IN THE SUPREME COURT OF FLORIDA

LARRY DONNELL BROWN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

CASE NO: 62,922

REPLY BRIEF OF THE APPELLANT

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

Appellant Larry Donnell Brown will rely on his initial brief to reply to the arguments presented in the State's answer brief, except for the following additions regarding Issues I., II.B., V., VI., VII.A., VII.B., VII.C., VII.D., VII.F., VII.H, VIII., IX., and X.

ARGUMENTS

I.

THE COURT BELOW ERRED IN OVERRULING LARRY BROWN'S OBJECTION TO THE PROSECUTOR'S ASSERTION DURING CLOSING ARGUMENT THAT BROWN AND HIS COUNSEL DELIBERATELY INTIMIDATED KEY STATE WITNESS GEORGE DUDLEY, AND IN REFUSING TO INSTRUCT THE JURY TO DISREGARD THE PROSECUTOR'S REMARKS.

Appellant Larry Donnell Brown takes exception with the State's assertion that there was a factual basis for the prosecutor's statement and that the statement was therefore proper. On the contrary, the record contains no factual support for what was, in effect, the prosecutor's "testimony" that the reason Brown moved to

sit in a particular part of the courtroom was so that he could intimidate the State's key witness, George Dudley.

Defense counsel explained to the court out of the jury's hearing that Brown had moved in order to be able to see Dudley, who sat slumped in the witness box, and thus to exercise his constitutional right to confront his accusers (R 174).

While providing no support for the prosecutor's comment, the record does provide support for defense counsel's explanation. As discussed in Brown's initial brief, the assistant state attorney himself admonished Dudley on several occasions to "speak up" and to take his hand away from his mouth so that he could be heard (R 913, 915, 924, 928, 932). In view of Dudley's apparent reluctance to testify, it is easy to understand why Brown felt it necessary to change position in order meaningfully to confront his chief accuser.

The State suggests a seven-part test culled from Donnelly v. De Christoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) for determining whether a prosecutorial remark is so prejudicial as to deny a defendant a fair trial. However, the State does not undertake an analysis of the remark made in the instant case using the Donnelly criteria. Brown will undertake such an analysis, addressing in turn each of the seven criteria identified by the State.

(1) Whether the remark was a brief episode or a persistent error. It is true that the remark at issue did not consume a substantial portion of the State's closing argument at trial.

However, it was given added emphasis by the prosecutor's continuation of comment along the same line after the bench conference at which Brown's objection was overruled (R 1174-1175). (Please see Brown's initial brief at page 21 for more this point.)

(2) Whether the comment introduced misleading evidence or omitted evidence valuable to the accused. As discussed above, the comment by the assistant state attorney did introduce misleading evidence in the form of the prosecutor's unsubstantiated allegation as to Brown's motive in moving from counsel table to face George Dudley.

(3) Whether the trial court instructed the jury to disregard the comment. Although requested by defense counsel to do so, the trial court refused to instruct the jury to disregard the prosecutor's comment (R 1174).

(4) The strength of the government's case. The case against Brown was weak, resting as it did upon circumstantial evidence and the testimony of the very co-defendant whom Brown allegedly tried to intimidate, a co-defendant who had worked a deal with the State for a life sentence in return for his testimony against Larry Brown (R 924-925, 968). (Please see the Statement of the Facts contained in Brown's initial brief for details concerning the evidence the State presented against Brown at trial.)

(5) Whether the comment was made in response to remarks made by defense counsel. Neither in the court below nor on appeal has the State claimed that the assistant state attorney was responding

to anything said by defense counsel, nor would the record support such an assertion.

(6) Whether there was an objection to the comment. The State acknowledges at page one of its brief that Brown did object to the prosecutor's remark accusing him of intimidating George Dudley, and the record clearly shows that he did object (R 1173-1174).

(7) The intent of the prosecutor and whether the prosecutor retracted the comment. Although the face of the record is silent concerning the prosecutor's intent, the gratuitous injection into the proceedings of unsupported and unsworn "testimony" as to why Brown positioned himself where he could see Dudley could have been for no other purpose than to prejudice the jurors against the defense. Far from retracting the comment, the assistant state attorney gave it additional impact by continuing in the same vein after the court overruled defense objections (R 1174-1175).

The above discussion makes it evident that, using the very criteria proposed by the State as appropriate, the remarks of the prosecutor in the presence of the jury that tried Larry Brown were so prejudical that Brown was denied a fair trial and is entitled to a new one.[1]

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1) At least one of the State's citations in its discussion of this issue is error. The Court will find Songer v. State at 322 So.2d 481, not 841.

II.

THE COURT BELOW ERRED IN FAILING TO GRANT LARRY BROWN MEANINGFUL RELIEF DUE TO THE STATE'S FAILURE TO COMPLY WITH FLORIDA'S DISCOVERY RULES, AND IN ALLOWING THE STATE TO INTRODUCE THE HEARSAY TESTIMONY OF GEORGE DUDLEY.

B. Hearsay Testimony

The State asserts that it is questionable whether Brown's hearsay objection to George Dudley's testimony concerning the familial relationship between Brown's wife and Ricky was sufficiently developed so as to give the trial judge an opportunity to rule on the objection. The record reveals that Brown's counsel made his hearsay objection in the following language (R 917):

> Judge, we object. First of all, this is hearsay, as far as his knowledge of how he might know this relationship.

It is difficult to imagine how the objection could have been set forth any more clearly, or the grounds therefor any further elucidated. The point has been preserved for appeal.

V.

THE COURT BELOW ERRED IN REFUSING BROWN'S REQUEST TO PROVIDE THE JURY WITH VERDICT FORMS WHICH WOULD INDICATE, IF THE JURY FOUND BROWN GUILTY OF FIRST-DEGREE MURDER, WHETHER THE VERDICT WAS BASED UPON A FINDING OF PREMEDITATION OR FELONY-MURDER.

Larry Brown takes exception with the State's reading of Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Enmund does much more than merely "suggest" that death "may" be inappropriate for one who neither killed, attempted to kill, nor intended or contemplated that life would be taken; Enmund absolutely bars the death penalty for a person so situated.

This Court's recent decision in Hawkins v. State, ___ So.2d ___ (Fla., Case No. 61,936, opinion filed July 14, 1983) clearly points up the need for the special verdict forms proposed by Brown. In Hawkins there was ample evidence to support premeditated murder. A witness testified that early on the evening of the murders he heard Hawkins talking about guns and about wanting to "blow away" two people in the subdivision where the victims lived. The two victims were shot with two different guns. Both Hawkins and his co-participant in the crimes had gunpowder residue on their hands. Despite this evidence, the jury returned a special verdict form finding Hawkins guilty of felony-murder rather than premeditated murder. This Court relied on the verdict in vacating Hawkins' death sentences and his sentence for the robbery that supported his felony-murder conviction. (Compare Walsh v. State, 418 So.2d 1000 (Fla. 1982), in which the jury did not return special verdict forms. Although the Court did reverse Walsh's death sentence, the Court found "more than sufficient evidence" to establish premeditation on far fewer facts indicative of premeditation than were present in Hawkins.)

VI.

THE COURT BELOW ERRED IN ADJUDICATING LARRY BROWN GUILTY OF BURGLARY AND IMPOSING A LIFE SENTENCE THEREFOR, BECAUSE BURGLARY WAS THE OFFENSE USED TO SUPPORT HIS CONVICTION FOR FELONY-MURDER.

In light of this Court's recent opinion in Bell v. State, ___ So.2d ___ (Fla., Case No. 62,002, opinion filed June 9, 1983), Larry

Brown asks that both his sentence and his conviction for burglary be vacated.[2]

VII.

THE COURT BELOW ERRED IN SENTENCING LARRY DONNELL BROWN TO DEATH BECAUSE THE SENTENCING WEIGHING PROCESS INCLUDED IMPROPER AGGRAVATING CIRCUMSTANCES AND EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, RENDERING THE DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

THE COURT BELOW ERRED IN CONSIDERING THE NON-STATUTORY AGGRAVATING CIRCUMSTANCE THAT LARRY BROWN HAD LED A "PARASITIC EXISTENCE" ALL HIS LIFE.

The State seems to argue in its brief that the trial court did not consider as an aggravating circumstance that Larry Brown had allegedly led a "parasitic existence" merely because the court did not reiterate this comment in his written sentencing order. This fact, however, is not determinative. See Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983); Norris v. State, 429 So.2d 688 (Fla. 1983).

In the recent case of Barclay v. Florida, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 33 Cr.L. 3292 (Case No. 81-6908, decided July 6, 1983), the Supreme Court of the United States held that it did not necessarily violate the United States Constitution for the

2) But see Hawkins v. State, ___ So.2d ___ (Fla., Case No. 61,936, opinion filed July 14, 1983), which was decided after Bell, but which reversed only Hawkins' sentence for the felony of robbery which underlay the felony-murder, and affirmed the conviction for said offense.

sentencing court in a death penalty case where there were no mitigating circumstances to consider the non-statutory aggravating circumstance of the defendant's criminal record. However, in Barclay and the related case of Zant v. Stephens, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 33 Cr.L. 3195 (Case No. 81-89, decided June 22, 1983), the Court indicated that a different result might apply if the non-statutory aggravating circumstance was one which the sentencing court could not constitutionally consider. Here the non-statutory aggravating circumstance was Larry Brown's status as an alleged "parasite." To weigh Brown's status in the balance when assessing the ultimate criminal sanction against him constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. See Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

B.

THE COURT BELOW ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT BROWN WAS ON PAROLE FOR BURGLARY AT THE TIME OF THE INSTANT CAPITAL OFFENSE.

In Williams v. State, 386 So.2d 538 (Fla. 1980), this Court held that the trial court should not have found an aggravating circumstance solely on the basis of information contained in a presentence investigation report. Because the State offered no evidence of said circumstance, the State failed to carry its burden of proving the circumstance beyond a reasonable doubt. The same is true of the finding of the court below with regard to the aggravating factor here under consideration.

C.

THE COURT BELOW ERRED IN FINDING THAT BROWN HAD BEEN PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OF THREAT OR VIOLENCE TO THE PERSON, BASED UPON A 1977 CONVICTION FOR ATTEMPTED SECOND DEGREE ARSON AND A 1981 CONVICTION FOR AGGRAVATED BATTERY.

Please see discussion of Williams in VII. B.

D.

THE COURT BELOW ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF A BURGLARY AND RAPE.

At page 20 of its brief the State erroneously says the trial court found that the murder was committed while Appellant was engaged in the crimes of robbery and kidnapping. The trial court found instead that the murder occurred during a burglary and rape; there was no kidnapping.

F.

THE COURT BELOW ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL.

Appellee incorrectly states at page 24 of its brief that the victim suffered a "brutal beating death." Anna Jordan did not die from any beating, but from asphyxiation (R 1082). Furthermore, the evidence fails to support the State's assertion that Jordan was "brutally beaten." George Dudley, the only eyewitness who testified, said only one blow was struck (R 930, 933). His testimony was

partially corroborated by the medical examiner, Dr. Joan Wood, who testified that the marks on Jordan's face could have been made by a single holding of her and a single blow (R 1099-1100). There was no testimony that would lend credence to the contention that Jordan was beaten, especially "brutally beaten."[3]

H.

THE COURT BELOW ERRED IN FAILING TO CONSIDER ALL EVIDENCE IN MITIGATION OF THE SENTENCE TO BE IMPOSED UPON LARRY DONNELL BROWN.

In Moody v. State, 418 So.2d 989 (Fla. 1982) this Court remanded the case for resentencing, in part because, as here, the sentencing order of the trial court was unclear as to whether the court considered nonstatutory mitigating circumstances, evidence of which as presented by the defendant. Similarly, in Magill v. State, 386 So.2d 1188 (Fla. 1980) the Court vacated the death sentence and remanded the case for further proceedings because the sentencing court failed to articulate specifically what mitigating circumstances he may or may not have considered. The Court noted that this step is needed so that the Court may give meaningful review to a sentence of death.

Brown set forth in his initial brief several circumstances supported by the evidence he presented which this Court has suggested may be legitimate considerations which can support a life sentence

3) At least one of the State's citations in its discussion of this sub-issue is in error. The Court will find Sireci v. State at 399 So.2d 964, not 309 So.2d.

rather than a death sentence. Here he would add that his capacity for gainful employment, as evidenced by his picking tomatoes to help his mother financially (R 1340), may be yet another fact which can justify a life sentence. See Buckrem v. State, 355 So.2d 111 (Fla. 1978).

SUMMARY

Contrary to Appellee's assertion, there are (non-statutory) mitigating circumstances which the trial court should have found. Therefore, even if one or more of the aggravating circumstances found by the trial court is valid, this cause must be remanded for resentencing. See, e.g., Blair v. State, 406 So.2d 1103 (Fla. 1981); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Miller v. State, 373 So.2d 882 (Fla. 1979); Elledge v. State, 346 So.2d 998 (Fla. 1977).

Furthermore, this Court stated in Williams, supra, that a jury recommendation of life imprisonment, such as was returned in the instant case, militates against the presumption that death is the appropriate penalty when there is one or more valid aggravating circumstance and no mitigating circumstance.

VIII.

THE COURT BELOW ERRED IN SENTENCING LARRY DONNELL BROWN TO DEATH WHEN HIS CO-PERPETRATOR, GEORGE DUDLEY, HAD NEGOTIATED A LIFE SENTENCE FOR HIS PART IN THE SAME OFFENSES.

The State asserts that Larry Brown planned the crimes involved herein (Brief of Appellee, p. 29). The only record support cited

for this assertion is page 925, where George Dudley testified that Brown approached him and said, "We got a job to do." This hardly constitutes proof that Brown planned the burglary. One should also keep in mind the third party who was allegedly involved in the crimes, Ricky Brown, and the possibility that it was he who conceived the burglary plan.

