IN THE SUPREME COURT
OF FLORIDA

FILED

NOV 28 1983

SID J. WHITE
CLERK SUPREME COURT
Chief Deputy Clerk

BARRY HOFFMAN,

Appellant,

vs

STATE OF FLORIDA,

Appellee.

CASE NO: ~~63,295~~

REPLY
BRIEF OF APPELLANT

John B. Monroe, Esquire
5426-1 Norwood Avenue
Jacksonville , Florida 32208
(904) 765-5534

Attorney for Appellant

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STATEMENT OF THE CASE AND FACTS

Appellant will rely upon the Statement of the Case and Statement of the Facts as presented in his original brief on the merits.

ARGUMENT III

APPELLANT WAS 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.

Appellee contends that appellant did not properly preserve for appellate review the issue of whether three jurors were improperly excluded for cause because their answers to questions about being irrevocably committed to voting against the death penalty were equivocal.

The State moved to excuse for cause juror Brown because of her views on capital punishment. (Tr. 332). Appellant objected to the exclusion of Ms. Brown for cause. (Tr. 333). A discussion ensued between appellant, the Court and the State regarding the application of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Witt v. State, 342 So. 2d 497 (Fla. 1977) to the question of whether or not Ms. Brown could be excused for cause. (Tr. 333-334) The Court on the State's motion, and over appellant's objection also excused Ms. Towns for cause. (Tr. 412)

In Witherspoon, supra, the Court stated:

> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

391 U.S. at 523, n.21.

Both Witt, supra, and Downs v. State, 386 So. 2d 788 (Fla. 1980) cite to Witherspoon, supra, as authority for excluding veniremen who make it unmistakably clear that they would automatically vote against the death penalty under any circumstances or could not render a fair and impartial verdict because of their views on capital punishment.

The Court considered both Witherspoon, supra, and Witt, supra, in ruling on the State's motion to excuse Brown and Towns for cause. The Court further concluded that Witt, supra, was the controlling authority on the question. (Tr. 333) The issue of whether Brown and Towns' answers regarding their views on capital punishment were equivocal was before the Court and properly preserved for appellate review.

ARGUMENT IV

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH

The crux of Appellant's contention that the death penalty imposed on him is improper is that it is not possible to determine from the record the precise reason that the death penalty was imposed. First, the prosecutor made impermissible comments to the jury as set forth in Appellant's initial brief. Next, the jury recommended the death penalty. The trial court then imposed the death penalty pursuant to the jury's recommendation.

The culmination of these facts or factors are stated in the "Findings Supporting Sentence." (R 132-136). This document does not delineate which aggravating factors were found by the court to exist. The State, in its Answer Brief, attempts to explain the trial court's "Findings Supporting Sentence." Appellee's Brief at 20-22. Such attempted explanations should not be necessary because as stated in the Appellee's Brief:

> 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.

Appellee's Brief at 24.

A careful reading of the court's "Findings Supporting Sentence" leaves one to guess as to which aggravating factors were found to exist. The trial court, quite understandably, was appalled at the descriptions of the murders. This Court, upon review, will also be left to "guess" as to why the death penalty was imposed.

The trial court stated co-defendant Mazzara " . . . did not come under several of the aggravating circumstances which exist for Mr. Hoffman." (R 135). What are the "several" aggravating circumstances?

Florida Statutes Section 921.141(3) reads as follows:

> (3) Findings in support of sentence of death.-Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose the sentence of life imprisonment in accordance with Section 775.082.

It is evident that the trial court's "Findings Supporting Sentence" do not comply with the statute. It appears as though the first twelve paragraphs are "aggravating circumstances" because paragraphs 13 and 14 address mitigating circumstances. (R 135.136). If that is so, then there were many impermissible nonstatutory aggravating circumstances used in arriving at the decision to impose the death penalty.

The conclusion is inescapable that the trial court based its decision to impose the death penalty on its subjective outrage at the nature of the crimes. When the sentencing judge departs from the requirements of the statute in imposing the death penalty and relies on his or her subjective views in arriving at the sentence, the death penalty should be vacated.

In Goode v. Wainwright, 704 F.2d 593 (11th Cir. 1983), the trial court judge complied with the requirement that he make clearly defined findings of aggravating and mitigating circumstances, 704 F.2d at 606, but he also believed, in essence, that society would be better off if Goode were executed when the death sentence was imposed. 704 F.2d 603-604.

The court found that to be a nonstatutory aggravating circumstance which required that Goode be resentenced.

Florida Statutes Section 921.141(3)(b) states in part that:

> If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with Section 775.082.

It is respectfully submitted that the death penalty imposed on the Appellant cannot be determined to be lawful based on the record before this Court. For this reason, the death penalty should be reduced to life imprisonment.

CONCLUSION

For the reasons stated herein and in appellant's original brief on the merits, the appellant prays that this Honorable Court will vacate the judgment and sentence herein and grant the appellant a new trial.

Respectfully submitted,

John B. Monroe, Esquire
5426-1 Norwood Avenue
Jacksonville, Florida 32208
(904) 765-5534
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Attorney General's Office, The Capitol, Tallahassee, Florida, by mail this 22nd day of November, 1983.

John B. Monroe
ATTORNEY