IN THE SUPREME COURT OF FLORIDA

BARRY HOFFMAN,

APPELLANT,

-VS-

CASE NO. 63,295

STATE OF FLORIDA,

APPELLEE.

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

Appellee accepts the statement of the case as stated on pages one and two of appellant's brief as being complete and accurate.

STATEMENT OF THE FACTS

The statement of the facts as stated on pages nine constitutes a reasonably accurate summary of the testimony of the witnesses called by the parties below and is therefore acceptable to appellee to the extent stated. Of course, by virtue of the verdict of guilt this Court must assume the jury rejected the testimony of appellant and his girlfriend Cathy Taylor that he was at her home when the crime was committed.

Parrish v. State, 97 So.2d 356 (Fla.1st DCA 1957). The jury obviously rejected their testimony since it contradicted appellant's admission of guilt and Ms. Taylor was impeached by the testimony of Roy Dorn (TT 1005).

Appellee, moreover, wishes to amplify the statement of facts since relevant facts are not included in appellant's summary of testimony.

Not only did George Marshall testify that appellant admitted "participation in the murders": He testified that appellant told him en route to the airport that he went to the Ramada Inn, struck Ihlenfeld with a board, stabbed him and ultimately slashed the victim's throat (TT 706). Appellant told Marshall that he said to the victim, ". . . he f----- over the wrong people. . ." (TT 707).

Doctor Floro in addition to describing the wounds that caused death testified there were several wounds to the hands and wrist that were "defensive wounds" (TT 610). Moreover, the wounds found on Ihlenfeld were consistent with appellant's description of how he killed this victim.

Agent Poleski and Special Agent Lukepas, who testified at length concerning the interrogation of appellant, both testified that appellant never requested counsel (TT 762, 780); that appellant was read his rights from the form (Exhibit 30) and that he understood those rights (TT 758). It should be noted that in the waiver form signed by appellant he stated he was

willing to talk and did not want an attorney at that time (TT 758). More importantly, Poleski testified that appellant told him the latter was willing to talk to Florida investigators if they would come to Michigan (TT 764). This also was confirmed by Lukepas (TT 785). Lukepas was present when appellant at the latter's request (TT 795) talked to Dorn and Maxwell and confirmed that appellant was again advised of his rights pursuant to Miranda (TT 788) and signed the second waiver (TT 794).

Both Poleski and Lukepas testified that appellant was not under the influence of any intoxicating alcohol or drugs (TT 761-762; 790-791). Poliski testified that he did not hear appellant ask Provost [appellant's employer and the person who actually wanted Ihlenfeld murdered] for an attorney (TT 769). Lukepas acknowledged that he heard appellant ask Provost for some assistance but didn't know what kind of assistance appellant was seeking (TT 816). Appellant's confession to Dorn and Maxwell, in Lukepas' presence, was consistent with the physical facts and was consistent with Marshall's testimony (TT 796-802) except with regard to the murder of Parrish.

Appellant has neglected to include in his summary the fact that a package of cigarettes was found at the murder scene and appellant's fingerprint was lifted from that physical evidence. (TT 886-893).

Other facts relevant to a disposition of the issues presented herein will be included in the argument portion of this brief.

POINTS ON APPEAL

POINT I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS CONFESSIONS AND ADMISSIONS AND ADMITTING SAME AT TRIAL, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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POINT I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS CONFESSIONS AND ADMISSIONS AND ADMITTING SAME AT TRIAL, IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

ARGUMENT

Appellant contends the trial judge erred in denying his motion to suppress the statement given to the various authorities because he equivocally asserted his right to counsel when he called Provost and the authorities made no effort to clarify whether appellant wanted to talk without an attorney present. Appellant relies upon Nash v. Estelle, 597 F.2d 513 (5th Cir. 1978).

Appellee respectfully submits that this argument is without merit, assuming this issue is even properly before this Court. The motion to suppress alleged the statement should be suppressed because (1) he was promised that if he admitted involvement in the crime, he would be allowed to plead guilty to second degree murder; and (2) that he was under the influence of drugs when he gave the alleged confession (R 38-39). It was never alleged that he had invoked his right to counsel and the authorities failed to honor his request. Based upon the testimony of appellant at the suppression hearing that he requested Lukepas and Dorn for an attorney (TT 239-240) which

they, of course, denied (TT 184; 196; 230), counsel urged that the statements were not freely and voluntarily given(TT 251)--even though appellant denied giving a confession (TT 245). The trial judge denied the motion (TT 251), and it is rather obvious that he simply elected to believe Poleski, Lukepas and Dorn and elected to disbelieve the testimony of this appellant, for his testimony was in direct contradiction with that of the State's witnesses. Had he believed the testimony of appellant, he would obviously granted the motion.

Appellant's premise that he invoked his right to counsel, equivocally or emphatically, rests upon his testimony and that testimony was not believed by the trier of the fact. Therefore, the cases he relies upon are factually inapplicable.

In any event, the written waiver executed by appellant after the phone call to Provost wherein he allegedly asked for legal assistance, was sufficient evidence of his voluntary and intelligent waiver of his right to remain silent and his right to counsel. Witt v. State, 342 So.2d 497 (Fla.1977) and Cannady v. State, 427 So.2d 723 (Fla.1983), 8 FLW 90, 92. In Cannady, supra, this Court said:

> This stricter standard for showing that an accused has knowingly and intelligently waived a previous request for counsel is met when the accused voluntarily executes a written waiver.

8 FLW at ~~92~~ 727

The phone call to Provost occurred prior to the execution of the written waiver (State's Exhibit 31; TT 224; 838-839) which

preceded the statement wherein appellant gave a full and complete statement (TT 224; 842-848) to Detective Dorn in the presence of Lukepas and Maxwell. Thus, if this Court were to conclude the alleged request for assistance from Provost took place, any ambiguity was subsequently removed by the execution of the waiver.

POINT II

THE TRIAL COURT DID NOT ERR BY FAILING TO FIND THAT APPELLANT'S CONFESSION WAS VOLUNTARILY MADE PRIOR TO ITS ADMISSION INTO EVIDENCE.

ARGUMENT

Appellant contends that the trial judge erred by failing to find that his confession was voluntarily made, and that the record does not satisfy the "unmistakable clarity test" mandated by Sims v. Georgia, 385 U. S. 538 (1967) and McDole v. State, 283 So.2d 553 (Fla.1973).

Appellee submits that appellant's position is without merit and it should be rejected.

In Peterson v. State, 382 So.2d 701 (Fla.1980), this Court addressed this issue and concluded the trial judge need not recite a finding of voluntariness if his having made such a finding is apparent from the record. This Court adopted the well-reasoned opinion of the district court reported in Peterson v. State, 372 So.2d 1017 (Fla.2d DCA 1979) and that decision clearly explains why this appellant is not entitled to relief. 372 So.2d at 1019-1021.

Appellant's citation to Tuff v. State, 408 So.2d 724 (Fla.1st DCA 1982) and Dino v. State, 405 So.2d 213 (Fla.3rd DCA 1981) is to no avail for in both instances the courts found the

record demonstrated the trial judge determined the confessions were freely and voluntarily given. In Dino, supra, the majority concluded "the Court's ruling [denying the motion to suppress] encompassed that ruling. . ." 405 So.2d at 216.

Inasmuch as the evidence presented by the State at the suppression hearing was in direct contradiction to the testimony given by appellant and since the respective parties argued the voluntariness issue (TT 250-251), the record shows with sufficient clarity that the trial judge made a finding that the statement was voluntary after determining credibility of the witnesses. Peterson v. State and Dino v. State, supra. Cf. Marshall v. Lonberger, ___ U.S. ___, 74 L.Ed.2d 646, 658 (1983) and Lavallee v. Delle Rose, 410 U.S. 690 (1973), cited to in Marshall.

This Court, after a review of the testimony, can only conclude the statement was freely and voluntarily given and that the trial judge so concluded, notwithstanding the latter's failure to explicitly so state on the record.

POINT III

APPELLANT WAS NOT DENIED HIS RIGHTS TO AN IMPARTIAL JURY AND DUE PROCESS OF LAW AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY THE IMPROPER EXCLUSION OF THREE VENIREMEN DUE TO THEIR VIEWS ON CAPITAL PUNISHMENT, DENYING HIM A JURY SELECTED FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY.

ARGUMENT

Appellant urges the trial judge erred in excusing for cause prospective jurors Towns, Shuler and Brown under Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny.

Appellee submits that this point is not well founded and that he is not entitled to a new sentencing hearing.

Prospective juror Brown stated that she could not vote for the death penalty "no matter what the circumstances (TT 302-303; 330-331). She stated that she could return a verdict (TT 331), but when the assistant state attorney asked her, "You could reach a verdict but you couldn't participate in the recommendation?", the prospective juror stated "Right." (TT 331). Based upon the questions and answers given by Miss Brown the State moved that she be excused (TT 332). Counsel for appellant objected (TT 333) saying that "she has testified that she could reach a verdict and that's what we are here about" (TT 333). Counsel never urged that Miss Brown's answers were not unequivocal

concerning her ability to consider recommending death--which is what he is now arguing on appeal.

This Court in Downs v. State, 386 So.2d 788 (Fla.1980), specifically rejected the argument that a prospective juror could only be excused upon a showing that he or she was unable to return a verdict and quite properly held that prospective jurors who made it clear that they were unable to consider death as a possible penalty could be excused for cause, citing to footnote 21 in Witherspoon, supra. 386 So.2d at 790-791. See also: Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.1978), cert.denied, 440 U.S. 976 (1979); Maggard v. State, 399 So.2d 973 (1981); Witt v. State, 342 So.2d 497 (Fla.1977), cert.denied, 434 U.S. 935 (1977). The trial judge so held, citing to Witt. (TT 333). Since appellant did not object on the basis that the prospective juror's answers were not unequivocal his attempt to raise that as a basis for reversal is improper. North v. State, 65 So.2d 777 (Fla.1953) and Steinhorst v. State, 412 So.2d 332 (Fla.1982). The aforementioned cases, of course, hold that a defendant is confined to the specific grounds asserted in the trial court, and new grounds raised on appeal will not be considered because it deprives the trial court of an opportunity to consider the claim and thus avoid any error. Cf. Castor v. State, 365 So.2d 701 (Fla.1978).

Prospective juror Shuler likewise stated he could not recommend a death sentence because of his opposition to capital punishment (TT 310). He was specifically asked whether he could

do so under any circumstances and he said "No, sir." (TT 310). See also: (TT 326 and 332). Admittedly, Mr. Shuler stated he could reach a verdict but he repeatedly stated he could not return a recommendation of death under any circumstances. Indeed, trial counsel admitted that Shuler ". . . couldn't recommend death (TT 335) and he interposed no objection to the court having excused said prospective juror (TT 336).

As to the excusal of Mr. Shuler, since no objection was interposed, appellant cannot now argue it was error to excuse him. Maggard v. State, supra, at 975; Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir.1983), reh. en banc denied; and Brown v. State, 381 So.2d 690 (Fla.1980).

In Maggard, supra, this Court stated:

> If a defendant does not want a prospective juror to be excused on the basis of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), he should make his objection known before the juror is excused. This is not an unreasonable requirement in view of the fact that it is certainly possible that the defendant himself does not want the particular juror to serve and is perfectly content to have the juror excused for cause by the court so that he will not have to use one of his peremptory challenges. Additionally, if the defendant were allowed to raise this point for the first time on appeal, he would be in a position to "sandbag" the trial court and the State by giving the appearance by his silence that he concurs in the court's excusal for cause of a particular juror. He could then proceed, awaiting the outcome of the trial, secure in the knowledge that if he receives the death sentence it would be set aside on appeal. We affirm our prior holdings in Brown v. State, 381 So.2d 690 (Fla.1980), that where no objection is made before the trial court, defendant is in no position to raise this point on appeal.

399 So.2d at 975.

Inasmuch as trial counsel conceded that Mr. Shuler ". . . said he couldn't recommend death. . ." (TT 335) and did not object to his excusal for cause, he cannot now be heard to argue his responses were unequivocal, Castor v. State (appellate counsel is bound by the acts of trial counsel) or raise the Witherspoon issue on this appeal. Maggard, supra.

Prospective juror Towns first stated that her opposition to the death penalty would prevent her from returning a verdict. The trial judge then indicated that all she would be making would be a recommendation, which, of course, ignores the importance and great weight accorded such a recommendation, and Towns indicated she didn't know whether she could even do that (TT 411-412). Both Mr. Obringer and Mr. Harris, appellant's trial attorney, elected not to question Ms. Towns further. The prosecutor stated, ". . . I'm satisfied that she couldn't recommend the death sentence under any circumstances. . ." (TT 412). Trial counsel responded, ". . .I think that's an accurate characterization of her answer judge. I would object to the excusing for cause on the same grounds previously stated. . ." (TT 412) meaning a juror who could return a verdict but not a recommendation of death could not be excused under Witherspoon, supra.

Appellee submits that the ground asserted was properly overruled under Downs, Witt, Maggard and Spinkellink, and since appellant did not assert the prospective juror's answers were at best equivocal, he cannot assert this as a basis for reversal under Steinhorst. If trial counsel did not feel the juror would

would automatically recommend life imprisonment, then it was incumbent upon him to object or attempt to rehabilitate the juror. Of course, he stated on the record that he agreed with the prosecutor's characterization of her answer! Appellate counsel is attempting to repudiate the position taken by counsel in the trial court and he is not permitted to do so. Castor, supra.

Inasmuch as the objection raised in the trial court is legally unmeritorious and the newly raised issues were not properly preserved, this Court need not decide whether Granviel v. Estelle, 655 F.2d 673 (5th Cir.1981) correctly interpreted Witherspoon or properly decided the issue presented by the facts of that case.

Moreover, since appellant did not contend below that the prospective jurors were equivocal in their statements of opposition to the death penalty, Allen v. State, 286 S.E.2d 3 (Ga.1982) is not relevant, even if it is factually comparable, which appellee suggests is not the case. In Allen, Mrs. Freeman did state she "might consider death in some circumstances" and none of the three prospective jurors in this case suggested they could.

Appellee declines to address the question of whether either or all of the prospective jurors were equivocal in their answers because if it does and this Court reaches the merits, the ruling will be subject to federal review in any future proceedings. County Court of Ulster County, New York v. Allen, 442 U.S. 140

(1979); Darden v. Wainwright, 513 F.Supp. 937 (M.D.Fla.1981). The appellee must preserve its procedural default. Sullivan v. Wainwright, supra.

Appellant is entitled to no relief under this point on appeal.

POINT IV

THE TRIAL COURT DID NOT ERR IN IMPOSING A SENTENCE OF DEATH.

A THE DEATH PENALTY IS IMPROPER DUE TO THE IMPERMISSABLE ARGUMENT BY THE ATTORNEY FOR THE STATE AT THE PENALTY PHASE.

ARGUMENT

Appellant urges the sentence of death is improper because during argument to the jury on the issue of penalty the prosecutor made improper arguments relating to the death of Ms. Parrish which was not a proper aggravating circumstance. Counsel also urges the prosecutor improperly argued the killing of Barry Hoffman was a heinous murder, after the prosecutor stipulated that an instruction on that aggravating circumstance would not be given. Appellee would note that counsel for the government didn't believe the evidence supported such a finding and was dubious as to the application of the heinous, atrocious and cruel aggravating circumstance (R 1162). In any event the jury was not given an instruction on that aggravating factor (R 1196-1197). The jury was instructed that the aggravating circumstances they were limited to considering were: (1) that the defendant had been previously convicted of another capital offense or of a felony involving the use of violence (R 1196); (2) the crime for which the defendant was to be sentenced was committed for financial gain (R 1196); and (3) the crime was

committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R 1196).

Appellee does not, of course, agree with appellant's characterization of the prosecutor's argument. The latter never suggested there were more than three aggravating circumstances presented (R 1181-1191). The quoted portion of Mr. Obringer is taken out of context for he was arguing that only certain kinds of first degree murders were authorized by the Legislature, which, of course, is true, and that since this case involved three aggravating factors they should recommend the death penalty--that this case was above the ordinary first degree murder (R 1190,1191).

The foregoing aside,a cursory examination of the closing argument complained of will reveal that no objection of any kind was interposed at anytime to the allegedly improper argument. This Court has repeatedly held that it will not consider claims directed to the comments of counsel where counsel for appellant did not object timely at trial. State v. Jones, 204 So.2d 515 (Fla.1967); Darden v. State, 329 So.2d 287 (Fla.1976) and Maggard v. State, 399 So.2d 973 (Fla.1981). Cf. Clark v. State, 363 So.2d 331 (Fla.1978); Herzog v. State, ___ So.2d ___ (Fla. 1983), 8 FLW 383 and Wainwright v. Sykes, 433 U.S. 72 (1977). The clear procedural default precludes consideration of the aforementioned complaint and this Court should decline to reach the merits.

Notwithstanding, the claim is meritless and one like it was rejected by the United States Court of Appeals, Eleventh Circuit, in the case of Adams v. Wainwright, 709 F.2d 1443 (11th Cir.1983) on the basis that since the jury was instructed as to what it could consider as aggravating circumstance, the Court would presume the jury followed the instructions. 709 F.2d at 1447. Counsel for appellant has not cited any case to support his position and appellee submits on this point the federal circuit court of appeals is correct. There is no error that affected this appellant's right to a fair sentencing hearing. See also: Shriner v. Wainwright, Case No. 82-5469, Opinion filed September 9, 1983.

B THE DEATH PENALTY IS IMPROPER DUE TO THE FACT THAT THE TRIAL COURT CONSIDERED THE APPELLANT'S CONVICTION OF SECOND DEGREE MURDER AS A PRIOR CONVICTION OF A VIOLENT CRIME.

Appellant contends that James White actually killed Linda Parrish and therefore he did not commit a violent felony which could be considered as an aggravating circumstance. Appellee respectfully submits this argument is totally unmeritorious and is inconsistent with the position taken by trial counsel. Mr. Harris recognized that under Lucas v. State, 376 So.2d 1149, 1153 (Fla.1979); King v. State, 390 So.2d 315, 320 (Fla.1980) and Palmes v. State, 397 So.2d 648, 656 (Fla.1981), the second degree murder conviction for the death of Ms. Parrish qualified as a prior conviction (R 1158). This, of course, was established in Elledge v. State, 346 So.2d 998 (Fla.1977). The record shows that appellant punched Ms. Parrish in the face knocking her to

the floor and told White "This one is yours" whereupon White repeatedly stabbed her and slit her throat (R 801). The trial judge found this as a fact (R 133) in his written findings, which is quoted on page 24 of appellant's brief.

The jury found this appellant guilty of committing murder in the second degree with regard to Ms. Parrish because he was a principal and/or aider and abettor, notwithstanding the fact that he may not have inflicted the mortal wound. And of course, he violently inflicted a blow to the victim which made the stabbing possible. In law and in fact, appellant was previously convicted "of a felony involving the use or threat of violence to the person." Section 921.141(5)(b), Fla.Stat. (R 120).

Nothing in either Daugherty v. State, 419 So.2d 1067 (Fla.1982) or Ruffin v. State, 397 So.2d 277 (Fla.1981) suggests because appellant didn't inflict the wound that medically caused the death of Parrish, he has not been convicted of a felony involving the use or threat of violence to the person.

Appellant's argument under this subpoint should be rejected as being without legal merit.

C THE DEATH PENALTY IS IMPROPER BECAUSE THE TRIAL COURT CONSIDERED THE DEATH OF LINDA PARRISH AND THE MANNER OF HER DEATH AS AN AGGRAVATING CIRCUMSTANCE.

Appellant, quoting paragraphs 7 and 9 of the trial judge's "Findings Supporting Sentence" (R 132-136), urges the trial judge

considered Ms. Parrish's death and the manner in which she was killed, to-wit: "violently" in an improper fashion. He states that by describing said death as "extremely violent" the trial judge was saying the murder was heinous. This claim is unmeritorious.

First, a crime can be violent and yet not heinous. Cooper v. State, 336 So.2d 1133 (Fla.1976); Godfrey v. Georgia, 446 U.S. 420 (1980), and characterizing a crime as violent is not "another way" of saying the crime was heinous. Secondly, the trial judge in paragraph 7 was describing the "facts" concerning the death of Ms. Parrish and made no finding of an aggravating circumstance. Lastly, paragraph 9 constitutes a finding that the second degree murder conviction of Ms. Parrish was another conviction of a felony involving the use of violence to the person, which is a valid aggravating circumstance under Elledge, Lucas and King, supra, which was discussed under subpoint B herein.

The trial judge did not err in considering the death of Ms. Parrish and that it was done in a "violent" manner.

D THE DEATH PENALTY IS IMPROPER BECAUSE THE TRIAL COURT CONSIDERED, AS AN AGGRAVATED, THE MANNER OF THE DEATH OF FRANK IHLENFELD AFTER RULING THAT IT WOULD NOT DO SO.

Appellant contends that the sentence of death in this case is improper because the trial judge found the "capital felony

herein was especially heinous,atrocious, and cruel" (R 134) allegedly after ruling he would not do so (App's Br. p. 26).

This claim lacks merit.

The trial judge never stated he would not determine whether the death in this case was "heinous, atrocious, and cruel", and there is no citation to the record wherein the trial judge even intimated that he would so restrict himself if it became necessary for him to state reasons he felt death was appropriate. The prosecutor, obviously out of an abundance of caution, stated he was not asking that the jury be instructed on this aggravating circumstance (R 1162), and the trial judge did not instruct the jury.

The trial judge, however, three weeks (R 136) later in his written findings of fact found that the killing of Ihlenfeld was done in an especially heinous, atrocious, and cruel manner (R 134). Appellant does not contend the finding is unsupported by the evidence or is erroneous as a matter of law;rather, he urges because the prosecutor elected not to pursue the matter before the jury, the trial judge was precluded from making the finding. In light of this Court's decisions in Morgan v. State, 415 So.2d 7 (Fla.1982) and the cases cited therein; Miller v. State, 332 So.2d 65 (Fla.1976); and most recently, Harris v. State, ___ So.2d ___ (Fla.1983), 8 FLW 345, the finding was supported in both fact and law. The aforementioned cases all hold that a physical beating together with multiple stab wounds,

some of which were defensive in nature, together with evidence that the victim did not die instantaneously fit within the definition of the heinous, atrocious or cruel circumstance.

Doctor Floro's testimony established there were multiple bruises about the head, neck and back (R 605-607); multiple stab wounds to the victim's neck and head (R 606); and slash marks on the fingers and back of the wrist (R 609), which were defensive wounds (R 610). The testimony of Agent Stanley J. Lukepas and George Marshal established the appellant slashed the victim's throat (R 801, 806, 706). According to Lukepas, the appellant stated that when Ihlenfeld moved and still alive or breathing ". . . he [appellant] reached down and slit his throat to put him out of his misery." (R 801). Significantly, the appellant prior to slitting his victim's throat, told the latter, ". . .he had f_____ over the wrong people" (R 707). (Expletive deleted).

Appellant's contention that the trial judge was forbidden from making a finding which so clearly existed because the prosecutor elected not to press the matter before the jury is legally without merit. In the recent case of Engle v. State, ___ So.2d ___ (Fla.1983), 8 FLW 357, this Court rejected the argument that the trial judge could not find an aggravating circumstance argued to him by the prosecutor which was not argued before the jury. This Court said, ". . . The trial judge, however, is not limited in sentencing to consideration of only that material put before the jury, is not bound by the jury's recommendation, and is

given the final authority to determine the appropriate sentence" 8 FLW at 360. Cf. Gardner v. Florida, 430 U.S. 349 (1977).

The trial judge is the sentencer in Florida and he is required to determine the existence of aggravating circumstance to insure the sentence is appropriate based upon the facts and circumstances of the crime and the character of the defendant. That he is precluded from making a finding that clearly exists because counsel fails to perceive the factual and legal basis for such is to allow counsel to control sentencing. What would counsel for appellant argue if the trial judge had found mitigating circumstance that counsel for appellant had not perceived or argued?

The suggestion that the finding which was statutorily authorized and supported by the facts violated Elledge v. State, supra, the only case relied upon by appellant, is untenable. Elledge, of course, involved the reliance upon a non-statutory aggravating circumstance. Even Elledge, however, did not constitute a violation of the United States Constitution, much less due process, Barclay v. Florida, ___ U.S. ___, 77 L.Ed.2d 1134 (1983).

Appellant's claim that the sentence of death is constitutionally tained should be rejected.

E HE DEATH PENALTY IS IMPROPER BECAUSE THE STATE SOUGHT THE DEATH PENALTY FOR PUNITIVE REASONS ASIDE FROM THE CRIME FOR WHICH THE APPELLANT WAS CONVICTED IN THAT THE DEATH PENALTY WAS SOUGHT BECAUSE THE APPELLANT DID NOT GIVE TESTIMONY AGAINST A CODEFENDANT.

ARGUMENT

Appellant, citing United States v. Jackson, 390 U.S. 570 (1968), contends the death penalty in this case is improper because the State had agreed not to seek such a penalty, but after appellant failed to testify at Mazzara's trial the State sought and obtained a death sentence for punative reasons.

Appellee submits the argument is without merit and that United States v. Jackson, supra, has absolutely nothing to do with this case.

On June 28, 1982, appellant, through counsel, withdrew his previously entered not guilty pleas and plead guilty to the crime of murder in the first degree (R 73-79). This plea was pursuant to an agreement whereby appellant would cooperate with the State of Florida in its prosecution of Mazzara and testify truthfully in said case (R 73-74). If appellant did not testify truthfully in said proceeding, ". . . the plea agreement [would] be withdrawn and [the cause would] go to trial. . ." (R 73-74). The State as part of its bargain ". . . would recommend, and the Court would accept, that the defendant be sentenced to life. . ." (R 73). The trial judge asked the defendant, who

was under oath, if he was pleading guilty because he was and he answered in the affirmative (R 76) and the assistant state attorney thereafter gave the factual basis for the plea (R 77) to which there was no exception (R 77). The Court, then asked appellant if he understood that if he failed to testify truthfully at the Mazzara trial ". . . the 'deal' is off and you will go to trial and then the chips will fall where they may. . ." (R 77-78). Appellant answered in the affirmative.

On September 17, 1982, appellant was called as a witness for the prosecution in the case of State v. Mazzara, Case No. 81-8666 (R 88-112), and he denied having killed anyone and admitted testifying to the contrary to Mr. Obringer (R 94-95). Mr. Obringer then announced that the plea agreement made with appellant was null and void (R 95). Appellant announced he wanted to withdraw his previous plea (R 96). Subsequent testimony reflects that appellant previously gave a deposition wherein he testified he killed Ihlenfeld and Parrish and conspired with Mazzara to do so (R 100). The trial judge, in due course, granted appellant's motion to withdraw his plea of guilty, and the cause proceeded to trial (R 52).

Newly appointed counsel thereafter filed a motion seeking to prevent the State from seeking the death penalty claiming the State was attempting to punish him because he failed to testify as desired (R 68). After hearing argument on this motion, wherein the State insisted that since appellant reneged on the plea agreement (TT 154, Vol. IV), the trial judge denied the motion.

Appellee respectfully submits that when appellant breached his plea agreement with the State of Florida and did not testify truthfully and when he thereafter withdrew his guilty plea, the parties were returned to their original position and the State was authorized to seek the penalty of death. Santobello v. New York, 404 U.S. 257 (1971); Pridgen v. State, 335 So.2d 622 (Fla.2d DCA 1976); People v. McCutcheon, 368 N.E.2d 886 (Ill.1977); State v. Ware, 306 N.W.2d 879 (Minn.1981) and Ehl v. Estelle, 656 F.2d 166 (11th Cir.1981).

Of course, initially offering appellant the opportunity to plead and, seeking the death penalty if he did not, in no way violated his rights. Bordenkircher v. Hayes, 434 U.S. 357 (1978) and Spinkellink v. Wainwright, 578 F.2d 582, 608 (5th Cir. 1978), distinguishing United States v. Jackson, supra. In Jackson, the Supreme Court declared the statute unconstitutional because under its terms a defendant who plead guilty could only receive a life sentence whereas if he plead not guilty and went to trial he could be sentenced to death. The Court held this resulted in the defendant being compelled to surrender his right to trial by jury in order to escape the death penalty. In Florida death can be imposed on a guilty plea or after a trial by jury. Jackson did not involve plea bargaining and the effect of a breach thereof by the accused.

In Ehl, supra, the defendant repudiated a plea bargain and attempted to bind the prosecution to its original offer claiming the prosecutor was being vindictive in seeking enhanced

punishment after the defendant breached the bargain and withdrew his plea, relying upon North Carolina v. Pearce, 395 U.S. 711 (1969). The court rejected this argument and held Pearce did not apply to plea bargaining cases and applied Bordenkircher v. Hayes, supra. The Court, after noting that the defendant, like this appellant, was clearly informed of the bargain and the consequences of repudiating it, said:

> We have not found a case from any jurisdiction that holds that a defendant can accept a plea bargain, take back his part of the bargain, insist upon a trial on the merits, and yet bind the prosecutor, and thus the Court, on the original promised recommendation of punishment after the prosecutor has lost all benefits of the bargain.
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> * * *
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> In short, if the defendant refuses to carry out his part of the bargain, the prosecutor is under no obligation to carry out his part . . .

656 F.2d at 171.

The court further held:

> . . . And there is no appearance of prosecutorial vindictiveness--and, in addition, no necessity for the prosecutor to offer any explanation for his actions--where the punishment fixed is the same punishment he had promised to seek throughout plea negotiations in the event that the defendant insisted on his right to plead not guilty and contest guilt. . . .

656 F.2d at 171-172. See also: State v. Ware, supra, wherein the court said, ". . . If defendant had wished to have the benefit of the negotiated agreement he should not have exercised his right to withdraw his pleas. . ." 306 N.W.2d at 882.

The courts in both Ehl and Ware recognized a contrary holding would end plea bargaining, which has been recognized as

a legitimate part of the criminal justice system. 368 N.E.2d at 886; 656 F.2d at 169. The appellant herein is arguing he is entitled to have his cake and eat it also and appllee submits there is absolutely no authority for such a position. This Court should not be the first jurisdiction to adopt such a concept.

Simmons v. State, 419 So.2d 316 (Fla.1982) and Moody v. State, 418 So.2d 989 (Fla.1982) have nothing to do with the issue posed herein. In Simmons, this Court remanded for further proceedings because the trial judge excluded evidence from the penalty proceedings relative to the defendant's ability to be rehabilitated. In Moody, the cause was remanded because the trial judge considered non-enumerated aggravating circumstances in violation of Elledge, supra, and because the trial judge erroneously thought he could not consider or order a presentence investigation report.

F THE IMPOSITION OF THE DEATH PENALTY AGAINST APPELLANT IS A DENIAL OF HIS RIGHT TO EQUAL JUSTICE UNDER THE LAW IN VIEW OF THE SENTENCES IMPOSED UPON OTHER PARTICIPANTS IN THE SUBJECT CRIMES.

Appellant contends the sentence of death is a denial of equal justice since Leonard Mazzara and James White received life sentences and George "Rocco" Marshall received immunity.

This contention is also unmeritorious.

Leonard Mazzare was one of the middleman, who secured the services of appellant to commit the homicide (R 681-682). Marshall, who was given immunity (R 683), was Mazzara's contact man with appellant. Neither Mazzara nor Marshall were the actual perpetrators of the homicide and the latter was coerced to assist Mazzara by threats that harm might come to his wife since she owed Provost a $10,000 drug debt (R 701-702). White, according to the testimony, did not kill Ihlenfeld and was directed by the appellant to kill Ms. Parrish (R 801). There is evidence that appellant actually killed Parrish because White froze up (R 706) and that White "wasn't as bad as he [appellant] thought he was." (R 707).

Of course, all of this was submitted to the jury and they were instructed that the sentences imposed against the codefendants could be considered as mitigating evidence (R 1197). Moreover, counsel strongly urged the jury to treat all of the conspirators alike (R 1194).

The trial judge in his sentencing order gave consideration to the sentences imposed on the others (R 135) but correctly noted "that James White was extremely young, had little criminal record, and took a secondary role in the murders, and that Leonard Mazzara did not participate directly in the murders, but acted merely as a 'procurer', and he therefore did not come under several of the aggravating circumstances which exist for Mr. Hoffman. . ." (R 135).

Appellant's reliance upon Messer v. State, 330 So.2d 137 (Fla.1976) is inapplicable because in that case this Court merely held the trial judge erred in refusing to allow the defendant to inform the jury that the codefendant was given a thirty-year sentence. Subsequently, this Court affirmed Messer's death sentence, Messer v. State, 403 So.2d 341 (Fla.1981). Slater v. State, 316 So.2d 539 (Fla.1975) is likewise inapplicable. In that case the jury recommended life which the trial court declined to accept and incredibly the actual "triggerman" was allowed to plead to a life sentence whereas Slater was an accomplice and never had the murder weapon in his hand. 316 So.2d at 542. Appellee has no quarral with the legal and moral pronouncement that ". . .[d]efendants should not be treated differently upon the same or similar facts. . . ." Slater v. State, supra, at 542.

This Court, however, has also recognized different defendants with different degrees of culpability need not be treated the same. Downs v. State, 386 So.2d 788 (Fla.1979) and Routly v. State, ___ So.2d ___ (Fla.1983), 8 FLW 388. So has the Supreme Court of the United States. Lockett v. Ohio, 438 U.S. 586 (1978); Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140 (1982).

In Downs, supra, the "triggerman" was sentenced to death, while an accomplice was immunized and the middleman (Procurer) received life imprisonment. It was argued that this alleged disparate treatment violated the concepts of Furman v. Georgia,

408 U.S. 238 (1972). This Court rejected the argument and distinguished Slater, supra, in upholding the death sentence imposed upon Downs. See also: Thompson v. State, 410 So.2d 501 (Fla.1982) wherein this Court noted a person otherwise properly sentenced to death is not entitled to a reduction of his sentence simply because his accomplice received a life sentence.

In light of Downs the jury and judge in the case sub judice could properly conclude, as they did, that the sentences imposed against the coconspirators did not outweigh the aggravating circumstance established against appellant. Indeed, to grant the relief to this appellant which he seeks would be an injustice to Downs!

CONCLUSION

For the reasons stated hereinabove, the judgment and sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been forwarded to Mr. John G. Monroe, 5426-1 Norwood Avenue, Jacksonville, FL 32208, via U. S. Mail, this 18th day of October 1983.

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