having failed to overcome the holding of Mann, appellee then seeks to argue that "it would appear that there were persons present in the dwelling at the time of the burglary"

(AB at 19). Appellant's immediate response to this argument is that the statement is too speculative to constitute proof beyond a reasonable doubt of an aggravating circumstance, as required by State v. Dixon, 283 So.2d 1 (Fla. 1973) and other cases. Such speculation is also too unreliable to constitute proof of an aggravating circumstance in light of Woodson v. North Carolina, 428 U.S. 280 (1976).

Appellee's argument also appears to violate another facet of Mann v. State, supra. There the state argued it could show burglary as a crime of violence by proof that Mann had committed a sexual battery upon the burglary victim. This Court rejected such an attempt to prove a crime of violence by extrinsic evidence, and limited proof to the judgment of conviction, by the language quoted above. Thus, the state never proved that appellant's burglary conviction was a violent crime.

Appellee concludes its argument on this point by stating that proof of a robbery conviction is enough to satisfy this aggravating circumstance. Appellee has done nothing to rebut appellant's argument that constitutional error has resulted when a jury returns a general verdict which may have been based upon an alternative unconstitutional theory. Appellee has not even discussed the principles of Sandstrom v. Montana, 442 U.S. 510 (1979) as argued in the initial brief. Thus, the trial court's erroneous instruction on burglary as a prior violent felony requires a new sentencing hearing before a new jury.

ISSUE V

ARGUMENT IN REPLY TO APPELLEE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ALLOWING DETECTIVE NEWMAN TO TESTIFY DURING THE PENALTY PHASE THAT APPELLANT STATED AT THE BOOK-IN DESK THAT HE WAS ON PAROLE AND IN CHARGING THE JURY ON THIS AGGRAVATING CIRCUMSTANCE.

Appellee argues the record does not show that appellant was not advised of his Miranda rights when booked into the Clay County Jail (AB at 20). The events surrounding appellant's arrest are as follows: He was arrested by the Jacksonville Sheriff's Office in Duval County and taken to the Duval County Jail, where he was read warnings by Jacksonville Detective Hendry (R 552) and Jacksonville Detective Pruitt (R 508). Appellant requested an attorney at the Duval County Jail (R 557) and requested that his mother contact an attorney, so the interview by Clay County Detective Newman at the Duval County Jail ceased (R 511-512). Appellant was then transported to the Clay County Jail, where Newman asked appellant whether he was on parole (R 1088-1089). There is no further indication of Miranda warnings in the record at that time. Indeed, in light of appellant's request for an attorney and for his mother to find one, all questioning should have ceased because of appellant's exercise of his right to counsel, Edwards v. Arizona, 451 U.S. 477 (1981) and of his right to remain silent, Michigan v. Moseley, 423 U.S. 96 (1975).

Thus, notwithstanding the ascertains by appellee to the contrary, the record does reflect that appellant was not

advised of his Miranda rights at the book-in desk, and after he affirmatively sought to cut off questioning, as recognized by the police, Detective Newman's attempt to gain further evidence falls squarely within the prohibition of Rhode Island v. Innis, 446 U.S. 291 (1980) and the other cases cited in the initial brief.

Appellee next contends that appellant never moved to suppress the book-in statement (AB at 21). His pre-trial motion to suppress specifically covered all statements referred to in the prosecutor's response to discovery (R 28-29; 180-181). Even if it did not, his oral motion to suppress the book-in statements at the penalty phase was enough to preserve the issue, even if not properly raised in the pre-trial motion to suppress. Savoie v. State, ___ So.2d ___ (Fla.S.Ct. Case No. 61,083, opinion filed November 10, 1982). When appellant's counsel objected and renewed his prior motion to suppress, his objection was overruled and neither the prosecutor nor the trial court expressed any doubt about what the objection pertained to (R 1088). Therefore, appellant's admission of being on parole was improperly considered by the jury because it was the only evidence of that aggravating circumstance which the jury may have found. Again, a new sentencing hearing before a new jury is required.

ISSUE VI

ARGUMENT IN REPLY TO APPELLEE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN INSTRUCTING THE JURY AND IN FINDING THREE AGGRAVATING CIRCUMSTANCES FOR WHICH THERE WAS NO RELIABLE EVIDENCE.

