IN THE SUPREME COURT OF FLORIDA

FILED

FEB 28 1983

SID J. WHITE
CLERK SUPREME COURT
By _____
Chief Deputy Clerk

DAVID W. TROEDEL,

Appellant,

vs. Case No. 61,957

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT
FOR COLLIER COUNTY, FLORIDA

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN ADMITTING THE RESULTS OF A NEUTRON ACTIVATION ANALYSIS TEST

Appellee respectfully submits the admissibility of the neutron activation analysis test was not preserved for appellate review since no objection to its admissibility was made either before or at trial, and no fundamental error is involved. Our Courts have long recognized issues not presented to the trial court cannot be raised for the first time on appeal. State v. Jones, 204 So.2d 515 (Fla. 1967); Clark v. State, 363 So.2d 331 (Fla. 1978); Castor v. State, 365 So.2d 701 (Fla. 1978) and Crespo v. State, 379 So.2d 191 (Fla. 4th DCA 1980).

The Court pointed out this contemporaneous objection rule is grounded in practical necessity. Timely objection by the party claiming error gives the trial judge notice of possible error and an opportunity to correct same. Additionally, if the propriety of evidence is properly challenged, a record is made so that the appellate court has the benefit of evidence and argument by both parties.

In Clark v. State, supra., the Court, citing State v. Jones, supra., said:

> At the present time all defendants in criminal trial who are unable to engage counsel are furnished counsel without charge. Application of the exception is no longer necessary to protect those charged with crime who may be ignorant of their rights. Their rights are now well guarded by defending counsel. Under these circumstances further application of the exception will contribute nothing to the administration of justice, but rather will tend to provoke censure of the judicial process as permitting "the use of loopholes, technicalities and delays in the law which frequently benefit rouges at the expense of decent members of society."
> (363 So.2d at 334)

The contemporaneous objection rule has been applied in other death cases. See Lucas v. State, 376 So.2d. 1149 (Fla. 1979) and Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

In Lucas the defendant's defense was that he was intoxicated at the murder and could not form the premeditation necessary for first-degree murder. The state called a police officer in rebuttal who had not been named on the prospective witness list. The officer testified concerning the defendant's behavior and appearance some two hours prior to the murder. On appeal the defendant claimed reversible error because Richardson v. State, 246 So.2d 771 (Fla. 1971) had not been complied with. In rejecting that argument, this Court said:

> "... it was incumbent upon the appellant to raise a timely objection and thereby allow the trial court to specifically rule on the issue. The record shows that while defense counsel brought the state's non-compliance to the attention of the court, he did not interpose an objection; but rather, he deferred to the trial court's statement of the applicable law. This court will not indulge in the presumption that the trial judge would have made an erroneous ruling had an objection been made and authorities cited contrary to his understanding of the law.
> (376 So.2d at 1151-1152)

An objection to the test should have been made in this instance.

Appellant seeks to justify his lack of an objection by blanketly claiming fundamental error without demonstrating same. Fundamental error is error which goes to the foundation of the case. See Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). The Court in State v. Smith, 240 So.2d 807 (Fla. 1970) quoted the Second District's discussion of fundamental error in Gibson v. State, 194 So.2d 19 (Fla. 2d DCA 1967). The three Gibson categories are:

(1) Cases a statute is alleged to be unconstitutional,

(2) Cases where the issue reaches down into the very legality of the trial itself, and

(3) Cases where a question exists as to the jurisdiction of the court.

None of these are applicable to this situation.

Error has not been demonstrated.

ISSUE II

THE TRIAL COURT PROPERLY WEIGHED THE AGGRAVATING AND MITIGATING FACTORS AND CONCLUDED DEATH IS THE APPROPRIATE SENTENCE

The trial judge in his written sentencing order found five (5) aggravating circumstances and no mitigating circumstances. The aggravating factors are:

(1) Homicide committed while engaged in both a robbery and burglary,

(2) Capital felony committed to avoid or prevent a lawful arrest or to escape from custody,

(3) The capital felony was committed for pecuniary gain,

(4) The homicide was especially henious, atrocious or cruel, and

(5) The capital felony was committed in a cold, calculated and premeditated manner.

Appellant argues the evidence does not support the factor of cold, calculated and premeditated. Appellee disagrees for the following reasons.

This Court in Combs v. State, 403 So.2d 418 (Fla. 1981) held a murder can be henious, atrocious and cruel as well as cold, calculated and premiditated. The henious apsect relates to the manner in which the crime was done, i.e. causing the decedent prolonged agony. The cold and calculated aspect of

the murder more nearly relates to the killers intent and state of mind when the crime is committed. The circumstances of these murders indicate appellant and his co-defendant went to the residence with the avowed purpose of killing.

During a conversation at the Good Times Lounge between appellant, co-defendant Hawkins and a Mike Tillman, Hawkins asked appellant if he owned a gun, and appellant stated he did. It was during this same conversation that Hawkins indicated he wanted to "blow away a couple of dudes". It is appellant's gun that is ultimately taken to the murder scene and is one of the murder weapons. Testimony at trial indicates a pillow and pillowcase were found with bullet holes through it, with feathers on both bodies of the victims and in a large pool of blood. Feathers were also found on the .25 caliber pistol identified as belonging to Troedel. The evidence also indicates two pair of rubber gloves were discovered at the scene. In addition, large amounts of barium and antimony were found on swabs after rubbing appellant's hands.

All of these factors led the trial judge to conclude this was a cold, calculated and premeditated killing and that appellant was the trigger man. The findings of the trial judge on aggravating and mitigating circumstances are factual findings which should not be disturbed unless there is a lack of competent evidence to support such a finding. Sireci v. State, 399 So.2d 964 (Fla. 1981) and Lucas v. State, supra. As indicated above

there was substantial, competent evidence to support this finding.

Appellant also argues the trial judge should have found he was under extreme duress and the substantial domination of another. This argument is based on the facts that appellant testified he acted out of duress, i.e. he was threatened by his co-defendant, that appellant allegedly did not know the victims and that he did not drive the vehicle. The United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, ___U.S.___, 101 S.Ct.___, 71 L.Ed.2d 1 (1982) indicated there must be individualized consideration of mitigating factors in each death case.

It is clear that the trial court considered this mitigating factor but found it had not been established.

> D. While the defendant had an accomplice in the perpetration of his criminal acts, the defendants' participation was nevertheless of major consequence to the murder of the victims. The defendant was the trigger man. In no way could it be said that the defendant's participation was relatively minor or that he was acting under extreme duress or substantial domication of another person. (R85)

In keeping with Lockett and Eddings the trial judge considered the mitigating circumstances discussed here.

This Court has repeatedly held the decision as to whether the death penalty should be imposed rests with the trial judge. White v. State, 403 So.2d 331 (Fla. 1981). Death is presumed the proper punishment when one or more aggravating circumstances

are found unless they are out-weighed by one or more mitigating circumstances. State v. Dixon, 283 So.2d 1 (Fla. 1973) Sub judice, no mitigating factors were found and several good aggravating factors were demonstrated. Under these circumstances the death penalty was appropriate.

ISSUE III

THE DEATH SENTENCE IN THIS SITUATION WAS THE PROPER SENTENCE

Appellee respectfully submits the principle enunciated by the Court in Enmund v. Florida, ___U.S. ___, 102 S.Ct.___, 73 L. Ed.2d 1140 (Fla. 1982) is not applicable here. The Enmund majority held imposition of the death sentence against one who aids and abets in the commission of a felony but does not himself kill, attempt to kill, intend to kill or contemplate that life be taken violates the Eighth and Fourteenth Amendments.

The evidence in this case indicates appellant fired the .25 caliber pistol, which was the murder weapon. The gun belonged to appellant, and he acknowledged same when asked by the first officer on the scene. Additionally, large amounts of barium and antimony were found on appellant's hands indicating close proximity to the .25 caliber weapon. Appellant was present during a conversation wherein his co-defendant not only

inquired about guns but also indicated the use to be made of the gun, to blow away two dudes.

Appellant was not just present during the commission of the felonies, he participated in the murders and knew killing was contemplated. Under these circumstances Enmund v. Florida, supra., is not applicable.

CONCLUSION

Based on the foregoing arguments and authorities the judgment and sentence of the trial court should be affirmed.

Resppectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Daniel R. Monaco, Esq. 3550 South Tamiami Trail, Naples, Florida 33942 on this 24th day of February, 1983.

Peggy A. Tunice

Of Counsel for Appellee