IX.

SENTENCING LARRY DONNELL BROWN TO DEATH WHEN IT WAS NOT PROVEN THAT HE INTENDED TO KILL ANNA JORDAN CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The State proposes several factual distinctions between Enmund v. Florida, supra, and the instant case. Unlike Earl Enmund, the State says, Brown was present during the killing. Enmund, however, does not turn upon presence or absence at the scene, but focuses upon the intent of the defendant. If presence or absence at the scene was the determining factor, one who hired another to commit murder, but himself stayed away from the scene, could not be sentenced to death.

The State also claims that Brown, unlike Enmund, initiated the underlying felony. There is scant evidence in the record to support this conclusion.[4]

The State also mentions that Brown affirmed after the crime that he had "'killed one white bitch'" (Brief of Appellee,

4) The judge who sentenced Earl Enmund to death found that Enmund planned the robbery of the Kerseys. See Enmund v. Florida, 73 L.Ed.2d at 1145, footnote 2.

p. 31). This statement lacks probative value because Brown did not say to whom he was referring, and the statement does not relate to whether or not Brown intended Anna Jordan's death.

Finally, the State says Brown made no effort to depart or to interfere with the killing, but "simply continued on with the joint venture" (Brief of Appellee, p. 31). Earl Enmund likewise made no effort to depart or to interfere with the killing, but continued on with the joint venture.

X.

THE TRIAL COURT ERRED IN SENTENCING LARRY DONNELL BROWN TO DEATH OVER THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, BECAUSE THE FACTS SUGGESTING DEATH AS AN APPROPRIATE PENALTY WERE NOT SO CLEAR AND CONVINCING THAT VIRTUALLY NO REASONABLE PERSON COULD DIFFER.

The State urges this Court to retreat from the standards it announced in Tedder v. State, 322 So.2d 908 (Fla. 1975) for assessing whether a court's override of a jury recommendatin of a life sentence is proper.

As recently as July 14, 1983 this Court relied upon Tedder in vacating the death sentences of David Lee Hawkins. Hawkins, supra.

The State has presented no persuasive argument why this Court should revisit Tedder. Contrary to the State's assertion, Tedder has not resulted in the jury becoming the sentencer.[5] This fact becomes apparent when one considers the number of cases in which this Court has upheld a sentencing court's override of a jury's

5) When arguing to the jury during the penalty phase of Brown's trial, the State took the position that a jury recommendation of life would be virtually binding on the judge. Said the prosecutor (R 1360):

life recommendation. See, e.g., Spaziano v. State, 433 So.2d 508 (Fla., Case No. 50,250, opinion filed May 26, 1983);[6] Bolender v. State, 422 So.2d 833 (Fla. 1982); Stevens v. State, 419 So.2d 1058 (Fla. 1982); Miller v. State, 415 So.2d 1262 (Fla. 1982); Buford v. State, 403 So.2d 943 (Fla. 1981); White v. State, 403 So.2d 331 (Fla. 1981); Zeigler v. State, 402 So.2d 365 (Fla. 1981); McRae v. State, 395 So.2d 1145 (Fla. 1980); Johnson v. State, 393 So.2d 1069 (Fla. 1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979); Hoy v. State, 353 So.2d 826 (Fla. 1977); Barclay v. State, 343 So.2d 1266 (Fla. 1977); Douglas v. State, 328 So.2d 18 (Fla. 1976).

Furthermore, in Barclay v. Florida, supra, the Supreme Court of the United States relied upon the Tedder rule to "buttress" its decision.

The Tedder standards were not met here. The trial judge offered no compelling reasons for rejecting the jury's life recommendation.

The State asserts that there are no significant mitigating factors to balance against the aggravating factors found by the court below. The jurors decided otherwise, as they were entitled to do. E.g., Lewis v. State, 398 So.2d 432 (Fla. 1981).

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5) (continued) If you do not recommend death, then Judge Farnell really, practically speaking, does not have the alternative of, either, life or death. You have to understand that.

6) In Spaziano this Court rejected appellant's argument that it constituted double jeopardy for the judge to override the jury's life recommendation because the recommendation is advisory only and is not binding.

CONCLUSION

Appellant Larry Donnell Brown respectfully renews his prayer for the relief requested in his initial brief, but he additionally asks that not only his life sentence for burglary be vacated, but his conviction for that offense as well.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to the Office of the Attorney General, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida and to the Appellant, Larry Donnell Brown, # 042359, P.O. Box 747, Starke, Florida 32091, this 29th day of July, 1983.

Robert F. Moeller
Robert F. Moeller