Appellee argues that appellant's statements can be used as evidence of three aggravating circumstances, citing Sireci v. State, 399 So.2d 964 (Fla. 1981)(AB at 23). There is nothing in that case to indicate that any attack was made upon Sireci's statements on the grounds that they unreliable. Thus, Sireci is not good authority for appellee's position.

Appellee then states that the reliability of evidence to support aggravating circumstances as required by Woodson v. North Carolina, 428 U.S. 280 (1976) "has be repudiated" by Gray v. Lucas, 677 F.2d 1086, on rehearing, 685 F.2d 139 (5th Cir. 1982). This is not true. Gray held that while aggravating circumstances must be proven beyond a reasonable doubt, it is not constitutionally required that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. There is nothing in Gray to support a claim that it undermines the reliability requirements of Woodson.

Moreover, the Eleventh Circuit has further strengthened the reliability requirement of Woodson in Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). There a challenge was made to the Florida death penalty procedure because the

defendant did not have the right to cross examine state witnesses during the penalty phase. The Eleventh Circuit noted that "reliability in the fact finding aspect of sentencing has been a cornerstone of [the United States Supreme Court's death penalty] decisions." Id. at 1253. The court then held that the defendant has the constitutional right to cross examine adverse witnesses in Sentencing hearings as a tool to insure reliability. Thus, the reliability of evidence of aggravating circumstances is still required, and appellant's contradictory statements, being unreliable, cannot be used to support any aggravating circumstances. Again, a new sentencing hearing before a new jury is required.

ISSUE VIII

ARGUMENT IN REPLY TO APPELLEE AND IN SUPPORT OF THE PROPOSITION THAT THE LOWER COURT ERRED IN FAILING TO CONSIDER ANY NON-STATUTORY MITIGATING CIRCUMSTANCES.

In Mann v. State, 420 So.2d 578, 581 (Fla. 1982), this Court stated:

> The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what he found . . . .

Appellee argues the trial court did consider non-statutory mitigation (AB at 30). But by the trial court's very words at sentencing, it is clear that this Court need not speculate that only statutory mitigation was considered:

> The Court having carefully considered each element in aggravation and mitigation as set forth in Section [921.141 (5)(6), Florida Statutes (1981)] the court makes the following findings on such elements. As to the mitigating elements or mitigating circumstances, as they are denominated in the statutes, from again the testimony, the evidence, and arguments heard on trial of the cause, as well as the pre-sentence investigation report prepared in this case, the court finds that none of the mitigating circumstances set forth in this statute are present in this case. (R 444; emphasis added).

Likewise, in the written sentencing order, the same limitation on consideration of only statutory mitigation is expressed (R 426). What more "unmistakable clarity" is need to show the trial court's improper limitation? It is crystal clear that the trial court failed to consider

non-statutory mitigation.

Appellee argues that "this court must presume, in the absence of evidence to the contrary, that the trial judge followed the appropriate fact finding procedures" (AB at 31). Such a position ignores this Court's traditional role in reviewing death sentences, and, if accepted, would amount to no review at all and would lead to unconstitutional death sentences in Florida. As Mann correctly stated, this Court must review the trial court's findings and not speculate as to their correctness. Here, there can be no speculation that the trial court improperly limited itself to statutory mitigation with "unmistakable clarity." The cause must be remanded for consideration by the trial court of all non-statutory mitigation.

III CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, as well as that contained in the initial brief, appellant requests the following relief: As to Issues I, II, and III, appellant requests that the judgment and sentence be vacated and the cause be remanded for a new trial. As to Issues IV, V, and VI, appellant requests that the sentence be vacated and the cause be remanded for a new penalty phase by a new jury. As to Issues VII and VIII, appellant requests that the sentence be reconsidered by the trial judge.

Respectfully submitted

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Ms. Barbara Ann Butler, Assistant Attorney General, Suite 513, Duval County Courthouse, Jacksonville, Florida, 32202; and a copy mailed to Mr. Daniel Karr Johnson, #A-602588, Post Office Box 747, Starke, Florida, 32091, on this 22 day of December, 1982.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender